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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT OF NORTH CAROLINA

Chief Justice

WILLIAM H. BOBBITT

Associate Justices

CARLISLE W. HIGGINS
SUSIE SHARP
I. BEVERLY LAKE
JOSEPH BRANCH
J. FRANK HUSKINS
DAN K. MOORE

Emergency Justices

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

Clerk

ADRIAN J. NEWTON

Marshal and Librarian

RAYMOND M. TAYLOR

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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.

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[1]	Greenville
4	HOWARD H. HUBBARD	Clinton
5	JOSHUA S. JAMES[2]	Wilmington
5	BRADFORD TILLERY	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[3]	Burlington
16	HENRY A. MCKINNON, JR.	Lumberton

Third Division

17	JAMES M. LONG[4]	Yanceyville
18	WALTER E. CRISSMAN	High Point
18	CHARLES T. KIVETT	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[5]	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

[1]Died 27 June 1970. Succeeded by Robert Dixon Rouse, Jr., Farmville, 7 August 1970.
[2]Appointed 28 February 1970 to succeed Rudolph I. Mintz.
[3]Died 5 April 1970. Succeeded by Thomas D. Cooper, Jr., Burlington, 28 May 1970.
[4]Appointed 16 February 1970 to succeed Charles M. Neaves who resigned 13 February 1970.
[5]Resigned 31 July 1970. Succeeded by Marvin K. Blount, Jr., Greenville, 25 August 1970.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	FENTRESS HORNER (Chief)	Elizabeth City
	N. ELTON AYDLETT[1]	Elizabeth City
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	GILBERT H. BURNETT[2] (Chief)	Wilmington
	N. B. BAREFOOT	Wilmington
	JOHN M. WALKER[3]	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	WILLIAM M. NOWELL[4] (Chief)	Mount Olive
	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

[1]Appointed 9 March 1970 to succeed William S. Privott who died 18 February 1970.
[2]Appointed Chief Judge 25 February 1970 to succeed H. Winfield Smith who died 14 February 1970.
[3]Appointed 25 February 1970.

DISTRICT	JUDGES	ADDRESS
15	HARRY HORTON (Chief)	Pittsboro
	STANLEY PEELE	Chapel Hill
	D. MARSH MCLELLAND	Burlington
	COLEMAN CATES	Burlington
16	SAMUEL E. BRITT[5] (Chief)	Lumberton
	JOHN S. GARDNER	Lumberton
	CHARLES G. MCLEAN[6]	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	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	Morganton
	BENJAMIN BEACH	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	Charlotte
27	LEWIS BULWINKLE (Chief)	Gastonia
	OSCAR F. MASON, JR.	Gastonia
	JOE F. MULL	Shelby
	JOHN R. FRIDAY	Lincolnton
	ROBERT W. KIRBY[7]	Gastonia
29	ROBERT T. GASH[8] (Chief)	Brevard
	WADE B. MATHENY	Forest City
	EVERETTE C. CARNES[9]	Marion
30	F. E. ALLEY, JR. (Chief)	Waynesville
	ROBERT J. LEATHERWOOD, III	Bryson City

[4]Appointed Chief Judge 29 July 1970 to succeed Charles P. Gaylor who retired 30 June 1970.
[5]Appointed Chief Judge 13 July 1970 to succeed Robert F. Floyd who resigned 13 July 1970.
[6]Appointed 13 July 1970.
[7]Appointed 21 September 1970 to succeed William A. Mason who died 31 August 1970.
[8]Appointed Chief Judge 30 June 1970 to succeed Forrest I. Robertson who resigned 30 June 1970.
[9]Appointed 7 August 1970.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

ROBERT MORGAN

Deputy Attorneys General

HARRY W. MCGALLIARD
RALPH MOODY
JAMES F. BULLOCK
JEAN A. BENOY
ROBERT BRUCE WHITE, JR.

Assistant Attorneys General

PARKS H. ICENHOUR
ANDREW H. MCDANIEL
WILLIAM W. MELVIN
MILLARD R. RICH, JR.
HENRY T. ROSSER
MYRON C. BANKS
I. BEVERLY LAKE, JR.
ANDREW A. VANORE, JR.
SIDNEY S. EAGLES, JR.
ROBERT S. WEATHERS
I. B. HUDSON, JR.
T. BUIE COSTEN
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WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
CHRISTINE Y. DENSON
JACOB L. SAFRON
EUGENE HAFER

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[1]	Fayetteville
9-A	JOHN B. REGAN	St. Pauls
10	DAN K. EDWARDS	Durham
10-A	THOMAS D. COOPER, JR.[2]	Burlington
11	THOMAS W. MOORE, JR.	Winston-Salem
12	W. DOUGLAS ALBRIGHT	Greensboro
13	M. G. BOYETTE	Carthage
14	HENRY M. WHITESIDES	Gastonia
14-A	ELLIOTT M. SCHWARTZ[3]	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 IVIE, JR.	Eden

[1]Resigned 31 August 1970. Succeeded by Jack Allen Thompson, 1 September 1970.
[2]Appointed Judge Fifteenth Judicial District 28 May 1970. Succeeded by Herbert F. Pierce, Burlington.
[3]Resigned 1 April 1970. Succeeded by Jerry W. Whitley.

SUPERIOR COURT, SPRING SESSIONS, 1970

FIRST DIVISION

First District—Judge Hubbard.
Camden—Apr. 6.
Chowan—Mar. 30*; Apr. 27†.
Currituck—Jan. 26†; Mar. 2(A).
Dare—Jan. 12†(2); Feb. 9*; May 25.
Gates—Mar. 23; May 18†.
Pasquotank—Jan. 5†; Feb. 16*(2); Mar. 16†; May 4†(2); June 1*(2).
Perquimans—Feb. 2†; Mar. 9†; Apr. 13.

Second District—Judge Mintz.
Beaufort—Jan. 19*; Jan. 26; Feb. 2†; Feb. 16†(2); Mar. 16*(2); May 4†(2); May 25*; June 8†.
Hyde—May 18.
Martin—Jan. 5†; Mar. 9; Apr. 6†; June 1†; June 22.
Tyrrell—Apr. 20.
Washington—Jan. 12; Feb. 9†; Apr. 27

Third District—Judge Parker.
Carteret—Feb. 9†(2); Mar. 9†(2); Mar. 30; Apr. 27†(A); June 8; June 22.
Craven—Jan. 5(2); Feb. 2†; Mar. 9(A); Apr. 6; May 4†(2); May 25(2).
Pamlico—Jan. 19; Apr. 13.
Pitt—Jan. 26; Feb. 23(2); Mar. 16(A)(2); Apr. 13†(A); Apr. 20; May 18; May 25†(A); June 22(A).

Fourth District—Judge Fountain.
Duplin—Jan. 19*; Mar. 2*(A); Mar. 9†(2); May 11*; May 25†.
Jones—Jan. 12†; Mar. 2(A).
Onslow—Jan. 5; Feb. 9†; Feb. 16(2); Mar. 23†(2); Apr. 13; May 18; June 22†.
Sampson—Jan. 26(2); Apr. 6†; Apr. 27*; May 4†; June 1†(2).

Fifth District—Judge Cowper.
New Hanover—Jan. 5*(A); Jan. 12*; Jan. 19†(2); Feb. 2†(A); Feb. 9†(2); Feb. 23*(2); Mar. 9†(2); Mar. 23†(A); Mar. 30*(2); Apr. 13†(2); Apr. 27*(A); May 4†(2); May 18†(A); May 25*(3); June 22†.
Pender—Jan. 5; Feb. 2†; Mar. 23(A); Apr. 27†.

Sixth District—Judge Cahoon.
Bertie—Feb. 9(2); May 11(2).
Halifax—Jan. 26(2); Mar. 2†; Apr. 27; May 25†(2); June 8*.
Hertford—Feb. 23; Apr. 13(2).
Northampton—Jan. 19†; Mar. 30(2).

Seventh District—Judge Peel.
Edgecombe—Jan. 19*; Feb. 23*(A); Apr. 20*; May 18†(2); June 8(A).
Nash—Jan. 5†; Jan. 26*(2); Mar. 9†; Mar. 30*; May 4†(2); June 1*; June 22†.
Wilson—Jan. 12†; Feb. 9*(2); Mar. 2†; Mar. 16*(2); Apr. 6†(2); May 4*(A)(2); June 8†.

Eighth District—Judge Bundy.
Greene—Jan. 5†; Feb. 23; June 22.
Lenoir—Jan. 12*; Feb. 9†(2); Mar. 9*(A); Mar. 16(2); Apr. 13†(2); May 18†(2); June 8*.
Wayne—Jan. 19*(2); Feb. 2†(A)(2); Mar. 2†(2); Mar. 30*(2); May 4†(2); June 1†.

SECOND DIVISION

Ninth District—Judge Clark.
Franklin—Feb. 2*; Feb. 23†; Apr. 20†(2); May 11*.
Granville—Jan. 19; Jan. 26†(A); Apr. 6(2).
Person—Feb. 9; Feb. 16†; Mar. 23†; May 18; May 25†.
Vance—Jan. 12*; Mar. 2*; Mar. 16†; June 8†; June 22*.
Warren—Jan. 5†; Jan. 26*; May 4†; June 1*.

Tenth District—Wake
Schedule A—Judge Hall.
Jan. 5*(2); Jan. 19†(3); Feb. 9*(2); Feb. 23†(2); Mar. 16†(2); Mar. 30*(2); Apr. 13*(2); Apr. 27†(2); May 18†(2); June 1*(2); June 22†.

Schedule B—Judge Bailey.
Jan. 5†(2); Jan. 19*(3); Feb. 9†(2); Feb. 23*(2); Mar. 16*(2); Mar. 30†(2); Apr. 13†(2); Apr. 27*(2); May 18*(2); June 1†(2); June 22*.

Eleventh District—Judge Carr.
Harnett—Jan. 5*; Feb. 9†(A)(2); Feb. 23†; Mar. 16*; Mar. 23†(A)(2); Apr. 20†; May 18*(A); June 8†.
Johnston—Jan. 12†(2); Feb. 2†(A); Feb. 9(2); Mar. 2†(2); Apr. 6†; Apr. 13*; May 4†(2); June 1.
Lee—Jan. 26*; Feb. 2†; Mar. 23*; Apr. 27†; May 25†.

Twelfth District
Schedule A—Judge McKinnon.
Cumberland—Jan. 5*(2); Feb. 16†(2); Mar. 2(2); Mar. 30*(2); May 4†(2); May 18*(2); June 22*.
Hoke—Jan. 26.

Schedule B—Judge Hobgood.
Cumberland—Jan. 5†(3); Feb. 2*(2); Feb. 16*(2); Mar. 9*(2); Mar. 30†(2); Apr. 13*(2); June 1†(2); June 22.
Hoke—Mar. 2†; Apr. 27.

Thirteenth District—Judge Bickett.
Bladen—Feb. 16; Mar. 16†; Apr. 20; May 18†.
Brunswick—Jan. 19; Feb. 23†; Apr. 27†; May 11(A); June 1†.
Columbus—Jan. 5†(2); Jan. 26*(2); Feb. 9†; Mar. 2†; Apr. 13†; May 4*; May 25†; June 22.

Fourteenth District—Judge Canaday.
Durham—Jan. 5†(A)(2); Jan. 5*(2); Jan. 19†; Jan. 26*(3); Feb. 16†(A)(2); Feb. 16*(2); Mar. 2†(2); Mar. 9*(A)(3); Mar. 23†(2); Apr. 6*(2); Apr. 20*(A)(2); Apr. 20†(2); May 4*; May 18†; May 25*(2); June 8*(A); June 8†; June 22*.

Fifteenth District—Judge Braswell.
Alamance—Jan. 5†(2); Jan. 19*(A)(2); Feb. 2†(2); Mar. 2*(2); Apr. 6*; Apr. 13†(2); May 4*; May 25†; June 8*; June 22*; Chatham—Feb. 16; Mar. 16†; May 11; June 1†.
Orange—Jan. 12*(A); Jan. 19†(2); Feb. 23*; Mar. 30†; Apr. 27*; June 8†(A).

Sixteenth District—Judge Brewer.
Robeson—Jan. 5*(2); Jan. 19†(2); Feb. 9*; Feb. 23*(2); Mar. 9†; Mar. 23*; Mar. 30†; Apr. 6*(2); May 4*(2); May 18†(2); June 1*(2).
Scotland—Feb. 2†; Mar. 16; Apr. 27†; June 22.

Numerals 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.

Seventeenth District—Judge McConnell.
Caswell—Feb. 23†; March 23.
Rockingham—Jan. 19*(2); Feb. 16†(A); Mar. 9†(2); Mar. 30*(A)(2); Apr. 13†(2); May 18†(2); June 22.
Stokes—Feb. 2; Apr. 6.
Surry—Jan. 5*(2); Feb. 9†(2); Mar. 30†; May 4*(2); June 1†(2).

Eighteenth District
Schedule A—Judge Johnston
Greensboro—Jan. 19†(2); Feb. 2*(2); Feb. 16*(2); Mar. 9†(2); Mar. 23*; Apr. 13†; May 4*(2); May 18†(2); June 1†(2); June 22†.
High Point—Jan. 5†(2); Mar. 30†(2).
Schedule B—Judge Collier.
Greensboro—Jan. 5*(3); Feb. 2†(2); Mar. 2*(2); Mar. 23†(3); Apr. 13*(2); Apr. 27†(2); June 1*(2).
High Point—Feb. 16†(2); May 18†(2); June 22†.
Schedule C—Judge Gambill.
Greensboro—Jan. 5†(2); Feb. 16†; Mar. 30*(2); Apr. 20†(2); May 25*; June 22*.
High Point—Jan. 19*; Feb. 9*; Mar. 9*; Apr. 13*; May 11*; June 8*.

Nineteenth District
Schedule A—Judge Gwyn.
Cabarrus—Feb. 2†(2); Mar. 30†; May 18.
Montgomery—Apr. 6; May 25†.
Randolph—Jan. 5†(2); Mar. 2†(2); May 4†(2); June 1†; June 8*.
Rowan—Jan. 26†; June 22*.
Schedule B—Judge Kivett
Cabarrus—Jan. 5*; Jan. 12†; Mar. 2†(2); Apr. 20(2); June 1†(2).
Montgomery—Jan. 19.
Randolph—Jan. 26*(2); Feb. 9†; Mar. 30*(A); Apr. 6†(2).
Rowan—Feb. 16*(2); Mar. 16†(2); May 4(2); May 18†(2).

Twentieth District—Judge Lupton.
Anson—Jan. 12*; Mar. 2†; Apr. 13(2); June 8*; June 22†.
Moore—Jan. 19†; Jan. 26*; Mar. 9†(A); Apr. 27*; May 18†.
Richmond—Jan. 5*; Feb. 9†; Mar. 16†(2); Apr. 6*; May 25†(2).
Stanly—Feb. 2†; Mar. 30; May 11†.
Union—Feb. 16(2); May 4(A).

Twenty-First District—Forsyth
Schedule A—Judge Crissman.
Jan. 5(3); Jan. 26†(3); Feb. 16†(2); Mar. 2(3); Mar. 30†(3); Apr. 20†(2); May 4(A); May 11(2); May 25†(3).
Schedule B—Judge Exum.
Jan. 5†(3); Feb. 2(3); Mar. 9†(2); Mar. 23†(2); Apr. 6(2); Apr. 20(A); Apr. 27†(2); May 11†(2); June 1(2); June 22.

Twenty-Second District—Judge Seay.
Alexander—Mar. 9; Apr. 13(A).
Davidson—Jan. 5†(2); Jan. 26; Feb. 16†(2); Mar. 9†(A); Mar. 16; Mar. 30†(2); Apr. 20†(A); Apr. 27*(A)(2); May 11†; May 18†(A)(2); June 1*; June 8†; June 22†.
Davie—Jan. 19*; Mar. 2†(A); Apr. 20.
Iredell—Jan. 5*(A); Jan. 19†(A); Feb. 2(2); Mar. 16†(A); Mar. 23*; Apr. 27†(2); May 18(2); June 8†(A).

Twenty-Third District—Judge Armstrong.
Alleghany—Mar. 23; May 18.
Ashe—Mar. 30; May 25.
Wilkes—Jan. 12†(2); Feb. 16*; Mar. 9†(2); Apr. 13; May 4†; June 1†(2); June 22*.
Yadkin—Feb. 2(2); May 11.

Twenty-Fourth District—Judge McLean.
Avery—Apr. 27(2).
Madison—Feb. 23; Mar. 16†(2); May 25(2).
Mitchell—Apr. 6(2).
Watauga—Jan. 19; Mar. 30; June 8†.
Yancey—Mar. 2(2).

Twenty-Fifth District—Judge Martin.
Burke—Feb. 16; Mar. 9; Mar. 16(A); Apr. 20*(A)(2); May 4†(2); June 1(2).
Caldwell—Jan. 5*(A)(2); Jan. 19†(2); Feb. 23(2); Mar. 23†(2); May 18(2).
Catawba—Jan. 5†(2); Feb. 2(2); Mar. 16(A); Apr. 6(2); Apr. 20†(A); Apr. 27†; June 1*(A)(2); June 22†.

Twenty-Sixth District—Mecklenburg
Schedule A—Judge Jackson
Jan. 5*(2); Jan. 19†(2); Feb. 2*(3); Mar. 2†; Mar. 9†(2); Mar. 23*(2); Apr. 6†(2); Apr. 20†(2); May 11*(3); June 1†(2); June 22*.
Schedule B—Judge Bryson.
Jan. 5*(2); Jan. 19†(2); Feb. 2*(3); Feb. 23†; Mar. 9*(2); Mar. 23†(2); Apr. 6*(2); Apr. 20†(2); May 11*(3); June 1†(2); June 22†.
Schedule C—Judge Anglin.
Jan. 5†(2); Jan. 19*(2); Feb. 2†(2); Feb. 16†(3); Mar. 16*; Mar. 23†(2); Apr. 6*(2); Apr. 20*(2); May 4†; May 18†(2); June 1*(2); June 22*.
Schedule D—Judge to be Assigned.
Jan. 5†(A)(2); Feb. 2†(A)(2); Feb. 16†(A)(3); Mar. 16†(A); Apr. 6†(A)(2); May 4†(A)(2); May 18†(A)(2).

Twenty-Seventh District
Schedule A—Judge Falls.
Cleveland—Feb. 16†(2); Apr. 27(2).
Gaston—Jan. 5*(2); Jan. 19†(2); Feb. 2*(2); Mar. 2*(2); Mar. 30†(2); Apr. 13*(2); May 25*; June 8*; June 22*.
Lincoln—May 11(2).
Schedule B—Judge Ervin.
Cleveland—Jan. 26; Mar. 23†(2); May 25.
Gaston—Jan. 5*; Feb. 2*(2); Feb. 16†(2); Mar. 2*(2); Apr. 20*; Apr. 27†; May 11†(2); June 1†; June 22†.
Lincoln—Jan. 12.

Twenty-Eighth District—Buncombe
Schedule A—Judge Hasty.
Jan. 5†(3); Jan. 26†(3); Feb. 16†(A); Feb. 23†(2); Mar. 9†(2); Mar. 23†(A); Mar. 30*(2); Apr. 13†(2); Apr. 27†(2); May 11†(2); May 25*(2); June 8†; June 22†.
Schedule B—Judge Grist.
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JOHN GEORGE WOLFE III.....Kernersville
CHARLES ROBERT WORLEY.....Arden
HERBERT JEROME ZIMMER.....Wilmington

ADMITTED BY COMITY:

PAUL GIBSON MALLONEE.....Fayetteville
HAROLD JESSE PINALES.....Hendersonville
RICHARD DUANE HOBBET.....Durham
JEROME FRANCIS CONNOR.....Winston-Salem
JOSEPH CLARENCE HOOPER, JR.....Greenville
GEORGE ALLEN BURWELL.....Warrenton

Given over my hand and the seal of the Board of Law Examiners, this 22nd day of September, 1970.

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 1969

STATE OF NORTH CAROLINA v. MARIE HILL

No. 2

(Filed 10 December 1969)

1. Criminal Law § 135; Homicide § 31— capital case — written plea of guilty — former G.S. 15-162.1

In order for [former] G.S. 15-162.1 to become applicable or operative, a defendant and his counsel were required to file a written plea of guilty which the prosecution and the court might or might not approve, the failure to tender such a plea leaving the section inoperable.

2. Criminal Law § 135; Homicide § 31— repeal of G.S. 15-162.1 — plea of guilty in capital case — G.S. 14-17 — punishment for first degree murder

The repeal by the 1969 Legislature of G.S. 15-162.1 (which provided for a sentence of life imprisonment to be imposed upon an accepted plea of guilty to a capital crime) did not change, add to or take from G.S. 14-17, which provides for the death sentence for first degree murder in the absence of a recommendation of life imprisonment.

3. Homicide § 31; Criminal Law § 135— jury verdict of first degree murder — death penalty

Where the jury returns a verdict of guilty of murder in the first degree without a recommendation that the punishment be imprisonment for life, the trial court is required to impose the death sentence.

4. Homicide § 31; Criminal Law § 135— sufficiency of verdict to support death penalty

In this first degree murder prosecution, the jury's verdict was sufficient to support imposition of the death penalty, where the jury foreman an-

nounced that the jury found defendant guilty of murder in the first degree, the court asked the foreman whether the jury made any recommendation with that verdict, to which the foreman replied, "We didn't come to that agreement," the court again asked whether the jury made any recommendation, the foreman answered, "We did not," and the jury answered "Yes" when asked by the clerk whether they found defendant guilty of first degree murder.

5. Homicide § 29— instructions — capital case — right to recommend life imprisonment

In this first degree murder prosecution, the trial court fully and correctly charged the jury with respect to the right of the jury as a part of its verdict to make the recommendation that punishment should be imprisonment for life, which recommendation would require the court to impose that sentence and no other.

6. Criminal Law § 75— confession by 17-year-old defendant — absence of counsel — admissibility

In this first degree murder prosecution, contention by seventeen year old defendant that her confession made in the absence of counsel should have been excluded because of her age and immaturity is without merit, since one who has arrived at the age and condition of accountability may make a valid waiver of counsel and may make a voluntary confession.

7. Constitutional Law § 32; Criminal Law § 21— waiver of preliminary hearing without counsel

In this first degree murder prosecution, defendant was not prejudiced by waiver of a preliminary hearing without counsel, where nothing said or done at the preliminary hearing had a bearing on the trial.

8. Criminal Law §§ 76, 123— voluntariness of confession — question for court — submission of issue to jury

In this first degree murder prosecution, the trial court did not err in failing to submit to the jury an issue as to the voluntariness of defendant's confession, since under North Carolina procedure voluntariness is a preliminary question for the trial judge in the absence of the jury.

9. Homicide §§ 25, 31— killing in perpetration of robbery — possible verdicts

When the indictment and evidence disclose a killing in the perpetration of a robbery, only a verdict of guilty as charged, guilty as charged with a recommendation of life imprisonment, or not guilty may be returned by the jury, and the court should so instruct the jury.

10. Homicide § 30— instructions — homicide committed in perpetration of robbery — failure to submit issue of second degree murder

In this prosecution for first degree murder committed during the perpetration of a robbery, the trial court did not err in failing to instruct the jury that it might return a verdict of guilty of second degree murder, where all of the evidence shows a killing in the perpetration of a robbery.

11. Criminal Law § 146; Constitutional Law § 10— judicial powers — appeal not based on errors of law

Consideration of an appeal not based on errors of law is beyond judicial competence.

12. Constitutional Law § 5— division of governmental powers

Under the constitutional division of governmental powers, the Legislative Branch makes the laws, the Judicial Branch interprets them, and the Executive Branch executes them.

13. Criminal Law § 146; Constitutional Law § 10— powers of Supreme Court

The Supreme Court hears appeals and determines whether the trial court committed prejudicial error of law or of legal inference, but the Court has neither the power to change the law nor to remit the penalty which the law provides for its violation.

14. Constitutional Law §§ 6, 9; Criminal Law § 138— legislative and executive powers — punishment for crime

Appeals for changes in the law should be made to the Legislature; appeals for relief from its penalties after conviction should be made to the Governor.

MOORE, J., did not participate in the consideration or decision of this case.

BOBBITT, C.J., and SHARP, J., dissenting as to death sentence.

APPEAL by defendant Marie Hill from a verdict of guilty of murder in the first degree and the sentence of death imposed thereon by *Fountain, J.* at the December 16, 1968 Criminal Session, EDGECOMBE Superior Court.

The defendant was tried upon the following bill of indictment:

"NORTH CAROLINA SUPERIOR COURT

EDGECOMBE COUNTY NOVEMBER TERM, A.D. 1968.

The jurors for the State upon their oath present, That Marie Hill, Carolyn Fox, Mamie K. Higgs and Bessie Doretha Wilkins late of the County of Edgecombe, on the 7th day of October, in the year of our Lord one thousand nine hundred and sixty-eight, with force and arms, at and in the County aforesaid, unlawfully, willfully and feloniously, and of their malice aforethought, did kill and murder one W. E. Strum, said killing having been committed in the perpetration of the felony crime of robbery with firearms, to wit; the unlawful willful and felonious armed robbery of W. E. Strum against the form of the statute in such case made and provided and against the peace and dignity of the State.

Roy Holdford /s/
Solicitor"

Marie Hill was arrested in South Carolina on October 25, 1968 under a Rocky Mount Recorder's Court warrant charging murder

in the felonious killing of W. E. Strum, in the perpetration of a felony — robbery with firearms. The following day she signed a waiver of extradition and was returned to Rocky Mount, North Carolina for trial. On October 28, she was brought before the Rocky Mount Recorder's Court, waived a preliminary hearing, and was ordered held for Grand Jury action. On November 4, 1968, Judge Copeland entered an order appointing Vinson Bridgers, Esq. as her attorney.

On December 17, 1968, the defendant and her court appointed attorney appeared before the Superior Court of Edgecombe County. She was arraigned and entered a plea of not guilty. Twelve jurors and one alternate were duly selected, sworn and empaneled to try the case. The State began the introduction of evidence, the substance of which we recite, with actual quotations from the testimony of material witnesses.

Prior to October 7, 1968, W. E. Strum operated a grocery store on Albemarle Avenue in Rocky Mount. At a few minutes after 10:00 on that day, Gladys Garrett entered the Strum store, as was her custom during her ten minute morning break. She saw the body of Mr. Strum partially concealed behind the drink box, and called the police. In response to her call, officers Mullen and Winstead went to the store. Finding the dead body of W. E. Strum, they called Dr. O. E. Bell, Assistant Coroner, who was admitted to be a medical expert in the general practice of medicine. Dr. Bell testified: "I did have occasion last October to view the body of Mr. W. E. Strum, of Rocky Mount. I saw him on the floor of his store. I observed that he had about six lacerations in various areas of his scalp. By laceration I mean cuts. They were not necessarily clean cuts; they looked like they had been struck with some object. He had approximately six of those in his scalp. . . . I observed that he had a bullet hole just to the left of the midline of his chest about three inches below the left nipple. Mr. Strum was dead at the time I observed him. He also had an injury on his left index finger, kind of a bruised place on that finger. He also had a bullet wound in his head. * * * . . . There was a bullet wound on the body of Mr. Strum at about the level of the top of the left ear, and, as I said, the six lacerations on his scalp. The wound at the top of the left ear was just a little puncture, a little hole there, which was in keeping with bullet wound; it looked more like a bullet wound than anything else. I observed that blood had run out around the head region; there was quite a little blood there on the floor. I did form an opinion as to the cause of death of Mr. W. E. Strum. He had enough head injuries to kill him, or the bullet wound in his chest, I would say either

one or both . . . contributed to his death, the loss of blood and shock from these wounds, and of course injuries on his scalp contributed, too; I suspect there were enough of those to kill without the bullet wounds, but I would say the bullet wounds were the main thing that killed him."

Officer Mullen testified for the State, describing the conditions in the interior of the store as he found them. ". . . The cash register was right next to the end of the counter before you got to the Coca-Cola box. The Coca-Cola box was across the end of the counter with just enough room there to go between the Coca-Cola box and the end of the counter where the cash register was. Then you could go on back towards the back of the store and in the right corner there was a sink with two faucets. The back door is on the right-hand side as you turn back to the left. That is where Mr. Strum was lying. His feet were towards the door. He was lying on his right side with his head towards the meat counter, which is at the end of the Coca-Cola box across the back of the store. * * * . . . There was a large puddle of blood right under Mr. Strum's head. There was a bullet wound in the left forehead just across the front of his left ear. It was right along here on his left forehead (witness indicating). His left front pocket was turned inside out and bloodstains were on his pants in the area of his pocket. . . . There were bloodstains around his pocket. * * * . . . I found a Dr. Pepper bottle just behind the drink box which had blood all over the side of it and also some hair embedded in the blood. * * * I arrived at the scene at approximately 10:25 in the morning. At that time, Mr. Strum was dead. . . . I looked at a pasteboard box directly behind where Mr. Strum was lying and I found a .25-caliber shell in that box. The shell was three or four feet to the rear of where Mr. Strum was lying. That was a .25-caliber empty shell. That was found at the back of the store. There was also a shell found in the front window on the right-hand side as you go in the store. That was lodged up in the window at the front. That shell was also a .25 automatic. I examined the cash register. I observed that the cash register was open and that there were no bills in the cash register. There was just a little change, some dimes, nickels and a few pennies, and one check. I determined that one bottle of bleach had been knocked off the counter and two packs of B-C's were lying on the floor behind the counter. * * * . . . I recovered a .25 automatic slug from the right side, the one that went in below the rib cavity and was almost up to the skin in the right rear part of his back. I do have that with me today. I have the shells that I found in the store. These are the two shells that came from Mr. Strum's store. This is the slug

that came out of Mr. Strum. * * * I did not find any type of wallet or billfold or purse on Mr. Strum when I examined him."

The officer explained that a .25 caliber automatic pistol, on being fired, automatically ejects the empty shell, throwing it a few feet to the right. The breech block opens by the force of the exploding shell. A coil spring closes the breech block and feeds a loaded shell from the magazine into the chamber, leaving the weapon ready to fire by trigger pressure.

In consequence of the leads developed during the investigation, the police, on October 25, obtained from the Rocky Mount Recorder's Court a warrant charging Marie Hill with the murder of W. E. Strum. She and her companion, Susie Wilkins, were arrested in Williamsburg County, South Carolina the same day and held for the North Carolina officers. The following day, officers Winstead and Mullen of the Rocky Mount Police Department interviewed Marie Hill in the Williamsburg County Sheriff's office, Kingstree, South Carolina.

When the solicitor asked Officer Mullen what statement, if any, Marie Hill made, defense counsel objected. The court, in the absence of the jury, conducted a voir dire examination in great detail to determine whether her statements were freely, voluntarily and understandably made. The defendant did not offer any evidence on this preliminary inquiry. At the conclusion of the voir dire, Judge Fountain made these findings: "Upon objection to the question asked by the Solicitor to Officer Walter G. Mullen, wherein the Solicitor seeks to elicit testimony of statements alleged to have been made by the defendant to Officer Mullen and Officer Winstead in Kingstree, S. C., and thereafter the Court conducted a voir dire examination upon objection by defendant and in the absence of the jury to determine whether the defendant had been fully advised of her constitutional rights before making any alleged statement to the aforesaid officers, and also to determine whether any alleged statements made by her were voluntary. The State offered evidence touching upon both questions. The defendant through counsel has elected not to offer evidence. Upon the evidence offered, the Court finds as a fact that in the afternoon of the 26th of October, 1968, in the Sheriff's Office at the County Jail in Kingstree, S. C., the defendant, in the presence of Officer Winstead and Officer Mullen, the Sheriff of Williamsburg County, South Carolina, and an agent with the South Carolina Law Enforcement Division, was interviewed by Officer Winstead. At the onset of their meeting, Officer Winstead, who was known to the defendant as a North Carolina officer, advised the de-

fendant that she had a right to remain silent, that anything that she said to the officers could be used in court against her, that she had a right to have a lawyer to advise her and to be present, and that if she was unable to employ counsel, counsel would be appointed for her, and that no questions would be asked until she had had an opportunity to confer with counsel, and that if she elected to make any statement she could stop at any time. The officer thereupon repeated each of her rights and she, in response to each question, said that she understood each of her rights as explained to her by the officer. After so informing Officer Winstead that she did understand each of her rights, she stated that if she had done something a lawyer could not undo it and that she wanted to tell the truth. That Officer Winstead told her at the time that if she wished to tell him anything to tell the truth or he would prefer that she tell him nothing. That the defendant then told the officer that she knew that he knew something or he would not be down there. That the officer told her that he had talked with Susie and he knew some things and some things he did not know. Whereupon, the defendant made certain statements to Officer Mullen and Officer Winstead. That Officer Winstead had given similar warnings to the defendant on another occasion about two years before, and had been acquainted with her and she with him for about five years. After having made statements to the officers, the defendant voluntarily agreed to reduce her statement to writing in her own handwriting, and while she was reducing her statement to writing the officers left her alone and informed her that they would be in an adjoining room or outdoors and she could let them know when she had completed the writing. That, during the interview between Officers Winstead and Mullen and others present and the defendant, there was no threat of any kind made against the defendant, nor any promise of reward or hope of reward, or any inducement, or any suggestion of duress to persuade the defendant to make any statement whatever. * * * The Court finds that such statements as were made by the defendant to Officer Winstead and Officer Mullen were freely, voluntarily and understandingly made without any inducement or duress of any kind and after the defendant had been fully and thoroughly advised of her constitutional rights regarding the making of a statement, and that the defendant thoroughly and fully understood her rights. Notwithstanding such understanding on her part, she thereupon made certain statements to Officer Winstead and Officer Mullen. Upon such finding, the objection by the defendant is overruled."

The findings of fact were amply supported by the evidence on the voir dire.

Officer Winstead, who had had occasion to question the defendant on prior offenses, testified that in the Sheriff's office in Kingstree he interrogated the defendant. Before any questions were asked about her possible connection with the Strum murder, he warned her that she need not answer any questions; that if she did volunteer to answer questions, her answers could and would be used against her in court; that she was entitled to counsel, and if she could not obtain an attorney on her own account the State would furnish counsel; that she was entitled to have a lawyer present during the questioning if she wanted one. Her reply was "I understand that. If you have done something a lawyer can't undo it is because it is already did."

The defendant then stated that the city inspector "was on my mother's back to fix up the house". She decided she "would invest herself on some money". Mamie Higgs, Carolyn Fox and Susie Wilkins agreed to help. Mamie and Susie said they would be on the lookout on the street corner. Carolyn was to enter Mr. Strum's store and come back in five minutes if Mr. Strum was alone. When Carolyn came out promptly, the defendant entered the store. Mr. Strum was placing cigarettes on the shelf. The defendant picked up an iron poker at the stove, struck Mr. Strum on the side of the head; he staggered and fell across the counter. She then shot him in the head with a .25 caliber automatic pistol. She dragged him to the end of the counter, broke two sofe drink bottles over his head, and when he groaned and struggled she shot him again in the stomach. She took the billfold from his pocket and all the bills in the cash register. All told, she got "a large amount of money". Between the time of the robbery and her arrest, she detailed a drinking and spending spree with her friends, which left her with $3.00 at the time the officers arrested her and her friend, Susie Wilkins.

Officers Mullen and Winstead testified that she consented to return with them to North Carolina without extradition proceedings. On the day of the interrogation, October 26, and with the defendant's consent, the officers returned her to Rocky Mount, North Carolina. When they arrived at the police headquarters, the officers brought her friend, Virginia Staton, into the office. As soon as Marie and Virginia saw each other, Virginia said: "Marie, you couldn't have done it because you were with me that day." Marie then said she did not commit the crime. "It is all a story." Marie and Virginia were then separated. It is in evidence, without objection, that Virginia said they went to Snow Hill on October 7; Marie said they went to Durham.

The following day the officers again interrogated Marie about the conflict between the confession she made and reduced to writing the previous day in South Carolina, and the denial the night before in the presence of Virginia Staton. She then stated she robbed and killed Mr. Strum as she had told them in South Carolina. They then asked if she would go to the store and show them how the hold up and shooting occurred.

She went to the store with the officers and voluntarily re-enacted the occurrences there on the morning of October 7. She pointed out to the officers where Mr. Strum was stacking cigarettes on the shelf; where she hit him with the poker; his position when she fired the two shots, and how she hit him with the soft drink bottles. She threw one of the bottles under the meat box. She pointed out this bottle to the officers, who had failed to find it during their investigation.

When asked whether she had intended to rob Mr. Strum or to rob and kill him, she said she had planned to rob and kill him. When asked why she intended to kill him, she said, "You think I'm crazy? That man knew me just as good as you do, and I won't going to have him running up there telling you all who I was."

At the conclusion of the State's evidence the court overruled the motion to dismiss. Marie Hill was the first defense witness. She testified she had nothing to do with the robbery or the killing of Mr. Strum. "I was in Snow Hill with Virginia, her brother and her mother. That is, Virginia Staton." She admitted the officers gave her the warnings and cautions as they had testified. In her cross examination she admitted she made to the officers the statements that she had planned the robbery and the killing and that she went into the store and carried out the plan. She denied, however, that her story was true and contended that it was made up by her. When asked how she got money to finance the drinking and spending orgy after October 7, she stated that she got the money by holding up an ABC store in South Carolina. On cross examination, she admitted that she had been convicted of forgery three times; larceny five times, and that she had been convicted of cutting two boys with a knife.

She stated she got the idea for the story she told the officers involving herself in robbing and killing Mr. Strum from one Raymond Lucas. "I do say that I told him (Mr. Winstead) that I murdered Mr. Strum knowing that I could go to prison for that. He did not in any way put any pressure on me to confess. I did tell him I wanted to go ahead and tell the truth. That is not what I did. I

told him I wanted to tell the truth about it and then turned around and told a lie about it."

Virginia Staton testified for the defendant that she, Marie and Johnny Hines left Rocky Mount before 9:00 on the morning of October 7, went to Snow Hill, and returned to Rocky Mount about 5:30 or 6:00 in the afternoon. They then learned that Mr. Strum had been killed. Johnny Hines testified for the defendant that he, Marie and Virginia left about 7:45, went to Snow Hill and did not return to Rocky Mount until after 5:30 in the evening, and that Marie was with him and his sister, Mrs. Staton, the entire day. Lola Peoples, mother of Virginia Staton and Johnny Hines, testified that on October 7, about 9:30, Johnny, Virginia and Marie got to her house and all of them went to Snow Hill and did not return until after 5:00. In rebuttal, Officer Mullen testified that Virginia Staton told him that on the morning of October 7 they left "sometime after 10:00 for Snow Hill".

The defendant renewed the motion to dismiss at the close of all the evidence. The motion was denied. After the arguments, and the court's charge, the jury returned to the courtroom and were asked if they had agreed upon a verdict. The jury replied "We have".

CLERK: Who shall speak for you?

JURY: Fred Williams.

CLERK: What is your verdict?

JUROR WILLIAMS: Your Honor, we, the Jury, find the Defendant guilty of First-Degree Murder.

COURT: Mr. Foreman and gentlemen, with that verdict do you make any recommendation?

JUROR WILLIAMS: We didn't come to that agreement.

COURT: Well, I just ask you if you do make a recommendation or not?

JUROR WILLIAMS: We did not.

CLERK: Hearken to your verdict, as the Clerk recordeth, You say that Marie Hill is guilty of Murder in the First Degree whereof she stands charged, so say you all?

BY THE JURY: Yes.

Motion for a new trial was denied. The sentence of death was pronounced. The defendant gave notice of appeal.

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General; Carlos W. Murray, Jr., Staff Attorney, for the State.

J. LeVonne Chambers, Chambers, Stein, Ferguson & Lanning, Roy C. Boddie for the defendant.

North Carolina Civil Liberties Union, Norman B. Smith, Charles E. Lambeth, Jr., Kenneth S. Broun, Kenneth S. Penegar, Amicus Curiæ.

HIGGINS, J.

Article XI, Section 2, North Carolina Constitution, provides: ". . . murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact."

The General Assembly, by G.S. 14-17, provided: "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, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death; Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison."

The proviso was inserted in the section by Chapter 299, Session Laws of 1949. At the same time, similar provisions were inserted in the other capital felony statutes, pertaining particularly to arson, first degree burglary, and rape. By Chapter 16, Session Laws of 1953, the General Assembly enacted G.S. 15-162.1, which provided: "Plea of guilty of first degree murder, first degree burglary, arson or rape. — (a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court under G.S. 15-4 and 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance what-

ever. (b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison. (c) Unless and until the State accepts such plea, no reference shall be made in open court at the time of arraignment or at any other time to the tender or proposed tender of such plea; and the fact of such tender shall not be admissible as evidence either for or against the defendant in the trial or at any other time and place. The defendant shall have the right to withdraw such plea, without prejudice of any kind, until such time as it is accepted by the State."

However, by Chapter 117, Session Laws of 1969, the General Assembly repealed G.S. 15-162.1 effective March 25, 1969. The crime here involved was committed before the repeal. The effect of the section has been discussed in a number of our cases. *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568; *State v. Spence and Williams,* 274 N.C. 536, 164 S.E. 2d 593, and more recently *State v. Atkinson,* 275 N.C. 288.

[1-3] To become applicable or operative, a defendant and his counsel were required to file a written plea of guilty which the prosecution and the court might or might not approve. If the tender of the plea is not approved "the trial shall be upon the defendant's plea of not guilty and such tender shall have no legal significance whatever." It seems the defendant might avail himself of the right to tender a written plea of guilty but a failure to tender such plea leaves the section inoperative. The absence of the written plea left the terms of G.S. 14-17 in full force and effect. The repeal of G.S. 15-162.1 did not modify, change, add to, or take from G.S. 14-17, under which the indictment here involved was drawn. The verdict of the jury as returned without a recommendation that the punishment be imprisonment for life required the court to impose the death sentence. *State v. Atkinson, supra; State v. Spence and Williams, supra; State v. Forcella,* 52 N.J. 263, 245 A. 2d 181.

[4] The defendant challenges the sufficiency of the verdict to support the judgment imposed. After its deliberation, the jury returned to the courtroom and announced agreement on a verdict and designated Juror Williams as foreman to speak for the jury. Juror Williams: "Your honor, we, the jury, find the defendant guilty of murder in the first degree." The court asked the jury: "With that verdict do you make any recommendation?" The foreman replied:

"We did not come to that agreement". This means that the jury did not agree to make any recommendation. After further discussion and question whether they made any recommendation, the foreman replied: "We did not". The clerk then said: "Hearken to your verdict, as the Clerk recordeth. You say that Marie Hill is guilty of Murder in the First Degree whereof she stands charged, so say you all?" By the Jury: "Yes." If defendant or counsel had any doubt concerning the unanimity of the jurors in the announced verdict, they should have had the jury polled. *State v. Cephus,* 241 N.C. 562, 86 S.E. 2d 70.

[5] Review discloses that the court charged fully and correctly with respect to the right of a jury as a part of its verdict to make the recommendation that punishment should be imprisonment for life. Such recommendation would require the court to impose that sentence and no other. In the absence of the recommendation, the court had before it a verdict of guilty of murder in the first degree. The verdict required the court to impose the death sentence. *State v. Atkinson, supra,* and cases therein cited.

In this case the evidence of guilt is overwhelming. The defendant was advised of the charge against her — murder — a serious crime; that she had the right to counsel, to remain silent; and that any admissions she made would be used against her in court. She voluntarily made the admissions heretofore detailed and later, upon the prompting of Virginia Staton, denied them. The following day, when asked by the officers which of her stories was correct, she again admitted the robbery and killing and voluntarily went with the officers to the Strum store and re-enacted the happenings as they occurred on the morning of October 7, 1968.

In response to this question by her attorney, "Did he (Detective Winstead) force you to tell him anything?", she answered, "No, he did not in any way put any pressure on me to confess. I did tell him I wanted to go ahead and tell the truth. I told him I had been in Mr. Strum's store many times before. He knew me and knew what my name was. That was why I shot him. I did tell Mr. Winstead that that was why I did it. I did tell Mr. Winstead that I shot Mr. Strum and pointed out to Mr. Mullen right where I shot him the first time. I did show him exactly where Mr. Strum fell. When we went to the store, I showed Mr. Winstead approximately where I shot Mr. Strum the second time. I did point out where they could find the broken bottle."

From the witness stand, however, she denied the truthfulness of her confession or that she was even in the City of Rocky Mount at

the time Mr. Strum was robbed and murdered. The witnesses by whom she sought to prove an alibi did not impress the jury. In fact, the elaborate and exhaustive briefs filed by counsel for the defendant and, on her behalf by the North Carolina Civil Liberties Union as amicus curiæ, do not discuss guilt or innocence. Counsel do argue, however, the court committed error in permitting the prosecution to introduce in evidence the defendant's confession made to the officers in Kingstree, South Carolina and, after a denial suggested by her friend Virginia Staton at police headquarters in Rocky Mount, but thereafter confirmed by the defendant who voluntarily went to the Strum store and, in the presence of the officers, re-enacted the robbery and shooting of Mr. Strum. The confession and the re-enactment fitted into the picture in such manner that the only logical conclusion is that the narrator must have been present at the time of the holdup. In fact, she pointed out one of the weapons she had used (a bottle) which the officers had failed to discover in their search.

[6] Counsel contend, because of the defendant's age and immaturity, her confession made in the absence of counsel should have been excluded. It would seem that one who has arrived at the age and condition of accountability for crime may make a valid waiver of counsel, and make a voluntary confession. Defense counsel cite, *contra, State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171. In *Thorpe,* this Court decided the evidence on the voir dire was insufficient to support a finding Thorpe knowingly and understandably waived his right to counsel at his in custody interrogation which produced the incriminating admissions. This Court ordered a new trial because the admissions were introduced in evidence without a finding (based on evidence) that Thorpe had waived the right to counsel at his in custody interrogation.

[7] Defense counsel argue the defendant's waiver of a preliminary hearing without counsel was prejudicial. Nothing done or said at the preliminary hearing, which defendant waived without counsel, had bearing on the trial. The trial was based entirely on a Grand Jury indictment returned subsequent to the preliminary hearing. Absence of counsel was non-prejudicial. *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740; *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589; *United States ex rel Hughes v. Galt,* 271 U.S. 142, 70 L. Ed. 875.

[8] Defense counsel also argue that the voluntariness of the confession should have been one of the issues submitted to the trial jury. Under North Carolina procedure, voluntariness is a preliminary question to be passed on by the trial judge in the absence of the jury. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481; *State v.*

Gray, 268 N.C. 69, 150 S.E. 2d 1; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. This procedure, we think, is approved by the Supreme Court of the United States. In *Jackson v. Denno,* 378 U.S. 368 (Footnote 19), the Court uses this language: ". . . (T)he states are free to allocate functions between the judge and the jury as they see fit."

[9] Defense counsel argue a new trial should be ordered upon the ground the court failed to charge the jury it might return a verdict of murder in the second degree. It is true that in a case of first degree murder, committed after premeditation and deliberation, a verdict of second degree murder is permissible if the jury should fail to find premeditation and deliberation. However, in a case of murder in the first degree committed in the perpetration of, or attempt to perpetrate, a robbery, instruction that the jury should return a verdict of guilty as charged, guilty as charged with a recommendation for life imprisonment, or not guilty is a proper instruction. When the indictment and evidence disclose a killing in the perpetration of a robbery, only one of such verdicts may be returned. *State v. Linney,* 212 N.C. 739, 194 S.E. 470; *State v. Myers,* 202 N.C. 351. 162 S.E. 764; *State v. Spivey,* 151 N.C. 677. These cases were decided before the passage of the act permitting the jury to recommend life imprisonment. They hold that a verdict of guilty of murder in the first degree, or not guilty, is a proper verdict.

[10] All the evidence in the case before us shows a killing in the perpetration of a robbery. The court charged the jury: "So, if, upon consideration of the evidence, the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant committed the crime of robbery with firearms against the person of W. E. Strum and during the perpetration or commission of that crime that she killed him with a .25-caliber pistol, then you would return one of two verdicts: either guilty of murder in the first degree, or guilty of murder in the first degree with a recommendation that the prisoner's punishment be imprisonment for life in the State's Prison instead of death. If you have a reasonable doubt as to her guilt, you would return a verdict of not guilty." The charge required proof beyond a reasonable doubt *that the killing was in the perpetration of a robbery.*

[11] Both in the briefs and in the oral argument, counsel addressed to us a potent appeal to save this girl from the judgment imposed in the trial court. The plea is based on the defendant's tender age, her lack of opportunity, and the tragic family life disclosed in the confession which she wrote (while alone), delivered to the officers, and

which was introduced in evidence and made a part of the record before us. Consideration of an appeal not based on errors of law is beyond judicial competence. Before the law, each individual stands on an equal footing.

[12] Each member of this Court is required to take an oath that he will administer justice without respect to persons and do equal right to the State and individuals, and perform all duties agreeably to the Constitution and laws of the State. Under the constitutional division of governmental powers, the Legislative Branch makes the laws; the Judicial Branch interprets them; and the Executive Branch executes them. The clear intent of the Constitution is that each of these governmental divisions should confine its activities to its own field. Article III of the North Carolina Constitution, in Section 6, provides that the Governor shall have power to grant reprieves, commutations and pardons after conviction (except in cases of impeachment) upon such conditions as he may think proper (subject to such regulations as may be provided by law relative to the manner of applying for pardons).

[13, 14] This Court has neither the power to change the law nor to remit the penalty the law exacts for its violation. This Court hears appeals and determines whether the trial court committed prejudicial error of law or legal inference. Hence, appeals for changes in the law should be made to the Legislature; appeals for relief from its penalties after conviction should be made to the Governor.

Error of law or legal inference does not appear in the record before us. In the trial and judgment, we find

No error.

MOORE, J., did not participate in the consideration or decision of this case.

BOBBITT, C.J., and SHARP, J., dissenting as to death sentence.

We vote to vacate the judgment imposing the death sentence. In our 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.

G.S. 15-162.1, which was in force when defendant was arraigned, tried and convicted, provided that the tender and acceptance of a plea of murder in the first degree, rape, burglary in the first degree, or arson, had the effect of a verdict of guilty of such crime with recommendation by the jury that the punishment be imprisonment for

life in the State's prison; and, in such event, required that the court pronounce a judgment of life imprisonment. If a plea of guilty was tendered by a defendant and accepted by the State, with the approval of the court, the defendant by such plea avoided a jury trial and the possibility of a conviction resulting in a death sentence. G.S. 15-162.1 was repealed March 25, 1969.

It is, and has been, our opinion that, prior to the repeal of G.S. 15-162.1, the death penalty provisions relating to murder in the first degree, rape, burglary in the first degree and arson (G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58, respectively) were invalidated by the 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 (1968), and in *Pope v. United States,* 392 U.S. 651, 20 L. ed. 2d 1317, 88 S. Ct. 2145 (1968). The reasons for our opinion are set forth fully in the dissenting opinions in *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593, and in *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241. If our view is correct, North Carolina had no death penalty in December, 1968, when Marie Hill was convicted of murder in the first degree and sentenced to die.

In *Alford v. State of North Carolina,* 405 F. 2d 340, a panel of the United States Court of Appeals for the Fourth Circuit in a split decision (two to one) held the *Jackson* and *Pope* decisions invalidated the death penalty provisions of our North Carolina statutes. The Supreme Court of the United States granted *certiorari* to review the *Alford* case and heard oral arguments therein on November 17, 1969. Its decision may determine whether *Jackson* and *Pope* did invalidate the death penalty provisions of our North Carolina statutes *as they existed* prior to March 25, 1969.

Notwithstanding the repeal of G.S. 15-162.1, uncertainty as to the validity of the death penalty provisions of our North Carolina statutes continues for reasons other than those discussed in *Jackson* and *Pope.* These additional questions may be resolved by the forthcoming decision of the Supreme Court of the United States in the case of *Maxwell v. Bishop,* which was first argued at the Spring Term 1969 and has been set for reargument at the Fall Term 1969. *Maxwell v. Bishop* involves Arkansas statutes containing provisions similar to those in our North Carolina statutes. The Supreme Court in allowing *certiorari* to review the decision of the United States Court of Appeals for the Eighth Circuit (*Maxwell v. Bishop,* 398 F. 2d 138), limited consideration to Questions 2 and 3 of the petition for *certiorari, viz.:*

"2. Whether Arkansas' practice of permitting the trial jury ab-

solute 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?"

It seems probable that the decision in *Maxwell v. Bishop* will settle existing uncertainty as to the validity of our *present statutory provisions* relating to capital punishment. If it should be determined that the majority of this Court are correct in their view that the death penalty provisions of our statutes were and are valid, we would join in the decision that the verdict and the judgment imposing the death sentence should be upheld.

On the other hand, if it should be determined by the Supreme Court of the United States that the death penalty provisions of our statutes, as of the date defendant was arraigned, tried and convicted, were invalid, either under the decisions in *Jackson* and *Pope* or on grounds that may be decided in *Maxwell v. Bishop,* we would not disturb the verdict but would remand the cause for pronouncement of a judgment imposing a life sentence.

Our statutes provide only two possible judgments, death or life imprisonment, where a defendant is convicted of murder in the first degree, rape, burglary in the first degree, or arson. If the death penalty provisions are invalidated, the only permissible punishment upon conviction for these crimes is life imprisonment. We are not at all impressed with the suggestion that, even if the death penalty provisions are invalidated, no judgment of imprisonment for life can be pronounced unless the jury, at the time of rendering its verdict in open court, recommends that "the punishment shall be imprisonment for life in the State's prison." If the alternative of death is invalidated, there would be no occasion for the jury to do otherwise than render a verdict as to defendant's guilt. The jury would have no discretion as to whether punishment should be death or life imprisonment. Any recommendation the jury might make in respect of punishment would be inappropriate and without legal significance. Upon conviction, the court would impose the only legally permissible punishment, being the statutory punishment most favorable to the defendant, that is a judgment of imprisonment for life.

The retrial of a capital case, which necessarily requires the expenditure of time and money and imposes great stress and strain upon all who are involved in it, should not be undertaken in the present uncertainty concerning these issues of life and death. Nothing will be lost by deferring our decision in this case until the Supreme Court of the United States has spoken definitively on the crucial questions now before it for decision. We favor that course.

BILLINGS TRANSFER CORPORATION, INC. v. COUNTY OF DAVIDSON

No. 28

(Filed 10 December 1969)

1. Taxation § 24— ad valorem tax — situs of corporate property — principal office

The tax situs of a corporation's tangible personal property is at the place of the corporation's principal office in this State, G.S. 105-281, G.S. 105-302(a), unless such property or a part thereof has a tax situs elsewhere and is thus not within the taxing jurisdiction of the State.

2. Taxation §§ 9, 25— ad valorem tax — levy on corporation engaged in interstate commerce

The ad valorem property tax may be levied upon personal property of an individual or corporation engaged in interstate commerce the same as upon any other property as long as the effect of such taxation does not place interstate commerce at a competitive disadvantage with intrastate commerce.

3. Constitutional Law § 23— due process — tax laws

The test of whether a tax law violates due process is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state.

4. Taxation § 24— ad valorem tax — situs of property — common carrier engaged in interstate commerce — sufficiency of findings

In an action by a common carrier of freight, who maintains its principal office in a county in this State, seeking (1) a judgment to require the county to assess the carrier's ad valorem tax by an apportionment method based on the ratio of miles traveled by the carrier's vehicles in this State to the total miles traveled and (2) a refund of a portion of ad valorem taxes paid to the county under protest in 1963 and 1964, plaintiff's evidence *is held* insufficient to support findings that any of its vehicles engaged in interstate commerce acquired a nondomiciliary tax situs in 1963 and 1964 and that inclusion of those vehicles by the county in its tax assessment cast an undue burden on interstate commerce, the plaintiff having failed to show either that its vehicles were operated along

fixed routes and on regular schedules into, through, and out of the nondomiciliary states or that its vehicles were habitually situated and employed in other states throughout the year; consequently, all of the carrier's property was subject to ad valorem taxation in the county. G.S. 105-281, G.S. 105-302(a).

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

APPEAL by plaintiff from *Ragsdale, J.*, at the April 21, 1969, Civil "A" Session DAVIDSON Superior Court.

Civil action to recover portions of ad valorem county taxes paid under protest to Davidson County for the years 1963 and 1964.

Plaintiff's evidence tends to show the following facts:

1. Plaintiff is a North Carolina corporation with its principal office in Lexington, the county seat of Davidson County, North Carolina. Defendant is a duly organized and existing county of the State of North Carolina and is the domicile of the plaintiff and of the vehicles owned by the plaintiff which are involved in this action.

2. During the period 1962-64 plaintiff was primarily engaged in interstate commerce as a common carrier of freight by motor vehicle with routes through North Carolina, Virginia, Maryland, Pennsylvania, Delaware, New Jersey, New York, and South Carolina. Plaintiff generally hauled furniture, textiles, and plywood from the Davidson County area to New York, New Jersey, and Pennsylvania; and on return trips brought other types of freight to North Carolina and South Carolina.

3. During 1962-64 plaintiff's destination points were New York City and twenty miles thereof; the entire state of New Jersey; the eastern one third of Pennsylvania; Wilmington, Delaware; Baltimore, Maryland; and Washington, D. C. To reach these points plaintiff's vehicles followed one of two prescribed routes insofar as possible, deviating as necessary to make special pickups and deliveries, and stopping for fuel and rest when necessary at specified truck stops where plaintiff had prearranged discounts. Except for emergency road repairs, the maintenance work on plaintiff's tractors and trailers was performed at plaintiff's terminal in Lexington where mechanics were employed and parts were stocked.

4. The northbound trips originated in Lexington while the southbound trips originated in New York, Pennsylvania, or New Jersey and terminated in Lexington. With rare exceptions, every truck returned to Davidson County at least once a week. During 1963-64 the daily average of trucks traveling along the routes from

Lexington, North Carolina, to points in New York and Pennsylvania was seven per day including Sundays — varying, however, with the season and the availability of freight. Plaintiff corporation had three salaried employees serving it in New York and one in Philadelphia where it maintained terminals.

5. During 1963 and 1964 plaintiff paid no state income taxes to any jurisdiction other than North Carolina. Except for those paid to the defendant, plaintiff paid no ad valorem taxes during either of said years to any state, county, or municipality, or to any sanitary, school, fire, or drainage district. During these years plaintiff owned approximately thirty-two tractors (all licensed in North Carolina) ranging in value from $500 to $9745 and approximately forty-five trailers ranging in value from $851 to $4160.

6. A state-by-state breakdown of miles traveled by plaintiff's vehicles during 1962, 1963 and 1964 is shown in the following table:

	1962		1963		1964	
	Total Miles	Percent of Total	Total Miles	Percent of Total	Total Miles	Percent of Total
NORTH CAROLINA	727,910	35.56%	768,192	35.88%	681,822	28.90%
VIRGINIA	488,458	23.86	499,244	23.32	744,023	31.53
MARYLAND	371,464	18.15	379,910	17.74	391,456	16.59
DELAWARE	47,735	2.33	48,460	2.26	53,231	2.26
PENNSYLVANIA	82,649	4.04	84,490	3.95	91,760	3.89
NEW JERSEY	300,101	14.66	325,725	15.21	359,616	15.24
NEW YORK	27,893	1.36	34,536	1.61	36,311	1.54
SOUTH CAROLINA	845	.04	651	.03	1,225	.05
GRAND TOTAL (ALL STATES)	2,047,055	100%	2,141,208	100%	2,359,444	100%

7. The mileage figures shown in the foregoing table include bobtail miles (tractor without trailer) and include miles traveled by tractors which plaintiff had *leased from* third parties. However, the mileage figures do not include miles traveled by tractors which plaintiff had *leased to* third parties. The figures represent tractor miles, not trailer miles. Moreover, the figures do not show, and

plaintiff offered no evidence to show, the total miles traveled by any single tractor, or tractor-trailer unit, and the proportionate part thereof in North Carolina.

8. Contending that Davidson County must use an apportionment method of assessing ad valorem taxes against it, plaintiff computed and attempted to list its 1963 taxes (based on 1962 mileage table) as follows:

Total Market Value of Interstate Motor Vehicles	$316,768		
Ratio of North Carolina Miles to Total Miles Traveled — .3556			
Market Value Taxable in North Carolina (35.56% of $316,768)	$112,643		
1963 Taxable Value (60% of $112,643)		$67,586	
Taxable Value of Other Motor Vehicles (not used in interstate commerce)		7,420	
Taxable Value of Other Personal Property		10,110	
Taxable Value of Real Estate		7,540	
Total Taxable Value for 1963		$92,656	
Taxes due Davidson County ($92,656 at $1.68 per $100)			$1,566.62

Plaintiff computed its 1964 taxes in the same fashion (based on 1963 mileage table and using the mileage ratio of 35.88% for that year) and arrived at a 1964 taxable value of interstate motor vehicles of $66,931 with taxes due Davidson County in the sum of $1,616.85.

9. Contending that the law required plaintiff to list all its tangible personal property in Davidson County where plaintiff's principal office in this State is located, defendant assessed plaintiff's 1963 taxes as follows:

Market Value of Interstate Motor Vehicles	$383,000	
Taxable Value of Interstate Motor Vehicles (60% of $383,000)		$229,800

Taxable Value of Other Motor Vehicles	7,420	
Taxable Value of Other Personal Property	10,110	
Taxable Value of Real Estate	7,540	
Total Taxable Value for 1963	$254,870	
Taxes Due Davidson County ($254,870 at $1.68 per $100)		$4,281.81

Davidson County computed plaintiff's 1964 taxes in the same fashion and arrived at a total taxable value for 1964 of $245,550 with taxes due Davidson County in the sum of $4,125.23.

10. Plaintiff paid under protest its 1963 and 1964 taxes as calculated and assessed by the County and claimed a refund of $2,725.19 on the 1963 tax and a refund of $2,508.38 on its 1964 tax.

11. The request for refunds was denied, and plaintiff instituted this suit seeking relief as follows: (1) Cancellation of the assessments against plaintiff's interstate vehicles as computed by defendant for 1963 and 1964 and reassessment of said property by an apportionment method based on the ratio of miles traveled in North Carolina to total miles traveled by plaintiff's vehicles; (2) judgment for $2,725.19 as a refund for excessive 1963 taxes paid and for the sum of $2,508.38 as a refund for 1964 excessive taxes paid; (3) judgment requiring defendant to use the apportionment method of taxing plaintiff's interstate vehicles in the future.

Defendant's motion for judgment of nonsuit at the close of plaintiff's evidence was allowed, and plaintiff appealed. Before determination by the Court of Appeals, we allowed plaintiff's motion to bypass that court, and the case is now before us for review in the first instance.

Frank P. Holton, Jr., Attorney for plaintiff appellant.

DeLapp, Ward and Hedrick by I. A. DeLapp and Charles W. Mauze, Attorneys for defendant appellee.

Burney and Burney and George H. Sperry, Attorneys for North Carolina Motor Carriers Association, Inc., Amicus Curiæ.

John T. Morrisey, Sr., General Counsel, North Carolina Association of County Commissioners, Amicus Curiæ.

HUSKINS, J.

The assessment, listing and collection of ad valorem taxes on tangible personal property in North Carolina is regulated by G.S. 105-281 and Article 18 of the Machinery Act, G.S. 105-302 *et seq.*

[1] G.S. 105-281 provides that all property, real and personal, *within the jurisdiction of the State,* not especially exempted, shall be subject to taxation. G.S. 105-302(a) provides that all tangible personal property shall be listed in the township in which its owner has his residence, and "[t]he residence of a corporation . . . domestic or foreign, shall be the place of its principal office in this State. . . ." Thus, with certain exceptions enumerated in G.S. 105-302(b) and (d) which have no pertinence here, the Legislature has fixed the tax situs of a corporation's tangible personal property subject to North Carolina's taxing jurisdiction at the place of its principal office in North Carolina. *In Re Freight Carriers,* 263 N.C. 345, 139 S.E. 2d 633. Since plaintiff's principal office is in Davidson County, plaintiff must list all its tangible personal property for ad valorem taxes in that county unless such property or a part thereof has a tax situs elsewhere and thus is not within the taxing jurisdiction of this State. Plaintiff contends that a portion of its rolling stock is taxable in other states and inclusion of that portion in its tax assessment by Davidson County casts an undue burden on interstate commerce, denies plaintiff the equal protection of the laws, and deprives plaintiff of its property without due process of law. We now examine the validity of these contentions.

[2] The usual ad valorem property tax is an annual levy on a predetermined percentage of the market value of the property. Such tax may be levied by the proper taxing authority upon personal property of an individual or corporation engaged in interstate commerce the same as upon any other property so long as the effect of such taxation does not place interstate commerce at a competitive disadvantage with intrastate commerce. *McGoldrick v. Berwind-White Co.,* 309 U.S. 33, 84 L. ed 565, 60 S. Ct. 388. Interstate commerce can be required to pay its nondiscriminatory share of taxes which each state may impose on property within its borders. *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 82 L. ed 823, 58 S. Ct. 546, 115 A.L.R. 944; *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 98 L. ed 583, 74 S. Ct. 396.

[3] The test of whether a tax law violates due process is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for

which it can ask return." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 85 L. ed 267, 61 S. Ct. 246, 130 A.L.R. 1229 (1940). "[N]o state may tax anything not within her jurisdiction without violating the Fourteenth Amendment." *Farmers Loan Co. v. Minnesota*, 280 U.S. 204, 74 L. ed 371, 50 S. Ct. 98, 65 A.L.R. 1000 (1930).

[4] Plaintiff's evidence is sufficient to survive the motion for nonsuit, if, taken in its light most favorable to plaintiff, it shows that a defined portion of plaintiff's rolling stock had acquired a nondomiciliary tax situs for ad valorem tax purposes. In that event, Davidson County, North Carolina, may tax only that portion which has not acquired a tax situs elsewhere. Hence, the controlling question is whether any portion of plaintiff's tangible personal property had acquired a nondomiciliary tax situs for 1963 and 1964.

We first examine federal decisions dealing with state taxation of property used in interstate commerce.

Early federal decisions permitted the domiciliary state of the owner to tax the entire value of his personal property regardless of its actual presence in the taxing state. *Hays v. Pacific Mail S. S. Co.*, 58 U.S. (17 How.) 596, 15 L. ed 254 (1855); *Cream of Wheat Co. v. Grand Forks County*, 253 U.S. 325, 64 L. ed 931, 40 S. Ct. 558 (1920). Thus, a steamship operating between Alabama and Louisiana was taxable only by New York which was the domiciliary state of its owner. *Morgan v. Parham*, 83 U.S. (16 Wall.) 471, 21 L. ed 303 (1873). Such ships could not be taxed in other states at whose ports they temporarily called to deliver or receive passengers or freight. The ships were not in any proper sense "abiding within the limits" of the nondomiciliary state and had no continuous presence or actual situs there. Therefore, it was held that they could be taxed only at their regular situs — their home port, the domicile of their owners. *Hays v. Pacific Mail S. S. Co., supra; St. Louis v. Ferry Co.*, 78 U.S. (11 Wall.) 423, 20 L. ed 192 (1870); *Wiggins Ferry Co. v. East St. Louis*, 107 U.S. 365, 27 L. ed 419, 2 S. Ct. 257 (1882); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 29 L. ed 158, 5 S. Ct. 826 (1885).

In *Old Dominion S. S. Co. v. Virginia*, 198 U.S. 299, 49 L. ed 1059, 25 S. Ct. 686 (1905), the plaintiff was a Delaware corporation engaged in the transportation of passengers and freight between New York, Norfolk, and other ports in Virginia. Several of its vessels, though engaged in interstate commerce, were employed wholly within the limits of Virginia. These vessels received freight and passengers destined for New York and other points outside Virginia, and transported same from shallow water loading areas to deep water at

Norfolk and Old Point Comfort where the passengers and freight were transferred to the larger oceangoing vessels. The court held that since the vessels in question never left the territorial waters of Virginia, they had acquired an "actual situs" in that state and were subject to the ad valorem tax which Virginia had levied upon them. The artificial situs created by home port or registry of a vessel determined jurisdiction to tax only in the absence of an actual situs; and actual situs was made to turn on the *uninterrupted presence* of the property within the taxing jurisdiction.

In *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18, 35 L. ed 613, 11 S. Ct. 876 (1891), plaintiff, an Illinois corporation, was engaged in running railroad cars into, through, and out of Pennsylvania, having at all times a large number of such cars within the State of Pennsylvania. Plaintiff was taxed in Pennsylvania by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which plaintiff's cars were run within Pennsylvania bore to the whole number of miles over which its cars were run in all states. The Supreme Court of Pennsylvania sustained the tax, and plaintiff appealed to the Supreme Court of the United States. That Court upheld the tax and distinguished the earlier vessel cases on the ground that, in those cases, "no continuous presence or actual situs" had been acquired in the taxing jurisdiction; whereas, here, the railroad cars "were continuously and permanently employed in going to and fro upon certain routes of travel."

In *American Refrigerator Transit Co. v. Hall,* 174 U.S. 70, 43 L. ed 899, 19 S. Ct. 599 (1899), plaintiff, an Illinois corporation, was in the business of furnishing refrigerator cars for the transportation of perishable products over the various railroads in the United States. The cars were run indiscriminately over the lines of any railroad over which shippers or the railroad desired to route them. Plaintiff had no office or place of business within the State of Colorado, and its cars were never run in said state in fixed numbers or at regular times. On the average, however, forty cars per year were used within that state. It was held that Colorado could impose upon plaintiff's movable personal property the same tax imposed upon similar property used in like manner by its own citizens and that such tax "may be fixed by an appraisement and valuation of the average amount of the property *thus habitually used and employed.*" (Emphasis ours.)

In *Union Refrigerator Transit Co. v. Kentucky,* 199 U.S. 194, 50 L. ed 150, 26 S. Ct. 36 (1905), plaintiff owned 2,000 railroad cars

which it rented to shippers who used them for the carriage of freight in the United States, Canada, and Mexico over the various railroads. Plaintiff, a Kentucky corporation, contended that the correct method of ascertaining the number of cars which should be assessed for taxation in Kentucky was to ascertain and list such a proportion of its cars as were shown to be used in the State of Kentucky during the fiscal year. Using a system of averages, the trial court found that sixty-seven cars for the year 1900 were subject to assessment in Kentucky and that the cars other than those mentioned were not liable to assessment. The Court of Appeals of Kentucky reversed and held the company was liable for taxation upon its entire 2,000 cars. Upon appeal to the United States Supreme Court it was held on due process grounds that plaintiff's tangible personal property *permanently located in other states and employed there* in the prosecution of plaintiff's business was not subject to taxation in Kentucky. Hence, Kentucky's attempt to impose a tax upon plaintiff's *entire fleet* of rolling stock was invalidated.

In *New York Central R. R. Co. v. Miller*, 202 U.S. 584, 50 L. ed 1155, 26 S. Ct. 714 (1906), decided only one year after the *Union Refrigerator* case, plaintiff was a New York corporation with interstate as well as intrastate lines and sent its cars to points without and within the state and over other lines as well as its own. The cars were often out of plaintiff's possession and transferred to many roads successively, and even used by other roads for their own independent business, before they were returned to the plaintiff-owner or to the domiciliary state of New York. "In short, by the familiar course of railroad business a considerable portion of the [plaintiff's] cars constantly is out of the state," and on this ground plaintiff contended that the portion of its cars constantly absent could not be taxed in New York. New York taxed all plaintiff's rolling stock and refused to make any reduction of the tax. Successive appeals carried the case to the Supreme Court of the United States. There, Mr. Justice Holmes, for the court, said: "It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. [Citations omitted.] But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, . . . the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts."

In *Johnson Oil Co. v. Oklahoma*, 290 U.S. 158, 78 L. ed 238, 54

S. Ct. 152 (1933), plaintiff, an Illinois corporation, owned a fleet of tank cars used mainly to transport oil from its refineries in Pawnee County, Oklahoma, for delivery in other states. Upon making such deliveries the cars usually returned to the Oklahoma refinery where plaintiff maintained trackage for a small part of the cars and facilities for minor repairs upon them. The cars were almost continuously in movement and on average out of Oklahoma from twenty to twenty-nine days each month. Under a state statute, Pawnee County levied ad valorem property taxes upon the entire fleet of cars. Plaintiff challenged the levy under the Due Process Clause of the Fourteenth Amendment upon the ground that the cars did not have a tax situs within the state and that Oklahoma had no jurisdiction to tax them. The Supreme Court of Oklahoma sustained the tax on the entire fleet and plaintiff appealed to the United States Supreme Court. Held: (1) Plaintiff had its domicile in Illinois, and that state had jurisdiction to tax appellant's personal property *which had not acquired an actual situs elsewhere;* (2) conversely, the domiciliary state had no jurisdiction to tax personal property when its actual situs was in another state; (3) although the cars were employed in interstate commerce, that fact did not make them immune from a non-discriminatory property tax in a state which could be deemed to have jurisdiction; and (4) even though the cars had acquired a situs outside Illinois — the domicile of their owner — for the purpose of state taxation the mere fact that they were loaded and reloaded in Oklahoma did not fix the situs of the entire fleet in that state; rather, Oklahoma's jurisdiction to tax such property must be determined on a basis consistent with like jurisdiction of other states in which the property was *habitually employed,* and this could be accomplished by taking the number of cars which on the average were found to be physically present in Oklahoma.

In *Northwest Airlines v. Minnesota,* 322 U.S. 292, 88 L. ed 1283, 64 S. Ct. 950, 153 A.L.R. 245 (1944), plaintiff, a Minnesota corporation with its principal place of business in St. Paul, was a commercial airline carrying persons, property, and mail on regular fixed routes primarily in Illinois, Minnesota, North Dakota, Montana, Oregon, Wisconsin, and Washington. For all the planes St. Paul was the home port registered with the Civil Aeronautics Authority under whose certificate of convenience and necessity Northwest operated. Maintenance bases were operated by Northwest at six of its scheduled cities, but the work of rebuilding and overhauling its planes was done in St. Paul. All of the planes were in Minnesota from time to time during every year. However, all planes were continuously en-

gaged in flying from state to state except when laid up for repairs and overhauling.

On May 1, 1939, the time fixed by Minnesota statutes for assessing personal property subject to its tax, Northwest's scheduled route mileage in Minnesota was fourteen percent of its total scheduled route mileage and the scheduled plane mileage in Minnesota was sixteen percent of the total scheduled. Northwest based its personal property tax for 1939 on the number of its planes in Minnesota on May 1, 1939. The appropriate taxing authority of Minnesota assessed a tax on Northwest on the basis of its entire fleet of planes coming into Minnesota. Plaintiff brought this action to recover taxes paid on that additional assessment. The Supreme Court of Minnesota affirmed the judgment of the lower court sustaining the assessment, and the United States Supreme Court granted certiorari to review that judgment. Held: "Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. . . . It was not shown in the *Miller* case and it is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, *i.e.,* a taxing situs, elsewhere. That was the decisive feature of the *Miller* case, and it was deemed decisive as late as 1933 in *Johnson Oil Co. v. Oklahoma,* 290 U.S. 158 [78 L. ed 238, 54 S. Ct. 152], which was strongly pressed upon us by Northwest. . . . The doctrine of tax apportionment . . . is here inapplicable. . . . The continuous protection by a State other than the domiciliary State — that is, protection throughout the tax year — has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered." Mr. Justice Frankfurter further asserts that no judicial restriction has ever been applied against the domiciliary state except when property is *permanently situated elsewhere,* "[a]nd permanently means continuously throughout the year, not a fraction thereof, whether days or weeks." *Ibid.* 322 U.S. 292, 298.

In *Ott v. Mississippi Barge Line,* 336 U.S. 169, 93 L. ed 585, 69 S. Ct. 432 (1949), the court reexamined the power of a nondomiciliary state to tax vessels engaged in interstate commerce. Defendant was a foreign corporation which transported freight in interstate commerce up and down the Mississippi and Ohio Rivers under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Defendant had an office or agent in Louisiana, but its principal place of business was elsewhere. The barges and towboats involved were registered at ports outside Lou-

isiana. In trips to Louisiana the tugs brought a line of barges to New Orleans and left them for unloading and reloading. The tugs then picked up loaded barges for return trips to ports outside that state. There was no fixed schedule for movement of the barges but the trips were accomplished as quickly as possible.

Louisiana and the City of New Orleans, using an assessment formula authorized by state statute, levied ad valorem taxes under assessments based on the ratio between the total miles of defendant's lines in Louisiana and the total number of miles of the entire line. The taxes were paid under protest and this suit instituted for their recovery on the ground that the taxes violated the Due Process and Commerce Clauses of the United States Constitution. Successive appeals carried the case to the United States Supreme Court. Held: An assessment based on the ratio between the total number of miles of the carrier's lines in Louisiana and the total number of miles of the entire line does not violate the Commerce or Due Process Clauses of the Federal Constitution. Allegations of defendant that its vessels visited Louisiana sporadically and for fractions of the year only and that there was no average number of vessels in the state every day were said to be immaterial because the Louisiana statute only intended to cover and actually covered an average portion of property *permanently within the state throughout the taxing year.*

In *Standard Oil Co. v. Peck,* 342 U.S. 382, 96 L. ed 427, 72 S. Ct. 309, 26 A.L.R. 2d 1371 (1952), plaintiff was an Ohio corporation owning boats and barges which it used to transport oil along the Mississippi and Ohio Rivers. The vessels neither picked up nor discharged oil in Ohio. The main terminals were in Tennessee, Indiana, Kentucky, and Louisiana. The maximum river mileage traversed by the boats and barges through waters bordering Ohio was seventeen and one half miles. The vessels were registered in Cincinnati but only stopped in Ohio for occasional fuel or repairs. Ohio, the domiciliary state, levied an ad valorem tax on all of these vessels. The Supreme Court of Ohio sustained the levy, and the Supreme Court of the United States reversed. The court distinguished *Miller* and *Northwest Airlines* on the ground that in those cases it was not shown that "a defined part of the domiciliary corpus" had acquired a taxable situs elsewhere, and held that *Ott* controlled "since most, if not all, of the barges and boats which Ohio has taxed were almost continuously outside Ohio during the taxable year." The doctrine of apportionment applied in *Ott* was held applicable, and the court for the first time held that "[t]he rule which permits taxation by two or more states on an apportionment basis precludes taxation

of all of the property by the state of the domicile." Without saying so, the court obviously held that the boats and barges had acquired a taxable situs in one or more nondomiciliary states.

In *Braniff Airways v. Nebraska Board,* 347 U.S. 590, 98 L. ed 967, 74 S. Ct. 757 (1954), plaintiff, an Oklahoma corporation with its principal place of business in Oklahoma City, operated a fleet of aircraft flying regular schedules over regular routes with stops in fourteen states including Nebraska and Oklahoma. Its aircraft made eighteen stops per day regularly in Nebraska, and one tenth of its revenue was derived from the pickup and discharge of Nebraska freight and passengers. Pursuant to a Nebraska tax statute, an apportioned ad valorem tax was levied on plaintiff's flight equipment, and the levy based on a formula prescribed in the statute for arriving at the proportion of a carrier's flight equipment to be allocated to the state. Plaintiff contended its flight equipment had no tax situs in Nebraska and that the levy imposed a burden on interstate commerce and violated due process under the Fourteenth Amendment. Held: There is no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats. The tax was sustained on authority of *Ott v. Mississippi Barge Line, supra* (336 U.S. 169, 93 L. ed 585, 69 S. Ct. 432); *Standard Oil Co. v. Peck, supra;* and *Curry v. McCanless,* 307 U.S. 357, 83 L. ed 1339, 59 S. Ct. 900, 123 A.L.R. 162 (1939). *Northwest Airlines v. Minnesota, supra* (322 U.S. 292, 88 L. ed 1283, 64 S. Ct. 950, 153 A.L.R. 245), was distinguished on the ground that, in that case, it was not shown *that a defined part of the domiciliary corpus had acquired a permanent location, i.e., a taxing situs, elsewhere. Hays v. Pacific Mail S. S. Co., supra* (58 U.S. [17 How.] 596, 15 L. ed 254); *Morgan v. Parham, supra* (83 U.S. [16 Wall.] 471, 21 L. ed 303); and *Southern Pacific Co. v. Kentucky,* 222 U.S. 63, 56 L. ed 96, 32 S. Ct. 13 (1911), were distinguished on the ground that the first two cases were efforts to tax the entire value of the ships, without apportionment, while the last case held the state of corporate domicile had power to tax vessels that were not taxable elsewhere.

In *Central Railroad Co. v. Pennsylvania,* 370 U.S. 607, 8 L. ed 2d 720, 82 S. Ct. 1297 (1962), plaintiff, a Pennsylvania corporation operating a railroad only in that state and having no tracks outside of it, owned freight cars which were used in ordinary transportation operations in three ways: (1) by plaintiff on its own tracks in Pennsylvania; (2) by Central Railroad Company of New Jersey (CNJ) on fixed routes and regular schedules over its tracks in New

Jersey, habitually during the taxable year; and (3) by many other railroads on their own lines in various parts of the country. Pennsylvania levied an annual property tax on the total value of all freight cars owned by plaintiff. Plaintiff challenged its right to do so under the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Held: The freight cars that had been run *habitually during the taxable year on fixed routes and regular schedules* over the lines of CNJ in New Jersey acquired a tax situs there and were subject to the imposition of an apportioned ad valorem tax by the State of New Jersey. Consequently, the daily average number of freight cars located on the CNJ lines during the tax year cannot constitutionally be taxed in Pennsylvania. With respect to the remainder of plaintiff's fleet of freight cars, including those used by other railroads in other states, Pennsylvania may constitutionally tax them at full value since plaintiff has failed to sustain its burden of proving that a tax situs had been established elsewhere with respect to such cars.

The foregoing federal decisions lend verity to these words of Mr. Justice Frankfurter: "The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future." *Freeman v. Hewit*, 329 U.S. 249, 252, 91 L. ed 265, 271, 67 S. Ct. 274, 276 (1946). Even so, the decisions seemingly support the following basic conclusions:

1. Situs is an absolute essential for tax exaction. *New York Central R. R. Co. v. Miller, supra* (202 U.S. 584, 50 L. ed 1155, 26 S. Ct. 714); *Johnson Oil Co. v. Oklahoma, supra* (290 U.S. 158, 78 L. ed 238, 54 S. Ct. 152); *Curry v. McCanless, supra* (307 U.S. 357, 83 L. ed 1339, 59 S. Ct. 900, 123 A.L.R. 162); *Northwest Airlines v. Minnesota, supra* (322 U.S. 292, 88 L. ed 1283, 64 S. Ct. 950, 153 A.L.R. 245).

2. The state of domicile may tax the full value of a taxpayer's tangible personal property for which no tax situs beyond the domicile has been established so that the property may not be said to have "acquired an actual situs elsewhere." *Hays v. Pacific Mail S. S. Co., supra* (58 U.S. [17 How.] 596, 15 L. ed 254); *Morgan v. Parham, supra* (83 U.S. [16 Wall.] 471, 21 L. ed 303); *St. Louis v. Ferry Co., supra* (78 U.S. [11 Wall.] 423, 20 L. ed 192); *Wiggins Ferry Co. v. East St. Louis, supra* (107 U.S. 365, 27 L. ed 419, 2 S. Ct. 257); *Gloucester Ferry Co. v. Pennsylvania, supra* (114 U.S. 196, 29 L. ed 158, 5 S. Ct. 826); *New York Central R. R. Co. v. Miller, supra; Southern Pacific Co. v. Kentucky, supra* (222 U.S.

63, 56 L. ed 96, 32 S. Ct. 13); *Cream of Wheat Co. v. Grand Forks County, supra* (253 U.S. 325, 64 L. ed 931, 40 S. Ct. 558); *Johnson Oil Co. v. Oklahoma, supra; Northwest Airlines v. Minnesota, supra; Central Railroad Co. v. Pennsylvania, supra* (370 U.S. 607, 8 L. ed 2d 720, 82 S. Ct. 1297).

3. The state of domicile may constitutionally subject its own corporations to nondiscriminatory property taxes even though they are engaged in interstate commerce. It is only multiple taxation of interstate operations that violates the Commerce Clause. *Standard Oil Co. v. Peck, supra* (342 U.S. 382, 96 L. ed 427, 72 S. Ct. 309, 26 A.L.R. 2d 1371).

4. The state of domicile may not levy an ad valorem tax on tangible personal property of its citizens which is *permanently* located in some other state *throughout the tax year.* This is forbidden by the Due Process Clause of the Fourteenth Amendment. *Pullman's Palace Car Co. v. Pennsylvania, supra* (141 U.S. 18, 35 L. ed 613, 11 S. Ct. 876); *Old Dominion S. S. Co. v. Virginia, supra* (198 U.S. 299, 49 L. ed 1059, 25 S. Ct. 686); *Union Refrigerator Transit Co. v. Kentucky, supra* (199 U.S. 194, 50 L. ed 150, 26 S. Ct. 36); *Northwest Airlines v. Minnesota, supra; Ott v. Mississippi Barge Line, supra* (336 U.S. 169, 93 L. ed 585, 69 S. Ct. 432).

5. When a fleet of vehicles is operated into, through, and out of a nondomiciliary state, a "tax situs" sufficient to satisfy constitutional requirements is acquired if (a) the vehicles are operated along fixed routes *and* on regular schedules, or (b) the vehicles are habitually situated and employed within the nondomiciliary jurisdiction throughout the tax year. In that event, their continuous presence supports imposition of an ad valorem tax based upon the average number continuously present in the taxing state regardless of routes and schedules. *American Refrigerator Transit Co. v. Hall, supra* (174 U.S. 70, 43 L. ed 899, 19 S. Ct. 599); *Union Refrigerator Transit Co. v. Kentucky, supra; Braniff Airways v. Nebraska Board, supra* (347 U.S. 590, 98 L. ed 967, 74 S. Ct. 757); *Central Railroad Co. v. Pennsylvania, supra.*

6. When an apportionment tax is imposed by a nondomiciliary state (a) it must be just and equitable (*Union Refrigerator Transit Co. v. Kentucky, supra*); (b) it must bear a reasonable relation in its practical operation to the opportunities, the benefits, and the protection afforded by the taxing jurisdiction (*Wisconsin v. J. C. Penney Co., supra* [311 U.S. 435, 85 L. ed 267, 61 S. Ct. 246, 130 A.L.R. 1229], *Ott v. Mississippi Barge Line, supra*); and (c) the

opportunities, benefits and protection must be available throughout the tax year (*Northwest Airlines v. Minnesota, supra*).

7. When *a defined part of the domiciliary corpus* has acquired a taxable situs in one or more nondomiciliary states, it may be taxed by those states on an apportionment basis; and taxation by apportionment precludes taxation of all of the property by the state of the domicile. *Pullman's Palace Car Co. v. Pennsylvania, supra; American Refrigerator Transit Co. v. Hall, supra; Union Refrigerator Transit Co. v. Kentucky, supra; Standard Oil Co. v. Peck, supra.*

8. With respect to tangible movable property, a mere *general* showing of its continuous use in other states is insufficient to exclude the taxing power of the state of domicile. *Ott v. Mississippi Barge Line, supra; Standard Oil Co. v. Peck, supra; Central Railroad Co. v. Pennsylvania, supra.*

9. The burden is on the taxpayer who contends that some portion of his tangible personal property is not within the taxing jurisdiction of his domiciliary state to prove that the same property has acquired a tax situs in another jurisdiction. *Central Railroad Co. v. Pennsylvania, supra; cf. Dixie Ohio Co. v. State Revenue Comm'n,* 306 U.S. 72, 83 L. ed 495, 59 S. Ct. 435 (1939).

[4] Applying the foregoing principles to the case before us, we find it impossible to determine from plaintiff's evidence that a defined portion of plaintiff's property had acquired a taxable situs for the years 1963 and 1964 in any nondomiciliary state.

It was incumbent upon plaintiff to show that a defined portion of its property was operated along fixed routes *and* on regular schedules into, through, and out of nondomiciliary states or was habitually situated and employed in other states throughout the tax year. *Old Dominion S. S. Co. v. Virginia, supra* (198 U.S. 299, 49 L. ed 1059, 25 S. Ct. 686); *New York Central R. R. Co. v. Miller, supra* (202 U.S. 584, 50 L. ed 1155, 26 S. Ct. 714); *Northwest Airlines v. Minnesota, supra* (322 U.S. 292, 88 L. ed 1283, 64 S. Ct. 950, 153 A.L.R. 245); *Ott v. Mississippi Barge Line, supra; Central Railroad Co. v. Pennsylvania, supra.*

Plaintiff's evidence fails to support either alternative and fails to show that the property was otherwise protected or benefited by any nondomiciliary state. Continuous presence throughout the tax year is not shown by evidence which "merely proves that some determinable fraction of its property is absent from the state for part of the tax year." *Central Railroad Co. v. Pennsylvania, supra.* Op-

eration along fixed routes *and* on regular schedules is not shown by evidence which proves that two *general routes* were followed insofar as possible, the vehicles deviating as necessary for pickups and deliveries. Furthermore, the mileage shown was made by an unknown number of tractors pulling a different but unknown number of trailers. It might have been ten or it might have been thirty tractors that made the total mileage. In any event, "it would be going a very great way to infer from car mileage the average number or proportion of cars absent from the State. . . . Certainly no inference whatever could be drawn that the same cars were absent from the State all the time." *New York Central R. R. Co. v. Miller, supra.* Even the daily average number of trucks on the road varied with the season and the availability of freight. Finally, all plaintiff's vehicles were registered in the domiciliary state. Except for emergency repairs on the road, plaintiff garaged and serviced all its vehicles in Davidson County, North Carolina. Almost without exception, all vehicles returned to North Carolina every week.

When the evidence is considered as a whole, it is apparent that the state of domicile continued at all times to afford all of plaintiff's property the opportunities, benefits, and protection which due process requires as a prerequisite of taxation. No protection, benefits, or opportunities were afforded by nondomiciliary jurisdictions throughout either of the tax years involved. Hence, all of the property was subject to ad valorem taxation in Davidson County. G.S. 105-281; G.S. 105-302(a). If the assessed valuation is excessive, which is not asserted here, appropriate statutes provide a remedy. We note, however, that plaintiff has stipulated to the correctness and accuracy of the market value placed by Davidson County on the vehicles involved for 1963 and 1964.

Plaintiff's fear of *double* taxation is largely imaginary. No other state has attempted to levy an ad valorem tax on any portion of plaintiff's property. Few, if any, of the states involved have statutes authorizing imposition of an apportionment tax on the rolling stock of nonresidents. In fact, the laws of Delaware provide that no tax may be levied, assessed or collected by the state or any of its political subdivisions on personal property generally. 9 Del. C. § 8102; 30 Del. C. § 102. Thus plaintiff's scheme of taxation would set at large about sixty-five percent of its rolling stock with the likely result that it would escape taxation altogether.

Plaintiff having failed to show that some portion of its property

had acquired a nondomiciliary tax situs, the judgment of nonsuit entered by the lower court is

Affirmed.

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

STATE OF NORTH CAROLINA v. JOHNNY RUTH

No. 9

(Filed 10 December 1969)

1. 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.

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

Judgment of the superior court sentencing defendant to death for first degree murder must be vacated under the decision of *Witherspoon v. Illinois*, 391 U.S. 510, where the trial court allowed the State's challenges for cause to seven prospective jurors who stated simply a general objection to or conscientious scruples against capital punishment, notwithstanding the trial occurred prior to the *Witherspoon* decision, since that decision is fully retroactive.

3. Constitutional Law § 29; Criminal Law § 135; Jury § 7— death sentence vacated under Witherspoon — new trial or resentencing to life imprisonment — State law

When a sentence of death must be vacated under the *Witherspoon* decision, the question of whether the verdict should be set aside and defendant granted a new trial or whether the case should be remanded to the superior court for imposition of a different sentence upon the verdict rendered by the jury is not determined by the decision in the *Witherspoon* case but by the law of this State.

4. Constitutional Law § 29; Criminal Law §§ 126, 137; Jury § 1— plea of not guilty — necessity for verdict of guilty for imposition of sentence

Neither the Supreme Court nor the superior court has authority to impose upon any defendant charged with any crime, to which charge he has entered a plea of not guilty, any sentence not supported by a verdict of guilty rendered by a jury properly selected and constituted.

5. Constitutional Law § 29; Criminal Law § 126; Jury § 7— authority of Supreme Court or superior court to change verdict

Neither the Supreme Court nor the superior court has authority to change a constitutionally impermissible verdict by adding thereto a provision which, had the jury added it, would have made the verdict constitutionally permissible, but which the jury failed to add, notwithstanding a clear instruction that it might do so.

6. Criminal Law § 135; Homicide § 31— first degree murder — discretion of jury to "recommend" life imprisonment — sentence by court — G.S. 14-17

While G.S. 14-17 gives the jury the discretion to "recommend" life imprisonment for first degree murder, it confers no discretionary power upon the superior court, or upon the Supreme Court, to impose a sentence different from that fixed by the jury.

7. Criminal Law § 135; Homicide § 31— first degree murder — jury verdict — sentence

The condition which calls into operation the one or the other alternative penalties for first degree murder prescribed by G.S. 14-17 is the verdict of the jury, not the determination of the judge, even though the judge so determines because the Constitution of the United States, as interpreted by the United States Supreme Court, forbids him to impose a sentence pursuant to the verdict.

8. Criminal Law § 134— conformity of judgment to statute

A judgment by a court in a criminal case must conform strictly to the statute, and any variation from its provisions, either in the character or the extent of punishment, renders the judgment void.

9. Criminal Law § 137— authority of court to impose punishment

No sentence to imprisonment or to any other punishment for a criminal offense can be valid unless supported by either a plea of guilty, a plea of *nolo contendere*, or a verdict of a properly constituted jury.

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

Where the jury which returned a verdict of guilty of first degree murder without a recommendation that defendant be sentenced to life imprisonment was selected by a method which did not meet the standards set forth in the *Witherspoon* decision, there is no verdict which will support the death sentence or any other sentence or which will support the release of defendant as upon an acquittal of the offense for which he has been indicted, and the case must go back to the superior court for a new trial.

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

BOBBITT, C.J., and SHARP, J., dissenting.

APPEAL by defendant from *Hall, J.*, at the 19 February 1968 Criminal Session of DURHAM.

By an indictment, proper in form, the defendant was charged with the murder of Flossie Evans on 19 October 1967. The defendant being found to be an indigent, Moses C. Burt was appointed as his counsel and represented him at the trial in the superior court. The defendant entered a plea of not guilty. The jury found him guilty of murder in the first degree, making no recommendation as to sentence. Pursuant to the verdict the defendant was sentenced to death by a judgment proper in form.

Notice of appeal to the Supreme Court was given on the day sentence was so imposed. On the same day, the superior court entered its order continuing the appointment of Moses C. Burt as counsel for the defendant for the purposes of the appeal and directing the county to bear the necessary costs of the transcript, the record and the briefs. The defendant was allowed 60 days in which to prepare and serve his statement of the case on appeal.

On 24 March 1969, the appeal not having been perfected and no statement of the case on appeal having been served, the superior court entered a further order discharging Moses C. Burt, directing that he not receive any compensation for services rendered subsequent to the trial in the superior court and appointing Jerry L. Jarvis as counsel for the defendant for the purpose of applying to the Supreme Court for certiorari. The petition for certiorari was allowed 19 May 1969 and the matter was heard in the Supreme Court as a belated appeal on 9 September 1969.

The only assignment of error is to the action of the trial court "in allowing challenges for cause by the State to seven prospective jurors simply because they voiced general objections to the death penalty or expressed conscientious scruples against capital punishment, contrary to the constitutional standards set forth in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968); *State v. Spence and Williams*, 274 N.C. 536 (1968); and *State v. Atkinson*, 275 N.C. 288 (1969)." For this alleged error the defendant, in his brief and oral argument, seeks to have the judgment of the superior court vacated "and the defendant granted a new trial."

Eighty prospective jurors were called and examined. Thirteen, including an alternate juror, were selected. Of the sixty-seven jurors rejected, seven were challenged peremptorily by the State, the defendant not assigning as error the allowance of the seventh peremptory challenge, thirteen were challenged peremptorily by the defendant, one less than the number of peremptory challenges allowed him by law, six were challenged for cause by the defendant, one was

challenged for cause by the State because of his acquaintance with the deceased and his preconceived opinion as to the guilt of the defendant, thirty-three were challenged for cause by the State because of statements of their opposition to capital punishment, conceded by the defendant to be proper grounds for challenge; and the remaining seven were challenged for cause by the State on account of their stated views concerning capital punishment, which the defendant contends were not proper cause for challenge.

While the questions directed to these seven jurors on voir dire and their responses thereto were not identical, the following interrogation of prospective Juror Howell is reasonably typical of their voir dire examinations:

"BY MR. EDWARDS [the solicitor]:

Q. Are you opposed to capital punishment?

A. Yes, sir.

OBJECTION OVERRULED.

Q. Challenge for cause.

"BY THE COURT:

Q. You say you are opposed to it?

A. Yes sir.

Q. You have conscientious scruples against capital punishment?

A. Yes sir.

Q. Challenge sustained.

DEFENDANT EXCEPTS. (Juror is excused)."

The evidence for the State is to the effect that the deceased was killed by a stab wound just below the heart, which severed or punctured the aorta. This wound and many lesser stab wounds were inflicted by the defendant when he entered the home of the grandmother of the deceased after he had been ordered not to do so and there attacked the deceased, who was living in the house. There was evidence of premeditation and deliberation.

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

Jerry L. Jarvis for defendant.

LAKE, J.

The defendant concedes that there was no error in sustaining the State's challenges for cause to those jurors who stated upon voir dire examination that they would not return a verdict which would require the death sentence in any case, regardless of the evidence. His sole assignment of error is directed to the allowance of the State's challenges to seven prospective jurors who stated simply a general objection to or conscientious scruples against the infliction of capital punishment. The fact that the questioning of the first group indicated that the solicitor was seeking a jury which would fairly consider the evidence and, in its light, determine whether to render a verdict requiring imposition of the death sentence has no bearing upon the validity of the rulings upon the challenges to the seven.

In fairness to the solicitor and to the learned judge who presided at the trial it should be observed that, at the time of the trial, the following statement by this Court in *State v. Arnold,* 258 N.C. 563, 573, 129 S.E. 2d 229, was regarded, in the courts of this State, as a correct declaration of the law upon the question presented by the defendant's assignments of error:

> "Each defendant assigns as error the court's allowing the State on *voir dire* to challenge for cause a number of jurors on the jury panel on the ground that they had conscientious scruples against the infliction of capital punishment. These assignments of error are overruled, for the simple reason that the court, in its discretion, could allow the State to challenge such jurors for cause for incompetency to serve in the case and sustain the challenge, it appearing that such jurors were disqualified. *S. v. Vick,* 132 N.C. 995, 43 S.E. 626; *S. v. Vann,* 162 N.C. 534, 77 S.E. 295."

[1, 2] At the time of the defendant's trial in the superior court, there had been no contrary decision by the Supreme Court of the United States with reference to the effect of the Fourteenth Amendment, or any other provision of the Constitution of the United States, upon the question. It was not until three months after the trial of this defendant that the Supreme Court of the United States rendered its decision in *Witherspoon v. Illinois,* 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, which, being an interpretation of the Constitution of the United States, is binding upon this Court. There, the Supreme Court of the United States said:

> "The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospec-

tive jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it. * * *

"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."

The *Witherspoon* decision being declared by the Court, in footnote 22 thereto, to be fully retroactive, we are compelled by it to vacate the judgment of the superior court sentencing the present defendant to death, which we do.

[3] The defendant also asks us in his brief and upon oral argument to set aside the verdict and grant him a new trial. Whether this should be done, or the case should be remanded to the superior court for the imposition of a different sentence upon the verdict rendered by the jury selected in a manner now declared to violate the Constitution of the United States, is not determined by the decision in the *Witherspoon* case but by the law of this State. See *Boulden v. Holman,* 394 U.S. 478, 22 L. Ed. 2d 433, 439, 89 S. Ct. 1138.

In *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593, a judgment imposing a death sentence upon a verdict of guilty of first degree murder without a recommendation that the defendant be sentenced to life imprisonment, which judgment had previously been affirmed by this Court (*State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802), was reconsidered by us pursuant to a directive from the Supreme Court of the United States. That directive required this Court to determine whether the method employed in selecting the jury met the standards set forth in the *Witherspoon* decision, which had been rendered after our affirmance of the judgment imposing the death sentence.

The record in the *Spence* case contained this stipulation: "A total

of 150 veniremen were examined on voir dire; 79 of those examined were successfully challenged for cause by the State because of their stated opposition to capital punishment." Having reconsidered our earlier decision in the light of the *Witherspoon* case, we said:

> "We have concluded the jury which convicted Spence and Williams was not selected according to their constitutional rights as set forth in *Witherspoon*. Although the defendants are indicted for having committed a most horrible crime, they cannot be executed for that crime until a jury, selected in accordance with their constitutional rights, has convicted them. The State has waived neither its right nor its duty to require them to answer the charge of murder in the first degree. To that end we order a new trial."

Thereafter, in *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241, we held that upon a verdict by a jury, properly selected and constituted, that the defendant was guilty of murder in the first degree, which verdict contained no recommendation that his punishment be life imprisonment and which verdict was rendered in a trial free from error, the death sentence may lawfully be imposed and is required by the law of this State.

In the present case, the State contends that the defendant should be executed because he has committed the crime of first degree murder. The correctness of this contention has not been lawfully determined for the reason that, under the rule of the *Witherspoon* case, there has been no verdict by a jury properly selected and constituted. For this reason the defendant contends he is entitled to a new trial. He does not ask this Court to modify the judgment of the superior court so as to impose a different sentence, nor does he ask this Court to remand the case to the superior court for the imposition of a different sentence upon the verdict which has been rendered.

[4] In any event, neither this Court nor the superior court has authority to impose upon any defendant charged with any crime, to which charge he has entered a plea of not guilty, any sentence not supported by a verdict of guilty rendered by a jury properly selected and constituted. See *State v. Walters*, 208 N.C. 391, 180 S.E. 664. The verdict in the record before us will support no sentence except the death sentence, which sentence cannot be carried out under the rule of the *Witherspoon* case.

[5, 10] Neither this Court nor the superior court has authority to change a constitutionally impermissible verdict by adding thereto

a provision which, had the jury added it, would have made the verdict constitutionally permissible, but which the jury failed to add, notwithstanding a clear instruction that it might do so. See: *State v. Snipes,* 185 N.C. 743, 117 S.E. 500; *State v. Craig,* 176 N.C. 740, 97 S.E. 400. There is in this case no verdict in the record which will support the sentence imposed (due to the *Witherspoon* case) or any other sentence or which will support the release of the defendant as upon an acquittal of the offense for which he has been indicted.

G.S. 14-17 is plain and explicit in prescribing the sentence to be imposed upon one convicted of murder in the first degree. The sentence must be: (1) Death if the jury does not "at the time of rendering its verdict in open court" recommend imprisonment for life, or (2) imprisonment for life in the State's prison if the jury does so recommend.

[6, 7] While the statute uses the word "recommend," it clearly confers no discretionary power upon the superior court, or upon this Court, to impose a sentence different from that fixed by the jury. *State v. Denny,* 249 N.C. 113, 105 S.E. 2d 446; *State v. Carter,* 243 N.C. 106, 89 S.E. 2d 789. Under G.S. 14-17 the court has no more authority to sentence a defendant to imprisonment where the verdict requires the death sentence than it has to sentence him to death where the jury "recommends" life imprisonment. The statute, itself, prescribes the penalty. It does so in the alternative, but the condition which calls into operation the one or the other alternative is the verdict of the jury, not the determination of the judge. It makes no difference that the judge so determines because the Constitution of the United States, as interpreted by the Supreme Court of the United States, forbids him to impose a sentence pursuant to the verdict.

[8] "A judgment by a court in a criminal case must conform strictly to the statute, and any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment void. A statute which creates an offense and prescribes a special form of punishment excludes any different or additional punishment. Accordingly, imprisonment cannot be imposed under a statute providing for punishment only by a fine." 21 Am. Jur. 2d, Criminal Law, § 535. *Accord: Weems v. United States,* 217 U.S. 349, 382, 54 L. Ed. 793, 30 S. Ct. 544; *In Re Graham,* 138 U.S. 461, 34 L. Ed. 1051, 11 S. Ct. 363; *Pressly v. State,* 114 Tenn. 534, 86 S.W. 378.

[9, 10] It is clear that no sentence to imprisonment or to any

other punishment for a criminal offense can be valid unless supported by either a plea of guilty, a plea of nolo contendere, or a verdict of a properly constituted jury. Here, the defendant's plea is "Not guilty." Since there is no verdict in the record which will support a constitutionally permissible sentence, the case must go back to the Superior Court of Durham County for a new trial.

New trial.

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

BOBBITT, C.J., and SHARP, J., dissenting:

All of defendant's assignments of error relate to the court's action in allowing challenges for cause by the State to seven prospective jurors simply because they voiced general objections to the death penalty or expressed conscientious scruples against capital punishment. The Court holds these rulings violate the constitutional standards set forth in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. ed. 2d 776, 88 S. Ct. 1770. We agree.

In *Witherspoon*, Mr. Justice Stewart, expressing the views of five members of the Court, stated: "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." Also, Mr. Justice Stewart stated: "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In the light of the presently available information, we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was. . . . It has not been shown that this jury was biased with respect to the petitioner's guilt." Footnote 21 of the majority opinion includes the following: "Nor does the decision of this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case." The separate opinion of Mr. Justice Douglas, who considered the decision too narrow, epitomizes the holding of the majority in these words: "Although the Court re-

verses as to penalty, it declines to reverse the verdict of guilt rendered by the same jury."

The clear decision of the majority in *Witherspoon* was (1) that the sentence of death could not be carried out, and (2) that the verdict establishing Witherspoon's guilt was not disturbed. Thus, subject to the limitation that the sentence of death could not be carried out, whether a judgment of imprisonment for life or a term of years should be pronounced on the verdict establishing Witherspoon's guilt or a complete new trial should be ordered became a matter for determination in accordance with Illinois law.

Heretofore, in split decisions, this Court has held, in *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593, and in *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241, that the same error in selecting the jury which occurred in this case entitled the defendant to a new trial on the issue of his guilt. We dissented in *Spence* and in *Atkinson.* It seems appropriate that we restate breifly the grounds of our dissent.

G.S. 15-162.1, which was in force when defendant was arraigned, tried and convicted, provided that the tender and acceptance of a plea of guilty of murder in the first degree, rape, burglary in the first degree, or arson, had the effect of a verdict of guilty of such crime with recommendation by the jury that the punishment be imprisonment for life in the State's prison; and, in such event, required that the court pronounce a judgment of life imprisonment. If a plea of guilty was tendered by a defendant and accepted by the State, with the approval of the court, the defendant by such plea avoided a jury trial and the possibility of a conviction resulting in a death sentence. G.S. 15-162.1 was repealed March 25, 1969.

It is, and has been, our opinion that, prior to the repeal of G.S. 15-162.1, the death penalty provisions relating to murder in the first degree, rape, burglary in the first degree and arson (G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58, respectively) were invalidated by the 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 (1968), and in *Pope v. United States,* 392 U.S. 651, 20 L. ed. 2d 1317, 88 S. Ct. 2145 (1968). The reasons for our opinion are set forth fully in the dissenting opinions in *State v. Spence, supra,* and in *State v. Atkinson, supra.* If our view is correct, North Carolina had no death penalty in February, 1968, when Johnny Ruth was convicted of murder in the first degree and sentenced to die.

In *Alford v. State of North Carolina,* 405 F. 2d 340, a panel of the United States Court of Appeals for the Fourth Circuit in a split

decision (two to one) held the *Jackson* and *Pope* decisions invalidated the death penalty provisions of our North Carolina statutes. The Supreme Court of the United States granted *certiorari* to review the *Alford* case and heard oral arguments therein on November 17, 1969. Its decision may determine whether *Jackson* and *Pope* did invalidate the death penalty provisions of our North Carolina statutes *as they existed prior to March 25, 1969.*

Notwithstanding the repeal of G.S. 15-162.1, the uncertainty as to the validity of the death penalty provisions of our North Carolina statutes continues for reasons other than those discussed in *Jackson* and *Pope.* These additional questions may be resolved by the forthcoming decision of the Supreme Court of the United States in the case of *Maxwell v. Bishop,* which was first argued at its Spring Term 1969 and has been set for reargument at its Fall Term 1969. *Maxwell v. Bishop* involves Arkansas statutes containing provisions similar to those in our North Carolina statutes. The Supreme Court in allowing *certiorari* to review the decision of the United States Court of Appeals for the Eighth Circuit (*Maxwell v. Bishop,* 398 F. 2d 138), limited consideration to Questions 2 and 3 of the petition for *certiorari, viz.:*

"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?"

It seems probable that the decision in *Maxwell v. Bishop* will settle existing uncertainty as to the validity of our *present statutory provisions* relating to capital punishment.

If it should be determined that the majority of this Court are correct in their view that the death penalty provisions of our statutes were and are valid, we would join in the decision that the verdict and judgment should be vacated and the cause remanded for a new trial.

On the other hand, if it should be determined by the Supreme Court of the United States that the death penalty provisions of our statutes, as of the date defendant was arraigned, tried and convicted,

were invalid, either under the decisions in *Jackson* and *Pope* or on grounds that may be decided in *Maxwell v. Bishop*, we would not disturb the verdict but would remand the cause for pronouncement of a judgment imposing a sentence of life imprisonment.

Our statutes provide only two possible judgments, death or life imprisonment, where a defendant is convicted of murder in the first degree, rape, burglary in the first degree, or arson. If the death penalty provisions are invalidated, the only permissible punishment upon conviction for these crimes is life imprisonment. We are not at all impressed with the suggestion that, even if the death penalty provisions are invalidated, no judgment of imprisonment for life can be pronounced unless the jury, at the time of rendering its verdict in open court, recommends that "the punishment shall be imprisonment for life in the State's prison." If the alternative of death is invalidated, there would be no occasion for the jury to do otherwise than render a verdict as to defendant's guilt. The jury would have no discretion as to whether the punishment should be death or life imprisonment. Any recommendation the jury might make in respect of punishment would be inappropriate and without legal significance. Upon conviction, the court would impose the only legally permissible punishment, being the statutory punishment most favorable to the defendant, that is, a judgment of imprisonment for life.

If the death penalty provisions are invalidated, this case should be remanded for the pronouncement of a judgment of life imprisonment. Where there is no error in the trial of defendant in respect of guilt, a new trial in respect of defendant's guilt should not be ordered when upon such new trial the State could not under any circumstances obtain a verdict that would result in the pronouncement of a valid death sentence.

The retrial of a capital case, which necessarily requires the expenditure of time and money and imposes great stress and strain upon all who are involved in it, should not be undertaken in the present uncertainty concerning these issues of life and death. Nothing will be lost by deferring our decision in this case until the Supreme Court of the United States has spoken definitively on the crucial questions now before it for decision. We favor that course.

TOWN OF HILLSBOROUGH, A MUNICIPAL CORPORATION v. CLARENCE DUPREE SMITH AND WIFE, MAE L. SMITH

No. 17

(Filed 10 December 1969)

1. Municipal Corporations § 30— building permit — rights of permittee — effect of subsequently enacted ordinance

The issuance by a municipality of a valid building permit does not, of itself, confer upon the holder thereof a vested property right, but such permit may be revoked by or pursuant to a zoning ordinance otherwise valid and adopted prior to the taking by the holder of any action in reliance upon the permit; but where, in bona fide reliance upon the permit, the holder constructs the building authorized thereby, his right to use it for the intended purpose, not otherwise unlawful, vests and may not be taken from him by a subsequently enacted zoning ordinance.

2. Municipal Corporations § 30— building permit — nonconforming use — acquisition of vested right — substantial expense

In order for the holder of a building permit to acquire a vested right to carry on a nonconforming use of his land, it is not essential that the permit holder complete the construction of the building and actually commence such use of it before the revocation of the permit, but it is sufficient that, prior to the revocation of the permit or enactment of the zoning ordinance and with the requisite good faith, he make a substantial beginning of construction and incur therein substantial expense.

3. Municipal Corporations § 30— reliance upon building permit — nature of landowners' expenses — change in land

There is no basis for distinction between the landowner who, with the requisite good faith and reliance upon a building permit, expends money in activity resulting in visible, physical changes in the condition of the land and the landowner who expends a like amount in the acquisition of construction materials and equipment to be used in the building or who incurs binding contractual obligations requiring expenditures for construction or for acquisition of materials and equipment.

4. Municipal Corporations § 30— building permit — basis of landowner's right to build — change of position

The basis of the landowner's right to build and use his land, in accordance with the building permit issued to him, is not the giving of notice to the town through a change in the appearance of the land but is the landowner's change of his own position in bona fide reliance upon the permit.

5. Municipal Corporations § 30— building permit — revocation of permit — rights of landowner — substantial expenditures

One who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit,

whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means, and this is true irrespective of the fact that such expenditures and actions by the holder of the permit do not result in any visible change in the condition of the land.

6. Municipal Corporations § 30— issuance of building permit — subsequently enacted zoning ordinance — rights of landowners

Landowners acquired vested right to construct and use a proposed building for a dry cleaning business in reliance upon a building permit issued to them by a municipality, notwithstanding the subsequent enactment of a zoning ordinance prohibiting such use, where (1) there was uncontradicted evidence that, after the issuance of the permit and before both the passage of the zoning ordinance and the revocation of the permit, the landowners purchased the land and incurred substantial contractual obligations for the construction of the proposed building and the purchase of dry cleaning equipment and (2) the jury found, upon sharply conflicting evidence, that the expenditures were made in good faith in reliance upon the permit and without notice of the pending zoning ordinance.

7. Municipal Corporations § 30— action to restrain noncompliance with zoning ordinance — vested rights of landowner

In an action by a municipality seeking to restrain landowners, who were holders of a building permit issued by the municipality, from continuing construction work on their land until they obtained a zoning permit therefor in compliance with a zoning ordinance enacted after issuance of the building permit, the municipality is not entitled to injunctive relief as a matter of law on the ground that the landowners, after adoption of the ordinance and revocation of the permit, began excavation and land preparation without obtaining the zoning permit, where (1) the landowners, by substantial expenditures in reliance upon the permit, had acquired a vested right to build the structure prior to adoption of the zoning ordinance and (2) the zoning ordinance did not authorize the issuance of a permit for nonconforming use for those buildings not under actual construction prior to the adoption of the ordinance.

8. Municipal Corporations § 30— zoning ordinance — authority of board of adjustment

A board of adjustment may not permit construction of a type of building which is prohibited by the ordinance itself.

9. Municipal Corporations § 30; Administrative Law § 2— landowners' attack on zoning ordinance — exhaustion of administrative remedies

Landowners were not required to apply to municipal administrative agency for a zoning permit before they could be entitled to assert the inapplicability of the zoning ordinance to their contemplated building, where the agency was not authorized, under the circumstances of the case, to issue the permit.

10. Municipal Corporations § 30— action to restrain noncompliance with zoning ordinance — good faith expenditures by landowner — instructions

On issue as to whether landowners, in good faith and without notice of pending zoning ordinance prohibiting use of their property for business

purposes, made substantial expenditures in reliance upon a building permit so as to allow them to complete construction of a building prohibited by the ordinance, trial court's instructions to the jury, although not specifically stating that the jury was to consider only those expenditures made prior to the adoption of the ordinance, *held* sufficient to confine the jury to consideration of landowners' expenditures made during the pendency of the ordinance.

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

ON certiorari to the Court of Appeals to review its decision in 4 N.C. App. 316.

The defendants are the owners of a lot at the corner of Churton and Orange Streets in the Town of Hillsborough. It was conveyed to them by deed on 22 May 1968, pursuant to their exercise of an option to purchase the property, which option was acquired 19 March 1968.

On 27 May 1968, the town enacted a zoning ordinance which is conceded to be within its police power and to have been adopted by lawful procedure. This ordinance zones for residential use only the area which includes the lot of the defendants. The ordinance also provides that no building designed or intended to be used for other than farm purposes shall be erected, and no excavation or other preparation of land shall be commenced within the town until a zoning permit has been issued by the zoning officer of the town.

On 3 May 1968, the defendants applied for and were issued, by the appropriate officer of the town, a building permit for the construction of a "dry cleaning building" upon the above lot. At that time, there was no zoning ordinance prohibiting the erection of such building thereon. It is stipulated that, on 22 May 1968 (after the issuance of the permit and before the enactment of the ordinance), the defendants acquired title to the land. Their uncontradicted evidence is that they then paid the option price of $9,400, $100 having previously been paid for the option, and that on the same day, 22 May 1968, they signed a contract with a builder for the construction of a building thereon for $15,000. On 24 May 1968, they placed an order for dry cleaning equipment. On 23 May 1968, the defendants caused stakes to be driven upon the lot showing three corners of the building they proposed to erect. No other work was done on the lot itself until 8 July 1968, by which date it is conceded that the defendants knew of the passage of the zoning ordinance and the terms of it. The defendants have not applied for or received a zoning permit from the zoning officer of the town.

Subsequent to the enactment of the ordinance, the following

things occurred: On 5 June 1968, the defendants contracted in writing for the purchase of equipment and of a franchise for the operation upon this property of a "martinizing" plant. They contracted for the purchase of certain other equipment prior to 11 June 1968. On 11 June 1968, the defendants received a written communication from the zoning officer advising that the building permit previously issued to them was revoked, and on the same day the zoning officer showed the defendants a copy of the ordinance enacted 27 May 1968. The defendants made payments totaling $8,000 upon their contract with the builders of the proposed building and a payment of $2,968.03 upon their contract for the "martinizing" franchise. On 8 July 1968, the existing dwelling house upon the lot was removed and the property was bulldozed.

On 11 July 1968, the town instituted this action, seeking to enjoin the defendants "from excavating or otherwise preparing the said lot for any non-farm use or from erecting any building * * * upon said lot without first obtaining a zoning permit therefor." The complaint alleges the passage of the ordinance, its applicability to the lot of the defendants, its prohibition of any excavation or other land preparation without the issuance of a zoning permit, the commencement by the defendants of excavation or other land preparation on their lot on 8 July 1968, that no permit has been issued therefor and that such excavation or other land preparation is in violation of the ordinance.

The defendants filed answer denying the applicability of the ordinance to their activities of which the plaintiff complains and asserting for further answer that, in reliance upon the building permit issued on 3 May 1968, the defendants expended large amounts and incurred substantial obligations in good faith for the sole purpose of using the lot in a business venture. They allege that they did not know their proposed use of the lot was forbidden by the ordinance until 11 June 1968 and that they made substantial expenditures and incurred substantial obligations, both before and after the enactment of the ordinance, in good faith, in reliance upon the building permit which had been issued and in the honest belief that the proposed building and use of their land would not violate the ordinance.

A temporary restraining order was issued and continued in force to the time of the hearing, subject to certain modifications not presently material.

At the trial in the superior court, only the following issue was submitted:

"Did the defendants in good faith and without notice of the

pending zoning ordinance prohibiting the use of their property for business purposes, incur substantial expenses in reliance upon the building permit issued to them on May 3, 1968?"

The jury answered the issue "Yes." Thereupon, judgment was entered vacating the restraining order. The town appealed to the Court of Appeals. The restraining order was continued in effect until final disposition of the appeal.

There was no conflict in the evidence with reference to the above stated facts. There was, however, sharp conflict in the evidence as to the good faith of the defendants and as to when they acquired knowledge of the ordinance. The evidence for the town was explicit to the effect that, at or before the issuance of the building permit on 3 May 1968, officers and employees of the town specifically informed the defendants that a zoning ordinance restricting the area in question to residential use was in process of adoption and a public hearing thereon was to be held 27 May 1968. The evidence for the town is that the defendants were then told that notice of the proposed ordinance had already been published in the newspaper and it would be enacted on 27 May 1968. The mayor testified that, two weeks prior to the issuance of the building permit, he informed Mr. Smith that, while there was then no zoning ordinance in effect, such an ordinance was "scheduled to be adopted on May 27." He further testified that a copy of the then proposed ordinance (the one adopted) was exhibited to Mr. Smith at that time.

The defendant's evidence on this point is equally explicit to the effect that he was not so informed by the officers and employees of the town and was not given a copy of the ordinance until 11 June 1968. He testified that when the building permit was issued to him on 3 May 1968 he did not know any zoning ordinance was pending and that he did not know his proposed building would violate the terms of any zoning ordinance until 11 June 1968. He denied that he was informed of a public hearing to be held with reference to a proposed zoning ordinance on 27 May 1968, and testified that he did not know of any proposed zoning of the property when he purchased it on 22 May 1968, or when he contracted for the construction of the building and placed his order for the dry cleaning equipment. At some time prior to 27 May 1968, he became aware that some proposed zoning ordinance was pending, but he did not think it would affect his plans for his property.

The Court of Appeals granted a new trial on the ground that there was error in the charge to the jury in that it left the jury free to consider the good faith of the defendants in making expendi-

tures after the enactment of the ordinance and up to the date the defendants received notice of the revocation of their building permit. The instruction in question was as follows, the portion in parentheses being assigned as error by the town:

> "(If the defendants acted in good faith and made substantial expenditures in reliance on the permit, but without notice of the pending ordinance prohibiting the use of the property for business purposes, the defendant would be protected, that is, if the defendant made substantial expenditures in the honest belief that the proposed construction would not violate the zoning regulations, the defendant would be protected and would be entitled to complete their proposed building, as a non-conforming use,) but the defendants would not be protected and would not have the right to build a dry cleaning plant if they had knowledge of the pendency of the zoning ordinance prohibiting such use and did not act in good faith at the time of incurring their expenditures. To be protected the defendants must have acted in good faith, with honest intentions and without knowledge of circumstances sufficient to put them on inquiry as to whether or not the proposed use was prohibited."

At a later point in the charge, the court further instructed the jury on this point:

> "I instruct you on that issue that if the defendants * * * have satisfied you by the greater weight of the evidence that they did, in good faith and without notice of the pending zoning ordinance prohibiting the use of that property for business purposes, incur substantial expenses in reliance upon the building permit issued to them on May 3rd, 1968, if you are so satisfied by the greater weight of the evidence, the burden of proof being on the defendants, it would then be your duty to answer the issue 'Yes.'
>
> "Now, if the defendants have failed to so satisfy you by the greater weight of the evidence, it would then be your duty to answer that issue 'No.' "

The town sought certiorari on the ground that the Court of Appeals erred in remanding the case for a new trial. The town contends that, it being uncontradicted that the defendants commenced work on the property after the effective date of the ordinance, without applying for or receiving a zoning permit, it was entitled to an injunction as a matter of law. In its appeal to the Court of Appeals it also assigned as error other rulings by the trial court.

Graham and Cheshire for plaintiff appellant.

Alonzo Brown Coleman, Jr., for defendant appellees.

LAKE, J.

[1] The town issued to the male defendant, who then had an option to purchase the land in question, a permit to construct thereon the building which he proposes to construct and to use for a dry cleaning business. Neither such construction nor such use was forbidden by law when the permit was issued. The issuance of the permit did not, of itself, confer upon the defendants a vested property right, of which they could not be deprived by a zoning ordinance subsequently enacted. *Warner v. W & O, Inc.,* 263 N.C. 37, 138 S.E. 2d 782. Such permit, though valid when issued, may be revoked by or pursuant to a zoning ordinance, otherwise valid and adopted prior to the taking by the holder of any action in reliance upon the permit. 8 McQuillin, Municipal Corporations, §§ 25.156, 25.158. Where, however, in bona fide reliance upon such permit, the holder constructs the building authorized thereby, his right to use it for the intended purpose, not otherwise unlawful, vests and may not be taken from him by a subsequently enacted zoning ordinance. *Warner v. W & O, Inc., supra.*

[2] In order to acquire a vested right to carry on such nonconforming use of his land, it is not essential that the permit holder complete the construction of the building and actually commence such use of it before the revocation of the permit, whether such revocation be by the enactment of a zoning ordinance or otherwise. To acquire such vested property right it is sufficient that, prior to the revocation of the permit or enactment of the zoning ordinance and with the requisite good faith, he make a substantial beginning of construction and incur therein substantial expense. *Warner v. W & O, Inc., supra; In Re Tadlock,* 261 N.C. 120, 134 S.E. 2d 177.

[3, 4] In this respect, we perceive no basis for distinction between the landowner who, with the requisite good faith and reliance upon the permit, expends money in activity resulting in visible, physical changes in the condition of the land and one who, with like good faith and reliance upon the permit, expends a like amount in the acquisition of construction materials or of equipment to be used in the proposed building. Likewise, we find no basis for a distinction between such a landowner and one who, in like good faith and reliance upon the permit, incurs binding contractual obligations requiring him to make such expenditures for such construction or for the acquisition of such materials or equipment. It is not the giving

of notice to the town, through a change in the appearance of the land, which creates the vested property right in the holder of the permit. The basis of his right to build and use his land, in accordance with the permit issued to him, is his change of his own position in bona fide reliance upon the permit.

While one does not acquire a vested right to build, contrary to the provisions of a subsequently enacted zoning ordinance, by the mere purchase of land in good faith with the intent of so building thereon, we find no basis for distinction in this respect between an expenditure for the acquisition of land, pursuant to a previously held option, and expenditures for the acquisition of building materials or services. One who, in good faith and in reliance upon a properly issued building permit, makes substantial expenditures for any of these purposes in reliance upon the permit falls within the reason of the rule stated in *Warner v. W & O, Inc., supra.* See 58 Am. Jur., Zoning, §§ 184, 185.

[5] We, therefore, hold that one who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means, and this is true irrespective of the fact that such expenditures and actions by the holder of the permit do not result in any visible change in the condition of the land.

Warner v. W & O, Inc., supra, strongly intimates that had the expenditure there made for an architect's drawings been made in reliance upon the issued permit, rather than prior to its issuance and for the purpose of obtaining it, it would have been proper to consider such expenditure in determining whether the permit holder had acquired a vested right to build in accordance with the permit. In *Stowe v. Burke,* 255 N.C. 527, 122 S.E. 2d 374, this Court cited with approval *Winn v. Lamoy Realty Corp.,* 100 N.H. 280, 124 A. 2d 211, in which the incurring of "legal obligations" by the landowner in bona fide reliance upon the permit was considered sufficient to vest in him the right to complete the construction in accordance with the permit. See also: *Willis v. Town of Woodruff,* 200 S.C. 266, 20 S.E. 2d 699; *Deer Park Civic Ass'n v. Chicago,* 347 Ill. App. 346, 106 N.E. 2d 823; 58 Am. Jur., Zoning, §§ 184, 185; 13 Am. Jur. 2d, Buildings, § 10; McQuillin, Municipal Corporations, 3d Ed, § 26.219; Yokley, Municipal Corporations, § 164.

The "good faith" which is requisite under the rule of *Warner v. W & O, Inc., supra,* is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him. See *Stowe v. Burke, supra.*

[6] In the present case, there is uncontradicted evidence that, after the issuance of the permit and before both the passage of the zoning ordinance and the revocation of the permit, the defendants exercised the option to purchase the land, paid the contract price and took title and also entered into contracts for the construction of the proposed building and for the purchase of equipment to be used in it. It is not contended that these contracts did not constitute obligations binding upon the defendants. The obligations so assumed are substantial in amount, as was the amount paid for the land. The jury found the defendants incurred "substantial expenses" (not specified, but obviously including the above) "in good faith and without notice of the pending zoning ordinance * * * in reliance upon the building permit." Though there was sharp conflict in the evidence as to the good faith of the defendants, the verdict of the jury is conclusive upon this question and establishes a vested right in the defendants to construct and use the proposed building, irrespective of the subsequently enacted zoning ordinance, unless there was error requiring a new trial or the town is otherwise entitled, upon the record before us, to the injunction prayed for.

[7] The town contends that it is entitled, as a matter of law, to the injunctive relief prayed for on the ground that the defendants, after the adoption of the zoning ordinance and the revocation of the building permit, commenced excavation and land preparation for the contemplated building without obtaining a zoning permit as required by the ordinance. The Court of Appeals held there was no error by the superior court in its denial of the plaintiff's motion for such judgment. We agree.

The defendants had a properly issued building permit which, for the reasons above stated, the town could not revoke so as to deprive the defendants of their right to build the contemplated structure upon their land. By reason of the defendants' vested right to build the structure, the zoning ordinance does not apply to their proposed construction project. Therefore, the provisions of the or-

dinance, relating to the issuance of a zoning permit prior to construction, do not apply to the proposed activity of the defendants.

Furthermore, the zoning ordinance does not authorize either the Zoning Officer or the Board of Adjustment to issue a zoning permit in the present situation. Section 11.1 of the ordinance defines a "nonconforming building" as one "upon which substantial construction was begun prior to adoption of this ordinance," and which building does not conform to the requirements of the ordinance. It specifically states that no other beginnings of buildings which do not conform to the provisions of the ordinance shall have "nonconforming status" under the provisions of the ordinance. Since no actual construction of the proposed building had begun prior to its adoption, the ordinance confers upon the Zoning Officer no authority to issue a zoning permit for this building. He is required by § 12.2 to enforce the ordinance "exactly as written." The ordinance provides he has no power to interpret it and no power to grant exceptions or variances from it.

[8] Similarly, the Board of Adjustment, though authorized to grant an exceptional use of land "permitted by the ordinance" and to grant a variance from the literal terms of the ordinance, is required by § 13.3.1 to "enforce the meaning and spirit of this ordinance as enacted." By the provisions of § 13.3.3.2, the Board of Adjustment may grant variances only as to "setback, lot area, yard and other dimensional requirements." These provisions are in accord with the decisions of this Court to the effect that a board of adjustment may not permit construction of a type of building which is prohibited by the ordinance itself since, for it to do so, would be to amend the law, which the board, not being a law-making body, cannot do. *Austin v. Brunnemer,* 266 N.C. 697, 147 S.E. 2d 182; *In Re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189; *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128. The defendants do not contend that, by reason of exceptional hardship, the municipal authorities should exercise a discretion granted them by the ordinance. Their contention is that they have a legal right to build, which right the city cannot take from them and for which no permit is authorized by the ordinance. Having this right under the rule of *Warner v. W & O, Inc., supra,* the law does not require them to make a vain trip to the City Hall before exercising it.

[9] *Garner v. Weston,* 263 N.C. 487, 139 S.E. 2d 642, is distinguishable from the present case in that there the trial court found, upon sufficient evidence, that the landowner had not acquired a vested right to build contrary to the provisions of the ordinance. In

such case, contrary to the present case, his only remedy was an application to the Board of Adjustment for the exercise of its administrative discretion on the basis of hardship. A landowner may not resort to the courts for relief on that basis until he has exhausted his administrative remedy under the ordinance. Similarly, in *Austin v. Brunnemer, supra,* the landowner conceded that his activities prior to the adoption of the ordinance had not been sufficient to confer upon him a vested right to build contrary to the ordinance and so he instituted the proceeding by application to the board for the granting of a variance, in its administrative discretion, on the basis of hardship. *Michael v. Guilford County,* 269 N.C. 515, 153 S.E. 2d 106, was a suit by the landowner to enjoin enforcement of a zoning ordinance by reason of hardship, brought after the board had denied an application for relief by rezoning because of a change in condition after the adoption of the zoning ordinance. The defendants did not initiate this proceeding to obtain judicial relief from an ordinance applicable to them. They have proceeded to exercise a property right to which the ordinance does not apply. They have been sued for an injunction preventing their exercise of this right. Before asserting the inapplicability of the ordinance to their contemplated building project, it is not necessary that they apply to an administrative agency for a permit which that agency is not authorized to issue. For a similar conclusion where the landowner's contention was that the ordinance was unconstitutional as applied to his property, see *County of Lake v. MacNeal,* 24 Ill. 2d 253, 181 N.E. 2d 85.

[10] The Court of Appeals ordered a new trial on the ground that there was error in the instruction to the jury quoted in the foregoing statement of facts. The Court of Appeals was of the opinion that this instruction left the jury free to consider expenditures made by the defendants after the enactment of the zoning ordinance. The Court of Appeals was correct in its view that expenditures made after the enactment of the ordinance, which took effect when enacted, could not vest in the defendants a right to build in violation of the ordinance. One does not acquire a right to violate an otherwise valid zoning ordinance, already in existence, by making expenditures or incurring obligations merely because when he made them he did not know the ordinance had been adopted. To have that effect, the expenditures must have been made "when the act was lawful." *Warner v. W & O, Inc., supra; Lansing v. Dawley,* 247 Mich. 394, 225 N.W. 500; Annot., 86 A.L.R. 659, 685; 58 Am. Jur., Zoning, § 185.

The issue submitted to the jury was: "Did the defendants, in good faith and without notice of the *pending* zoning ordinance * * * incur substantial expenses in reliance upon the building permit

* * *?" (Emphasis added.) Immediately preceding the portion of the charge to which the town excepts, the court instructed the jury that the permit issued to the defendants vested no right in them, but they must have exercised the privilege of the permit "at a time when it was lawful" in order to acquire a property right which would be protected from the zoning power of the town. It further charged that the construction need not be completed by them "before the adoption of a zoning ordinance." Reference to the portion of the charge to which the town excepts and to the remainder of the sentence discloses that the jury was instructed that the defendants would be "protected" if they made substantial expenditures in good faith, in reliance on the permit and "without notice of the *pending* ordinance." (Emphasis added.) In the same sentence the jury was told that the defendants would not "have the right to build a dry cleaning plant" if they had knowledge of the *"pendency* of the zoning ordinance." (Emphasis added.) Later in the charge, the court instructed the jury that they would answer the issue submitted to them, "Yes," if the defendants had satisfied them by the greater weight of the evidence that they did "in good faith and without notice of the *pending* zoning ordinance" incur substantial expenses in reliance upon the building permit, and otherwise they would answer the issue, "No." (Emphasis added.)

Although the court did not specifically state that the jury was to consider only those expenditures made prior to the adoption of the zoning ordinance, and though the court reviewed all of the evidence, including testimony of the male defendant, admitted without objection, as to payments made by him after the passage of the zoning ordinance, the charge appears to confine the jury to consideration of expenditures made during the pendency of the ordinance.

Assuming, however, that the jury's verdict reflected consideration by it of expenditures, both before and after the adoption of the ordinance, we see no possibility of the town's being prejudiced by this instruction. There is no conflict in the evidence with reference to the time, nature and extent of the expenditures made and obligations incurred by the defendants. The controversy is not as to these matters, but as to the good faith of the defendants, or lack of it, at the time these expenditures were made and these obligations were incurred. The town's only contention in this respect is that all expenditures were made, and all of the obligations were incurred, after the defendants knew the zoning ordinance was under consideration by the town commissioners and knew its provisions. For this reason, the town contends they could not be deemed made or incurred in good faith.

It is inescapably true that, if the later expenditures and contracts were made by the defendants in good faith and without knowledge of the zoning ordinance, the earlier ones were likewise so made. Thus, the jury's verdict inescapably establishes that the expenditures and contracts made by the defendants prior to the adoption of the ordinance were made in good faith, without knowledge of the pending zoning ordinance and in reliance upon the previously issued building permit. Obviously, these expenditures and obligations were "substantial." While the evidence as to the good faith of the defendants throughout this transaction is sharply in conflict and would have supported a verdict in accordance with the town's contention, the jury has determined that matter in favor of the defendants.

Although the defendants have not sought review of and reversal of the order of the Court of Appeals directing a new trial, in our general supervisory power over the decision of the other courts of this State (see: *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280; *Greene v. Laboratories*, 254 N.C. 680, 694, 120 S.E. 2d 82; *Edwards v. Raleigh*, 240 N.C. 137, 81 S.E. 2d 273), we find the judgment of the Court of Appeals directing a new trial erroneous and reverse it, thereby affirming the judgment of the superior court.

Reversed.

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

STATE v. J. N. McBANE

No. 23

(Filed 10 December 1969)

1. Counties § 5.5— county subdivision ordinance — sale of land by reference to plat not approved and recorded — misdemeanor — prerequisite to conviction

As one of the prerequisites to conviction for violation of G.S. 153-266.6, it must be alleged and established that an ordinance regulating the subdivision of land was adopted by the board of county commissioners in accordance with the authority conferred by G.S. 153-266.1 *et seq.*

2. Indictment and Warrant § 14— motion to quash for failure to charge offense — basis of decision

When a warrant or indictment is challenged by a timely motion to quash

on the ground it fails to charge a criminal offense, decision must be based solely on the contents of such warrant or indictment.

3. Criminal Law § 13— jurisdiction — valid indictment or warrant

A valid warrant or indictment is an essential of jurisdiction.

4. Indictment and Warrant § 9— charge of all essential elements of offense — G.S. 15-153 and G.S. 15-155

Nothing in G.S. 15-153 or in G.S. 15-155 dispenses with the requirement that the warrant or indictment charge all the essential elements of the offense.

5. Indictment and Warrant § 9— statutory offenses — sufficiency of indictment

A warrant or indictment following substantially the language of the statute is sufficient if and when it thereby charges the essentials of the offense in a plain, intelligible and explicit manner, but if the statutory words fail to do this they must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged.

6. Indictment and Warrant § 9— statutory offenses — reference to statute — sufficiency of indictment

A warrant or indictment merely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient.

7. Indictment and Warrant § 9; Counties § 5.5— general allegation of statutory violation — sufficiency of indictment

The general allegation that defendant's conduct constituted a misdemeanor in violation of G.S. 153-266.6 is insufficient to charge a violation of that statute.

8. Counties § 5.5— county subdivision ordinance — sale of land by reference to plat not approved and recorded — misdemeanor — sufficiency of warrant

In this prosecution for the misdemeanor of selling or transferring land subject to a county subdivision ordinance with reference to a plat showing a subdivision of land before such plat had been properly approved under the ordinance and recorded, a violation of G.S. 153-266.6, the warrant is fatally defective where it fails to allege that defendant was the owner or agent of the owner of land within the platting jurisdiction granted to the county commissioners by G.S. 153-266.1.

9. Counties § 5.5— crime defined by G.S. 153-266.6

What G.S. 153-266.6 condemns as a misdemeanor is the description of land in any contract of sale, deed or other instrument of transfer by reference to a subdivision plat that has not been properly approved and recorded, it being immaterial whether the contract of sale, deed or other instrument of transfer is recorded.

10. Counties § 5.5— county subdivision ordinance — purpose of G.S. 153-266.6

The sole purpose of G.S. 153-266.6 is to compel compliance with ordi-

nance provisions which seek to prevent any subdivision of land covered by its terms unless and until the proposed subdivision map has been submitted to and approved by the designated governmental agencies.

11. Statutes § 2— local acts authorizing laying out, etc. of highways, streets or alleys — constitutional prohibition

Section 29, Article II, of the Constitution of North Carolina prohibits a local act which authorizes the laying out, opening, altering or discontinuing of a given particular and designated highway, street or alley.

12. Statutes § 2; Counties § 5.5— authorizing laying out, etc. of highways and streets — G.S. 153-266.3 and G.S. 153-266.4

Provisions of G.S. 153-266.3 and G.S. 153-266.4 setting forth what may and what must be included in a county subdivision ordinance do not constitute "authorizing the laying out, opening, altering, maintaining or discontinuing of highways, streets, or alleys" within the meaning of Section 29, Article II, of the Constitution of North Carolina.

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

APPEAL by the State from *Burgwyn, Emergency Judge,* May 26, 1969 Criminal Session of GUILFORD Superior Court, certified, pursuant to G.S. 7A-31, for review by the Supreme Court before determination by the Court of Appeals.

The magistrate's warrant on which this criminal prosecution is based authorized the arrest of defendant for the alleged criminal offense described in the attached affidavit of Lindsay W. Cox, Guilford County Planning Director, *viz.:*

"The undersigned, Lindsay Cox, being duly sworn, complains and says that at and in the County named above and on or about the 26th day of January, 1967, the defendant named above did unlawfully, wilfully, did transfer or sell certain property described in the deed recorded in Deed Book, 2331, at page 32, in the Office of the Register of Deeds, Guilford County Courthouse, Greensboro, North Carolina, by reference to a plat showing a sub-division of land before such plat had been properly approved under the Guilford County Sub-Division Ordinance and recorded in the Office of the Register of Deeds of Guilford County, such reference constituting the committing of a misdemeanor in accordance with Chapter 153-266.6 which is incorporated in the Guilford County Sub-Division Ordinance at Section 23.

"The offense charged here was committed against the peace and dignity of the State and in violation of law according to Chapter 153-266.6 of the General Statutes of the State of North Carolina."

In the district court, defendant moved to quash the warrant. Upon

denial of his motion, defendant entered a plea of not guilty. The court found the defendant guilty and entered the following judgment: "Prayer for Judgment continued 12 months Pay 50.00 fine and cost." Defendant appealed.

In the superior court, before pleading to the accusation set forth therein, defendant moved to quash the warrant on the ground "the same does not charge an offense under the laws of North Carolina, the statute referred to being unconstitutional, invalid and void." The court allowed defendant's motion and entered judgment quashing the warrant and dismissing the action. Neither the motion to quash nor the judgment indicates any specific ground for holding G.S. 153-266.6 unconstitutional.

The State excepted and appealed.

Attorney General Morgan and Assistant Attorney General Rich for the State.

Turner, Rollins, Rollins & Suggs for defendant appellee.

BOBBITT, C.J.

This appeal by the State is specifically authorized by G.S. 15-179(3) and (6). *State v. Vaughan*, 268 N.C. 105, 150 S.E. 2d 31.

The provisions of Chapter 1007, Session Laws of 1959, captioned "AN ACT AUTHORIZING COUNTIES TO REGULATE THE SUBDIVISION OF LAND IN AREAS OUTSIDE MUNICIPAL SUBDIVISION - REGULATION JURISDICTION," now comprise Article 20A, Chapter 153, of the General Statutes (Vol. 3C, Replacement 1964). Article 20A consists of G.S. 153-266.1 through G.S. 153-266.9.

The warrant purports to charge a violation of G.S. 153-266.6, which provides: "If a board of county commissioners adopts an ordinance regulating the subdivision of land as authorized herein, any person who, being the owner or agent of the owner of any land located within the platting jurisdiction granted to the county commissioners by G.S. 153-266.1, thereafter transfers or sells such land by reference to a plat showing a subdivision of land before such plat has been properly approved under such ordinance and recorded in the office of the appropriate register of deeds, shall be guilty of a misdemeanor. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from such penalties. The county, through its county attorney or other official designated

by the board of county commissioners, may enjoin such illegal transfer or sale by action for injunction."

[1] G.S. 153-266.6 purports to create and define a misdemeanor "(i)f a board of county commissioners adopts an ordinance regulating the subdivision of land" as authorized by the provisions of Article 20A, Chapter 153. Hence, as one of the prerequisites to conviction for violation of G.S. 153-266.6, it must be alleged and established that an ordinance regulating the subdivision of land was adopted by the board of county commissioners in accordance with the authority conferred by G.S. 153-266.1 *et seq.*

Stipulations appearing in the record set forth that the Board of County Commissioners of Guilford County adopted "an Ordinance regulating the subdivision of land as authorized in Article 20A, Chapter 153, of the General Statutes," and that this ordinance had been "in full force and effect since May 17, 1965." The only provision of the ordinance referred to in the stipulations is Section 23 which simply repeats certain provisions of G.S. 153-266.6.

[2] When a warrant or indictment is challenged by a timely motion to quash on the ground it fails to charge a criminal offense, decision must be based solely on the contents of such warrant or indictment. State v. Guffey, 265 N.C. 331, 333, 144 S.E. 2d 14, 16.

For present purposes, we assume, but do not decide, that a Guilford County Subdivision Ordinance was duly adopted and properly pleaded. Whether it was authorized, in whole or in part, by G.S. 153-266.1 *et seq.* is not presented. Its provisions do not appear in the record before us.

G.S. 153-266.1 confers upon a board of county commissioners authority to adopt a subdivision control ordinance. However, this authority may be lawfully exercised only within prescribed limitations. Thus, a subdivision ordinance adopted by the board of county commissioners applies solely to land lying within the county and outside the subdivision-regulation jurisdiction of any municipality. A municipality, under G.S. 160-226, may enact a subdivision ordinance applicable to land lying within the municipality or within one mile in all directions of its corporate limits. However, a municipality *may*, by resolution, agree to be governed by a county ordinance. A board of county commissioners, if it determines, pursuant to G.S. 153-266.13, that only certain areas of the county need to be governed by zoning regulations, *may* in its discretion elect to adopt subdivision regulations which apply only to such areas.

The sufficiency of the warrant on which this criminal prosecution

is based must be tested in the light of well-established legal principles stated below.

[3, 4] "A valid warrant or indictment is an essential of jurisdiction." *State v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *State v. Thornton,* 251 N.C. 658, 660, 111 S.E. 2d 901, 902. The warrant or indictment must charge all the essential elements of the alleged criminal offense. *State v. Morgan, supra.* Nothing in G.S. 15-153 or in G.S. 15-155 dispenses with the requirement that the essential elements of the offense must be charged. *State v. Gibbs,* 234 N.C. 259, 261, 66 S.E. 2d 883, 885, and cases cited; *State v. Strickland,* 243 N.C. 100, 101, 89 S.E. 2d 781, 783.

[5] A warrant or indictment following substantially the language of the statute is sufficient if and when it thereby charges the essentials of the offense "in a plain, intelligible, and explicit manner." G.S. 15-153; *State v. Eason,* 242 N.C. 59, 86 S.E. 2d 774. If the statutory words fail to do this they "must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged." *State v. Cox,* 244 N.C. 57, 60, 92 S.E. 2d 413, 415, and cases cited.

[6] A warrant or indictment "(m)erely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient." *State v. Ballangee,* 191 N.C. 700, 702, 132 S.E. 795, and cases cited. Subsequent cases in accord with the foregoing include *State v. Sossamon,* 259 N.C. 374, 130 S.E. 2d 638, and *State v. Cook,* 272 N.C. 728, 158 S.E. 2d 820.

[7, 8] The general allegation that defendant's conduct constituted a misdemeanor in violation of G.S. 153-266.6 is insufficient. The owner or agent of the owner of land within the "platting jurisdiction" granted the county commissioners by G.S. 153-266.1 is the only person subject to criminal prosecution for violation of G.S. 153-266.6. The warrant alleges that the defendant unlawfully and wilfully transferred or sold "certain property" described in Deed Book 2331, at page 32, of the Guilford County Registry. Assuming the allegations sufficiently imply that defendant was the owner or agent of the owner of the "certain property" described in Deed Book 2331, page 32, there is no allegation that this property is located within the "platting jurisdiction" granted to the county commissioners by G.S. 153-266.1 or that it is located in a portion of Guilford County "outside the subdivision-regulation jurisdiction of any municipality." In short, the warrant is fatally defective on account of its failure to allege one of the essential elements of the

criminal offense created and defined in G.S. 153-266.6, namely, that defendant was the owner or agent of the owner of land within the platting jurisdiction granted to the county commissioners by G.S. 153-266.1. Cf. *State v. Furio,* 267 N.C. 353, 148 S.E. 2d 275.

While we base decision on the insufficiency of the warrant, it seems appropriate to call attention to the matters discussed below.

The general purposes of an authorized county subdivision ordinance are stated in G.S. 153-266.3. Procedural requirements as to notice and hearing prior to the adoption thereof are set forth in G.S. 153-266.2. G.S. 153-266.7 defines "Subdivision," describing certain divisions as included in and other divisions as excluded from the definition. G.S. 153-266.4 requires that the ordinance contain a provision giving certain specified agencies an opportunity to make recommendations prior to the approval of any individual subdivision plat; and the ordinance may provide that final approval is to be given (1) by the board of county commissioners, or (2) by the board of county commissioners on recommendation of the county planning board, or (3) by the county planning board.

G.S. 153-266.4 also provides: "From and after the time that a subdivision ordinance is filed with the register of deeds of the county, no subdivision plat of land within the county's subdivision-regulation jurisdiction shall be filed or recorded until it shall have been submitted to and approved by the appropriate board, as specified in the subdivision ordinance, and until such approval shall have been entered on the face of the plat in writing by the chairman of said board. The register of deeds shall not file a plat of a subdivision of land located within the territorial jurisdiction of the county commissioners as defined in G.S. 153-266.1 hereof which has not been approved in accordance with these provisions, nor shall the clerk of superior court order or direct the recording of a plat where such recording would be in conflict with this section."

[9, 10] The misdemeanor defined in G.S. 153-266.6, quoted above, relates to a sale or transfer of land with reference to a plat showing a subdivision of land before such plat has been properly approved under the ordinance and recorded in the office of the appropriate register of deeds. Whether the contract of sale, deed or other instrument of transfer is recorded is immaterial. What G.S. 153-266.6 condemns as a misdemeanor is the description of land in any contract of sale, deed or other instrument of transfer *by reference to a subdivision plat that has not been properly approved and recorded.* Obviously, the sole purpose of G.S. 153-266.6 is to compel compliance with ordinance provisions which seek to prevent any subdivision of

land covered by its terms unless and until the proposed subdivision map has been submitted to and approved by designated governmental agencies. See Cunningham, *Land Use Control,* 50 Iowa L. Rev. 367 at 423 (1965). Hence, decision of the controversy must turn upon the validity of the statutory and ordinance provisions *as applied to defendant's proposed division of land.* It would seem that all relevant facts necessary to determination of the crucial questions would be presented more appropriately in a civil action.

Defendant contends the statutes comprising Article 20A, of Chapter 153, constitutes a local act "authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys," in violation of Section 29, Article II, of the Constitution of North Carolina. The basis assigned for this contention is that, on May 17, 1965, when, according to the stipulation, the Guilford County Subdivision Ordinance was adopted, G.S. 153-266.9 provided: "This article (Article 20A, Chapter 153) shall not apply to the following counties: Bertie, Brunswick, Caswell, Craven, Franklin, Greene, Hoke, Pender, Scotland and Washington." (Note: G.S. 153-266.9 was repealed by Chapter 1010, Session Laws of 1969, effective July 1, 1969.)

[11] Whether Article 20A, Chapter 153, *as of May 17, 1965,* was a *local* act is immaterial. In *Deese v. Lumberton,* 211 N.C. 31, 34, 188 S.E. 857, 858, and cases cited, this Court held Section 29, Article II, of the Constitution of North Carolina, applies only to a local act which authorizes the "laying out, opening, altering, or discontinuing of a *given particular and designated* highway, street, or alley." Accord: *In re Assessments,* 243 N.C. 494, 498, 91 S.E. 2d 171, 173.

[12] Article 20A, Chapter 153, authorizes, as set forth above, the adoption by county commissioners of a subdivision ordinance. G.S. 153-266.3 includes a provision that "(s)uch ordinance may provide . . . for the coordination of streets and highways within proposed subdivisions with existing or planned streets and highways and with other public facilities." G.S. 153-266.4 provides that such ordinance shall contain a provision to the effect that, prior to the approval of any subdivision plat, the district highway engineer will be given opportunity to make recommendations "as to proposed streets, highways, and drainage systems." In our opinion, and we so hold, these statutory provisions as to what may and what must be included in a county subdivision ordinance do not constitute "authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys," within the meaning of Section 29, Article II, of the Constitution of North Carolina.

Since neither the provisions of the ordinance nor the nature of defendant's proposed subdivision are before us, we deem it inappropriate, upon the present record, to consider other grounds, advanced by defendant in his brief on appeal, upon which he bases contentions that G.S. 153-266.6 is unconstitutional.

Our decision, which affirms Judge Burgwyn's ruling, is based solely on the ground the warrant does not charge all essential elements of the misdemeanor created by and defined in G.S. 153-266.6.

Affirmed.

MOORE, J., did not participate in the consideration or decision of this case.

THEODORE JEFFERSON DUPREE, SR., ADMINISTRATOR OF THE ESTATE OF THEODORE JEFFERSON DUPREE, JR. v. BUREN THOMAS BATTS AND MINERVA PARKER BATTS AND THE CHRYSLER CORPORATION

No. 8

(Filed 10 December 1969)

1. Automobiles § 108— family purpose automobile — sufficiency of evidence

In this action for the wrongful death of a guest passenger, allegations that the *femme* defendant kept and maintained an automobile as a family purpose automobile and that the male defendant was a member of her household failed for lack of supporting proof where plaintiff's evidence tended to show that, although the automobile was registered in her name, the *femme* defendant contributed neither to the purchase price nor to the maintenance of the automobile which was never in her possession and that defendant was not a member of her household.

2. Pleadings § 36; Trial § 26— necessity for both pleadings and proof

The court cannot submit a case to the jury on a particular theory unless such theory is supported by both pleadings and evidence, proof without allegation being as ineffective as allegation without proof.

3. Automobiles § 105— proof of registration — G.S. 20-71.1 — failure to allege agency

In this action for the wrongful death of a guest passenger, proof of registration of the automobile in the name of the *femme* defendant is insufficient to take the case to the jury as to her under G.S. 20-71.1 where the complaint did not allege that defendant driver was the agent, servant or employee of the *femme* defendant, or that the driver acted or purported to act for her at any time in the use of the automobile.

4. Automobiles § 105— proof of registration — prima facie evidence of agency — necessity for allegation of agency

Proof of registration of an automobile is *prima facie* evidence of ownership and that the agent was acting for the owner's benefit and in the scope of his employment, but there must be allegation of agency to make evidence of agency admissible against the principal.

5. Automobiles §§ 51, 68— oversized, unbalanced tire — speeding — sufficiency of evidence of negligence

In this action for the wrongful death of a guest passenger in an automobile accident, plaintiff's evidence was sufficient to go to the jury on the issue of defendant driver's negligence where it tended to show that defendant placed an oversized, unbalanced tire on the right rear wheel of the automobile involved in the accident which would cause the vehicle, during road use, to shimmy and vibrate to the extent he should have known that speed would render the vehicle unsafe, that defendant was driving 60 mph in a 55 mph speed zone, and that the wheel broke down and the automobile wrecked.

6. Automobiles § 23— duty of driver to keep automobile properly equipped

It is the duty of one operating a motor vehicle upon the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to the occupants or to other travelers.

7. Automobiles § 30— speeding — negligence

Driving in excess of the lawful speed limit is negligence.

8. Sales §§ 17, 22— defective automobile — action against manufacturer — negligence — implied warranty — sufficiency of evidence

In this action against an automobile manufacturer for the wrongful death of an automobile passenger in an accident which occurred when a wheel on the automobile failed, plaintiff's evidence *is held* sufficient to go to the jury on the issue of the manufacturer's negligence in manufacturing and placing on the market a defective automobile and on the issue of the manufacturer's breach of implied warranty, where it tends to show that the right rear wheel broke loose from the moving vehicle when the five lug nuts pulled through and ruptured the metal hub which attached the rim to the axle, that this wheel was on the vehicle at the time of its delivery to the manufacturer's sales agent, that the metal used in the structure of the damaged wheel was of the softest and weakest commercially available grade of steel and contained non-metallic impurities and slag inclusions which made the wheel less resistant to deformation, that the impurities could have been discovered by an inspection at the time of manufacture, and that the use of a stronger steel free of impurities or the use of a greater thickness of the type used could or might have prevented the loss of the wheel.

9. Sales § 22— negligence by manufacturer — selection of materials — failure to inspect

A manufacturer's negligence may be found over an area quite as broad as his whole activity in preparing and selling the product or designing the

article; it may arise by selecting materials for use in the manufacturing process or in failing to make reasonable inspection for hidden defects.

MOORE, J., did not participate in the consideration or decision of this case.

APPEAL by plaintiff from judgment of involuntary nonsuit entered by *Hobgood, J.*, at the December, 1968 Regular Session, WAKE Superior Court.

The plaintiff, Theodore Jefferson Dupree, Sr., as administrator of Theodore Jefferson Dupree, Jr., instituted this wrongful death action against Buren Thomas Batts, driver, and Minerva Parker Batts, registered owner of a specifically described 1965 Plymouth automobile in which the intestate was riding as a guest passenger at the time the driver wrecked the vehicle.

The complaint alleged the fatal injuries were caused by the actionable negligence of Buren Thomas Batts in operating the automobile which his mother, Minerva Parker Batts, owned and maintained for the use and convenience of her son and other members of her household.

Subsequent to the institution of the action, the plaintiff, by motion, made The Chrysler Corporation an additional party defendant and filed an amended complaint, which alleged: (1) A cause of action against Buren Thomas Batts for actionable negligence in operating the automobile; (2) A cause of action against Minerva Parker Batts as owner of the automobile which she maintained for the use and convenience of herself and the members of her household, including the driver, Buren Thomas Batts; (3) A cause of action against The Chrysler Corporation by reason of its negligence in manufacturing and placing on the market a defective automobile which broke down under road use.

The defendants filed separate answers in which each denied allegations of negligence. Both Buren Thomas Batts and his mother, Minerva Parker Batts, denied that Minerva Parker Batts owned or had any interest in, or maintained the Plymouth automobile involved, or that Buren Thomas Batts was at any time during his ownership of the automobile a member of his mother's household. The Chrysler Corporation denied all allegations of negligence and set up special defenses. At the conclusion of the plaintiff's evidence, some of which will be discussed in the opinion, the trial court entered judgment of involuntary nonsuit dismissing the action as to all defendants. The plaintiff excepted and appealed. Upon proper petition, this Court certified the cause for review here without prior determination by the North Carolina Court of Appeals.

Tharrington & Smith, by J. Harold Tharrington and Roger W. Smith, Earle R. Purser for the plaintiff.

Smith, Leach, Anderson & Dorsett by John H. Anderson; Young, Moore & Henderson by Carter G. Mackie for the defendants Buren Thomas Batts and Minerva Parker Batts.

Teague, Johnson, Patterson, Dilthey & Clay by I. Edward Johnson for the defendant The Chrysler Corporation.

HIGGINS, J.

The plaintiff's evidence disclosed that on and prior to December 22, 1964, Buren Thomas Batts, age 19, lived and worked as an automobile mechanic in Raleigh. At all times pertinent to this controversy his mother, Minerva Parker Batts, resided in Pender County, more than 100 miles from Raleigh.

[1] On the above date, Buren Thomas Batts purchased from O'Neal Motor Company of Raleigh the Plymouth automobile involved in the accident. Because of his age, the purchaser was unable to execute a satisfactory deferred payment lien on the automobile. The purchaser, with his mother's consent, caused the vehicle to be registered in her name. She executed the lien agreement. Buren Thomas Batts kept and used the automobile in Raleigh. Minerva Parker Batts contributed neither to the purchase nor to the maintenance of the automobile which was never in her possession. Consequently, the allegations in the complaint that she kept and maintained the Plymouth as a family purpose automobile, and that Buren Thomas Batts was a member of her household, failed for lack of supporting proof. The complaint did not allege that Buren Thomas Batts was the agent, servant, or employee of his mother, or that he acted or purported to act for her at any time in the use of the automobile.

[2] It is settled law that a court's decree of civil liability must be based on both allegation and proof. In this case, allegation of family purpose is present — proof is absent. There is no allegation that Buren Thomas Batts was acting as his mother's agent in any capacity at the time he wrecked the Plymouth automobile. "The court cannot submit a case to the jury on a particular theory unless such theory is supported by both pleadings and evidence." *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25. "Proof without allegation is as ineffective as allegation without proof." *Calloway v. Wyatt,* 246 N.C. 129, 97 S.E. 2d 881.

[3] The plaintiff, however, contends that proof of registration of the Plymouth automobile in the name of Minerva Parker Batts under G.S. 20-71.1 is sufficient to take the case to the jury as to her without allegation of agency. Actually, the section referred to relates solely to proof and not to allegation. Proof of ownership or proof of registration under G.S. 20-71.1 shall be *prima facie evidence,* etc. However, evidence, direct, circumstantial, or *prima facie,* does not take away the necessity of alleging agency if the principal is to be held liable. G.S. 20-71.1 applies when ". . . the plaintiff, *upon sufficient allegations* (emphasis added) seeks to hold the owner liable for the negligence of a non-owner operator under the doctrine of respondeat superior." *Howard v. Sasso,* 253 N.C. 185, 116 S.E. 2d 341; *Belmany v. Overton,* 270 N.C. 400, 154 S.E. 2d 538; *Taylor v. Parks,* 254 N.C. 266, 118 S.E. 2d 779; *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295; *Osborne v. Gilreath,* 241 N.C. 685, 86 S.E. 2d 462; *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767.

[4] Neither *Perkins v. Cook,* 272 N.C. 477, 158 S.E. 2d 584, nor *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47 is in conflict with the above cited cases. In *Perkins,* the plaintiff alleged the offending vehicle was a family purpose automobile owned by Mrs. Clay and maintained by her for the benefit of her family, including her minor sister, Ruth Cook, the driver. But, in addition to the allegation of family purpose, the complaint, after detailing specific acts of negligence on the part of Ruth Cook, contained this additional allegation: ". . . (A)ll of which acts of negligence on the part of the defendant Ruth Cook, while acting as the agent, employee and servant of the defendant Joan Cook Clay were the direct and proximate causes of the injuries and damages sustained by the plaintiff." Such allegations of agency make proof of ownership prima facie evidence that the vehicle was being operated at the time of the accident by the owner's agent. *Carter v. Motor Lines,* 227 N.C. 193, 41 S.E. 2d 586. Proof of registration is prima facie evidence of ownership and that the agent was acting for the owner's benefit and in the scope of his employment, but there must be allegation of agency to make evidence of agency admissible against the principal. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309.

In *Bowen, supra,* this Court cited *Perkins, supra.* However, in *Bowen,* the trial court entered judgment of involuntary nonsuit. The Court of Appeals affirmed the judgment on the ground the plaintiff's evidence disclosed her contributory negligence as a matter of law. This Court reversed the nonsuit, holding the evidence of contributory negligence presented a jury question.

[5, 6] In the instant case, the plaintiff's evidence permitted the inference the defendant Batts placed an oversized, unbalanced tire on the right rear wheel of his Plymouth automobile which would cause the vehicle, during road use, to shimmy and vibrate to the extent he should have known that speed would render the vehicle unsafe. "Generally speaking, it is the duty of one operating a motor vehicle upon the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to the occupants or to other travelers. . . ." *Scott v. Clark,* 261 N.C. 102, 134 S.E. 2d 181. Excessive speed is negligence. *Smart v. Fox,* 268 N.C. 284, 150 S.E. 2d 403.

[5, 7] After the wheel broke down, the vehicle moved 443 feet before it came to rest, "on its top". The driver admitted to the investigating officer that his speed at the time of the accident was 60 miles per hour. The breakdown occurred at, in, or near a curve. The maximum speed limit at the time and place of the accident was 55 miles per hour. Driving in excess of the lawful speed limit is negligence. *Rudd v. Stewart,* 255 N.C. 90, 120 S.E. 2d 601. The evidence was sufficient to go to the jury on the issue of negligence on the part of Buren Thomas Batts.

[8] The Chrysler Corporation admitted it manufactured the Plymouth automobile which its sales agent, O'Neal Motor Company, delivered to Buren Thomas Batts. While there was objection on the ground the wheel had not been properly identified, nevertheless the evidence in the record was sufficient to permit the inference that the wheel which gave way, causing the accident, was on the vehicle at the time of its delivery by Chrysler's agent. Evidence in the record was sufficient to permit a reasonable inference that the right rear wheel broke loose from the moving vehicle when the five lug nuts pulled through and ruptured the metal hub which attached the rim to the axle.

By way of proof in support of the allegations of negligence and breach of warranty on the part of The Chrysler Corporation, the plaintiff offered evidence of Dr. Austin, found to be in expert in the field of metallurgical engineering. Dr. Austin testified that he examined a damaged wheel and hub from a 1965 Plymouth automobile. "The lug bolt holes had been severely enlarged, and it was evident from the shape of the enlarged holes that this wheel had pulled off right over the lug nuts. . . . In several places the metal adjacent to the lug nuts or lug bolt holes in the wheel had actually pulled apart and ruptured in the process."

By stipulation the plaintiff (Exhibit 6) placed in evidence a report of the chemical composition of pieces of metal made by the Pittsburg Testing Laboratory and used by Dr. Austin in his testimony. Dr. Austin testified that the type of metal used in the structure of the damaged wheel was of the softest and weakest commercially available grade of steel. Non-metallic inclusions found in the damaged wheel made it easier for the wheel to fail in service. Some slag impurities were present in the places where the metal ruptured. "We found a significant amount of non-metallic inclusions or impurities in the micro-structure". These non-metallic impurities and slag inclusions made the wheel less resistant to deformation. The impurities could have been discovered by an inspection at the time of manufacture. The use of a stronger steel, free of impurities, or the use of a greater thickness of the type used would have increased the load-carrying capacity of the wheel and could or might have prevented the loss of the wheel.

[9] A manufacturer's negligence may be found over an area quite as broad as his whole activity in preparing and selling the product or in designing the article — *Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98; Negligence may arise by selecting materials for use in the manufacturing process — *Wilson v. Hardware Co.*, 259 N.C. 660, 131 S.E. 2d 501; . . . (I)n failing to make reasonable inspection for hidden defects — *Gwyn v. Motors, Inc.*, 252 N.C. 123, 113 S.E. 2d 302.

When this Court considers a judgment of nonsuit in the trial court and concludes it should be reversed, the practice is to discuss the evidence and the allegations only to the extent necessary to disclose the basis for decision. The reason is that only the evidence favorable to the plaintiff is considered on the question of nonsuit. The defenses alleged and the evidence to support them are not considered. By ordering a new trial in this case, the Court does no more than hold the plaintiff's evidence on the causes of action alleged against Buren Thomas Batts and The Chrysler Corporation was sufficient to require that the jury pass on it. In the trial, the defendants Buren Thomas Batts and The Chrysler Corporation will have full opportunity to present evidence and be heard on all issues raised by the pleadings.

We now hold the judgment of nonsuit as to Minerva Parker Batts was proper and the judgment is affirmed. We hold the plaintiff's evidence was sufficient to go to the jury on the causes of action

alleged against Buren Thomas Batts and The Chrysler Corporation, and the nonsuit as to them is reversed.

As to Minerva Parker Batts — Affirmed.

As to Buren Thomas Batts — Reversed.

As to The Chrysler Corporation — Reversed.

MOORE, J., did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. GROVER CLEVELAND NORMAN
(2 CASES: 68-7587 AND 68-7588 HEARD TOGETHER)

No. 43

(Filed 10 December 1969)

1. Criminal Law § 25— plea of nolo contendere — nature of the plea

A plea of *nolo contendere* is a formal declaration by defendant that he will not contend with the State in respect to the charge and is tantamount to a plea of guilty for purposes of the particular criminal action in which it is tendered and accepted.

2. Criminal Law § 25— nolo contendere — power of trial court

On defendant's plea of *nolo contendere* the presiding judge acquires full power to pronounce judgment against the defendant for the crime charged in the indictment.

3. Criminal Law § 25— nolo contendere — matter of grace

A defendant is not entitled to plead *nolo contendere* as a matter of right, but such plea is accepted by the court only as a matter of grace.

4. Criminal Law § 25— conditional plea of nolo contendere

A conditional plea of *nolo contendere* is neither sanctioned by the law nor permitted by the Constitution.

5. Criminal Law § 25— plea of nolo contendere — whether plea conditionally accepted — authority of court to pronounce judgment

Evidence *held* sufficient to support defendant's contentions that his plea of *nolo contendere* was conditionally tendered and accepted in violation of N. C. Constitution, Art. I, § 13, and that the trial court was without authority to pronounce judgment thereon, where the record shows that (1) upon defendant's tender of the plea the trial court questioned defendant as to whether he wanted to enter "a plea of *nolo contendere* to all these charges and permit the judge to try the case, to hear the facts and to determine whether or not you are guilty or not guilty," (2) more than sixty pages of testimony was elicited, (3) defendant attempted to prove an alibi, and (4) the judgment of the trial court, after a lengthy

recital of the evidence, found as a fact that defendant was guilty of the crimes charged.

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

APPEAL by defendant from decision of the Court of Appeals upholding judgment of *Burgwyn, E.J.,* at the March 1969 Session of BURKE Superior Court.

In Case No. 68-CrD-7587 defendant was charged with feloniously breaking and entering the dwelling house of Luther Browning on 27 August 1968 and with the larceny therefrom of goods valued at more than $200. In Case No. 68-CrD-7588 defendant was charged with the armed robbery of Mrs. Florence Houck on 29 August 1968. The two indictments were consolidated for trial by consent, and upon arraignment the following colloquy took place:

MR. DALE (Defendant's counsel): "If the Court please, I have talked with Mr. Norman and we will agree that the Court hear this and dispense with a jury trial."

THE COURT: "What kind of plea are you giving me, nolo contendere?"

MR. DALE: "Nolo contendere, if the Court will accept it, sir."

THE COURT: "All right, sir."

The defendant, through counsel, thereupon tendered a plea of nolo contendere to the charge of breaking and entering and larceny and to the charge of armed robbery. The Court then examined the defendant as follows:

THE COURT: "You hear what your lawyer said? You wanted to enter what is known as a plea of nolo contendere to all of these charges and permit the judge to try the case, to hear the facts and determine whether or not you are guilty or not guilty. You do that freely and voluntarily of your own free will and accord without any coercion on his part or part of anyone?"

DEFENDANT: "Yes."

THE COURT: "I understand it is alleged by the State that this defendant, along with others, robbed a certain lady, a Mrs. Houck. We are trying all the cases, aren't we?"

MR. DALE: "Yes, sir."

THE COURT: "He wants to plead nolo contendere in each case?"

MR. DALE: "Yes, sir."

The record further reflects that defendant, being duly sworn, answered the following questions in writing:

"1. Are you able to hear and understand my statements and questions?

"Answer: Yes.

. . . .

"4. Do you understand that you have the right to plead not guilty and to be tried by a jury?

"Answer: Yes.

"5. How do you plead to these charges?

"Answer: Nolo contendere."

The Court thereupon ordered that defendant's plea of nolo contendere be entered in the record.

Evidence was then heard both for the State and the defendant. The testimony of Larry Costner, age sixteen, and Rodney Wayne Butner, age nineteen, tended to show that one of them was staying at defendant's home; that they were afraid of defendant; that defendant planned both crimes for which he was on trial; that he transported them in his car to each location, told them to enter the respective residences, "get what was valuable," and bring it out; that they entered the Browning residence, found nobody home, and carried out a portable television set, a pistol, a rifle, a radio, a wristwatch and other items of property, all of which they took to defendant's waiting car and he put it in the trunk; that two days later defendant transported them to Mrs. Houck's home, told them to enter, "tape the woman up, ransack the house, find the money, and come back out"; that defendant drove away with the understanding that he would come back and pick them up; that they forcibly entered the home as instructed, intimidated Mrs. Houck with a knife, robbed her of $2.20 in cash and took her shotgun; that during the robbery they wore gloves which were furnished by the defendant; that they hid the gloves and shotgun beside the road and defendant later got them; that defendant picked them up three hours later and six miles away.

Defendant attempted to establish an alibi through the testimony of one Arthur Holland and Deputy Sheriff Frank Browning, both of whom were cross examined by the State.

The Court thereupon pronounced judgment which contains, among other things, the following recital and findings of fact:

"This cause coming on to be heard . . . and it appearing to the Court from the findings of the fact, prior to the selection

of the jury at trial of the defendant, through his counsel, . . . announced that he desired to enter a plea of nolo contendere to the charge of breaking and entering and larceny, and also to the charge of armed robbery and larceny allegedly committed on the person of Mrs. Houck . . . to which he pleaded nolo contendere.

"The Court further finds as a fact that this defendant, according to the evidence before it, deliberately, wilfully used two young boys by the names of Larry Allen Costner and Rodney Wayne Butner to act as stooges for him in the commission of said crimes; that he carried them to the place where the breaking and entering and larceny was committed on the 27th day of August in his car, and at his connivance sent them in the house to rob it and waited nearby to receive whatever goods they might have been able to purloin and steal from the house which they entered by force. Thereafter, he used the same boys or young men, at his connivance and his suggestion, to rob the person of Mrs. Houck at her residence by force and with the use or threatened use of a dangerous weapon, to wit, a knife; that he drove away promising to return; that he picked them up after they had accomplished the robbery by use or threatened use with a deadly weapon, to wit, a knife, which he suggested to them; and that he later did pick them up, though not at the time he promised to do so, but on the same morning; that the goods were taken from Mrs. Houck by force and with the use or threatened use of a dangerous weapon, to wit, a knife; that he later procured the gun or shotgun which was stolen from her house by these two young men at his suggestion and connivance and assistance.

"The Court finds as a fact that the defendant is guilty of breaking and entering and larceny committed at the house of Luther Browning on the 27th day of last August. Also, that this defendant is guilty of being a party to and a principal in the breaking and entering and armed robbery of Mrs. Houck by these young men; and he is equally guilty with them, as principals, in that he suggested, also that he participated in it by carrying them to the house and by telling them to go in and rob by force and arms Mrs. Houck, a lady 64 years of age, and that he would pick them up, and which he later did, and received part of the loot from the house."

Following the foregoing findings and recitals defendant was sentenced to ten years in prison in one case and twenty years in prison

in the other, to run consecutively. These sentences were upheld by the Court of Appeals. See 6 N.C. App. 31, 169 S.E. 2d 256.

Defendant appeals to this Court alleging (1) that his plea of nolo contendere was conditionally tendered and accepted with the Court to pass upon his guilt or innocence in violation of Article I, Section 13, of the Constitution of North Carolina; and (2) that the evidence offered and the facts found establish his innocence of the charges contained in the bills of indictment.

C. David Swift, Attorney for defendant appellant.

Robert Morgan, Attorney General; Harrison Lewis, Deputy Attorney General; and J. Bruce Morton, Trial Attorney, for the State.

HUSKINS, J.

[1, 2] A plea of nolo contendere is a formal declaration on defendant's part that he will not contend with the State in respect to the charge and is tantamount to a plea of guilty for purposes of the particular criminal action in which it is tendered and accepted. The presiding judge acquires full power to pronounce judgment against the defendant for the crime charged in the indictment. *State v. Jamieson*, 232 N.C. 731, 62 S.E. 2d 52; *State v. Cooper*, 238 N.C. 241, 77 S.E. 2d 695; *State v. McIntyre*, 238 N.C. 305, 77 S.E. 2d 698; *State v. Shepherd*, 230 N.C. 605, 55 S.E. 2d 79; *State v. Stansbury*, 230 N.C. 589, 55 S.E. 2d 185; *State v. Ayers*, 226 N.C. 579, 39 S.E. 2d 607; *State v. Beasley*, 226 N.C. 580, 39 S.E. 2d 607; *State v. Parker*, 220 N.C. 416, 17 S.E. 2d 475; *State v. Burnett*, 174 N.C. 796, 93 S.E. 473.

[3] A defendant is not entitled to plead nolo contendere as a matter of right. It is pleadable only by leave of the court, and "its acceptance by the court is entirely a matter of grace." *State v. Thomas*, 236 N.C. 196, 72 S.E. 2d 525.

[4] A conditional plea of nolo contendere is neither sanctioned by the law nor permitted by the Constitution. *State v. Camby*, 209 N.C. 50, 182 S.E. 715; *State v. Horne*, 234 N.C. 115, 66 S.E. 2d 665. By Chapter 23 (as amended by Chapter 469) of the 1933 Session Laws, the General Assembly provided that in all trials in the superior court upon all charges other than capital "it shall be competent for the defendant to enter a conditional plea of guilty therein, or nolo contendere, if the court shall permit the latter plea; and thereupon, the court may hear and determine the matter" without the intervention of a jury. The judge was authorized to pass upon the weight

and sufficiency of the evidence, and if it satisfied him beyond a reasonable doubt of the defendant's guilt, he was authorized to proceed to judgment and sentence upon the plea entered in like manner as upon a conviction by a jury. If not so satisfied the plea was to be stricken out and a verdict of not guilty entered. This Act was held unconstitutional in *State v. Camby, supra,* on the ground that it was in conflict with Article I, Section 13, of the Constitution of North Carolina which provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal."

Recently, the Judicial Council recommended that Article I, Section 13, of the Constitution of North Carolina be modified to allow the General Assembly, if it so desired, to provide for waiver of a jury trial upon a plea of not guilty and to permit a defendant, at his option, to have his guilt passed upon by a judge rather than a jury. The Constitutional Study Commission was advised of this suggestion and included it among bills submitted to the 1969 General Assembly. The proposal was rejected by the General Assembly, however, and the Constitution with respect to jury trials remains unchanged.

[5] In light of the foregoing principles, we are constrained to hold that the trial judge accepted defendant's plea as his authority to hear the evidence and, in lieu of a jury, to pass upon the question of defendant's guilt or innocence. That is exactly what he told defendant the plea of nolo contendere meant at the time it was tendered. That is the inference to be drawn from the fact that more than sixty pages of testimony was elicited bearing upon every facet and detail of the crimes charged in the bills of indictment. That defendant so understood it is implied by his attempt to prove an alibi. That the Court so understood it may be inferred from the recitals and the detailed findings of fact contained in the judgment. The result is therefore controlled by *State v. Camby, supra,* and *State v. Horne, supra. State v. Barbour,* 243 N.C. 265, 90 S.E. 2d 388, depicts a perfect example of what the trial court *should not do* upon a plea of nolo contendere. Cases relied on by the State — *State v. Shepherd, supra; State v. Jamieson, supra; State v. McIntyre, supra* — are all factually distinguishable.

Since there must be a new trial, we put aside the question whether, as contended by defendant, the evidence offered by the State establishes his innocence of the charges contained in the bills of indictment.

The proceeding in the superior court was contrary to constitutional requirements; hence, the decision of the Court of Appeals upholding the judgment based thereon 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.

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

WILLIAM W. BUNDY v. WILL AYSCUE (ASKEW) AND JAMES R. WALKER, JR., GUARDIAN AD LITEM

No. 39

(Filed 10 December 1969)

1. Appeal and Error §§ 1, 3— appeal from Court of Appeals to Supreme Court — substantial constitutional question — dismissal of appeal

For failure of appellant to show that a substantial constitutional question is involved such as will entitle him to an appeal as a matter of right from a decision of the Court of Appeals pursuant to G.S. 7A-30(1), the Supreme Court dismissed the appeal from a decision of the Court of Appeals.

2. Judgments §§ 24, 31— motion to set aside judgment for excusable neglect — questions of fact — jury trial

A motion to set aside a former judgment on the grounds of mistake, surprise or excusable neglect is addressed to the court, and questions of fact arising on the motion are for the court and are not issues of fact for the jury.

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

APPEAL by defendant from decision of the North Carolina Court of Appeals.

This is an appeal from an order denying defendant's motion to set aside a judgment on the ground of mistake, surprise and excusable neglect. Plaintiff instituted this action against defendant for

specific performance of an alleged contract to convey real property. The facts are fully and correctly stated by the Court of Appeals in its opinion reported in 5 N.C. App. 581. We therefore will not repeat those facts leading to the entry of the order attacked, except to note that the case was calendared for trial at the January-February 1966 Session of Perquimans Superior Court, at which term defendant's attorneys, Gerald F. White and Robert B. Lowry, reported that defendant refused to come to court. The case was calendared, with appropriate notice to defendant, at the March 1966 Session and the March 1967 Session of Perquimans Superior Court, and defendant failed or refused to appear in court. The court entered an order allowing defendant's original counsel, who had duly filed answer, to resign at the March 1966 Session and gave defendant notice thereof. The case was again calendared at the March 1968 Session and a copy of the court calendar was mailed to defendant. He did not appear in personam or by counsel, and the case was tried. The jury answered appropriate issues in favor of plaintiff, and on 7 March 1968 judgment was entered directing specific performance of the contract.

On 9 July 1968 defendant, through new counsel, moved that the judgment entered on 7 March 1968 be set aside on the ground of mistake, surprise and excusable neglect. In support of the motion defendant alleged mental incompetency both at the time of the alleged agreement and at the time of the trial and entry of judgment, and fraudulent representations by plaintiff at the time of the alleged agreement. He further prayed for appointment of a guardian ad litem. Plaintiff filed a reply in the nature of a general denial.

At the October 1968 Session of Perquimans Superior Court defendant's attorney moved that the hearing on his motion be continued and that the question of defendant's incompetency be referred to the Clerk of Superior Court. On 30 October 1968 the court entered an order in which it stated that the court did not find Ayscue to be incompetent, but as a precautionary measure and at the request of defendant's counsel the court appointed defendant's counsel, James R. Walker, Jr., to represent the defendant not only as attorney but as guardian ad litem. The court, on its own motion, continued the hearing to 11 November 1968. On 11 November 1968, defendant's counsel again moved for a continuance, and moved for a jury trial on issues raised in the motion to vacate, including defendant's incompetency at the time of trial and at the time of the alleged contract. The court denied both the motion for jury trial and the motion for continuance and proceeded to hear the motion to set aside the judgment entered on 7 March 1968 upon affidavits

of each party. At the conclusion of the hearing the court entered an order in which it, *inter alia,* found:

> "The court finds as a fact that the defendant, his counsel and guardian ad litem heretofore appointed, have had ample opportunity to offer any evidence, either by affidavit, or otherwise, and that such motion to continue should be denied, and the Court finds as a fact that neither of the parties is entitled to a jury trial, to determine whether the Judgment should be set aside. The Court thereupon considers the affidavits offered by each of the parties, and the record in the cause, and upon the evidence so offered, there being no oral evidence tendered by either of the parties, the Court finds as a fact that the defendant at the time of the institution of this action against him, and at the time of the trial of his cause, was mentally competent to know and understand the nature and cause of action against him, and that he deliberately refused to attend the trial and the trial was regularly conducted, and judgment was entered on the verdict, and no sufficient cause is made to appear as to why the Judgment should be set aside."

The court thereupon entered an order denying defendant's motion to set aside the judgment entered on 7 March 1968. Defendant appealed to the North Carolina Court of Appeals, and that Court affirmed the trial court. Defendant appealed.

W. H. Oakey, Jr., and Silas M. Whedbee, attorneys for plaintiff.

James R. Walker, Jr., attorney for defendant and Guardian ad Litem.

BRANCH, J.

[1] Defendant appeals to this Court under provisions of G.S. 7A-30(1), contending he was denied his constitutional rights as secured by Article I, Section 17, of the North Carolina Constitution, and the Fourteenth Amendment to the United States Constitution, in that he was denied a jury trial as to his mental capacity at the time of the filing of the original suit, its trial, and during the pendency of this motion. Defendant also contends that he was denied right of jury trial and the right to confront witnesses at the original trial.

In the case of *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376, this Court considered the right of a party to appeal, as a matter of right, from a decision of the Court of Appeals to the Supreme Court under G.S. 7A-30(1), and stated:

". . . we hold that an appellant seeking a second review by the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved must *allege and show* the involvement of such question or suffer dismissal. The question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination. Mere mouthing of constitutional phrases like 'due process of law' and 'equal protection of the law' will not avoid dismissal. Once involvement of a substantial constitutional question is established, this Court will retain the case and may, in its discretion, pass upon any or all assignments of error, constitutional or otherwise, allegedly committed by the Court of Appeals and properly presented here for review."

It must be borne in mind that this is an appeal from an order denying defendant's motion to set aside a judgment on the grounds of mistake, surprise or excusable neglect. The order was entered four months after filing of the motion, and defendant was represented by the same counsel in every phrase of the pending motion from the date it was filed until the order was entered. This was not an inquisition of lunacy as provided by Chapter 35 of the General Statutes, and the mental condition of defendant was only a matter of evidence to be considered by the trial judge in finding facts and reaching conclusions of law as to the disposition of the motion before him.

[2] A motion to set aside a former judgment on the grounds of mistake, surprise or excusable neglect is addressed to the court, and questions of fact arising on the motion are for the court and are not issues of fact for the jury. *Coker v. Coker,* 224 N.C. 450, 31 S.E. 2d 364; *Cleve v. Adams,* 222 N.C. 211, 22 S.E. 2d 567.

[1] An examination of this record leads us to conclude that defendant has failed to show that a substantial constitutional question is involved in this appeal, and the appeal must be dismissed. However, since this appeal indirectly affects an important property right, we have closely reviewed and considered the well-reasoned opinion of Parker, J., speaking for the North Carolina Court of Appeals, and find it to be free from error.

Appeal dismissed.

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

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ENTERPRISES, INC. v. HEIM

No. 95 PC.

Case below: 6 N.C. App. 548.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 6 January 1970.

LAND v. PONTIAC, INC.

No. 70 PC.

Case below: 6 N.C. App. 197.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 January 1970.

STATE v. GARRETT

No. 97 PC.

Case below: 5 N.C. App. 367.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 January 1970.

STATE v. HUGHES

No. 92 PC.

Case below: 6 N.C. App. 287.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 January 1970.

STATE v. LAWSON

No. 94 PC.

Case below: 6 N.C. App. 1.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 January 1970.

STATE v. PENLEY

No. 103 PC.

Case below: 6 N.C. App. 455.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 January 1970.

STATE v. RIERA

No. 89 PC.

Case below: 6 N.C. App. 381.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 10 December 1969.

TRUST CO. v. INSURANCE CO.

No. 87 PC.

Case below: 6 N.C. App. 277.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 9 December 1969.

STATE v. ROBY E. CATRETT

No. 52

(Filed 6 January 1970)

1. Criminal Law §§ 75, 76— in-custody statements — substantive evidence — impeachment of defendant — Miranda warnings — voluntariness — necessity for voir dire hearing

In-custody statements attributed to a defendant, when offered by the State and objected to by the defendant, are inadmissible either as substantive evidence or for impeachment purposes unless, after a *voir dire* hearing in the absence of the jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional rights.

2. Criminal Law §§ 75, 76— incriminating in-custody statements — impeachment of defendant — Miranda warnings — voluntariness — necessity for voir dire hearing

In this prosecution of defendant for aiding and abetting a co-defendant in the felonious breaking and entering of a cottage and in the larceny of property therefrom, wherein defendant testified that he had no knowledge of the location of the cottage and had not seen his co-defendant on the day of the crimes after the co-defendant entered his mother's home some five hours before the crimes were committed, the trial court erred in admitting for impeachment purposes, over defendant's general objection, rebuttal testimony by a deputy sheriff of defendant's in-custody statements that he had let the co-defendant out of a car near the cottage and was supposed to pick him up in 30 or 40 minutes, where the court did not conduct a *voir dire* hearing in the absence of the jury to determine whether

the statements attributed to defendant were made voluntarily and understandingly after defendant had been fully advised of his constitutional rights.

3. Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence

State's evidence *is held* sufficient to be submitted to the jury on issues of defendant's guilt of aiding and abetting in the felonious breaking and entering of a cottage and in the larceny of property therefrom.

APPEAL by defendant from the Court of Appeals under G.S. 7A-30(1).

Defendant was tried at the January 1969 Session of Polk Superior Court before McLean, J., and a jury, on a two-count bill of indictment which charged that defendant *aided and abetted* Ray Pace (1) in feloniously breaking and entering a certain house occupied by Eddie Lee Brown, and (2) in the larceny of personal property of Eddie Lee Brown from said house. Defendant was found guilty as charged. Judgment, which imposed an active prison sentence on the first count and a suspended prison sentence on the second count, was affirmed by the Court of Appeals. 5 N.C. App. 722, 169 S.E. 2d 248. Defendant appealed to the Supreme Court on the ground a substantial question arising under the Fifth Amendment to the Constitution of the United States and under Article I, Section 11, of the Constitution of North Carolina, is presented.

On account of defendant's indigency, Judge McLean entered an order appointing defendant's present counsel, who, as court-appointed counsel, had represented defendant at the trial, to represent him on appeal, and ordered Polk County to pay all necessary costs incident to appeal.

The record, which includes a transcript of the evidence and of the charge, discloses that Ray Pace was separately indicted for (1) feloniously breaking and entering a certain house occupied by Eddie Lee Brown, and (2) the larceny of certain personal property of Eddie Lee Brown from said house; that the indictments against Pace and Catrett were consolidated for trial; and that both defendants were represented at trial by the same counsel. Pace is not a party to this appeal.

Attorney General Morgan, Deputy Attorney General Lewis and Trial Attorney Harris for the State.

O. B. Crowell, Jr., for defendant appellant.

BOBBITT, C.J.

[2] The constitutional question presented relates to the admission in evidence, over defendant's general objection, of the testimony of Boyce Carswell, a deputy sheriff of Polk County, North Carolina, as to in-custody statements made to him by defendant.

During the presentation of the State's evidence, Carswell testified to the circumstances under which he arrested defendant but did not refer to any statements made by defendant on the occasion of the arrest or thereafter. After defendant had testified, Carswell was recalled. He then testified as to statements he attributed to defendant. These statements, made after he had arrested defendant and while defendant was in his custody, were in sharp conflict with defendant's testimony.

When objections were interposed to Carswell's rebuttal testimony, the presiding judge did not conduct a *voir dire* hearing in the absence of the jury to determine whether statements attributed to defendant were made voluntarily and understandingly and after defendant had been advised of his constitutional rights.

The Court of Appeals reached these conclusions: (1) That Carswell's rebuttal testimony was admissible as bearing upon defendant's credibility as a witness; (2) that defendant's general objection was insufficient to require the court to instruct the jury as to the limited purpose for which this rebuttal testimony was admitted; and (3) that, *in view of the limited purpose for which the rebuttal testimony was admitted,* the court was not required to conduct a *voir dire* hearing in the absence of the jury to determine whether the statements attributed to defendant were made voluntarily and understandingly and after defendant had been fully advised of his constitutional rights.

The admissibility of Carswell's rebuttal testimony must be considered in the context of the evidential facts narrated below.

The State offered evidence tending to show the following:

Eddie Lee Brown, of Landrum, S. C., owned a four-room summer cottage in Polk County, N. C., which was located on a public (Old Melrose) road about seven-tenths of a mile from Saluda, N. C. Upon arrival at his mountain cottage on Saturday, August 31, 1968, between 6:00 and 6:30 p.m., Brown observed: (1) Personal property (valued at $175.00) owned by him and consisting principally of articles of furniture, which had been removed from his cottage, was piled in the yard a few feet from the cottage; (2) a man, carrying two frying pans, Brown's property, coming out of one of the win-

dows; and (3) a red and white 1959 Chevrolet, the sole occupant being a man in the driver's seat, in the portion of his driveway adjoining the road. The man who emerged from Brown's cottage left the premises on foot and was last seen walking along the road towards Saluda. He was not apprehended on or near the Brown premises. When Brown and others with him were devoting their attention to the invader of the Brown cottage, the man in the 1959 Chevrolet drove away along the Old Melrose Road, first traveling towards Saluda, turning around upon reaching another driveway and then passing the Brown premises as he headed down the mountain.

Brown drove to Saluda and reported the breaking, entering and larceny to the police.

George Smith, a Saluda policeman, was the first officer to arrive in the vicinity of the Brown cottage. He saw the red and white 1959 Chevrolet. It was parked on the side of the Old Melrose Road 300-400 feet below (down the mountain) from the Brown cottage. Catrett was under the steering wheel. As Smith stood by the Chevrolet, Deputy Sheriff Boyce Carswell, accompanied by other officers, passed on their way up the mountain to the Brown cottage. After talking with Brown, Carswell and other officers came back to where Smith was standing and the Chevrolet was parked. Carswell testified: "(W)e got him (Catrett) out of the car and placed him under arrest and put him in my car" and went to the police station in Saluda. Thereafter, another deputy sheriff and Smith arrested Pace at his mother's home. After the arrest of Pace, both Pace and Catrett were taken in a police car to the Brown cottage. Brown then identified Pace as the man who came out of the window and Catrett as the man under the wheel of the 1959 Chevrolet while it stood in his driveway.

With reference to Catrett's condition when arrested, Carswell testified: "He was drunk . . . (H)e was about as drunk a man as you see out and still going. . . . He could walk but not too steady. . . . We assisted him up the steps at the Jail. I don't think we did getting in the car. . . . His speech was impaired."

It is noteworthy that Brown's testimony included the following: As he approached his cottage, traveling up the mountain towards Saluda, Brown's attention was attracted by a red and white 1959 Chevrolet which was parked in "a space where the dirt had been cleaned back settin with the back toward the bank where it could go either way . . . to the right or to the left." The Chevrolet was parked approximately three-fourths of a mile from the Brown

cottage. When Brown was almost to it, the driver (Catrett) of the Chevrolet "just pulled out in the road in front of us and went about 15 feet and stopped." He was headed towards the Brown cottage, "toward Saluda." Catrett stopped on a narrow bridge, right in the center of it, requiring Brown to stop. As to what happened when Catrett was stopped on the bridge, Brown testified: "He opens the door, the driver's door and did something like this, I couldn't tell whether he vomited or what, but he did something and I'd say in a minute, closed the door back and then drove off very slowly." Brown waited from two to five minutes before going on because the road was so narrow "you couldn't pass anybody" between there and Brown's cottage. When Brown reached his cottage, the Chevrolet was in his driveway beside the Old Melrose Road and Catrett was under the wheel.

Catrett testified, in substance, as follows: He and Pace (brothers-in-law) were then living in East Flat Rock, Henderson County. Pace's mother lived in Saluda. On Saturday morning, August 31, 1968, in Hendersonville, N. C., they purchased a pint of vodka at the ABC store and bought a carton of beer from "a package store." They went to Polk County, traveling in Pace's red and white 1959 Chevrolet, to make inquiry concerning the rental of a house but were unable to locate the party referred to in the advertisement. Since the car was "skipping," they drove into Saluda. There, at "Saluda Texaco," they got an oil change, a new oil filter and an adjustment of the "plugs." When this work was completed, they drove to the home of Pace's mother. Pace went into his mother's home. He (Catrett) would not go in because he had been drinking. Instead, he drove Pace's car back to town (Saluda), parked the car and fell asleep. When he woke up, he thought some air would do him good. He testified: "I didn't feel like I was intoxicated, I just felt woozy, which I knew I had been drinking enough to be intoxicated, so I drove down there and drove up this small road (Old Melrose Road) and parked." When asked whether he went to sleep down there, Catrett testified: "I dozed, in a drunken stupor. I guess I was." He testified he did not know where the Brown cottage was. He testified: "I could have been to his cottage or near it or on the road to it and me not even know it." He denied having any connection with any breaking and entering or larceny at the Brown cottage. He testified he did not see Pace from the time he left the home of Pace's mother until after both had been arrested.

With reference to Carswell's testimony in rebuttal, directly involved in the question presented by this appeal, the record shows the following:

"Q. Mr. Carswell, did you have a conversation with Mr. Catrett here about his presence on the Old Melrose Road on the 31st day of August, 1968?

"A. Yes, sir.

"Q. What did he tell you, if anything, about who had been with him on the afternoon of the 31st day of August, 1968, on the Old Melrose Road?"

"MR. CROWELL: Objection.

"THE COURT: Sustained as to Pace. Do not consider this evidence as to Pace, Members of the Jury, but only as to Catrett.

"A. Well, he stated to me that he let Ray Pace out of the car above Mr. Brown's cabin and he was suppose(d) to pick him up in 30 or 40 minutes and he also said he didn't know what—

"MR. CROWELL: Objection.

"A. —Samuel Ray Pace was planning to do."

Carswell testified further that Catrett was under arrest and in custody when the statements attributed to him were made; that before questioning Catrett he advised him of his constitutional rights by reading from a card each of the warnings required by *Miranda v. Arizona,* 384 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974; and that these warnings were read to Catrett at the Atkins Service Station when he was on his way to get a warrant for Catrett. This portion of the cross-examination of Carswell is noted: "Q. That was after you had already talked to him down here on the road? A. Yes, sir. Q. That was after you had already asked him about what he was doing and who was with him? A. I don't think we asked him who was with him at that time. Q. Was this after you had already asked him about what he was doing down there? A. I don't remember."

If Carswell's testimony as to defendant's in-custody statements had been offered during the presentation of the State's case, the admission thereof, over defendant's objection, would have been erroneous unless the presiding judge, after a *voir dire* hearing in the absence of the jury, had made factual findings on sufficient evidence that defendant's statements were made voluntarily and understandingly *and* after he had been fully warned of his constitutional rights as required by *Miranda. State v. Moore,* 275 N.C. 141, 153, 166 S.E. 2d 53, 62, and cases cited; *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51, and cases cited. In this connection, see *Jackson v. Denno,* 378 U.S. 368, 391, 12 L. ed. 2d 908, 924, 84A S. Ct. 1774,

1788, 1 A.L.R. 3d 1205, 1221; *Boles v. Stevenson,* 379 U.S. 43, 13 L. ed. 2d 109, 85 S. Ct. 174.

If a *voir dire* hearing had been conducted in the absence of the jury, and if the presiding judge on sufficient evidence had made factual findings that the in-custody statements attributed to defendant were voluntarily and understandingly made after defendant had been fully advised of his constitutional rights, the challenged testimony of Carswell would have been competent as substantive evidence of significant probative value. The challenged evidence tended to show that defendant let Pace "out of the car above Mr. Brown's cabin" and that he was "suppose(d) to pick him up in 30 or 40 minutes." This evidence was in sharp conflict with defendant's testimony that he had no knowledge of the location of Brown's cottage and that he had not seen Pace since about 1:30 p.m. when Pace entered his mother's home. Its primary impact, when considered in connection with other facts in evidence, was to show that Catrett aided and abetted Pace in the commission of the crimes charged in the bill of indictment by transporting him to the scene of the crimes and giving assurance that he would return in 30 or 40 minutes to pick up Pace and such stolen goods as Pace had obtained. In short, the significant probative value of the challenged testimony was its direct bearing on defendant's guilt of the crimes charged in the bill of indictment.

The Court of Appeals held Carswell's testimony was admissible for the limited purpose of impeaching defendant's testimony, basing its decision on *Walder v. United States,* 347 U.S. 62, 98 L. ed. 503, 74 S. Ct. 354 (1954), and on *Tate v. United States,* 283 F. 2d 377 (1960).

In *Agnello v. United States,* 269 U.S. 20, 70 L. ed. 145, 46 S. Ct. 4 (1925), Mr. Justice Butler, speaking for a unanimous Court, stated: "It is well settled that, when properly invoked, the 5th Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the 4th Amendment." Accord: *Weeks v. United States,* 232 U.S. 383, 58 L. ed. 652, 34 S. Ct. 341 (1914); *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 64 L. ed. 319, 40 S. Ct. 182 (1920). The opinion in *Agnello* quotes with approval the following statement from the opinion of Mr. Justice Holmes in *Silverthorne:* "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

In *Walder,* the defendant was tried on a 1952 indictment charg-

ing him with illegal possession of narcotics. In addition to his denial of guilt in connection with the particular transaction for which he was on trial, the defendant under direct examination (and later under cross-examination) testified he had never sold or handled narcotics and had never possessed any narcotics except what had been given him by a physician for an ailment. The Government, in rebuttal, was permitted to offer evidence that defendant had been indicted in 1950 on account of narcotics then found in his possession. Notwithstanding the 1950 indictment was dismissed on the ground the narcotics then found in the defendant's possession were obtained as a result of an illegal search and seizure, it was held that evidence with reference to this prior unrelated transaction was admissible for the purpose of impeaching the defendant's testimony that he had not previously possessed any narcotics. For present purposes, it is sufficient to point out that the testimony of Walder there involved and the contradictory testimony offered by the Government in rebuttal did not relate to the particular offense for which the defendant was then on trial. In *Walder,* Mr. Justice Frankfurter, for the Court, said: "Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny *all the elements of the case against him* without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." (Our italics.)

Thereafter, decisions of certain appellate courts, ostensibly based on *Walder,* held that, if a defendant elected to take the stand and testify, evidence of unconstitutionally seized articles or of unconstitutionally obtained statements was admissible to impeach the defendant's testimony as to circumstances relating to the crime for which he was on trial provided it did not relate directly to *an essential element* of such crime. *Tate v. United States, supra; United States v. Curry,* 358 F. 2d 904 (2d Cir. 1966).

In *Tate,* the defendant was convicted under a two-count indictment charging that he entered a hospital with intent to steal and with the theft of hospital property. The question was whether it was error to receive, in rebuttal, testimony as to statements made by the defendant to police during a period of alleged "unnecessary delay" between arrest and preliminary hearing. For purposes of decision, it was assumed that the (impeaching) statements were made by the defendant during a period of unlawful detention. There was evidence that the defendant was seen in the hospital with an unidentified man when the building was closed to the public. When arrested, he was leaving the hospital grounds carrying a typewriter

wrapped in a coat. An unidentified man, who preceded the defendant, was not apprehended. One Payne was arrested nearby within about ten minutes. The defendant took the stand at trial. In addition to denying all elements of the crime for which he was being tried, he testified on his direct examination that he had come to the hospital alone to see a friend and that he had not known Payne before the time he and Payne were arrested. He explained his possession of the hospital's typewriter by saying that moments before he was arrested someone unknown to him had thrust the typewriter into his arms. His explanation for running with the typewriter in his arms was that he was running after the unknown man to return the unwelcome gift. The Government, in rebuttal, produced a police officer who testified that during the alleged illegal detention the defendant told police that he and Payne had come to the hospital together by car. The officer's testimony was thus in direct conflict with the defendant's direct testimony that (a) he had come alone and (b) he was not acquainted with Payne. The United States Court of Appeals, District of Columbia Circuit, held the officer's testimony in rebuttal was competent for the limited purpose of consideration as bearing upon the credibility of the defendant's testimony as a witness. The conflicting testimony of the defendant and of the police officer, although it did not relate directly to any specific essential element of the crimes for which the defendant was on trial, related generally to events occurring at or about the time of the alleged crimes for which he was being tried.

Prior to *Miranda v. Arizona, supra,* which was decided June 13, 1966, other courts had reached conclusions in conflict with *Tate.* In *People v. Underwood,* 389 P. 2d 937 (Cal. 1964), the opinion of Chief Justice Gibson states: "It is also established in California and many other jurisdictions that involuntary *confessions* may not be used for purposes of impeaching the testimony of an accused. (Citations.) We believe a similar rule should operate to exclude involuntary *admissions* when they are offered for that purpose, and it has been so held in a number of jurisdictions. (Citations.) The credibility of an accused who takes the stand may be of critical importance to the trier of fact in determining whether or not a defense has been established, and we should not permit an accused's credibility to be attacked by use of an involuntary statement which would be inadmissible as affirmative evidence under the rule of *People v. Atchley, supra,* 53 Cal. 2d 160, 170, 346 P. 2d 764." Indeed, the Court of Appeals, District of Columbia Circuit, has substantially restricted the scope of *Tate* in *Johnson v. United States,*

344 F. 2d 163 (1964), and in *Inge v. United States,* 356 F. 2d 345 (1966).

In *Malloy v. Hogan,* 378 U.S. 1, 12 L. ed. 2d 653, 84 S. Ct. 1489, the Supreme Court of the United States, overruling prior decisions, held the privilege against self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States, namely, that no person "shall be compelled in any criminal case to be a witness against himself," is applicable to State action by virtue of the Due Process Clause of the Fourteenth Amendment.

In *Miranda v. Arizona, supra,* the Supreme Court of the United States considered the constitutional privilege against self-incrimination with reference to the admissibility of statements made by an accused person while in custody. This excerpt from the opinion of Mr. Chief Justice Warren is pertinent: "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility *of any statement made by a defendant.* No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself *in any manner;* it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. *In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.*" (Our italics.) 384 U.S. at 477-478, 16 L. ed. 2d at 725, 86 S. Ct. at 1629.

Decisions subsequent to *Miranda,* holding that evidence obtained in violation of a defendant's constitutional privilege against self-incrimination is *not* admissible for impeachment purposes, include the following: *Wheeler v. United States,* 382 F. 2d 998 (10th Cir. 1967) (dictum); *Blair v. United States,* 401 F. 2d 387 (D.C. Cir. 1968); *Proctor v. United States,* 404 F. 2d 819 (D.C. Cir. 1968); *Groshart v. United States,* 392 F. 2d 172 (9th Cir. 1968); *United States v. Fox,* 403 F. 2d 97 (2d Cir. 1968); *State v. Brewton,* 422 P. 2d 581 (Or. 1967); *Commonwealth v. Padgett,* 237 A. 2d 209 (Pa.

1968). See also, *United States v. Pinto,* 394 F. 2d 470, 474-476 (3d Cir. 1968).

The question under consideration is discussed in two excellent law review articles, *viz.:* Comment, *The Impeachment Exception to the Exclusionary Rules,* 34 University of Chicago Law Review 939 (1967), and (2) Comment, *The Collateral Use Doctrine: From Walder to Miranda,* 62 Northwestern University Law Review 912 (1968).

In *Wheeler,* the opinion states: "While it is true that the court in *Miranda* was concerned with the admissibility of custodial statements as substantive proof of the facts related, we think the procedural safeguards prescribed there are equally important to a consideration of the admissibility of prior inconsistent statements for impeachment purposes. If the veracity of an accused person testifying in his own behalf is to be attacked by a prior inconsistent or contradictory statement made while he was under in-custody interrogation, we think it is reasonable to require the Government to meet the burden of showing that the statement was voluntarily made after the accused had been fully advised of all of his rights and had effectively waived them in accordance with the standards prescribed by *Miranda.* To hold otherwise would permit an unconstitutional invasion of an individual's rights to be used as a weapon to influence the jury's consideration of his trial testimony."

In *Blair,* the opinion states: "The teaching of *Walder,* however valid in other contexts, appears irrelevant when a *Miranda* problem is presented."

In *Proctor,* the opinion states: "Without considering whether the impeachment in this case was on a point sufficiently collateral to come within *Walder* and *Tate,* we hold that the *Walder-Tate* exception to the exclusionary rule does not apply to evidence obtained in violation of *Miranda.*"

In *Groshart,* the opinion states: "Whether the objective be to show guilt or to attack credibility, at the trial the prosecution must first show that the statements have been obtained in compliance with the constitutional requirements as defined by our highest court. Insofar as *Walder* would compel a different result, it has, we believe, been undermined by the Supreme Court's *Miranda* decision."

In *Fox,* the opinion quotes from *Miranda* the excerpt set forth above and the further statement in the *Miranda* opinion that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can

be used against him." 384 U.S. at 479, 16 L. ed. 2d at 726, 86 S. Ct. at 1630. The opinion in *Fox* continues: "These pronouncements by the Supreme Court may be technically dictum. But it is abundantly plain that the court intended to lay down a firm general rule with respect to the use of statements unconstitutionally obtained from a defendant in violation of *Miranda* standards. The rule prohibits the use of such statements whether inculpatory or exculpatory, whether bearing directly on guilt or on collateral matters only, and whether used on direct examination or for impeachment."

In *Brewton,* the opinion expresses the view that "any attempt in the future to restrict the exclusionary rule to the state's case in chief would be inconsistent with the constitutional principles which are inherent in the *Miranda* case . . ." After stating the opinion that the rule suggested in *Tate* was "virtually unworkable," the opinion concludes: "The state should be free to impeach, but it ought to come by its impeachment as legally as it accumulates its other evidence."

[1, 2] We are of the opinion, and so hold, that in-custody statements attributed to a defendant, when offered by the State and objected to by the defendant, are inadmissible *for any purpose* unless, after a *voir dire* hearing in the absence of the jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional rights. Hence, in the factual situation under consideration, Carswell's testimony, absent a *voir dire* hearing and factual determinations as indicated above, was not admissible either as substantive evidence or for impeachment purposes.

[3] We are in agreement with that portion of the decision of the Court of Appeals to the effect that the evidence, when considered in the light most favorable to the State, was sufficient to require submission to the jury as to the crimes charged in the bill of indictment. However, we are of the opinion, and so hold, that defendant is entitled to a new trial on account of the erroneous admission of Carswell's rebuttal testimony. Accordingly, the decision of the Court of Appeals is reversed and the cause is remanded to that Court with direction to award a new trial to be conducted in accordance with the legal principles stated herein.

Error and remanded.

STATE OF NORTH CAROLINA v. ROBERT ALLEN ROBERTS

No. 60

(Filed 6 January 1970)

1. Searches and Seizures § 1; Criminal Law § 84— search and seizure incident to lawful arrest — admissibility of seized evidence

A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest and in the course of such search may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof, such article being properly introduced into evidence if otherwise competent.

2. Narcotics § 1— possession of LSD

It is a felony to possess lysergic acid diethylamide (LSD) in any quantity for any purpose, in the absence of proof that the possession was lawful under the provisions of the Narcotic Drug Act.

3. Arrest and Bail § 3— arrest without warrant — likelihood of evasion of arrest — G.S. 15-41

The likelihood of evasion of arrest, frequently referred to as the likelihood of escape, by the person to be arrested is not a factor to be considered in determining the right of a police officer to arrest without a warrant when the offense, felony or misdemeanor, has been committed in the presence of the officer, or when the officer has reasonable ground to believe that the offense has been committed in his presence by the person to be arrested. G.S. 15-41.

4. Narcotics § 1— possession of LSD — continuing offense

The felony of unlawful possession of lysergic acid diethylamide (LSD) is a continuing offense, committed wherever, whenever, and so long as a person has such substance in his possession, whatever the purpose of such possession.

5. Arrest and Bail § 3— arrest without warrant — possession of LSD — reasonable belief felony being committed in officer's presence

In this prosecution for the unlawful possession of LSD, finding by the trial court that the officers who arrested defendant had reasonable ground to believe that defendant, at the time of his arrest, was in the possession of some quantity of LSD and, therefore, was presently committing a felony in the presence of the officers, *is held* supported by the State's uncontradicted evidence that one of the officers was advised by a confidential informer, who had on many previous occasions given the officer reliable information pertaining to narcotics, that defendant, whose dress was described to the officer, and a male companion were in the possession of and selling LSD in the vicinity of a certain restaurant, that the officers went to a nearby building and observed defendant and his companion in the restaurant parking lot acting in a manner consistent with the information the officers had received, that this occurred about midnight, as the restaurant was closing, in an area where the officers knew narcotics had been peddled before, that the officers saw defendant and his companion

enter a nearby washerette, and that the officers entered the washerette and placed defendant and his companion under arrest without a warrant upon the charge of unlawful possession of LSD.

6. Arrest and Bail § 3— arrest without warrant — reasonable ground for belief — reliable hearsay information

Reasonable ground for belief, which is an element of an officer's right to arrest without a warrant under G.S. 15-41(2) and under one of the situations provided for in G.S. 15-41(1), may be based upon information given to the officer by another, the source of such information being reasonably reliable, and it is immaterial that such hearsay information is not itself competent in evidence at the trial of the person arrested.

7. Searches and Seizures § 1; Criminal Law § 84— Fourth Amendment to U. S. Constitution — applicability to states

Provisions of the Fourth Amendment to the United States Constitution, relating to searches and seizures, are incorporated into the Fourteenth Amendment and thus constitute limitations upon the power of state officers, as well as upon the power of Federal officers, to search and to seize articles in the possession of those suspected of criminal offenses and upon the admission of such articles into evidence in state courts.

8. Arrest and Bail § 3; Criminal Law § 84; Searches and Seizures § 1— validity of arrest and search without warrant — admissibility of seized evidence

No right conferred upon defendant by the United States Constitution or by the Constitution or statutes of this State was violated in the arrest and search of defendant without a warrant, in the seizure of LSD pills found upon him or in the admission of those pills in evidence, where the officers who arrested defendant had reasonable ground to believe that defendant, at the time of his arrest, was committing a felony in their presence by the possession of LSD.

APPEAL by defendant from the decision of the Court of Appeals, reported in 6 N.C. App. 312.

The defendant was tried in the Superior Court of Cumberland County under an indictment, proper in form, charging that he unlawfully and feloniously had in his possession and control 57 tablets containing lysergic acid diethylamide, commonly known as LSD. The jury found him guilty and he was sentenced to imprisonment in the State penitentiary for a term of not less than four nor more than five years. He appealed to the Court of Appeals, his only assignment of error being that the superior court erred in admitting evidence obtained without a search warrant. The evidence in question was certain pills found in the finger of a glove worn by the defendant in the course of a search of his person by the arresting officers at the time of his arrest. It was stipulated at the trial that some of the tablets so found were analyzed and each tablet analyzed contained lysergic acid diethylamide.

The Court of Appeals affirmed the judgment of the superior court. The defendant then appealed to this Court on the sole ground that his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States, and under Art. I, §§ 11 and 15, of the Constitution of North Carolina, were violated by the taking of the tablets from his person and their admission in evidence.

At the trial in the superior court the State's evidence, in addition to the pills in question, consisted of the testimony of Special Agent Windham of the State Bureau of Investigation, who at the time of the arrest of the defendant was conducting narcotics investigations in Cumberland County, and Lieutenant Studer of the Fayetteville Police Department, who at the time was assigned to narcotics investigations. The defendant offered no evidence.

The testimony of the two officers before the jury was to the following effect: At approximately 11:00 p.m. on 7 January 1969, pursuant to information received by him, Agent Windham went to and entered the Hubbard Realty Company Building in Fayetteville, just across the street from the Village Shoppe Restaurant. There he met Lieutenant Studer. Their purpose in so meeting was to look for the defendant in connection with a narcotics investigation. For approximately fifteen or twenty minutes they observed the defendant and another man in a parking lot adjoining the restaurant. The defendant and his companion were seen by the officers to be "milling around the parking lot talking to several other persons." At approximately 11:20 p.m., the defendant and his companion left the parking lot and walked to and entered a washerette located approximately "two doors" from the restaurant. The officers then followed the defendant and his companion, went into the washerette and placed the defendant and his companion under arrest upon the charge of unlawful possession of narcotic drugs, advising them immediately of their "constitutional rights under the *Miranda* decision." Thereupon, Lieutenant Studer searched the defendant and found LSD in a glove worn by the defendant. At the time of the search the officers had no search warrant and no warrant for the arrest of the defendant.

As soon as Agent Windham testified to the making of the arrest and the search and before any testimony as to what the search disclosed and before the introduction of the pills in evidence, the defendant objected and thereupon the trial court conducted a voir dire examination in the absence of the jury. On that examination, Lieutenant Studer testified that he was at his home shortly before 11:00 p.m. on 7 January 1969, at which time he received information from

Agent Windham that the latter had "just received reliable information from a confidential informant" that the defendant and another man had LSD tablets in their possession and were then selling them in the vicinity of the Village Shoppe Restaurant. Agent Windham told Lieutenant Studer how the defendant was dressed. Lieutenant Studer proceeded immediately to the building across the street from the restaurant and, watching through a window, observed the defendant and his companion directly in front of the window, standing in the driveway beside the restaurant. The restaurant "was closing." The defendant was talking briefly to numerous persons in the parking lot and "milling around the persons there." The defendant and his companion then "left and walked to the Haymount Washerette." The officers "left and entered the washerette," and Lieutenant Struder placed the defendant under arrest "for unlawful possession of narcotics, LSD, and proceeded to search him." In the process of searching the defendant, Lieutenant Studer felt a hard lump in one of the gloves worn by the defendant. Looking into the glove, he found a "rubber medical fingertip with paper stuffed in the top end part." Upon pulling the paper out, he found approximately 57 small purple pills.

Upon the voir dire examination, Agent Windham testified that while he was at home he received a telephone call from a "confidential informer" with whom he had previously worked on narcotics investigations and who had on numerous occasions before this given him "good and reliable information pertaining to narcotics." This confidential informer advised Agent Windham that the defendant and another man were at that time in the vicinity of the Village Shoppe Restaurant and each of them had a quantity of LSD in his possession and they were "dealing in it" at that time. Agent Windham immediately called Lieutenant Studer and gave this information to him, requesting Lieutenant Studer to meet him in the Hubbard Building, across the street from the restaurant. Agent Windham arrived at the Hubbard Building approximately twenty minutes after he received the information from his informant. Upon arrival he found Lieutenant Studer already inside the building. Looking out of the window, he observed the defendant "talking and milling around numerous people and numerous people coming up to him." Agent Windham "had previously observed the selling of LSD and marijuana in that vicinity before that night." The actions of the defendant, while the officers were so watching him, were "similar to the actions of those selling narcotics in that area." The officers observed the defendant and his companion walk to the washerette. The officers followed them therein and Lieutenant Studer placed the

defendant under arrest "for unlawful possession of narcotics, LSD," advised the defendant and his companion "of their rights" and searched the defendant, finding the "rubber finger" containing the LSD tablets in one of the gloves the defendant was then wearing. When he received the information concerning the defendant, Agent Windham went directly to the vicinity of the Village Shoppe Restaurant, knowing that it was "almost time for the Village Shoppe to close its business and that he didn't have time to go by to get an arrest warrant."

The trial judge thereupon made the following finding: "Cuyler L. Windham, Agent of the S.B.I., had reasonable grounds to believe that a felony was being committed, and that the defendant * * * was at the place committing the felony; that he * * * had reasonable grounds to believe that unless he was apprehended and arrested that he would escape from the scene of the arrest, and that the arrest was based on reasonable belief of the officer that a felony had been and was being committed and that the arrest was legal without a warrant, and that the search of the defendant * * * was, at the instant of the arrest, and therefore was valid."

Thereupon, Lieutenant Studer testified in the presence of the jury to the arrest, the search and the finding of the LSD and the pills in question were admitted into evidence.

Robert Morgan, Attorney General; William F. Briley, Trial Attorney; James E. Magner, Jr., Staff Attorney, for the State.

Nance, Collier, Singleton, Kirkman & Herndon by Rudolph G. Singleton, Jr., James R. Nance, Jr., for the defendant.

LAKE, J.

[1] A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest. *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544. In the course of such search, the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof. If such article is otherwise competent, it may properly be introduced in evidence by the State. *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269. The defendant having been placed under arrest by Lieutenant Studer upon the charge of unlawful possession of narcotics, specifically lysergic acid diethylamide, commonly known as LSD, the pills containing that substance, found upon his person and taken from him by the arresting officer in the course of a search made at the scene

of the arrest and immediately following it, were obviously competent evidence of his having committed the offense charged, if the arrest was lawful.

G.S. 90-88 provides: "It shall be unlawful for any person to * * * possess * * * any narcotic drug, except as authorized in this article [Art. 5, c. 90, General Statutes of North Carolina, entitled "Narcotic Drug Act"]." G.S. 90-87(9), defining terms used in that Act, provides, "'Narcotic drugs' means * * * lysergic acid diethylamide * * *." G.S. 90-109 provides, "In any * * * indictment, and in any action or proceeding brought for the enforcement of any provision of this article, it shall not be necessary to negative any exception * * * and the burden of proof of any such exception * * * shall be upon the defendant." G.S. 90-111(a) provides, "Any person violating any provision of this article * * * shall upon conviction be punished, for the first offense, by a fine of not more than one thousand dollars ($1,000.00), or be imprisoned in the penitentiary for not more than five years, or both, in the discretion of the court." G.S. 14-1 provides, "A felony is a crime which * * * (3) is or may be punishable by imprisonment in the State's prison * * *."

[2] Consequently, it is a felony to possess lysergic acid diethylamide in any quantity for any purpose, in the absence of proof that the possession was lawful under the provisions of the Narcotic Drug Act. This is the offense with which the defendant was charged by the arresting officer at the time of arrest and of which he has been convicted. If, therefore, the arrest of the defendant without a warrant upon this felony charge was lawful under the then existing circumstances, there was no error in the judgment imposing a sentence within the limits prescribed by the statute.

The right of a police officer to arrest a person without a warrant is set forth in G.S. 15-41, which reads as follows:

> *"When Officer May Arrest Without Warrant.* — 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;
>
> "(2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

It will be observed that this statute has two independent pro-

visions. Subparagraph (1), in turn, applies to two situations, the first being where the person to be arrested has actually committed a felony or misdemeanor in the presence of the arresting officer, and the second being where, whether or not the offense has actually been committed, the officer has reasonable ground to believe that the person arrested has committed a felony or misdemeanor in his presence. Subparagraph (2) relates to the arrest of a person whom the arresting officer has reasonable ground to believe has committed a felony, irrespective of whether it is believed that such felony was committed in the presence of the arresting officer or elsewhere.

[3] It is only in the situation to which subparagraph (2) is applicable that the statute makes it a condition to the right of the officer to arrest without a warrant that the arresing officer has reasonable ground to believe the person to be arrested will evade arrest if not immediately taken into custody. The likelihood of evasion of arrest, frequently referred to as the likelihood of escape, by the person to be arrested is not a factor to be considered in determining the right of a police officer to arrest without a warrant when the offense, felony or misdemeanor, has been committed in the presence of the officer, or when the officer has reasonable ground to believe that the offense has been committed in his presence by the person to be arrested.

[4] The felony, of which the defendant has been convicted, is the possession of lysergic acid diethylamide. This is a continuing offense, committed wherever, whenever, and so long as a person has such substance in his possession, whatever the purpose of such possession may be. Thus, the offense with which the defendant was charged, and of which he has been convicted, was committed in the washerette, in the actual presence of the officers, whether or not it was also committed on the parking lot adjoining the Village Shoppe Restaurant.

For present purposes, we need not determine whether the right of a police officer to arrest without a warrant extends to the arrest of a person who has actually committed a felony or misdemeanor in the presence of the officer, of which actual offense the officer is unaware at the time of the arrest. For the determination of the present appeal, it is sufficient that, at the time of the arrest of this defendant, Lieutenant Studer had reasonable ground to believe the defendant was then in possession of some quantity of lysergic acid diethylamide.

[5] The undisputed evidence in this record is clearly sufficient to support the finding by the trial judge that the arresting officer had

reasonable ground to believe that the defendant, at the time of his arrest, was in the possession of some quantity of this substance and, therefore, was presently committing a felony in the presence of these two officers. Agent Windham, some twenty minutes earlier, had been advised by a confidential informer, with whom he had previously worked in making narcotics investigations and who had on many previous occasions given Agent Windham "good and reliable information pertaining to narcotics," that the defendant and a male companion were each in possession of a quantity of lysergic acid diethylamide and were then "dealing in it" in the vicinity of the Village Shoppe Restaurant. Lieutenant Studer was given this information by his fellow officer. Together they observed the defendant's conduct at the place named by the informer. What they saw, considered in the light of their own experience in the investigation of such offenses, confirmed, in their opinion, the information so given by the informer to Agent Windham. The departure of the defendant and his companion from the scene of their observed activities was not necessarily indicative of their having completely disposed of all of the lysergic acid diethylamide in their possession. Their departure from the parking lot was at least equally consistent with the fact, known to the officers, that the adjoining restaurant was about to close for the night. Thus, at the time the officers entered the washerette, they had reasonable ground to believe that the defendant and his companion still retained in their possession some quantity of lysergic acid diethylamide and so were, at that moment, in commission of a felony in the immediate presence of the officers. Under these circumstances, the officers clearly had the right to arrest the defendant though they had no warrant for his arrest. Having the right to arrest him, they had the right to search him and to take from him the lysergic acid diethylamide then actually concealed in a finger of the glove worn by the defendant.

While it is not necessary so to determine in the present case, it is obvious that these officers were faced with a sudden emergency, demanding immediate action and not permitting the obtaining of a warrant. The entire episode appears to have occupied not more than thirty minutes. In that interval two police officers, then at their respective homes, received reliable information that the defendant, whose dress was described to them but who does not appear otherwise to have been known to the officers, was at a public place in the possession of and dealing in lysergic acid diethylamide; the officers went to a nearby building; observed the defendant, with his companion at the place designated by the informer; saw that he was conducting himself in a manner consistent with the information the

officers had received; and then saw him and his companion leave that place and proceed along the street to another public place which they entered, all of this being at the approximate hour of midnight in an area where they knew narcotics had been peddled before. There is nothing in the record to indicate that either of the officers had ever seen the defendant before or knew where to look for him if he got out of their sight.

This case is readily distinguishable from *United States v. Coplon,* 185 F. 2d 629, relied upon by the defendant. There, the defendant was well known to the Federal Bureau of Investigation, whose agents made the arrest. She had been for years and still was an employee of the State Department in a position of importance. She had been trailed on many occasions by Federal agents because of their suspicion that she was systematically delivering confidential documents to an emissary of the government of Russia. There was nothing to indicate that the mission, on which she was engaged at the time of her arrest, was intended by her to be her last act of treachery. On the contrary, the very type of operation of which she was suspected made it a virtual certainty that she would return to her post of duty and to her known residence in Washington after the completion of her then current mission. Furthermore, her arrest on this particular occasion had been carefully planned in advance by the Federal officers. They had, for this purpose, placed in her possession a decoy document in order that she might deliver it to her Russian associate and had assigned a police matron to wait for her arrest and take her in charge when she was brought into the police headquarters. Having ample time to secure a warrant without losing sight of their quarry, the officers in the *Coplon* case failed to do so. Both as to the likelihood of evasion of arrest and as to the practicability of obtaining a warrant for arrest, the *Coplon* case bears no similarity whatever to the present case.

For the reasons above mentioned, it is not necessary, in the present case, to determine whether the conduct of the defendant, while upon the parking lot of the restaurant and under observation of the police officers from their position in the building across the street, was conduct in the presence of the officers. We are not, however, to be understood as intimating any opinion that it was not in their presence, they having the defendant in full view and being in reasonable proximity to him. See, *State v. McAfee,* 107 N.C. 812, 12 S.E. 435.

[6] It is entirely clear that the reasonable ground for belief, which is an element of the officer's right to arrest without a warrant under

subsection 2 and under one of the situations provided for in subsection 1 of G.S. 15-41, may be based upon information given to the officer by another, the source of such information being reasonably reliable. Upon this question it is immaterial that such information, being hearsay, is not, itself, competent in evidence at the trial of the person arrested. There are many instances, in the reports of the decisions of this Court and of other courts, in which the arresting officer has acted upon information that a felony has been committed and a description of the person suspected of committing it. See: *State v. Tippett, supra; State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Grier,* 268 N.C. 296, 150 S.E. 2d 443; *State v. Grant,* 248 N.C. 341, 103 S.E. 2d 339; 5 Am. Jur. 2d, Arrest, § 46.

In *Brinegar v. United States,* 338 U.S. 160, 175, 93 L. Ed 1879, 69 S. Ct. 1302, the Supreme Court of the United States, speaking through Mr. Justice Rutledge, said: "In dealing with probable cause * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians act." Applying that test, the Supreme Court of the United States, in *Draper v. United States,* 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, sustained the arrest without a warrant and the conviction of a defendant upon the charge of concealing and transporting narcotic drugs. In the *Draper* case, as here, the arresting officers acted upon information given them by a confidential informer previously found by the officers to be accurate and reliable. That information was that the defendant, named and described by the informer, would be arriving in Denver by train from Chicago on one of two succeeding days and would be in possession of heroin. Though the officers knew the name and residence of the person to be arrested for at least two days prior to the arrest, no warrant was obtained and there was nothing to indicate that, had he not been arrested at the railroad station, he would not have returned to his known residence. The Court held the arrest and search of Draper without a warrant were lawful and the heroin taken from his person in the process was properly admitted in evidence against him.

[7, 8] The Supreme Court of the United States has declared that the provisions of the Fourth Amendment to the Constitution of the United States, relating to searches and seizures, are incorporated into the Fourteenth Amendment and thus constitute limitations upon the power of state officers, as well as upon the power of Federal officers, to search and to seize articles in the possession of those suspected of criminal offenses and upon the admission of such articles

into evidence in state courts. See: *Benton v. Maryland,* 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056; *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684. That Court has not held, however, that these amendments impose upon state officers limitations not applicable to the actions of Federal officers. The *Draper* case having sustained the authority of Federal officers to arrest and search without a warrant under the circumstances detailed above, there is nothing in the facts of the present case to support the contention of the defendant that his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States were violated by the search of his person by Lieutenant Studer and by the seizure of the lysergic acid diethylamide found in the course thereof.

[8] Clearly, the record before us discloses, in the arrest and search of this defendant, in the seizure of the pills found upon him or in the admission of those pills in evidence, no violation of any right conferred upon him or guaranteed to him by the Constitution or statutes of this State or by any decision of this Court.

No error.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND VIRGINIA ELECTRIC AND POWER COMPANY v. WOODSTOCK ELECTRIC MEMBERSHIP CORPORATION AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION

No. 47

(Filed 6 January 1970)

1. Electricity § 2— competition of suppliers — rural territory — prior law

Prior to the enactment of G.S. 62-110.2 in 1965, electric membership cooperatives and investor-owned public utility companies were free to compete in the rural portions of the State in the absence of contractual restrictions upon such right, irrespective of the fact that such competition resulted in substantial duplication of power lines and facilities.

2. Electricity § 2; Utilities Commission § 7— assignment of rural territory — electric suppliers — present law

G.S. 62-110.2(b) confers upon each electric supplier in the State the right, in territories outside of municipalities, to serve all "premises" being served by it on 20 April 1965, and the right to serve "premises" initially requiring service after that date, which premises are located within 300 feet of a line of such supplier and not in a territory assigned by the Utilities Commission to a different supplier pursuant to G.S. 62-110.2(c).

3. Electricity § 2— supply of electricity — premises in rural areas — choice of supplier

Any "premises" in territories lying outside of a municipality and more than 300 feet from the line of any electric supplier can be served, prior to an assignment of such territory by the Utilities Commission, by any electric supplier chosen by the user, and service of such premises by any other supplier is prohibited. G.S. 62-110.2(b)(5), (10).

4. Electricity § 2; Utilities Commission § 7— assignment of rural territory — division of service area between co-op and power company — validity of assignment

On application by an electric membership cooperative for an assignment of territorial rights pursuant to G.S. 62-110.2, order of the Utilities Commission directing that the cooperative alone serve all users in a rural service area whose demand for power does not exceed 400 KW and that any user therein whose demand exceeds 400 KW be served either by the cooperative or by an electric power company, with the user to choose the supplier, *held* not to violate the rights of the cooperative under N. C. Constitution, Art. I, §§ 7, 17, or under U. S. Constitution, Fourteenth Amendment, where (1) the assignment did not take from the cooperative any right previously enjoyed by it, (2) the assignment did not impose upon the cooperative the duty to serve any user it did not request permission to serve, and (3) there is no suggestion that service to any potential user would be unprofitable or burdensome.

5. Constitutional Law § 4— standing to deny constitutionality of statute

One may not, in the same proceeding, seek an advantage which is authorized by a specific statute only and at the same time deny the constitutionality of the statute.

6. Electricity § 2; Utilities Commission § 7— assignment of rural service area — two suppliers in same area — authority of Commission

Under the statute authorizing the Utilities Commission to assign rural service areas to electric suppliers by "adequately defined boundaries," G.S. 62-110.2(c), the Commission has authority, when the public convenience and necessity so require, (1) to assign the same territory to one supplier for service below a specified level of demand and to another supplier above that level of demand, and (2) to permit a membership cooperative who has been assigned the area of smaller demand to serve a user whose demand is above the division line if the user desires the services of the cooperative.

7. Electricity § 2; Utilities Commission § 7— assignment of rural service area — purpose of statute

The overriding purpose of G.S. 62-110.2(c)(1), which authorizes the Utilities Commission to assign rural service territory to electric suppliers, is to promote the public interest, not the business of the electric membership cooperative or that of the investor-owned utility.

8. Electricity § 2; Utilities Commission § 7— assignment of rural service area — consideration of economic development

The attraction to a sparsely settled rural territory of industry which will develop its natural resources and provide opportunity of employment

to its residents is one of the "other things," within the purview of G.S. 62-110.2(c)(1), to be considered by the Commission in determining the assignment of rural territory to electric suppliers.

9. Electricity § 2; Utilities Commission § 7— assignment of rural service area — consideration of factors

In assigning rural service areas to electric suppliers pursuant to G.S. 62-110.2, the Utilities Commission may consider, in addition to development of natural resources and employment opportunities, (1) the past history of service to residential, agricultural, and small commercial users in adjacent territories, (2) the capital required for supplying electric power to large users in the territory and the past experience of a supplier in serving such users, and (3) the demonstrated preference of a substantial class of potential users for one supplier over another.

10. Utilities Commission § 9— findings of fact — review

Where the evidence before the Utilities Commission is not brought forward in the record on appeal, all of the Commission's findings of fact are deemed supported by competent and sufficient evidence, and the findings are binding upon the Supreme Court.

11. Electricity § 2— assignment of rural service area — division of boundary at 400 KW — sufficiency of order

Order of the Utilities Commission determining that a demand level of 400 KW is to be the "boundary" between the areas to be served by an electric membership cooperative and by power company in a given geographic area, the cooperative to be solely responsible for demand below 400 KW, *held* not arbitrary and capricious, where (1) the cooperative is assigned users whose demands for electric service are similar to those previously served by it, (2) contemplated phosphate mining operations in the area, and related industrial activity, will result in power requirements exceeding 400 KW, and (3) the cooperative has never served a demand larger than 400 KW but the power company has demonstrated its ability to do so.

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

APPEAL by Woodstock Electric Membership Corporation and North Carolina Electric Membership Corporation from the decision of the Court of Appeals, reported in 5 N.C. App. 663.

Woodstock Electric Membership Corporation, hereinafter called Woodstock, and Virginia Electric and Power Company, hereinafter called VEPCO, are suppliers of electric power to users thereof in Beaufort, Hyde and Washington Counties. Subsequent to the enactment in 1965 of G.S. 62-110.2, Woodstock applied to the Utilities Commission for the assignment to it of extensive areas in those counties lying outside the corporate limits of any municipality and more than 300 feet from any then existing line of any supplier. Shortly thereafter, VEPCO filed a like application. As to some of

the areas the two applications overlapped, so that both applicants sought the right to supply electric power in the same area.

The Utilities Commission consolidated the applications for hearing. At such hearing voluminous evidence, both oral and documentary, was introduced by both applicants. The Commission made extensive findings of fact and reached certain conclusions upon which it entered an order assigning to each applicant alone areas applied for by it only and certain of the areas for which both had applied. These portions of the order are not presently in controversy.

As to certain other areas, designated B-1 to B-6, inclusive, the Commission ordered that Woodstock alone serve all users therein whose demand for power does not exceed 400 kilowatts and that any user therein whose demand exceeds that limit be served either by Woodstock or by VEPCO, depending upon which supplier the user chose to serve it. The effect is that in these areas Woodstock alone may serve residential, agricultural, commercial and small industrial users — the categories of users served by Woodstock in the past — while large industrial users — of which none presently exist and none have ever existed in any of these areas — would be served by Woodstock or by VEPCO as each user may prefer.

The six areas in question are exclusively rural and completely undeveloped for industrial purposes at the present time. Explorations in recent years have disclosed in the B-6 area extensive phosphate deposits, which offer basis for widespread expectation that substantial mining operations may soon be begun in that area and may be followed by the establishment therein of mining facilities and other related industrial enterprises, each of which will consume large quantities of electric power.

Woodstock and North Carolina Electric Membership Corporation, an intervenor before the Utilities Commission, appealed from the order of the Commission to the Court of Appeals. That court held the Utilities Commission had made an assignment of areas B-1 to B-6, inclusive, of a type permitted by the statute, G.S. 62-110.2(c)-(1), but had not made findings of fact sufficient to support its establishment of the 400 KW demand as the dividing line between the exclusive right of Woodstock to serve and the right of the user to choose its supplier. On that ground, the Court of Appeals reversed the order of the Utilities Commission and remanded the matter to the Commission "for such further proceedings as may be appropriate."

Woodstock and the intervenor appealed to this Court on the ground that the type of assignment made by the Commission in the

six areas, which the Court of Appeals held not unlawful per se, would violate rights of Woodstock guaranteed by Art. I, §§ 7 and 17, of the Constitution of North Carolina, and by the Fourteenth Amendment to the Constitution of the United States. Simultaneously, the appellants filed their petition for writ of certiorari to review the decision of the Court of Appeals on the ground that it failed to hold the order of the Utilities Commission to be in excess of the statutory authority of the Commission and arbitrary in that the order undertakes to permit both suppliers to serve within the same area. That is, Woodstock makes no point of the selection by the Utilities Commission of a demand level of 400 KW as the division line in Areas B-1 to B-6, but contends that, both as a matter of its constitutional right and by virtue of the statute under which the Utilities Commission has acted, no order can be valid which permits both suppliers to operate in these areas, whatever demand level be taken as the division point between Woodstock's exclusive right to serve and the right of the user to select its supplier. For this reason, Woodstock contends that the order of the Court of Appeals remanding the proceeding for further action by the Utilities Commission in fixing this division point is erroneous.

Both VEPCO and the Utilities Commission contend that the Court of Appeals correctly ruled that no constitutional right of Woodstock has been violated by the order of the Commission, or would be violated by a similar order issued after further proceedings pursuant to the remand directed by the Court of Appeals. VEPCO further contends that, while review by this Court is premature until the Commission has acted under the remand, the Court of Appeals erred in holding that the findings of fact made by the Commission are not sufficient to support its choice of the demand level of 400 KW as the division line. The Utilities Commission raises no objection to the remand of the proceeding to it but does not concede that its findings of fact are insufficient to support its order.

Woodstock brought forward in the record on appeal, both in the Court of Appeals and in this Court, only a portion of the evidence introduced before the Utilities Commission, its contention being that the findings of fact made by the Commission do not support its order, not that any finding of fact is unsupported by competent evidence.

The order of the Utilities Commission is not set forth in the record filed with this Court, but all portions thereof, deemed pertinent to this appeal by the parties, are quoted in the opinion of the Court of Appeals. Of these, the portions set forth below are deter-

minative of the questions presented upon this review of the decision of the Court of Appeals.

The Utilities Commission made the following findings of fact:

"1. Both VEPCO and Woodstock are electric suppliers as defined by Section 62-110.2(a)(3) of the North Carolina General Statutes; * * *.

"2. * * * VEPCO generates the preponderance of the electric power it sells.

"3. * * * Woodstock does not generate electric power, but purchases the preponderance of its total requirements as a wholesale customer of VEPCO.

"4. Both VEPCO and Woodstock are capable of supplying, and do supply, good, adequate, and dependable electric service for the requirements of their existing customers and members, respectively, in the areas of the three counties mentioned. * * *

"7. The entire area of the applications, being situate outside the corporate limits of municipalities, and more than 300 feet from the lines of another supplier as defined by the Act, must be described as rural and agricultural. * * *

"8. The historical development of electrical facilities in the area as a whole may be described as follows: For many years, VEPCO has served Woodstock as well as the municipal systems of the Cities of Washington and Belhaven at wholesale. * * * VEPCO's distribution facilities are concentrated almost exclusively in the northern third of the total area. For the purpose of moving bulk power, VEPCO has a 34.5 KV line in the southern portion of the total area * * * VEPCO has one (1) retail distribution customer on this line at approximately 400 KW demand. * * * Woodstock's distribution facilities * * * may be said to cover the southern two-thirds of the area * * *.

"11. In one large area in Beaufort County * * * (marked B-6 on VEPCO Exhibit No. 2 and hereafter referred to as the 'B-6' area) there are no lines of any supplier as defined in the Act other than Woodstock * * *.

"Woodstock seeks to have this area assigned to it; VEPCO seeks to have the area left unassigned or, in the alternative, assigned to VEPCO.

"12. In the areas * * * marked B-1 and B-3 on VEPCO Exhibit No. 2 (and hereafter referred to by reference to the

VEPCO Exhibit) there are virtually no facilities of any supplier as defined in the Act other than Woodstock, except for VEPCO's 34.5 KV line through Area B-3 and the VEPCO retail customer in Area B-1, as previously found. * * *

"14. The area marked B-2 * * * has the aforesaid 34.5 KV line running east-west through the south-central portion. The area marked B-5 * * * has the aforesaid 34.5 KV line running along the northern border thereof. There are no other lines of a supplier as defined by the Act in either area. * * *

"15. The areas designated B-1, B-2, B-3, B-4 and B-5 * * * are areas of potential industrial development * * *.

"16. The area designated B-6 * * * is an area of great industrial potential in that it has been established that the area contains one of the richest phosphate deposits in the United States, is under active consideration for phosphate mining operations * * *. These mining operations and processes usually require complex and technical electric power accommodations, very large blocks of available power, alternate sources of power supply, and experienced supplier personnel readily available and technically trained. Further, such mining operations tend to attract allied industrials, such as chemicals and fertilizer, having large power requirements, and requiring large capital investments to install service.

"17. Industrial and manufacturing concerns tend to locate on and demand the services of VEPCO as opposed to Woodstock. There are many reasons for this. Some industries are philosophically opposed to, and wary of, becoming members in cooperatives where they have no more protection than a single vote in rate and policy matters, i.e., they prefer the regulation of the State Commission to the regulation of the Cooperatives' membership and the REA. Others base their preference on the electric utility's financial strength and its ability to supply operational expertise, specialized equipment, alternate and emergency supplies of energy and many others.

"Industries usually have more than one available site for location and, all other things being equal, tend to choose that site served or to be served by VEPCO and tend not to choose the site to be served by Woodstock. While the phosphate deposit in the B-6 area will require the mining industry to locate there without regard to which supplier is assigned the area, the testimony of mining officials is to the effect that assignment to Woodstock would tend to cause their companies not to perform

all their mining processes on site and that they probably would only mine the basic product and ship it elsewhere for operations and processes requiring heavy electric loads. The testimony further indicates that manufacturers and producers other than mining will tend not to locate near the mines if the area is assigned exclusively to Woodstock. * * *

"19. The areas where Woodstock's facilities are located are predominantly residential and farming, or rural, areas. * * * Woodstock serves two (2) industrial customers with demands greater than 50 KW. Its largest service demand is to Coastal Lumber Company, with a demand exceeding 240 KW and possibly as high as 400 KW demand.

"20. The portions of the total area in which VEPCO's facilities are located are also predominantly residential and farming, or rural, areas. However, VEPCO has a number of very large power users in this and other states. It has a permanent staff of experts in promoting industrial development and attending to complex power supply and load requirements. * * *

"23. VEPCO is financed by capital furnished from the sale of securities in the financial markets and from internally generated funds. Its bonds are rated AA, and it has a proven ability to raise large sums of capital on comparatively short notice. * * * While Woodstock has never been called upon to provide service for which it could not obtain capital, it nevertheless has not been called upon to raise capital to meet the electric needs of extremely large industrial customers.

"24. Woodstock is organized and exists for the purpose of furnishing electricity to persons in rural areas not otherwise having central station service. It is not organized to, and does not operate on, the basis of 'pecuniary profit,' as does VEPCO. For this reason, the procurement of large volume industrial loads is not as fully compatible with the corporate and public objectives of Woodstock as it is with VEPCO."

After making the foregoing findings of fact, the Utilities Commission made the following statements which the Commission does not specifically designate "Findings of Fact":

"From the testimony and from experience in other matters involving electric cooperatives and power companies, it appears to us almost universally true that cooperative members prefer a continuation and expansion of cooperative service and territory.

"On the other hand, industry, particularly heavy industry, just as strongly prefers the service of the power company. * * *

"* * * Traditionally, the cooperative has not attracted industry to its service area while the power company has. The attraction of the capital wealth of industry also builds up residential loads. We are convinced that many areas of the State will be handicapped in, if not precluded from, obtaining industry, unless weight is given to industry's obvious preferences for the power company.

"Further, we hold that the power company is better equipped and better able to serve heavy industrial loads. We are of the considered opinion that it would be harmful both to the cooperative and to the public in an area with industrial potential to assign that area to the cooperative for all purposes. On the other hand, where in many cases the cooperative has historically served the residential, agricultural, and small commercial loads, we think it would be manifestly unjust and duplicative to take this area and their potential residential, agricultural, and commercial loads from the cooperative."

Upon the basis of these "findings of fact" and statements, the Commission assigned areas B-1 to B-6, inclusive, as follows:

"To Woodstock for purposes of loads up to and including 400 KW demand; all loads with contract demands greater than 400 KW being hereby assigned jointly to VEPCO and Woodstock; provided that this joint assignment is made subject to the consumers' reasonable choice of supplier * * *."

Crisp, Twiggs & Wells for Woodstock Electric Membership Corporation and North Carolina Electric Membership Corporation.

Edward B. Hipp and Larry G. Ford, Commission Attorneys, for North Carolina Utilities Commission.

Joyner, Moore & Howison for Virginia Electric and Power Company.

LAKE, J.

[1] G.S. 62-110.2 was enacted in 1965. Prior to its enactment, electric membership cooperatives, such as Woodstock, and investor-owned public utility companies, such as VEPCO, were free to compete in the rural portions of this State, in the absence of contractual restrictions upon such right, irrespective of the fact that such com-

petition resulted in substantial duplication of power lines and facilities. *Utilities Commission v. Lumbee River Electric Membership Corp.*, 275 N.C. 250, 166 S.E. 2d 663; *Blue Ridge Electric Membership Corp. v. Power Co.*, 258 N.C. 278, 128 S.E. 2d 405; *Pitt & Greene Electric Membership Corp. v. Light Co.*, 255 N.C. 258, 120 S.E. 2d 749; *Carolina Power & Light Co. v. Electric Membership Corp.*, 211 N.C. 717, 192 S.E. 105. It is not contended that there is any contract of either supplier involved in this proceeding which restricts its right to compete for the business of potential users of its service within the six territories in question. Thus, prior to the Act of 1965, G.S. 62-110.2, neither Woodstock nor VEPCO had a monopoly upon the right to sell electric power to the potential users of such power in the six territories here in question, or to any class of those users.

[2, 3] The Act of 1965 did not, without more, alter this situation. By its terms, G.S. 62-110.2(b), there was conferred upon each electric supplier in the State, i.e., upon both Woodstock and VEPCO, the right, in territories outside of municipalities, to serve all "premises" being served by it on 20 April 1965, and the right to serve "premises" initially requiring service after that date, located within 300 feet of a line of such supplier and not in a territory assigned by the Utilities Commission to a different supplier, pursuant to G.S. 62-110.2(c). However, all parts of all six of the territories here in controversy lie more than 300 feet from the line of any electric supplier. Under the provisions of the Act, G.S. 62-110.2(b), Clauses (5) and (10), any "premises" within the territories here in question could, prior to such an assignment of such territory by the Utilities Commission, have been served by any supplier chosen by the user, and service of such "premises" by any other supplier was prohibited. *Utilities Comm. v. Lumbee River Electric Membership Corp., supra.*

[4] Thus, prior to the enactment of G.S. 62-110.2, Woodstock never had any exclusive right to serve any user upon any "premises" within any territory here in controversy. After the effective date of G.S. 62-110.2, and prior to the assignment by the Utilities Commission out of which this appeal arises, Woodstock had no right whatever to serve any such user unless chosen by such user. It obviously follows that the assignment, of which Woodstock here complains, took from Woodstock no right previously enjoyed by it.

Woodstock applied to the Utilities Commission for the assignment to it of the exclusive right to serve every user, i.e., every prospective user, within all of the six territories here in controversy. Thus, the assignment, of which Woodstock complains, does not im-

pose upon it the duty to serve any user Woodstock did not request permission to serve.

It does not appear upon the record before us that any user of any type within any territory here in controversy has demanded service from Woodstock. Thus, we do not have before us, and we do not determine, whether Woodstock, not having been granted its application in its entirety, may be compelled to serve any user which the order of the Commission authorizes Woodstock to serve. Woodstock has not suggested in the record, or in its brief or oral argument before us, that any service right granted it by the order is not presently desired by it, or that to serve any user which the order permits it to serve would be unprofitable or burdensome to Woodstock. Thus, Woodstock has shown no duty imposed upon it by the order amounting to an unconstitutional deprivation of its property or liberty.

The order denies to Woodstock no right to serve any user of electric power, large or small, within any territory here in controversy, which user desires service by Woodstock. Woodstock's sole complaint is that, under the terms of the order, it will not have the right to serve certain, presently hypothetical users who, if and when they come into existence, will not want its services. The right of a potential user of electric power to choose between vendors of such power seeking his patronage is not lightly to be denied. *Blue Ridge Electric Membership Corp. v. Power Co., supra.* Prior to the assignment of which it complains, no statute of this State, no order of any administrative agency of this State and no decision of this Court, conferred upon Woodstock the right to compel such user to choose between using power sold by Woodstock and having no electric service at all. This being true, the assignment in question deprived Woodstock of no property and of no liberty. Since, by the terms of the order of which Woodstock complains, any user in any of the six territories, whose demand for electric power exceeds 400 KW, may choose Woodstock as its supplier, the order confers no monopoly upon VEPCO.

[5] Woodstock does not challenge the constitutional validity of G.S. 62-110.2. On the contrary, this proceeding was initiated by Woodstock's application to the Utilities Commission for an assignment to it of territorial rights pursuant to this statute. One may not, in the same proceeding, seek an advantage which is authorized by a specific statute only and, at the same time, deny the constitutionality of the statute. *Ramsey v. Veterans Commission,* 261 N.C. 645, 135 S.E. 2d 659; *Convent v. Winston-Salem,* 243 N.C. 316, 90 S.E. 2d 879. Woodstock does not here attempt to do so.

[4] There is, therefore, no merit in the contention of the appellants that the order of the Utilities Commission violates their rights under Art. I, § 7 or § 17, of the Constitution of North Carolina, or under the Fourteenth Amendment to the Constitution of the United States.

[6] We turn to the contention that the order of the Utilities Commission exceeds its authority under G.S. 62-110.2. Woodstock contends that subsection (c) of this statute requires that the six territories in question be assigned to one supplier exclusively. Its contention is not that some demand level other than 400 KW should have been used as the dividing line between the exclusive right of Woodstock to serve and the right of the user to select its supplier. Woodstock contends that, under the statute, no user may be permitted to choose between two or more suppliers in the territories in question. To so construe the statute not only deprives VEPCO of a right previously enjoyed by it, but also deprives the potential user of the right he formerly had to choose between willing suppliers. The statute should not be so construed unless this is clearly its intent. *Blue Ridge Electric Membership Corp. v. Power Co., supra.*

The statute provides:

> "(c)(1) In order to avoid *unnecessary* duplication of electric facilities, the Commission is authorized and directed to assign, * * * to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines that the existing lines of two or more electric suppliers are in such close proximity that no substantial avoidance of duplication of facilities would be accomplished by assignment of such area. The Commission shall make assignment of areas in accordance with *public convenience and necessity,* considering, *among other things,* the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers. * * *" (Emphasis added.)

The Utilities Commission has no authority to assign any service right in these six territories, either to Woodstock or to VEPCO, except insofar as that authority has been conferred upon it by this statute. Obviously, it may not make an assignment which is contrary to the provisions of the statute. *Utilities Commission v. Lum-*

bee River Electric Membership Corp., supra; Utilities Commission v. Motor Lines, 240 N.C. 166, 81 S.E. 2d 404. In the *Lumbee River* case, we said of the statute here in question:

> "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. * * * 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."

Woodstock contends that since the proviso in subsection (c) (1) permits the Commission to leave a territory unassigned under specified circumstances, it may not leave a territory unassigned where, as here, those circumstances do not exist. We need not now determine that question, for we agree with the Court of Appeals that the Commission did not leave the six territories here in question unassigned. Each territory, in its entirety, is assigned to Woodstock alone for service of all users whose demands do not exceed 400 KW. Each territory is assigned in its entirety to both Woodstock and VEPCO for the service of users whose demands exceed 400 KW, each such user to have the choice of Woodstock's service or of VEPCO's service. This raises two questions: (1) Can the same territory be treated by the Commission as two service "areas," one including users of a specified type and the other including users of other types? (2) If so, can one of these "areas" be assigned to more than one supplier?

Subsection (c) declares the purpose for which the authority to assign "areas" is conferred upon the Commission. That purpose is "to avoid *unnecessary* duplication of electric facilities." (Emphasis added.) To accomplish this objective, the statute directs the Commission to make assignments "in accordance with public convenience and necessity." In determining whether an assignment is in accord with "public convenience and necessity," the Commission is directed to consider the "adequacy and dependability of the service of electric suppliers." It is also directed to consider "other things."

[7-9] The overriding purpose of this statute is to promote the public interest, not the business of the electric membership cooperative or that of the investor-owned utility. The attraction to a sparsely settled rural territory of industry, which will develop its natural resources and provide opportunity of employment to its residents, is one of the "other things" to be considered by the Commission in

determining what assignment of the territory will be in accord with public convenience and necessity. None of the things which the statute directs the Commission "to consider" is determinative, per se, of the requisite accord between the assignment and public convenience and necessity. The past history of service to residential, agricultural, and small commercial users in adjacent territories is another factor to be considered in this determination. The capital required for supplying electric power to large users in such a territory and the past experience, or lack of experience, of a supplier in serving such users is also a factor which may properly be considered. The demonstrated preference of a substantial class of potential users of electric power for the service of one supplier rather than that of another supplier is also a matter properly to be considered, both for the reason that such users are part of the "public" whose convenience and necessity is to be promoted and for the further reason that, if such potential users are not satisfied with the available service in the territory, they may elect to establish their own plants elsewhere and thus deprive the entire "public" of the desired industrial development of the territory.

[6] Obviously, subsection (c) of G.S. 62-110.2 contemplates the assignment of a territory to a single supplier for all classes of users of electric power, nothing else appearing. However, in our opinion, the statutory direction that the Commission assign service areas "by adequately defined boundaries" does not compel the conclusion that the intent of the Legislature was to require the Commission to choose between (1) jeopardizing the industrial development of a geographic area by assigning it exclusively to an electric membership cooperative, or (2) boxing the cooperative into the narrow strips bordering its existing lines by assigning the territory outside those strips to an investor-owned utility for all types of electric service. In such a situation, we think the statute leaves the Utilities Commission free to promote the public convenience and necessity by treating the geographic area as two separate service areas, the "adequately defined boundary" between which is the level of the user's demand for electric service. Thus, we hold that it is within the statutory authority of the Commission, when the public convenience and necessity so requires, to assign a territory to one supplier for service below a specified level of demand and to another supplier for service above that level of demand.

We also construe subsection (c) of G.S. 62-110.2 to authorize the Commission, having determined, upon sufficient and competent evidence, that the public convenience and necessity would best be pro-

moted by dividing the geographic area into two service areas on the basis of the users' demand levels, to permit, on the basis of public convenience and necessity, an electric membership cooperative, to which the area of the smaller demands has been assigned, to serve a user whose demand is above the division line, if that user desires to become a member of the cooperative and thus to use its service. We do not have before us any question as to the authority of the Commission to require an unwilling cooperative to build the facilities necessary to serve such a user and we express no opinion thereon.

[10] The evidence before the Utilities Commission not having been brought forward into the record on appeal, all of the findings of fact made by the Commission are deemed supported by competent and sufficient evidence. *In Re Housing Authority*, 233 N.C. 649, 65 S.E. 2d 761. These findings are, therefore, binding upon this Court. *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890. The conclusion of the Commission that the public convenience and necessity requires the division of each of these six geographic areas into two service areas based upon the level of the users' demands cannot be deemed arbitrary and capricious in view of these findings of fact.

[11] There remains for consideration the question of whether the facts found by the Commission are sufficient to support the determination that the "boundary" between the two service areas within each of the six geographic areas be the demand level of 400 KW. We conclude that the findings are sufficient to support that determination by the Commission.

The drawing of this division line at the demand level of 400 KW throws into the service area assigned to Woodstock all users whose demands for service are similar to those heretofore served by Woodstock. The findings by the Commission establish the adequacy and dependability of Woodstock's service at those demand levels. Considering the context, it is implicit in the findings that the anticipated mining operations and related industrial activities will require "large blocks of available power," will have "large power requirements" and "heavy electric loads," and that the demand of many of these establishments will exceed 400 KW. Thus, the findings by the Commission are sufficient to support, though not to require, its conclusion that contemplated mining operations and related industrial operations in the geographic area, upon which the contemplated industrial development of the territory depends, will necessitate the use of equipment and installation resulting in a demand above that level. The Commission found Woodstock has never served a demand larger than 400 KW but VEPCO had demonstrated its ability to do

so. Under these circumstances, the Commission's expert choice of the level of 400 KW as the "boundary" between the two service areas cannot be deemed arbitrary or capricious. Consequently, it was error for the Court of Appeals to reverse the order of the Commission.

The judgment of the Court of Appeals is, therefore, reversed and the matter is remanded to that court for the entry of a judgment affirming the order of the Utilities Commission.

Reversed and remanded to the Court of Appeals.

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

STATE OF NORTH CAROLINA v. CHARLES LEON KIRBY

No. 48

(Filed 6 January 1970)

1. Criminal Law § 166— exceptions — assignments of error — the brief

Exceptions and assignments of error not discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Criminal Law § 161— assignments of error — form and sufficiency

Although the circumstances of each case must largely dictate the form of an assignment of error, the assignment should clearly present and specifically point out the alleged error relied upon without the necessity of going beyond the assignment itself to ascertain the question to be debated.

3. Criminal Law § 146; Appeal and Error § 24— rules of the Supreme Court — nature and purpose

The Rules of the Supreme Court have been dictated by experience and stem from a desire to expedite the public business; they are designed to enable the Court to grasp more quickly the questions involved and to help it follow the assignments of counsel more intelligently.

4. Criminal Law § 146; Appeal and Error § 24— Supreme Court — mandatory rules

The Rules of the Supreme Court are mandatory and will be enforced.

5. Criminal Law § 161— assignment of error — form and sufficiency

A mere reference in the assignment of error to the record page where the asserted error may be discovered fails completely to comply with Rules 19(3) and 21, Rules of Practice in the Supreme Court.

6. Criminal Law § 161— broadside assignment of error

An assignment of error based on numerous exceptions and presenting

several questions of law — none of which are set out in the assignment itself — is broadside and ineffective.

7. Criminal Law § 163— assignment of error to the charge

Assignments of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged.

8. Criminal Law § 161— assignment of error to jury selection

Assignment of error to the examination and selection of jurors, which referred to 152 pages of *voir dire* examination without specifying a single instance in which a juror was improperly excused, is ineffective.

9. Criminal Law § 162— assignment of error — restrictions on cross-examination

Assignment of error relating to restrictions placed on defendant's cross-examination of the State's witnesses is ineffectual where it does not contain any question put to any witness on cross-examination.

10. Criminal Law § 169— exclusion of evidence — prejudicial error — failure to show witness' answer

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial; this rule also applies to questions asked on cross-examination.

11. Criminal Law § 127— motion in arrest of judgment — nature and purpose

A motion in arrest of judgment is one made after verdict and to prevent entry of judgment and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record.

12. Criminal Law § 127— arrest of judgment — fatal error on face of record

A judgment in a criminal prosecution may be arrested when, and only when, some fatal error or defect appears on the face of the record proper.

13. Criminal Law § 127— motion in arrest of judgment — allowable in Supreme Court

A motion in arrest of judgment for a defect appearing on the face of the record proper may be made at any time, even in the Supreme Court on appeal; and, in the absence of such motion, the Court *ex mero motu* will examine the record proper for such defect.

14. Criminal Law § 161; Appeal and Error § 26— exception to the judgment — scope of review

An exception to the judgment presents the face of the record for review, but review is ordinarily limited to the question of whether error of law appears on the face of the record and whether the judgment is regular in form.

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

APPEAL by defendant from *Burgwyn, E.J.*, at the 2 December 1968 Session of ONSLOW Superior Court.

Defendant was tried upon a bill of indictment charging that on 20 April 1968 Charles Leon Kirby and Raynaldo P. Trevino, with force and arms, unlawfully, willfully, feloniously, with premeditation and deliberation, and with malice aforethought, did kill and murder Raymond LaCourse while engaged in the perpetration of the crime of robbery. Although there was a joint indictment, the solicitor elected to try the defendants separately.

Defendant was convicted of murder in the first degree with recommendation that his punishment be life imprisonment. Judgment was pronounced accordingly and defendant appealed.

THE STATE'S EVIDENCE

Kirby and Trevino were members of the Marine Corps and stationed at Camp Lejeune near Jacksonville, North Carolina. Raymond LaCourse operated a place of business in Jacksonville known as Ray's Variety Store. He customarily closed his store at 11-11:30 p.m., put his daily receipts in a "brown leather pouch bag," called his wife when he was ready to leave, then left the store, entered his car parked at the rear, and drove home.

Raynaldo P. Trevino testified as a witness for the State. His testimony tends to show that defendant Kirby owned a two-door RT Dodge with a black vinyl top and a yellow bottom. On 20 April 1968 he and defendant rode around together in defendant's car. They passed Ray's Variety Store a time or two, then parked the car a little before 10 p.m. on a dirt road on the edge of a lawn one and a half blocks from the store. They walked by the store two or three times waiting for all the customers to leave. When the customers had gone they went to the rear of the store where a white Oldsmobile belonging to Mr. LaCourse was parked. Kirby instructed Trevino to check the car doors to see if they were unlocked. Trevino did so and found the door on the passenger side locked but the door on the driver's side unlocked. Kirby directed Trevino to enter the car from the driver's side and unlock the door on the other side. Trevino did so and then took a position in front of the car. Kirby took a position on the passenger's side of the car, leaning down while Trevino was stooping down in front. Mr. LaCourse came out of the store, opened the car door on the driver's side and seated himself under the wheel. Kirby then opened the door on the passenger's side, shot Mr. LaCourse and told Trevino to grab the money bag. Mr. LaCourse screamed about the time he was shot. Kirby and Trevino

ran from the scene, entered Kirby's car with Kirby under the wheel and drove to the Second Tank Battalion barracks on the Marine Base where they lived. Kirby had wrapped the money and the pistol in a coat and put it under the car seat. At Kirby's direction, Trevino took it and placed it in Kirby's wall locker. About five minutes later the two of them took the money bag to a rest room where they divided the money. Trevino received about $300 in tens, twenties and ones which Kirby handed to him.

Trevino had requested a fifteen-day leave a week before the robbery, and the morning following the robbery, which was Sunday, Kirby woke Trevino and drove him to the airport in Greensboro. There Trevino took a plane to Chicago and from Chicago to Los Angeles where his mother lived. He stayed in Los Angeles fifteen days, returned to North Carolina by plane and reached Camp Lejeune on 6 May 1968.

Jean LaPlace, a Warrant Officer in the Marine Corps, was living in a trailer directly behind Ray's Variety Store on 20 April 1968. About 10:40 p.m. he heard a shot followed by a loud scream. He ran out on the porch, saw no one, but heard a moaning sound which led him to Mr. LaCourse's car. The door to the driver's side of the car was open, the motor was running, and the lights were on. Mr. LaCourse was lying alongside the car, his head about six feet from the rear door of the store. His eyes were open and he appeared to be in a deep shock. No heartbeat could be detected. Officers were called and in due course an ambulance removed the body from the scene.

On the night of 20 April 1968 at approximately 10:30 p.m., Ronald Parker saw a "yellow RT with a black vinyl top and a bumblebee stripe" parked on Lake Drive at the edge of Roger Daltry's yard about two blocks from Ray's Variety Store. He later saw defendant's car at the courthouse and identified it as the same car.

Donald White rode along Lake Drive on the night of 20 April 1968 and saw a yellow Dodge RT parked in the corner of Roger Daltry's yard. The car had "a yellow bottom and a black vinyl top and a bumblebee stripe, a 1968 model." The following Monday he saw defendant's car at the courthouse and "it looked like the same car."

Marland Sanders, Service Manager at Padgett Motor Company in Jacksonville, had been servicing defendant's car — a yellow RT Dodge with a black vinyl top and a bumblebee stripe, 1968 model. That car was at Padgett Motor Company from Wednesday to Fri-

day (April 17-19, 1968) being serviced. It had three standard tread tires and, on the left rear wheel, one racing slick tire. A blown out tire and a second racing slick tire were in the trunk. The car was picked up on Friday night about 7 p.m.

Bobby Smith, a member of the Marine Corps, borrowed defendant's car about 6 p.m. on 20 April 1968 and returned it about 9 p.m. on that date. It was a yellow and black 1968 RT Dodge and had a racing slick tire on the left rear wheel.

While searching for clues about 2:30 a.m. following Mr. LaCourse's death, officers found a set of tire tracks on the edge of Roger Daltry's yard and on the left side of Lake Drive. These tracks showed one track to have been made by a slick tire. The tracks were photographed and the photographs were offered in evidence to illustrate the testimony of the witnesses.

Five fingerprints and palm prints lifted from the hood and window of Mr. LaCourse's Oldsmobile on the night he was murdered were, in the opinion of experts who testified at the trial, identical with the fingerprints and palm prints of defendant Kirby; and three such fingerprints and palm prints lifted from the Oldsmobile were identical with Trevino's.

DEFENDANT'S EVIDENCE

Charles Leon Kirby, a witness in his own behalf, testified that he had been in the Marine Corps for three and one-half years. On 20 April 1968 he was Corporal of the Guard, Second Tank Battalion and was on duty from 4 to 8 p.m. He loaned his car to Bobby Smith on that date and it was returned to him at approximately 9:15 p.m. in front of the Guard Shack where ten to fifteen other Marines were present. He had previously loaned his car to Raynaldo Trevino, and when it was returned by Bobby Smith at 9:15 p.m. on 20 April 1968, he again loaned it to Trevino at approximately 9:30 p.m. He turned the key over to Trevino in front of the Guard Shack and does not know where Trevino went. Trevino said he was going to the Service Battalion on the other side of the Base to see a friend because he needed some money. He next saw Trevino the following morning at approximately 7:30 a.m. when the Sergeant of the Guard directed his attention to the fact that Trevino had just come through the battalion area stripping the gears of the car. He went to where Trevino had parked the car, got the keys, and criticized Trevino for stripping the gears.

Between 8 p.m. on the night of April 20 and 8 a.m. on the morning of April 21, he (Kirby) did not leave Camp Lejeune. During

those hours he saw various people in the Guard Shack, went to the NCO Club and listened to the band, and listened to music in the Guard Shack where a record player was kept. He went to sleep in the Guard Shack at approximately 11 p.m. on the night of April 20, awoke at 4 a.m. on the morning of April 21 to go on guard duty, and signed in as Corporal of the Guard at that time. He was then on guard duty until 8 a.m. when he signed out as Corporal of the Guard.

Defendant Kirby further testified that there is another 1968 Dodge automobile in Jacksonville just like the one he owns. His car has been serviced by Padgett Motors several times. He had three regular tires and one racing slick tire on his car but noticed one of the regular tires leaking air and replaced it with a second racing slick tire on 19 April 1968. His car therefore had two racing slick tires on 20 April 1968 when he loaned it to Trevino.

He never had any discussion with Trevino about robbing any place. He did not know where Ray's Variety Store was located on 20 April 1968. He has never been on Lake Drive. He has never shared money received from a robbery with Raynaldo Trevino or anyone else. He voluntarily told the officers when questioned that he had loaned his car on the date in question and furnished names of the borrowers. The first time he knew that Trevino had accused him of participating in a robbery and murder was when Trevino testified at the preliminary hearing. The first time he knew he was a suspect was about 26 April 1968 when the officers told him so and stated they were going to call his battalion commander and request permission to lock him and Bobby Smith up for safekeeping until they could get Trevino back from California. He thereupon went to a phone booth and called his mother in Philadelphia and informed her that his car was involved in a serious investigation, that "they" were not being very fair about it, and that they were threatening to lock him up and he would not be able to get a fair trial. The following day he went home to explain the situation and saw Lawyer Coffman while there. At 6 a.m. on Sunday morning, 28 April 1968, he was arrested at his mother's home in Philadelphia. As a result of the advice given him by his uncle and by Lawyer Coffman, he was preparing to return to Camp Lejeune at the time he was arrested. Except for traffic tickets, he has never been convicted of any crime.

Melvin D. Brown testified that on 20 April 1968 he knew Charles Leon Kirby and was familiar with Kirby's 1968 RT Dodge automobile. He was present when the car was returned by Bobby Smith.

On the night of 20 April 1968 defendant relieved Melvin D. Brown twice as Corporal of the Guard — at 4 p.m. on the evening of the 20th and at 4 a.m. on the morning of the 21st. He and defendant were together at the Guard Shack and defendant was waiting for his car to be returned. After his car was returned sometime after 9 p.m. on April 20, they played records in the Guard Shack for awhile, went over to the NCO Club where a band was playing and couples were dancing, and later returned to the Guard Shack. There the witness Brown prepared for bed and engaged in conversation with defendant until he eventually went to sleep. He does not know how long he slept but states definitely that he was with defendant Kirby between 9 p.m. on April 20 and the time he finally went to sleep.

Lt. William H. Smathers, with the Second Tank Battalion at Camp Lejeune, testified that defendant was in his platoon and that defendant's general reputation and character in the Camp Lejeune community are very good.

Percy Kirby, defendant's uncle, testified that while he was in Newark, New Jersey, in April 1968 defendant talked to him by telephone. "He called and told me that there had been a robbery in Jacksonville and the people were trying to railroad him and so he ran and came home. Got afraid and came home. . . . I found out he was arrested in the process of coming back to Camp Lejeune."

Defendant's motion for judgment of nonsuit at the close of all the evidence was denied, and the case was submitted to the jury. From judgment of life imprisonment pronounced upon the verdict, defendant appealed.

Arthur L. Lane, Attorney for the defendant appellant.

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General; Andrew A. Vanore, Jr., Staff Attorney, for the State.

HUSKINS, J.

[1] The record in this case, including the appendix, consists of 352 pages and contains 149 exceptions. These exceptions have been assembled into fifteen groups labeled "Assignments of Error." In the brief filed here, defendant's attorney has discussed only eight groups. All other exceptions and assignments are deemed abandoned. *State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322; Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783. We quote the first assignment as illustrative of the eight groups discussed in the brief:

"GROUP I — EXCEPTIONS NOS. 6 (R p 25), 7 (R pp 25-26), 8 (R p 29), 9 (R p 30), 10 (R pp 31-32), 11 (R p 39), 12, 13 (R p 40), 14 (R pp 40-41), 15 (R p 41), 16 (R p 45), 17 (R pp 45-46), 18 (R p 46), 19 (R pp 46-47), 20 (R p 47), 21, 22 (R p 48), 23 (R pp 50-51), 24 (R p 52), 25 (R p 53), 26 (R pp 55-56), 27 (R pp 56-57), 28 (R p 59), 29 (R pp 61-62), 30 (R p 62), 31 (R pp 64-65), 32 (R p 66), 33 (R p 67), 34 (R pp 68-69), 35, 36 (R p 71), 37, 38 and 39 (R p 72).

"The court below allowed prejudicial, irrelevant and immaterial evidence to be adduced in the presence of the jury to the prejudice of the defendant, and these for the Appellant are EXCEPTIONS NOS. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39."

The second and third assignments are identical with the first except that different numbered exceptions are listed therein.

[2] While the circumstances of each case must largely dictate the form of an assignment of error, the assignment should clearly present and specifically point out the alleged error relied upon without the necessity of going beyond the assignment itself to ascertain the question to be debated. *Gilbert v. Moore,* 268 N.C. 679, 151 S.E. 2d 577; *Long v. Honeycutt,* 268 N.C. 33, 149 S.E. 2d 579. "The assignment must be so specific that the Court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary." *Thompson v. R. R.,* 147 N.C. 412, 61 S.E. 286.

As aptly stated in *McDowell v. Kent,* 153 N.C. 555, 69 S.E. 626, "[w]hat the Court desires, and indeed the least that any appellate court requires, is that the exceptions which are *bona fide* . . . shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance (as the case may be) as shall be necessary to present clearly the matter to be debated."

[3, 4] The Rules of the Supreme Court have been dictated by experience and stem from a desire to expedite the public business. They are designed to enable the court to grasp more quickly the questions involved and to help it follow the assignments of counsel more intelligently. These rules are mandatory and will be enforced. *Walter Corp. v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313; *Pamlico County v. Davis,* 249 N.C. 648, 107 S.E. 2d 306; *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126.

[5] Since the Rules require that assignments of error specifically show within themselves the questions sought to be presented, it follows, therefore, that a mere reference in the assignment of error to the record page where the asserted error may be discovered — defendant's procedure here — fails completely to comply with Rules 19(3) and 21, Rules of Practice in the Supreme Court, 254 N.C. 783. *In Re Will of Adams,* 268 N.C. 565, 151 S.E. 2d 59; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829.

Twenty-two alleged errors in the charge are presented under "Group V" in the following language:

> "GROUP V — EXCEPTIONS NOS. 132 (R p 174), 135 (R pp 175-176), 136 (R p 176), 137 (R p 177), 138, 139 (R p 178), 140 (R p 179), 141 (R pp 179-180), 142, 143 (R p. 180), 144 (R p 181), 144A, 144B (R p 182), 144C, 144D (R p 183), 144E (R pp 183-184), 144F (R p 184), 144G (R p 185), 144H (R pp 185-186), 144I (R p 186), 144J (R p 187), and 144K (R p 188).
>
> "The court erroneously charged the jury as to the facts, law and evidence produced in the case to the prejudice of the defendant, and this for the appellant is EXCEPTIONS NOS. 132, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 144A, 144B, 144C, 144D, 144E, 144F, 144G, 144H, 144I, 144J, and 144K."

[6] This assignment — like a hoopskirt — covers everything and touches nothing. It is based on numerous exceptions and attempts to present several separate questions of law — none of which are set out in the assignment itself — thus leaving it broadside and ineffective. "An assignment which attempts to raise several different questions is broadside." *Hines v. Frink and Frink v. Hines,* 257 N.C. 723, 127 S.E. 2d 509.

[7] Assignments of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736. "When an exception relates to the charge, that portion to which the exception is taken must be set out in the particular assignment of error. A mere reference to the exception number and the page number of the record where the exception appears . . . will not present the alleged error for review. *Pratt v. Bishop,* 257 N.C. 486, 499, 126 S.E. 2d 597, 607; *Darden v. Bone,* 254 N.C. 599, 601, 119 S.E. 2d 634, 636; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95

S.E. 2d 271." *Samuel v. Evans and Cooper v. Evans,* 264 N.C. 393, 141 S.E. 2d 627.

[8] Defendant's next assignment discussed in the brief is labeled "Group XIII." Under it is the following language: "The court below erred in excusing for cause all jurors with conscientious scruples against the imposition of the death penalty and this for the appellant is Exception No. 4. This error is presented and preserved in Exception No. 4 (R p 24)." We turn to page 24 of the record and it directs us to "See Appendix" for "questions propounded and jurors excused for cause as set forth in the Record." Following this lead we successfully locate the "Appendix to Record." It begins on page 198 and continues for 152 pages! Somewhere in those 152 pages, defendant says, prospective jurors were excused for cause on the ground that they had conscientious scruples against the imposition of the death penalty. We are not furnished with the name of a single juror who was thus excused, nor the page where such action is recorded, nor the voir dire examination which produced such result. With respect to each juror allegedly erroneously excused, this examination should have been lifted from the record and quoted in the assignment itself.

This Appendix contains the voir dire examination of *every juror* questioned by the solicitor for the State and by counsel for defendant — including all those excused both peremptorily and for cause by defendant himself! Nevertheless, we have tediously examined this entire 152-page Appendix, and if a single juror was excused for cause in violation of the principles enunciated in *Witherspoon v. Illinois,* 391 U.S. 510, 20 L. ed. 2d 776, 88 S. Ct. 1770, we have been unable to find it. This assignment is overruled.

Eight exceptions, collected in Group XV, relate to rulings of the trial court which defendant contends "unreasonably restricted the defendant's right to cross examine the State's witnesses to the prejudice of the defendant. This error is presented and preserved under the defendant's Exceptions Nos. 49, 50 (R p 83), 51 (R p 88), 52 (R p 89), 53 (R p 91), 54 (R p 92), 55 (R pp 92, 93), 56 (R p 93)."

[9, 10] This ineffectual, broadside assignment does not comply with Rules 19(3) and 21, Rules of Practice in the Supreme Court, in that it does not contain any question put to any witness on cross examination. We must go beyond the assignment and discover it for ourselves. Furthermore, the record does not show what the witness would have answered had he been permitted to do so. Therefore, it is impossible for us to know whether the rulings were prej-

udicial or not. *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342. Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross examination. *State v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340; *State v. Poolos, supra; State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *State v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398.

Finally, defendant moved in arrest of judgment and assigns as error the denial of his motion and the entry of judgment. No authorities are cited in the brief to support the motion.

[11-13] "A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record." *State v. McCollum,* 216 N.C. 737, 6 S.E. 2d 503. In a criminal prosecution, however, judgment may be arrested when — and only when — some fatal error or defect appears on the face of the record proper. *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681; *State v. Eason,* 242 N.C. 59, 86 S.E. 2d 774; *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297. When based on such defect, the motion may be made at any time, even in the Supreme Court on appeal; and, in the absence of such motion, the Court *ex mero motu* will examine the record proper for such defect. *State v. Fowler,* 266 N.C. 528, 146 S.E. 2d 418; *State v. Brown,* 264 N.C. 191, 141 S.E. 2d 311; *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318; *State v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781. The face of the record reveals no fatal defect; consequently, denial of the motion in arrest of judgment was proper.

[14] Defendant's exception to the judgment presents the face of the record for review. *In Re Wallace,* 267 N.C. 204, 147 S.E. 2d 922; *Vance v. Hampton,* 256 N.C. 557, 124 S.E. 2d 527. But review is ordinarily limited to the question of whether error of law appears on the face of the record and whether the judgment is regular in form. *State v. Mallory,* 266 N.C. 31, 145 S.E. 2d 335, 18 A.L.R. 3d 1340, cert. den., 384 U.S. 928, 16 L. ed. 2d 531, 86 S. Ct. 1443. When no error appears on the face of the record proper, the judgment will be affirmed. *Seibold v. Kinston,* 268 N.C. 615, 151 S.E. 2d 654. We have searched the record for prejudicial error without success.

Defendant's failure to perfect his appeal in conformity with the rules has necessitated a judicial Easter egg hunt. No error of law appears on the face of the record proper, and our reluctant voyage

through the remainder of the record has uncovered no error which would require a new trial. The evidence of defendant's guilt is plenary and convincing. In the trial below we find

No error.

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

ANNA BELLE WIGGINS v. JAMES PIVER

No. 51

(Filed 6 January 1970)

1. Physicians and Surgeons § 11— degree and application of skill

A physician or surgeon must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess, and even though he possessees such qualifications, he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case.

2. Physicians and Surgeons §§ 15, 17; Evidence § 50— malpractice — expert medical testimony — "same locality" rule — "similar locality" rule

In this action for damages allegedly resulting from defendant surgeon's negligent surgical treatment of plaintiff in a Jacksonville, N. C., hospital, testimony by plaintiff's expert medical witness relating to good surgical practice for a simple operative procedure, closing shallow incisions after removing a small amount of tissue, was not rendered incompetent because the witness was not familiar with the actual practice in Jacksonville, if the witness was familiar with practice in similar communities around Winston-Salem, the "same locality" rule no longer being the standard by which to judge a doctor's procedures.

ON petition for certiorari, this Court ordered the appeal docketed in the Supreme Court without prior review by the Court of Appeals.

The plaintiff appealed from judgment of compulsory nonsuit entered by Cahoon, J. at the March 31, 1969 Civil Session, Onslow Superior Court.

The plaintiff, Mrs. Anna Belle Wiggins, instituted this civil action against Dr. James Piver. The summons was issued and the complaint was filed on March 30, 1966. In the complaint, the plaintiff alleged that on January 25, 1965, on the advice of her family physician, Dr. Heath, she entered Onslow Memorial Hospital, Jack-

sonville, North Carolina, where she engaged the defendant, Dr. James Piver, as her surgeon to perform biopsies on her legs and right arm. The defendant performed the surgical procedures which "consisted of a linear incision . . . on the surface of each leg and . . . on the right arm. The surgeon removed certain subcutaneous tissues and one possible muscle" for the purpose of having a pathologist determine whether malignancy existed.

The plaintiff, on information and belief, alleged the defendant failed and neglected to use due diligence and skill in the post-surgical treatment and was also negligent in that:

"(a) He negligently failed to follow proper procedures to keep the incisions made by him asceptic and caused or permitted the incision made in the plaintiff's right leg to become infected.

(b) He negligently failed to use proper procedures in closing the incisions made by him for that he failed to bring the edges of the incision into close apposition and failed to properly align the edges of said incisions through the use of proper techniques of suturing.

(c) He negligently failed and neglected to properly stitch or suture said incisions when he knew or in the exercise of due care should have known that the failure to properly stitch or suture said incisions would cause said incisions to heal in such a manner as to leave excessive, unnecessary and unsightly scarring."

The plaintiff further alleged that as a result of the defendant's negligent operation and treatment, the plaintiff has and will continue to have unsightly scars on her legs and arm which will continue to cause embarrassment for the rest of her life. She further alleged that the incisions became infected and she suffered pain and discomfiture during the healing process. The plaintiff testified:

"At that time (the day of discharge from the hospital) my legs were swollen pretty bad and paining pretty bad. There was drainage from both legs — it was yellow looking drainage. After leaving the hospital, I went home. There was a lot of pain in my legs. There were two stitches in each leg and one stitch in my arm. Approximately two weeks after leaving the hospital the stitches were removed by Dr. Heath. . . . The first time I went to Dr. Heath to have the stitches removed after leaving the hospital, he did not remove them because he said the infection was still too bad in my legs to remove the stitches. . . .

* * *

> After the stitches were removed, the incisions were red looking and they had wide gaps in them. Because they looked so bad, I wore patches over the incisions off and on for about a year. I didn't go out as much in public because I hated to wear the patches over my legs and they looked bad if I uncovered them. . . ."

The plaintiff called the defendant as an adverse witness. Dr. Piver admitted he employed two sutures in each incision. "The sutures were pulled tight". On cross examination by his own counsel, Dr. Piver was permitted to testify over plaintiff's objection that his procedures in performing the biopsies and in closing the incisions with two sutures was in accordance with approved surgical practices in Jacksonville.

The plaintiff called Dr. Julius Howell of Winston-Salem as an expert witness. Upon inquiry as to his qualifications, he testified he did his undergraduate work at Wake Forest College. In 1943 he received his medical degree at the University of Pennsylvania. Following graduation, he was admitted to practice his profession in North Carolina. He served one year of internship and one year of general surgery at the University of Pennsylvania. Then followed one year of pathology residency training and two years of nose and throat residency at the Baptist Hospital, Winston-Salem. Then followed one year of plastic surgery training at Cornell University Medical School and Hospital in New York City. He is a member of the American Board of Plastic and Reconstructive Plastic Surgery; the American, state and local medical societies; the American and the Southwest Plastic and Reconstructive Plastic Surgery Associations; the American College of Surgeons; the Research Council of Plastic Surgery; and the American Foundation of Plastic and Reconstructive Plastic Surgery. Since 1949, he has been on the teaching staff of Bowman Gray School of Medicine. The court found the witness to be an expert.

In June, 1965, Dr. Howell examined the plaintiff. She gave a history of the biopsy surgical procedures performed by Dr. Piver. She explained the infections following the surgery and the pain incident thereto. The witness examined the scars resulting from the biopsies. On the right leg the scar measured 1-¼" in length and 1/5" in width. A scar of similar length on the left leg measured ¼" in width. The witness further testified that tightly drawn sutures compress an incision to such an extent as to block out fresh blood supply and prevent blood from reaching all parts of the incision. The lack of fresh blood supply tends to produce atrophy and to permit infec-

tion. He testified in his opinion two sutures were insufficient properly to close the two incisions in the legs.

Plaintiff's counsel proposed a long hypothetical question based on the premise the facts be found as recited in the question and called for an opinion of the witness (if he had one satisfactory to himself) as to whether procedures followed would conform to good surgical practice in Jacksonville, North Carolina or in similar communities. The witness stated he was not familiar with the actual practice in Jacksonville, but he was familiar with practice in similar communities around Winston-Salem. He offered to testify that in such similar areas the procedure described in the hypothetical question would not be according to approved practice. The witness, in addition to the recitals in the hypothetical question, had the benefit of an actual examination of the scars.

In sustaining the defendant's objection to the question and the proposed answer, the trial court acted upon the assumption that the law required the expert to be familiar with the locality where the alleged improper practices occurred; and that one who testifies as to his knowledge of similar localities would not qualify him to give an expert opinion.

The plaintiff testified Dr. Piver closed each incision on her legs by using two sutures. Dr. Piver, on his adverse examination, was asked this question: "(I)n order to hold the edges of the wound in that position, were these sutures pulled tight? A. Yes sir."

Dr. Howell was asked this question: "Doctor, do you have an opinion satisfactory to yourself as to whether or not sutures placed in the manner in which these sutures were placed would retard healing and if so, why? (Answer in the absence of the jury) A. It would retard healing for the reason that it would cause compression of the tissues which would tend to block out the blood supply coming into the edges of the skin and this would therefore cause the blood supply to be diminished, and if enough pressure is exerted, that would cause some death of some tissue right at the edge of the wound; it would cause some red color and if the wound got infected, it would be hard for the blood supply to get in to counter the infection." The foregoing question and answer were excluded upon defendant's objection.

At the conclusion of the plaintiff's evidence, the court, on defendant's motion, entered judgment of involuntary nonsuit. The plaintiff appealed, assigning errors.

Aycock, LaRoque, Allen, Cheek and Hines by C. B. Aycock for the plaintiff.

E. W. Summersill and Marshall & Williams by Alan A. Marshall for the defendant.

HIGGINS, J.

The plaintiff seeks to hold the defendant financially responsible for injury and damage she alleges resulted from his negligent surgical treatment. She does not allege a lack of professional learning, skill or ability to perform the operation. *Starnes v. Taylor,* 272 N.C. 386, 158 S.E. 2d 339; *Belk v. Schweizer,* 268 N.C. 50, 149 S.E. 2d 565; *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861; *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762; *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356. She does allege, however, the defendant was negligent: (1) By attempting to close incisions of such length (1-¼" and 1-½") by the use in each instance of only two sutures; (2) By drawing the sutures too tightly, thus impeding the flow of blood necessary to heal the incisions and to prevent infection; and (3) By inserting the sutures too far from the edges of the skin, resulting in excessive scarring. *Watson v. Clutts,* 262 N.C. 153, 136 S.E. 2d 617.

The operative procedures here involved would seem to be as simple and uncomplicated as any cutting operation one may imagine. Reason does not appear to the non-medically oriented mind why there should be any essential differences in the manner of closing an incision, whether performed in Jacksonville, Kinston, Goldsboro, Sanford, Lexington, Reidsville, Elkin, Mt. Airy, or any other similar community in North Carolina.

In this connection, it may be observed that while the defendant was on the stand (as an adverse witness), his own counsel, over objection, was permitted to ask the question and receive the answer here quoted: "State whether or not you followed these procedures, the ordinary and customary and accepted procedures, in such cases. A. Yes, sir. . . . The surgery that I did on Mrs. Wiggins was identical to the surgery that I do daily and prior to her operation I had done daily and since her operation have done daily. This procedure is in accordance with good medical practice. I followed the procedures required by good medical practice. . . ."

The witness' answer as to the ordinary, customary and accepted procedures was not limited to Jacksonville or even to similar areas. However, the defendant, by successful objection, excluded testimony of Dr. Howell because he was not familiar with Jacksonville.

Unless the trial court committed error in excluding the testimony of Dr. Howell, the judgment of nonsuit should be sustained. The picture changes, however, if Dr. Howell's testimony is added to the other evidence. *Koury v. Follo,* 272 N.C. 366, 158 S.E. 2d 548. Hence, the admissibility of Dr. Howell's testimony is crucial and determinative of this appeal.

[2] The question of law presented simply stated is this: Was Dr. Howell's testimony on a simple operative procedure (closing shallow incisions after removing a small amount of tissue) rendered incompetent because he was not familiar with the practice in Jacksonville. He did have knowledge of these procedures in similar localities around Winston-Salem. The trial court excluded the testimony, adhering strictly to the "locality rule".

[1] Our cases hold that a physician or surgeon must "possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess". The rule stated refers to the minimum qualifications a physician or surgeon must have in order to qualify him to render personal services in his field. The cases further hold that even though the physician or surgeon possess the qualifications, he still must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case. *Starnes v. Taylor, supra,* and cases therein cited.

The "locality rule" (never recognized in England) had its origin in the very old and far away days when there were many little institutions which called themselves medical schools. Students were admitted who could show a high school diploma or furnish a certificate from a school principal that the bearer had completed the "equivalent" of a high school course of study. At the end of the course, he was given an M.D. degree. Passing the licensing board was in the nature of a formality. In many rural communities, ever thereafter the doctor was on his own. Frequent refresher courses, now generally attended, were unknown. The practice in the earlier days is described in the concurring opinion in *Sims v. Ins. Co.,* 257 N.C. 32, 125 S.E. 2d 326.

Now medical schools admit only college graduates. They are equipped to the highest point of efficiency and turn out doctors who must continue their studies by internships and by actual experience under expert supervision. They continue to study, continue to attend refresher courses, and have access to journals which afford them opportunity to keep them current in the latest treatments and procedures.

In the old days, there was some reason for the "locality rule" as the standard by which to judge a doctor's procedures. Then, except for a few stops on the railroads, the quickest mode of travel was by "coach and four". Forty miles between sun up and sun down was a full day's travel — less than 50 minutes will suffice today. A doctor's practice was limited to a small area. Because of the vast changes, some of which are touched on here, the reason for the "locality rule" has ceased to exist. Objections to the rule are being made from all sides. Here is a quotation from Prosser on Torts, 3d Ed., Negligence, Standard of Conduct, p. 166 (citing many cases):

> "Allowance also has been made for the type of community in which the physician carries on his practice, and for the fact, for example, that a country doctor cannot be expected to have the equipment, facilities, libraries, contacts, opportunities for learning, or experience afforded by large cities. The older decisions sometimes stated this as a standard of the 'same locality;' but this is now quite generally recognized as too narrow. Later cases expanded it to speak of 'the same or similar localities,' thus including other towns of the same general type. The present tendency is to abandon any such formula, and treat the size and character of the community, in instructing the jury, as merely one factor to be taken into account in applying the general professional standard."

The following is from N. C. L. Rev., Vol. 46, April, 1968: "Most courts have realized that the 'same' locality is too narrow, and have extended the rule to include 'same or similar' localities." (Citing many cases) Northwestern L. Rev., Vol. 60, 1965-66, speaking of the "locality rule" says: ". . . Even at its inception, some courts rejected this strict application of the locality rule and held that the underlying policy would still be observed if a doctor from a *similar* community could testify as to the proper standard of care. The insurmountable handicap which confronted a plaintiff in a community with only one doctor was an important factor in early rejection of the strict rule. * * * Most courts which originally embraced the *same* locality principle have now abandoned it in favor of the *similar* locality view." (Citing many cases) Stanford L. Rev., Vol. 14, Dec. 1961-July 1962, says: ". . . In recent years changes in the rural-urban population pattern of the country and changes in medical education, training, and communication have led to greater standardization of medical practices. Thus, even in cases involving the general practice of medicine, many courts adhering to the 'same locality' rule have extended the geographical area within the defined

locality; other courts have adopted a 'similar locality' rule; and others have adopted a standard of reasonable care under the circumstances, with defendant's locality as one of the circumstances. . . ." (Citing many cases)

The purpose of the foregoing citations is two-fold: (1) To disclose the reason for the "same locality" rule; and (2) To demonstrate that under modern conditions the rule has lost all potency. Rules of evidence are creatures of experience and are never frozen. Experiences and conditions change and consequently require changes in the practical methods of dealing with them, even in the courts. Usually changes are gradual and amendments and exceptions to rules take care of them.

The idea of changes to meet changed conditions is not new in this Court. On April 4, 1905, Justice Connor, in *Ins. Co. v. Railroad*, 138 N.C. 42 (original 33 Reprint) discussed the subject:

> ". . . The question is of first impression in this State. We have given it careful and anxious consideration, desiring to make no departure from the well-settled principles of the law of evidence or the decisions of this Court, at the same time recognizing and keeping in view the duty of the Court to make diligent effort to find in those general principles such safe and reasonable adaptability that in the changing conditions of social, commercial, and industrial life there may be no wide divergence in the decisions from the standards by which men are guided and controlled in important practical affairs. The law of evidence, based upon certain more or less well-defined general rules, evolved from experiencee, has been molded by judicial decision and legislative enactment into a system having for its end and purpose, and believed to be adapted to, the discovery of truth in judicial proceedings. . . ."

[2] We now hold the trial court committed error in excluding the testimony of Dr. Howell and consequently in entering the judgment of nonsuit. The judgment is set aside. The case is remanded to the Superior Court of Onslow County for jury trial.

Reversed and remanded.

STATE OF NORTH CAROLINA v. SAMUEL NICK MOORE

No. 29

(Filed 6 January 1970)

1. Criminal Law § 178— homicide — motion for nonsuit — decision on former appeal — law of the case

Defendant's motion for nonsuit in his second trial for first degree murder must be denied where the Supreme Court determined on appeal from defendant's first trial for the same crime that his motion for nonsuit was properly denied and the evidence at the second trial did not differ materially from that of the first trial.

2. Criminal Law § 34; Homicide § 15— prior conduct and attitude toward deceased

In this prosecution of defendant for first degree murder of his wife, the trial court properly admitted testimony tending to show defendant's conduct and attitude toward his wife on numerous occasions prior to her death.

3. Criminal Law §§ 50, 65, 71; Homicide § 15— testimony that person was angry, unconscious, or nervous

In this prosecution of defendant for first degree murder of his wife, the trial court did not err in the admission of testimony (1) that failure of defendant's wife to say anything to defendant on an occasion about three months before her death "made him mad," and that he kept hitting her until she fell to the floor "unconscious," (2) that a witness saw defendant at a county fair standing about twenty-five feet from his wife, who was lying "unconscious" on the ground, her blouse torn and her body saturated with water from the waist down, and (3) that defendant appeared "nervous, like he was emotionally upset" when he brought his child to the home of his mother-in-law on the morning of the homicide, instantaneous conclusions of the mind as to the appearance, condition or mental or physical state of persons being matters of fact which are admissible in evidence.

4. Homicide §§ 17, 18— evidence of ill will toward member of deceased's family

In this prosecution of defendant for first degree murder of his wife, the trial court did not err in the admission of testimony by defendant's mother-in-law that when she went to defendant's trailer to see about her daughter shortly after defendant had beaten her a few months before the homicide occurred, defendant told her it was none of her business, that she was nothing and deceased was nothing, and that she should get out of the trailer, defendant's statements being directly related to defendant's abuse of his wife, and evidence of defendant's ill will toward a member of the family of deceased being admissible to show malice, premeditation or general state of mind.

5. Criminal Law § 43; Homicide § 20— photographs of body of deceased and place where found

In this prosecution of defendant for first degree murder of his wife, the trial court did not err in the admission of properly identified photographs

showing the body of deceased and its location in defendant's trailer for the purpose of illustrating the testimony of witnesses who saw the body before it was moved.

6. Criminal Law § 128— mistrial — unsolicited testimony by State's witness — other crimes — prejudice removed by court's instructions

In this prosecution of defendant for first degree murder of his wife, the trial court did not err in failing, on its own motion, to declare a mistrial when, in response to questions by the solicitor as to whether defendant had made a statement to two State's witnesses concerning what he would do to his wife if she left him, one witness stated on four occasions and another on one occasion that defendant said that "he had killed one person," where the trial judge on each occasion struck the witness' unresponsive answer from the record and instructed the jury to disregard the answer and not consider it for any purpose, the statement containing no suggestion that the homicide was the result of a criminal act or that defendant had been prosecuted for it, there being no subsequent events which tended to emphasize such inconclusive testimony, and defense counsel having made no motion for mistrial.

7. Criminal Law § 128— mistrial on court's own motion — failure of defendant to move for mistrial

In this prosecution for the capital offense of first degree murder wherein the trial court, upon objections by defendant, struck unresponsive answers given by two State's witnesses from the record and instructed the jury not to consider them for any purpose, and defendant made no motion for mistrial but elected to proceed with the trial and take his chances with the jury then empaneled, defendant may not successfully contend that the court, on its own motion, should have declared a mistrial.

8. Criminal Law § 128— mistrial in capital case — consent of accused

It is only in cases of necessity in attaining the ends of justice that a mistrial may be ordered in a capital case without the consent of the accused.

MOORE, J., did not participate in the consideration or decision of this case.

APPEAL by defendant under G.S. 7A-27(a) from *Fountain, J.*, May 1969 Session of BEAUFORT.

Defendant's wife, Joanne Woolard Moore, was killed on 7 March 1968 by the discharge from a shotgun in his hands, and he was indicted for her murder. At the August 1968 Session, the jury convicted defendant of murder in the first degree and recommended a sentence of life imprisonment. From judgment pronounced upon that verdict he appealed, and we ordered a new trial for errors in the judge's charge. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652. Defendant was retried at the May 1969 Session. Again the verdict was guilty of murder in the first degree with the recommendation that the punishment be imprisonment for life. Now, for the second time,

defendant appeals from a mandatory life sentence. He assigns as error, *inter alia,* the overruling of his motion for nonsuit, the admission of certain evidence, and the failure of the court, *ex mero motu,* to declare a mistrial because of unsolicited statements made by two State's witnesses.

Robert Morgan, Attorney General, and Ralph Moody, Deputy Attorney General, for the State.

Leroy Scott and Carter & Ross for defendant appellant.

SHARP, J.

The evidence introduced at the first trial is summarized in our former opinion. *State v. Moore,* 275 N.C. 198, 201-205, 166 S.E. 2d 652, 654-657. At the second trial, defendant added to his testimony some details which he had formerly omitted, but the evidence for both State and defendant was substantially the same as that previously offered. Defendant concedes that his wife was killed by a blast from a shotgun he was carrying. It is his contention that the gun was discharged accidentally.

In brief summary, the State's evidence tended to show: For approximately three and one-half years prior to her death, on various occasions, defendant had beaten his wife into unconsciousness, intentionally inflicted personal injuries upon her, and had otherwise abused her. He had threatened to kill her if she ever left him. At the time of her death her face was still bruised and swollen from a beating he had given her several days earlier. On the morning of her death he telephoned his mother-in-law, Mrs. Woolard, and told her to come over and get the baby; that he was going to kill himself and Joanne. About twenty minutes later, defendant arrived at Mrs. Woolard's home with the baby. Although the day was cold and windy, the child was without wraps. Defendant's hands were trembling, and he appeared nervous and upset. He told Mrs. Woolard that he was going back to talk to Joanne; that every time he tried to talk to her the baby cried. He left, and Mrs. Woolard tried to telephone her daughter. Receiving no answer, she went to the trailer. There she found her daughter's body lying in a pool of blood. The right side of her face and head had been blown away.

Defendant's evidence tended to show: He had never abused or injured his wife. On 7 March 1968 her face was bruised and swollen, but these injuries had occurred when she fell out of bed the preceding Sunday. Before breakfast, on the morning of her death, she had told him that she had talked to a lawyer; that her mother wanted

her to divorce him and had taken pictures of her face to be used as evidence; that she was supposed to tell her mother that day what she intended to do about the divorce, but she did not then know what her decision would be. Defendant told her to make up her mind and let him know, that in the meantime he would be at his mother's. Joanne, who was then preparing breakfast, asked him whether he wanted sausage or bacon, and he specified sausage. He then collected some clothes, his rifle and shotgun, and started with them to his truck. On the way out he shifted the gun and rifle from one arm to the other in order to reach for a pack of cigarettes on a table, and the gun — which he did not know was loaded — accidentally discharged. When he saw Joanne lying on the floor "with her head half blown off," he called Mrs. Woolard to come for the baby; he did not tell her that he had shot Joanne. When Mrs. Woolard did not come he carried the child to her home. She asked him if he had beaten Joanne, and he said NO. When she asked him where he was going he said, "Well, I guess I'm going to the penitentiary, if I don't kill myself." He then borrowed some money from his brother and drove to West Virginia, but the next day returned to Beaufort County and surrendered to the police.

[1] The decision on the first appeal was that defendant's motion for nonsuit was properly overruled. Since the second-trial evidence did not differ materially from that of the first trial, the same ruling upon the motion for nonsuit was required. *State v. Peterson,* 226 N.C. 770, 40 S.E. 2d 362.

[2] Thirteen of defendant's assignments of error relate to the admission of testimony tending to show defendant's conduct and attitude toward his wife on numerous occasions prior to her death. The competency of this evidence was established by our opinion in the former appeal, and no further discussion of it is required. *State v. Moore, supra* at 206-207; *State v. Kincaid,* 183 N.C. 709, 110 S.E. 612; *State v. Turner,* 143 N.C. 641, 57 S.E. 158.

[3] Assignments of error 1, 19-22, 29, and 30 are directed (1) to Clarence Bullock's testimony that Joanne's failure to say anything to defendant on an occasion about three months before her death *made him mad,* and that he kept hitting her until she fell to the floor *unconscious;* (2) to Patrolman Boykin's statement that in October 1965 at the Beaufort County Fair he had seen defendant standing about twenty-five feet from Joanne, who was lying *unconscious* on the ground, her blouse torn and her body saturated with water from the waist down; and (3) to Mrs. Woolard's statement that defendant appeared *nervous, like he was emotionally upset,* when he brought

his child to her home on the morning of the homicide. All this evidence was competent. The rule is stated in *State v. Leak,* 156 N.C. 643, 647, 72 S.E. 567, 568:

"The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence.

"A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation — a series of things — go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature. . . ." *Accord, State v. Brown,* 204 N.C. 392, 168 S.E. 532; *Moore v. Insurance Co.,* 192 N.C. 580, 135 S.E. 456; *State v. Walton,* 186 N.C. 485, 119 S.E. 886; Stansbury, N. C. Evidence § 129 (2d ed., 1963); 32A C. J. S. *Evidence* §§ 546(12), (23); 31 Am. Jur. 2d *Expert and Opinion Evidence* §§ 96, 162 (1967).

[4] Assignments of error 3 and 4 relate to Mrs. Woolard's testimony that on the night of 23 December 1967 she went to defendant's trailer and found her daughter, Joanne, in bed, her face and arms swollen and bruised; that defendant told her it was none of her g - - d - - - business and she didn't have any g - - d - - - business being there; that she was nothing and Joanne was nothing; and that she should get out of the g - - d - - - trailer. Defendant contends that these statements, made "on another occasion," were unrelated to the case and prejudicial to him. This contention will not withstand scrutiny. The statements (according to the State's evidence) were made by defendant to his mother-in-law, who had come to the trailer to see about her daughter shortly after defendant had beaten her. The statements were not unrelated utterances evidencing only defendant's ill will toward his mother-in-law. On the contrary they were directly related to defendant's abuse of his wife. In a prosecution for homicide "[e]vidence of previous difficulties between the accused and a third person is admissible where properly connected with the victim and offense. . . . [E]vidence of

prior difficulties between accused and a third person is admissible to show malice, premeditation, or general state of mind, *as is evidence of accused's ill will toward a member of the family of deceased.* . . ." 40 C. J. S. *Homicide* § 209 (1944) (Emphasis added.)

[5] Assignments of error 10, 11, and 23-27 are based upon exceptions to the admission of properly identified photographs showing the body of the deceased and its location in the trailer. These photographs were offered and admitted to illustrate the testimony of the witnesses who saw the body before it was moved. At the time of the introduction of the pictures, and again in his charge, the judge carefully instructed the jury that the photographs were not substantive evidence, that they had been admitted solely for the purpose of illustrating the testimony. The competency of these photographs for that purpose is well established. *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329; *State v. Lentz,* 270 N.C. 122, 153 S.E. 2d 864; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Butler,* 269 N.C. 483, 153 S.E. 2d 70.

[6] Defendant argues strenuously that he is entitled to a new trial because the court failed to declare a mistrial on account of "the situation that occurred" during the direct examination of Mr. and Mrs. Clarence Bullock, witnesses for the State. This "situation" is the subject of assignments of error 31-35. The circumstances which created it were as follows:

When Bullock was asked if he had ever had a conversation with defendant with reference to what defendant would do if his wife ever left him, Bullock replied, "Nick had said he had killed one person. . . ." Defendant's counsel interrupted this statement with an objection which the court promptly sustained. In addition, the court instructed the jury to disregard the witness' answer and not to consider it for any purpose whatsoever. After instructing Bullock not to "go into that" the solicitor again asked him whether defendant had made any statement concerning his wife. Again Bullock replied, "He stated he had killed one person and he . . . ." Defendant's motion to strike was allowed, and Judge Fountain repeated his instruction that the jury disregard the witness' answer. He then explained the solicitor's question to the witness, telling him to answer that question and to say no more. Once again Bullock said, "He made the statement that he had killed one person . . . ." Judge Fountain immediately reinstructed the jury to disregard the statement, reminded Bullock that he had twice previously stricken that assertion from the record, and asked him if he understood the ruling. Bullock replied that he did. The solicitor then said: "Mr. Bullock,

don't reply and make any statement concerning any other person other than defendant and his wife, Joanne. Leave out any reference to anything else. Did the defendant, Samuel Nick Moore, make a statement to you concerning what he would do to his wife if she left him?" The witness answered YES. The next question, "What did he say?", for the fourth time brought the reply, "He said he had killed one person and . . . ."

For the fourth time Judge Fountain instructed the jury to disregard the witness' answer. He then told Bullock that disciplinary action would be required if he persisted in violating the court's ruling. Judge Fountain also informed the solicitor that, "if it happened again," he would require Bullock to leave the stand. Thereupon the solicitor asked Bullock if he could leave out the first part of any statement which defendant had made to him and report only what defendant said concerning his wife. The reply was, "I don't know how to explain it Sir." The matter was not pursued further with Bullock.

As the State's next and last witness, Mrs. Clarence Bullock, who had not been in the courtroom when her husband was testifying, was called to the stand. She testified that a day or two before Mrs. Moore's death she and her husband had had a conversation with defendant about his wife. Asked to repeat the conversation, she — as her husband had done — began with the statement, "He said that he had killed one person . . ." The judge himself interrupted her and instructed the jury to disregard the statement completely and not to consider it for any purpose whatsoever. When the solicitor asked her if she could omit everything defendant had said about what he had done to anybody else and confine her testimony to what he had said about his wife, Mrs. Bullock's reply was, "I just know only what he said. I don't know how to put it unless I say it." She was not examined further.

In support of his contention that the prejudicial effect of the Bullocks' repetitive statement was not subject to correction, counsel for defendant cite *State v. Aycoth*, 270 N.C. 270, 154 S.E. 2d 59. Aycoth appealed from a conviction of armed robbery. At his trial, a deputy sheriff was asked if he knew who owned the automobile which was in the defendant's possession at the time of his arrest. The reply was that at the time the defendant had been arrested on another charge he had said it was his car. The officer then added, "His wife asked me to go search the car and see if I could find some article that was left in the car sitting in the yard *when he was indicted for murder.*" (Emphasis added.) Defendant's objection and

motion to strike were allowed, and the court instructed the jury not to consider what defendant's wife had said. Thereafter defendant moved for a mistrial, and this motion was denied. In awarding a new trial this Court said: "The unresponsive statement of Fowler informed the jury that Aycoth had been *indicted* for murder. . . . *Subsequent incidents* tend to emphasize rather than dispel the prejudicial effect of Fowler's testimony. . . . Being of the opinion the incompetent evidence to the effect Aycoth had been or was under indictment for murder was of such serious nature that its prejudicial effect was not erased by the court's quoted instruction, we are constrained to hold that Aycoth's motion for a mistrial should have been granted." *Id.* at 272-273, 154 S.E. 2d at 61. (Emphasis added.)

Material differences distinguish this case from Aycoth's. In the latter, the unresponsive statement was that the defendant had been *indicted* for murder. Here the statement was only that defendant had "killed one person." Was the killing accidental, in self-defense, or felonious? The statement contained no suggestion that the homicide was the result of a criminal act or that defendant had been prosecuted for it. Furthermore, no *subsequent events* tended to emphasize this inconclusive testimony that defendant "had killed one man." We do not, therefore, deem this evidence so inherently prejudicial that its initial impact — whatever it was — could not have been erased by the judge's prompt and emphatic instructions that the jury should not consider the testimony for any purpose whatsoever. As Devin, J. (later C.J.), said in *State v. Ray,* 212 N.C. 725, 729, 194 S.E. 482, 484, "[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so. *Wilson v. Mfg. Co.,* 120 N.C. 94, 26 S.E. 629." *Accord, State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216; 2 Strong, N. C. Index 2d *Criminal Law* § 96 (1967).

[7, 8] At his trial defendant was represented by competent counsel of his own choosing. They evidently thought that any prejudice to defendant from the Bullocks' statement had been removed by the action of the judge in striking their unsolicited statements and by his instructions to the jury to disregard them. Unlike defense counsel in *Aycoth,* defendant's attorneys made no motion for a mistrial. Defendant elected to proceed with the trial and to take his chances with the jury then impaneled. Under the circumstances here disclosed he may not successfully contend that the court, of its own

motion, should have declared a mistrial. *Allen v. Garibaldi,* 187 N.C. 798, 123 S.E. 66. Indeed, without defendant's consent or a motion by him, had the court declared a mistrial, *ex mero motu,* at the onset of the next trial the judge would most certainly have been confronted with defendant's plea of former jeopardy. Annot., 63 A. L. R. 2d 782, 791-793 (1959); 22 C. J. S. *Criminal Law* § 261 (1961). "It is only in cases of necessity in attaining the ends of justice that a mistrial may be ordered in a capital case without the consent of the accused." *State v. Harris,* 223 N.C. 697, 700, 28 S.E. 2d 232, 235; *accord, State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243; 3 Strong, N. C. Index 2d *Criminal Law* § 128 (1967).

A careful examination of the record and of all defendant's assignments of error, including those to the charge, discloses no reason to disturb the verdict. In the trial we find

No error.

MOORE, J. did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. GEORGE HAYNES

No. 46

(Filed 6 January 1970)

1. Criminal Law § 75— admissibility of confession — Miranda warnings — inducement — drugs — sufficiency of findings

Trial court properly found that defendant's confession was freely, voluntarily, and understandingly made, where officers testified on voir dire that they fully advised defendant of his *Miranda* rights prior to his confession, and where defendant admitted in his testimony that the warnings were given and that he had heard them many times before, but contended that he had been drinking heavily and taking drugs prior to the confession and that the officers had promised to testify for him.

2. Homicide § 25— felony-murder prosecution — instructions — premeditation and deliberation

In a homicide prosecution under indictment drawn pursuant to G.S. 15-144, an instruction to the jury that the wilful killing of a human being committed in the perpetration or attempted perpetration of a robbery or other felony is murder in the first degree, irrespective of premeditation, deliberation or malice aforethought, *held* without error.

3. Homicide § 12— indictment under G.S. 15-144 — sufficiency to sustain verdict — allegations

An indictment drawn pursuant to G.S. 15-144 is sufficient to sustain a

verdict of murder in the first degree if the jury should find from the evidence, beyond a reasonable doubt, that the killing was done either with malice and premeditation and deliberation or in the perpetration or attempted perpetration of a felony, notwithstanding there was no allegation in the indictment that the killing was done with premeditation and deliberation or in the perpetration or attempted perpetration of a robbery.

4. Homicide § 12— indictment under G.S. 15-144 — bill of particulars

If a defendant charged with murder in the first degree by indictment drawn under G.S. 15-144 desires to know whether the State relies on proof the killing was done with premeditation and deliberation or in the perpetration or attempted perpetration of a robbery, he should apply for a bill of particulars as provided in G.S. 15-143.

MOORE, J., did not participate in the decision of this case.

APPEAL by defendant from *Hall, J.*, June, 1969 Criminal Session, ROBESON Superior Court.

This criminal prosecution was founded upon the following bill of indictment:

> "The Jurors for the State upon their oath do present, that George Haynes late of Robeson County, on the 18th day of September A.D. 1968, with force and arms, at and in the said County, feloniously, willfully, and of his malice aforethought, did kill and murder one Hunter Locklear contrary to the form and the statute in such case made and provided, and against the peace and dignity of the State."

In summary, the State's evidence disclosed the following: The deceased (Hal) Hunter Locklear, age 32, on and prior to August 23, 1968, lived in Robeson County, North Carolina. On that day, he left home driving his automobile (a red Torino Ford). Twenty-eight days thereafter, his body was found concealed in bushes and weeds near a dirt road in Robeson County. "The pockets of his pants were turned wrongside out" and on the ground around the body were two or three pennies. There was a bullet wound in the head.

James Locklear, a resident of Robeson County, but not related to Hal Hunter Locklear, testified as a witness for the State: On August 23, he and Hal Locklear left Robeson County and drove in Hal's automobile to Texas, where they met the defendant George Haynes, whose home was in Charles County, Maryland. "He said he was on the run." The three left El Paso in the red Torino Ford. Each took turns driving. In Florida, the defendant, the witness and the deceased held up and robbed a filling station. The holdup netted both money and the operator's credit card, which the defendant

kept and used to buy gas and tires on the way North. In Georgia, they stole a license plate which they transferred to the Torino. Dur- their travels, they subsisted on some food and a large quantity of beer.

Just south of Dillon, South Carolina, the defendant began driving. The witness was in the seat beside the driver. The deceased, Hal Hunter Locklear, was in the rear seat asleep. The witness went to sleep. At some time in the night, he was awakened by a loud noise. At the time he became conscious, he saw the defendant just outside the car with a pistol. Hal Hunter Locklear was "slumped over" in the back seat. At the command of the defendant, the witness took the body of the deceased from the back seat and concealed it in some bushes and weeds off the road. The defendant, at the point of the pistol, forced the witness to take the money from the deceased and deliver it to him. The defendant forced the witness to turn over his own money, saying: "Don't run. I have done killed your buddy. Now I am fixing to kill you." The witness begged for his life. "I told him I would help him rob places. He said before he left El Paso he planned to kill me and Hal." The defendant and the witness continued North in the automobile.

The witness drove the car to Emporia, Virginia. Part of the time, the defendant was asleep. At Emporia, they stopped at a filling station for gas. At the station, the witness went into the restroom. "George was in the back seat. When I went to the restroom, I jumped through the window . . . and reported what had taken place to the Emporia police."

Sheriff Garner of Charles County, Maryland testified that in consequence of dispatches he received from the North Carolina and Virginia officers, on the morning of September 19, 1968 he located a 1968 red Torino Ford parked in a lot adjoining a bar and restaurant near LaPlata, Maryland. Sheriff Garner was acquainted with George Haynes, the defendant. "When we found the car, we surrounded the building. Donald Poole and myself went in." Haynes was arrested and handcuffed in the restroom where he was hiding. The officers found the pistol (a revolver) behind the door. It contained one empty shell and three loaded shells. The officers found two Ford keys rolled up in toilet paper in the restroom. These keys fitted the switch and trunk of the red Torino Ford. The defendant's brother was in the restaurant. When the officers brought the defendant from the restroom, George said to his brother, "They have got me for more than jail break."

Sheriff Garner testified that he gave the prisoner all *Miranda*

warnings orally and by reading from a card on which the warnings were typed. The defendant, after being warned of his rights, stated to the Sheriff, "I will tell you everything that I have done except how I got the hacksaw blades and the razor when we broke out of jail. . . ." After the jail break, the defendant went to Florida; then to Texas where he met Hal Hunter Locklear and Jimmy Locklear.

The defendant admitted the robbery of the filling station in Florida, and the use of the victim's credit card to purchase tires and gas. He then signed a written confession which was later offered in evidence. When the defendant's privately employed counsel objected to the confession, Judge Hall conducted a detailed voir dire hearing in the absence of the jury.

Sheriff Garner and Deputy Sheriff Poole of Charles County, Maryland, and Deputy Sheriff Stone of Robeson County, North Carolina, were witnesses to the incriminating statements made by the defendant. They testified at the voir dire hearing. The defendant also testified that he had been drinking heavily and taking drugs and "yellow jackets". He admitted he was advised of his rights; that he had heard them many times before. He testified Deputy Sheriff Poole had agreed to help him and to attend court in North Carolina to testify for him. Deputy Sheriff Stone told him, before he made the statements, that in North Carolina prisoners could be put on work release and could make money while serving time.

At the conclusion of the voir dire hearing, Judge Hall found facts and adjudged the statement made by the defendant to officers Poole and Stone "was freely, voluntarily and understandingly made without promise or threat and that such statement is admissible in evidence." The testimony at the hearing fully warranted the findings of fact and the conclusion of the court that the confession was freely and voluntarily made, without threat or inducement. Here are pertinent parts of the signed statement, which was read before the jury: "On September 18th, traveling up 301, in South Carolina, I was in the rear seat. Jimmy was driving and Hal Locklear was on the front seat in the right side. I heard Hal say to Jimmy that he was going to rob and kill me. Jimmy said, 'Rob him, but don't kill him.' Hal said, 'Yes, I am going to.' The pistol was in the front seat where Hal was sitting then. He said he was going to do that when we got to Lumberton. I lay there fifteen minutes, then raised up and said I would drive. Hal got in the back seat. Jimmy got on the right front. Jimmy told me to stop in Dillon, South Carolina, and he would drive again. * * * When we got to Dillon, they were both asleep and I kept on

going. After leaving Dillon I was driving sixty-five or seventy, drove about thirty minutes before I pulled off I-95, a four lane road, to my left and went a mile and a half to my best knowledge, turned off this road on a dirt road, went about a block and turned right. Then I stopped, got out of the car and took the key. * * * Between Dillon and there I had reached and got the pistol from under the seat and I had it in my hand. When I got out, Jimmy woke up and slipped over under the steering wheel. Hal was still asleep in the rear seat with the right rear window down and his head lying in the window. I walked around the car and stuck the 32 caliber pistol about six to ten inches from his head and shot him. When I shot him, he sort of slumped down. * * * At this time, Jimmy jumped out of the car, came around to the back of the car where I was and started crying and begging me not to shoot him. I told him to get Hal's body out of the car and drag it over in the bushes. He did. I told him to empty Hal's pockets and give me his wallet. He did. Then I took what money Jimmy had and he kept begging me not to shoot him. . . . then I told him I would take him with me. Jimmy got under the steering wheel. We came north on I-95. * * * I drank two or three more beers on the way. I got in the back seat, sat up toward the wheel with the pistol under my leg and went to sleep. The next thing I knew we were stopped at a station. Jimmy said we needed gas. I told the man at the station to fill it up. Jimmy asked me if he could go to the bathroom. I could see the bathroom door, so I told him he could go ahead. * * * After the man filled it up with gas, Jimmy had not come back. I pulled the car over to the bathroom, went in and he was not in there. I came back out, got in the car, drove a while, pulled over and stopped and slept until about 9:00 A.M. I then drove to Maryland, when I was arrested. The time I shot Hal Locklear in my opinion was between 11:00 P.M. Wednesday night, 9-18 and 2:00 A.M. September 19, 1968. The reason I did not shoot Jimmy Locklear, was he took up for me, and also that he was so young. * * * I have had the above statement read to me by Deputy Sheriff Stone and it is true to the best of my knowledge. 5:30 P.M. Witness: Hubert Stone, Donald Poole, Deputy Sheriff, Charles County, Maryland"

When the State rested, the defendant elected not to offer evidence. Following the arguments and charge of the court, the jury found the defendant guilty of murder in the first degree, with a recommendation that his punishment be imprisonment for life in the State's prison.

The court denied defendant's motion to set aside the verdict. From a sentence of life imprisonment, the defendant appealed.

Robert Morgan, Attorney General; Bernard A. Harrell, Assistant Attorney General; Ralph Moody, Deputy Attorney General, for the State.

Everett L. Henry, W. Earl Britt for the defendant.

HIGGINS, J.

The record discloses the defendant, at the conclusion of his trial, made eleven assignments of error. However, in the brief filed here, his careful and faithful attorneys have discussed only three questions of law which are decisive of this appeal. Only questions 1 and 2 require discussion. The third involves a formal objection — the refusal of the court to set aside the verdict.

[1] The defendant's counsel place their main reliance for a new trial on the ground of alleged error in admitting in evidence the defendant's confession. At the time the State offered the confession the defendant objected, whereupon Judge Hall, in the absence of the jury, conducted a voir dire examination. The scope of the inquiry was broad and the evidence introduced was in detail. State's witnesses Sheriff Garner, Deputy Sheriff Poole of Charles County, Maryland, and Deputy Sheriff Stone of Robeson County, North Carolina, testified that full and complete warnings of the defendant's rights were given before any questions were asked. The defendant, in his testimony, admitted the warnings were given, but contended that at the time he made the statements, he had been drinking heavily, taking drugs, and did not fully appreciate his situation. He further testified that Deputy Sheriff Poole agreed to go to North Carolina and testify for him; that Deputy Sheriff Stone told him that prisoners in North Carolina were permitted to avail themselves of a work release program and were paid during the time they were serving sentences.

Judge Hall heard the evidence, found the facts, and concluded therefrom the defendant's admissions were freely, voluntarily and understandingly made without any inducement or coercion. The evidence fully supports the findings. In fact, before any questions were asked, and immediately after arrest when the officers emerged from the restroom, and in the presence of the defendant's brother, the defendant said this to him: "This time they have got me for more than jail break." The confession was properly admissible in evidence. *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453; *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344.

[2] The defendant's second objection to the trial involves the following instruction to the jury: ". . . (I further instruct that it is also murder in the first degree where the killing is done in the commission or the attempted commission of a robbery or other felony. * * * The unlawful and felonious and willful killing of a human being committed in the perpetration or attempt to perpetrate a robbery or other felony is murder in the first degree, irrespective of any premeditation, deliberation or malice aforethought. That is to say, members of the jury, when a murder is committed in the perpetration or attempt to perpetrate the felony of robbery, it is murder in the first degree, irrespective of premeditation, deliberation or malice aforethought.)"

G.S. 14-17 provides: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture or any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, robbery, burglary or other felony shall be deemed to be murder in the first degree."

[3] Before giving the quoted instruction, Judge Hall charged that the jury, according to its findings from the evidence, might return one of these verdicts: (1) Guilty of murder in the first degree; (2) Guilty of murder in the first degree with recommendation of life imprisonment; (3) Guilty of murder in the second degree; (4) Guilty of manslaughter; or (5) Not guilty. The indictment in this case neither alleged the killing was done after premeditation and deliberation, nor in the perpetration or attempt to perpetrate a robbery. Nevertheless, the bill is sufficient to sustain a verdict of murder in the first degree if the jury should find from the evidence, beyond a reasonable doubt, that the killing was done with malice and after premeditation and deliberation; or in the perpetration or attempt to perpetrate a robbery. The form of the bill and its effect as above set out are justified by G.S. 15-144; *State v. Arnold,* 107 N.C. 861; *State v. Covington,* 117 N.C. 834; *State v. Fogleman,* 204 N.C. 401, 168 S.E. 536; *State v. Linney,* 212 N.C. 739, 194 S.E. 470; *State v. Streeton,* 231 N.C. 301, 56 S.E. 2d 649; *State v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340; *State v. Hill,* decided December 10, 1969.

[4] If a defendant is charged with murder in the first degree by bill of indictment drawn under G.S. 15-144, and desires to know whether the State relies on proof the killing was done with premeditation and deliberation, or in the perpetration or attempt to perpetrate a robbery, he should apply for a bill of particulars as

provided in G.S. 15-143. *State v. Stephens,* 170 N.C. 745; *State v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883.

Careful review fails to disclose any error of law in the trial.

No error.

MOORE, J. did not participate in the decision of this case.

STATE OF NORTH CAROLINA v. GEORGE JUNIOR JENNINGS

No. 34

(Filed 6 January 1970)

1. Homicide § 21— second-degree murder — sufficiency of evidence

Evidence of defendant's guilt of murder in the second degree *held* sufficient to be submitted to the jury.

2. Homicide § 5— murder in the second degree — definition

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

3. Homicide § 14— presumptions from use of deadly weapon — unlawful killing — malice

Where there is plenary evidence in second-degree murder prosecution that the deceased died from a wound intentionally inflicted by defendant with a rifle, the presumptions arise that the killing was unlawful and that it was done with malice.

4. Homicide § 14— burden of proof — self-defense and mitigation

It is incumbent upon defendant to satisfy the jury that the homicide was committed without malice, so as to mitigate it to manslaughter, or that the homicide was justified on the ground of self-defense.

5. Homicide § 27— instructions on manslaughter — sufficiency of evidence

Instruction, in second-degree murder prosecution, which would allow the jury to find defendant guilty of manslaughter if it found that he had killed the deceased in sudden passion or heat of blood, *held* justified by facts which would allow the inference that deceased approached defendant with a pistol pointed at him on the same day that defendant and deceased had been engaged in an altercation.

6. Criminal Law § 113— instructions — matters not in evidence

It is error for the trial judge to charge on matters which materially affect the issue when they are not supported by the evidence.

7. Homicide § 27— instructions on manslaughter — "heat of passion or blood"

The terms "heat of passion" or "heat of blood" as used in instructions on manslaughter are synonymous.

8. Homicide § 6— mitigation of homicide — passion of terror

When there are circumstances strongly calculated to excite the passion of terror, a homicide may be mitigated from murder to manslaughter.

9. Homicide § 28— instruction on self-defense — explanation of "without fault" and "free from blame"

Where the defendant in a second-degree murder prosecution had been engaged for a period of years in improper conduct with deceased's wife, which, in the eyes of an average juror, would tend to fix him with blame and fault in the shooting of deceased, the trial court, at defendant's request, should have defined and explained the meaning of the words "without fault" and "free from blame" in its instructions to the jury on the law of self-defense, such explanation being necessary to relate properly defendant's conduct to the time and place of the homicide and to dispel the idea that defendant's right of self-defense was precluded solely by reason of his prior improper association with the wife of deceased.

10. Criminal Law § 113— instructions — words of common usage — definition

It is not error for the court to fail to define and explain words of common usage in the absence of a request for special instructions.

11. Homicide § 9— self-defense — defendant's immoral conduct

The fact that defendant has previously been guilty of immoral conduct or wrongful acts, or has had past difficulties with the decedent, does not, standing alone, deprive defendant of his right of self-defense.

12. Homicide § 9— self-defense — requirement that defendant be free from fault

The requirement that a defendant must be free from fault in bringing on the difficulty before he can have the benefit of the doctrine of self-defense ordinarily means that he himself must not have precipitated the fight by assaulting decedent or by inciting in him the reaction which caused the homicide.

13. Homicide § 9— self-defense — free from fault — time and place of killing

Whether the defendant is free from blame or fault will be determined by his conduct at the time and place of the killing, but this determination is not confined to the precise time of the fatal encounter.

14. Homicide § 28— instruction on self-defense — use of force — omission of apparent necessity

An instruction on self-defense that the defendant could use no more force than was reasonably necessary to repel an assault by deceased is erroneous in omitting the element of apparent necessity, and the error

is not cured by correct instructions on this point in other portions of the charge.

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

HUSKINS, J., dissents.

ON Certiorari to the North Carolina Court of Appeals to review its decision, reported in 5 N.C. App. 132.

Defendant, George Junior Jennings, was indicted by a Guilford County Grand Jury for the murder of Willie Edward Gibson. Upon call of the case at the 9 December 1968 Criminal Session of Guilford Superior Court, the solicitor for the State elected to try defendant for murder in the second degree or manslaughter. Defendant entered a plea of not guilty.

The evidence offered in the case, in summary, tends to show:

Defendant had been "dating" the wife of Willie Gibson for a period of four or five years. Deceased and defendant had words about this relationship in the year 1967. On 17 July 1968, Jennings took Mrs. Gibson and her children to the home of a relative who lived two doors from her father, Lacy Clawson. She moved to her father's home on the following Friday. On Saturday, 20 July 1968, Jennings was traveling on Penny Road in Guilford County, allegedly returning from an attempt to pawn his loaded rifle, when Gibson blocked the road with his automobile, opened the door of defendant's automobile, cursed him and struck him in the face with some hard object. Jennings thereupon went to his home and told his wife that he was going over to see Willie and ask him why he had hit him. With the loaded rifle still in his possession, Jennings drove to the Clawson house, where he observed the automobile that Willie Gibson had been driving parked in the Clawson yard. He drove past once, then came back and stopped his automobile on Bundy Road, near the Clawson driveway. Willie Gibson came out of the house and paused near his automobile before proceeding towards defendant's car. The State's witnesses did not see Gibson obtain a pistol at that time, although there was evidence offered by defendant that deceased had obtained a 32 pistol and was pointing it toward defendant as he approached defendant's automobile. The evidence is in conflict as to who fired first. Gibson went to the rear of defendant's car and there was evidence that he shot through the rear window and that defendant fired several shots through the rear window. Gibson then ran across Bundy Road and over a low bank. Defendant Jennings got out of his automobile, squatted down and fired more shots at de-

ceased, who was still pointing his pistol toward defendant. Gibson then said, "Don't shoot me no more," and collapsed in the field. Defendant went to the field and then left and placed himself in police custody. The State offered medical evidence to the effect that deceased died as a result of a gunshot wound.

There was testimony that the pistol used by Gibson had been fired once and, because of malfunction, could not have been fired more than once. There was also evidence of threats by deceased against the life of defendant. A more detailed statement of facts may be found in the opinion of the North Carolina Court of Appeals.

The jury returned a verdict of guilty of manslaughter, and from the judgment rendered thereon defendant appealed to the North Carolina Court of Appeals. That Court found no error in the trial below and defendant filed petition for writ of certiorari to the North Carolina Court of Appeals to review its decision pursuant to G.S. 7A-31 (c)(1), (2) and (3). The petition for certiorari was allowed by order dated 29 August 1969.

Attorney General Morgan and Staff Attorney Andrew A. Vanore, Jr., for the State.

Schoch, Schoch and Schoch, by Arch K. Schoch, Jr., for defendant.

BRANCH, J.

[1] Defendant assigns as error the refusal of the trial court to grant his motion for nonsuit at the close of all the evidence.

[1-4] The State elected to prosecute defendant for second degree murder. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889; *State v. Street*, 241 N.C. 689, 86 S.E. 2d 277. There was plenary evidence that deceased died from a wound intentionally inflicted by defendant with a rifle, thus creating the presumptions that the killing was unlawful and that it was done with malice. *State v. Meadows*, 272 N.C. 327, 158 S.E. 2d 638; *State v. Redfern*, 246 N.C. 293, 98 S.E. 2d 322. Upon the jury finding that deceased died from a wound intentionally inflicted by defendant with a rifle, it became incumbent upon defendant to satisfy the jury that the homicide was committed without malice so as to mitigate it to manslaughter or that the homicide was justified on the ground of self-defense. *State v. Redfern, supra; State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322. We hold that the Court of Appeals correctly overruled this assignment of error.

The reasoning and authorities cited by the Court of Appeals in overruling defendant's assignment of error relative to cross-examination of defendant as to previous criminal convictions, without limiting instructions, appear to be correct, and further discussion by us is not required.

[5-7] By his Assignment of Error No. 3, defendant contends that the trial judge erred in his instructions to the jury by allowing the jury to find defendant guilty of manslaughter if it found that he had killed the deceased "in sudden passion" or "heat of blood." Admittedly, it is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence. *State v. Knight,* 248 N.C. 384, 103 S.E. 2d 452; *State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921. However, if the instruction is based upon a state of facts presented by a reasonable view of the evidence produced at the trial, there is no prejudicial error. *State v. Wilson,* 104 N.C. 868, 10 S.E. 315. The terms "heat of passion" or "heat of blood," as used by the trial judge, are synonymous.

In Black's Law Dictionary (4th ed. 1951) at page 1281, we find the following definition:

> "PASSION. In the definition of manslaughter as homicide committed without premeditation but under the influence of sudden 'passion,' this term means any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection. *Stell v. State,* Tex. Cr. App., 58 SW 75; *State v. Johnson,* 23 N.C. 362, 35 Am. Dec. 742; *Winton v. State,* 151 Tenn. 177, 268 SW 633, 637; *Collins v. State,* 88 Fla. 578, 102 So. 880, 882; *Commonwealth v. Flax,* 331 Pa. 145, 200 A. 632, 636."

In 1 Wharton, Criminal Law and Procedure § 275 (Anderson ed.) at page 584, it is stated:

> "Passion is not limited to rage, anger, or resentment. It may be fear, terror, or, according to some decisions, 'excitement' or 'nervousness.' . . ."

[8] This Court has recognized that when there are circumstances strongly calculated to excite the passion of terror, a homicide may be mitigated from murder to manslaughter. *State v. Will,* 18 N.C. 121.

[5] The instant case presents facts which would allow the inference that deceased approached defendant with a pistol pointed at him on the same day that defendant and deceased had been engaged in another altercation. It is reasonable to infer from this evi-

dence that defendant might have become dominated by a sudden passion or rage, anger, fear or terror that caused him to inflict the fatal wound. In any event, it would seem that the instruction complained of was for defendant's benefit rather than to his prejudice, since it presented a ground upon which the homicide could have been reduced from murder in the second degree to manslaughter. We find no error prejudicial to defendant in this assignment of error.

[9, 10] Defendant next contends that the trial court erred in its charge on self-defense in failing to define or further explain the words "without fault" and "free from blame" in bringing on the controversy, when defendant specifically requested such charge. The words "without fault" and "free from blame" are words of common usage and would ordinarily require no explanation to be understood. There are many cases in this jurisdiction which hold that it is not error for the court to fail to define and explain words of common usage in the absence of a request for special instructions. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548; *State v. Godwin,* 267 N.C. 216, 147 S.E. 2d 890; *State v. Jones,* 227 N.C. 402, 42 S.E. 2d 465. Further, this Court has approved charges on self-defense which used these words or words so nearly identical as to be indistinguishable without further definition or amplification. *State v. De Mai,* 227 N.C. 657, 44 S.E. 2d 218; *State v. Robinson,* 213 N.C. 273, 195 S.E. 824; *State v. Parker,* 198 N.C. 629, 152 S.E. 890; *State v. Pollard,* 168 N.C. 116, 83 S.E. 167.

In *State v. Crisp,* 170 N.C. 785, 87 S.E. 511, Hoke, J., speaking for the Court, stated:

> "In some of the decisions on the subject it has been stated as a very satisfactory test that this right of perfect self-defense will be denied in cases where, if a homicide had not occurred, a defendant would be guilty of a misdemeanor involving a breach of the peace by reason of the manner in which he had provoked or entered into a fight. Under our decisions such a position would exist: *a.* Whenever one has wrongfully assaulted another or committed a battery upon him. *b.* when one has provoked a present difficulty by language or conduct towards another *that is calculated and intended to bring it about.* . . . And in this connection, it is properly held that language may have varying significance from difference of time and circumstances, and the question is very generally for the determination of the jury." (Emphasis ours)

[11-13] Likewise, it is our opinion that conduct towards another must be evaluated within the framework of the surroundings, cir-

cumstances and parties, including their previous relations and the then existing state of their feelings. However, the fact that a person has previously been guilty of immoral conduct or wrongful acts, or has had past difficulties with the decedent, does not, standing alone, deprive a defendant of his right of self-defense. 40 C.J.S., Homicide, § 119, at 990. The requirement that a defendant must be free from fault in bringing on the difficulty before he can have the benefit of the doctrine of self-defense ordinarily means that he himself must not have precipitated the fight by assaulting the decedent or by inciting in him the reaction which caused the homicide. Usually, whether the defendant is free from blame or fault will be determined by his conduct at the time and place of the killing. Yet the fault in bringing on a difficulty which will deprive him of the right of self-defense is not confined to the *precise* time of the fatal encounter, but may include fault so closely connected with the difficulty in time and circumstances as to be fairly regarded as operating to bring it on. 40 Am. Jur. 2d, Homicide, § 145, at 434.

[9] Here, defendant had been engaged for a period of years in conduct with deceased's wife which, in the eyes of an average juror, would fix him with blame and fault, and under the particular facts of this case the court should have amplified and explained the meaning of "without fault" and "free from blame." We wish to make it crystal-clear that we do not intend to overrule the line of cases which have used the words "without fault" or "free from blame" without further definition when there was no request for further instruction. We emphasize that this opinion must be read in connection with the facts of the case. *Light Co. v. Moss*, 220 N.C. 200, 17 S.E. 2d 10. We conclude that upon the facts of the instant case, upon request of counsel, the court should have further clarified the charge so as to properly relate defendant's conduct to the time and place of the homicide and to dispel any idea that defendant's right of self-defense was precluded *solely* by reason of his prior improper association with the wife of deceased.

[14] Defendant contends that the trial judge erred in his instructions on self-defense by instructing the jury that defendant could use no more force than was reasonably necessary without the further alternative "or apparently necessary." In his original instructions and again in additional instructions, given at the request of the jury, the trial judge charged as follows:

> "Now, when you come to consider the plea of self-defense, you should ask yourselves these questions: No. One: At the time the fatal shot was fired by the defendant, if you find that

it was fired by him, that took the life of the deceased, Willie Gibson, was the defendant at a place where he had a right to be? Second: Was the defendant himself without fault in bringing on or entering into the encounter or difficulty with the deceased Willie Gibson? Third: Was the defendant unlawfully or feloniously assaulted by the deceased Willie Gibson? Four: Did the defendant believe and have reasonable grounds to believe that he was about to suffer death or great bodily harm at the hands of the deceased Willie Gibson? Five: Did the defendant act with ordinary firmness and prudence under the circumstances as they reasonably appeared to him, and under the belief that it was necessary to kill the deceased, Willie Gibson, in order to save his own life or to protect his person from enormous bodily harm? *Six: Did he use no more force than was reasonably necessary to repel the assault which he contends the deceased, Willie Gibson, was making upon him at the time the deceased, Willie Gibson, was killed?"* (Emphasis ours)

In the case of *State v. Francis,* 252 N.C. 57, 112 S.E. 2d 756, the defendant assigned as error this pertinent portion of the charge:

"So, in determining the degree of force one may use, the law permits a person to use such force as is reasonably necessary to protect himself, and he can even go to the extent of taking human life where it is necessary to save himself from death or great bodily harm, but if he uses more force than is reasonably necessary he is answerable to the law."

The court granted a new trial and stated:

"(2) It is erroneous in that the court failed to charge the jury with respect to the use of such force as was necessary or *apparently necessary* to protect the defendant from death or great bodily harm. The plea of self-defense rests upon necessity, real or apparent."

Accord: *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24; *State v. Hardee,* 3 N.C. App. 426, 165 S.E. 2d 43; *State v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892; *State v. Goode,* 249 N.C. 632, 107 S.E. 2d 70; *State v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620; *State v. Moore,* 214 N.C. 658, 200 S.E. 427. This unbroken line of decisions clearly indicates error in the charge.

The court, in several other places, charged correctly as to apparent necessity. It is apparent that the able judge was fully cognizant of the principles of law involved, but that he fell into the snare, on both these occasions, of using a stereotyped set of ques-

tions that have consistently caused confusion and error in charges. Nor can this error be cured because the court correctly instructed the jury in other portions of the charge. In the case of *State v. Johnson,* 184 N.C. 637, 113 S.E. 617, the trial judge, *inter alia,* charged:

> " 'In order to excuse the killing, on the plea of self-defense, it is necessary for the accused to show that he quit the combat before the mortal wound was given, or retreated or fled as far as he could with safety, and then, urged on by mere necessity, killed his adversary for the preservation of his own life.' "

Holding this portion of the charge to be error, the Court stated:

> "It was incorrect and material error to charge the jury that the prisoner must have killed the deceased from mere necessity, in order to excuse the homicide, Whether there was any actual necessity for killing the deceased in order to save his own life, or to prevent great bodily harm to him, makes no difference, provided, at the time, the prisoner believed, and had reason to believe, that from the facts and circumstances as they then appeared to him he was about to be killed, or to suffer some enormous bodily harm.
>
> . . . . .
>
> "It is true that the judge in this case did, in another part of his charge, give the correct instruction, but he did not retract the erroneous one and substitute the other in its place; and, therefore, the jury were left to conjecture as to which of the two essentially different principles applied to this case."

We also find the following statement in the case of *State v. Ellerbe,* 223 N.C. 770, 28 S.E. 2d 519:

> "It is contended on behalf of the State that, taking the charge contextually, there is no prejudicial error. We cannot so hold. An erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated. This is especially applicable in the instant case, because the jury was instructed that, in order for the defendant to have the benefit of the principle of law, that is, of self-defense, he must show certain things, some of which he was not required to show under the facts and circumstances disclosed on this record, in order to have the jury consider his evidence on the plea of self-defense. It is impossible to determine on which of the instructions the jury acted."

See also: *State v. Fowler, supra; State v. Isley,* 221 N.C. 213, 19 S.E. 2d 875; *State v. Floyd,* 220 N.C. 530, 17 S.E. 2d 658; *State v.*

Starnes, 220 N.C. 384, 17 S.E. 2d 346; *State v. Mosley,* 213 N.C. 304, 195 S.E. 830; *State v. Johnson, supra.*

We do not deem it necessary to rule on the other assignments of error since these questions may not recur in a new trial.

The decision of the Court of Appeals is reversed and the cause is remanded to that Court with direction to award a new trial to be held in accordance with the principles herein stated.

Error and remanded.

HUSKINS, J., dissents.

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

REVEREND JAMES R. WALKER, JR. v. CITY OF CHARLOTTE AND WILLIAM H. JAMISON, SUPERINTENDENT OF BUILDING INSPECTION OF THE CITY OF CHARLOTTE

No. 53

(Filed 6 January 1970)

1. Constitutional Law § 11— private property rights v. public interest

As between a citizen and the public, the citizen's private property rights must be subordinated to such reasonable regulation as the overriding public interest requires.

2. Constitutional Law § 13— minimum standards for buildings

For the purpose of protecting life, health, safety and welfare, the General Assembly has power to promulgate rules, fix minimum standards, prescribe materials and designs for buildings and other structures so long as they are not arbitrary, capricious or unreasonable and so long as they tend to promote health, safety and welfare.

3. Constitutional Law § 13; Municipal Corporations § 37— condemnation of unsafe buildings — constitutionality

The statute, G.S. 160-151, authorizing municipalities to condemn unsafe buildings, provisions of the Charlotte Building Code authorizing city authorities to inspect buildings for the purpose of ascertaining whether safety standards are being observed and to order correction or removal of structures found to be unsafe, and provisions of the Charlotte City Code authorizing the authorities to correct or remove unsafe buildings *are held* constitutional as applied to the owner of a building who stipulated that he was in violation of an order to remove the building and that he intended to remain in violation of such order.

APPEAL by plaintiff from *Ervin, J.*, April, 1969 Schedule C Session, MECKLENBURG Superior Court.

Upon proper petition, at the request of both parties, and because of the constitutional and procedural questions involved, this Court ordered the appeal docketed here without prior review by the North Carolina Court of Appeals.

At the trial, a jury was waived. The parties entered into the following stipulation of facts:

"Plaintiff, acting as his own counsel, and Henry W. Underhill, Jr., Counsel of Record for the defendants, being of the opinion that the resolution of this controversy depends upon questions of law and having heretofore waived a jury trial in the cause and consented that the court may hear and resolve said matters upon an agreed STATEMENT OF FACTS, stipulate and agree as follows:

1. That the plaintiff is the owner of a wood frame dwelling house located on the corner of West Summit Avenue and South Church Street in the City of Charlotte and that said dwelling is listed as 1449 South Church Street and was used by the plaintiff in connection with his business as a Minister and as an attorney at law.

2. That plaintiff's dwelling, from time to time prior to the present controversy, had been the subject of repairs which were authorized by the City of Charlotte through the issuing of building permits, the last of which was issued in November of 1959 for the re-roofing of the entire dwelling.

3. That the defendants, by letter and Order dated March 24, 1964, ordered plaintiff to remove his dwelling within 30 days from the date of the letter and order as the same is set forth in Paragraph IV of the complaint. That defendants order was issued after proper administrative procedure as set forth by the North Carolina General Statutes and by the Code of the City of Charlotte had been followed. That defendants' order was issued along with notice to plaintiff that plaintiff's building had been found to be unsafe pursuant to Sections 5-6(e) of the Charlotte Building Code; further, these Code provisions set forth a procedure for notice, opportunity to be heard and the right to appeal from decisions of the Superintendent.

4. That the order to remove said dwelling as aforesaid was based upon an inspection of plaintiff's premises, and was issued

after administrative procedures specified and set forth in the Charlotte Building Code had been followed by defendants as set forth in the letter and Order dated March 24th, 1964.

5. That no warrant for entry and inspection of the plaintiff's dwelling was had or secured by the defendants and no search warrant is required by law and is set forth in Paragraph 5 of the Further Answer and Defense of the defendants. That plaintiff was present at the time this building was inspected on June 23rd, 1964, and plaintiff, at no time, prohibited defendants from entering and inspecting his building.

6. That by June 23, 1964, plaintiff had made extensive repairs to his dwelling, including the replacement of windows, doors and siding on the house and that plaintiff was tried and convicted for making repairs without a permit as is set forth in Paragraph IX of the complaint.

7. That the action of the defendants in condemning and ordering plaintiff's dwelling removed after inspection was authorized and done pursuant to authority of law, to wit: G.S. 160-151, Charlotte City Charter, Section 6.61 and 6.162 and the Building Code of the City of Charlotte, Section 5-6(e) as the same are set forth in Paragraph III (a), (b) and (c) of the complaint.

8. That plaintiff is in violation of the Order of March 24, 1964, and intends to remain in violation of the same for reasons set forth in Paragraph XI of the complaint and other paragraphs of the complaint."

At the conclusion of the hearing, Judge Ervin entered judgment:

"2. The Constitutions of the United States and the State of North Carolina protect property owners from unreasonable invasions of their right to privacy, and against public entry of government agents, unless such entry is pursuant to a valid warrant or unless entry to the property is permitted.

3. The Constitution of North Carolina prohibits municipal investigating agents and officials from exercising unbridled discretion in making standards and formulating rules concerning building safety, and such officials may act only pursuant to reasonable statutory limitations or guidelines as set forth in municipal ordinances.

4. The acts in question set forth reasonable standards.

5. Property owners are guaranteed a right to procedural due process by the Constitutions of the United States and the State of North Carolina. Sections 5-6 and 5-7 of the Charlotte City Code establishes procedures conforming to administrative due processes and comply with the Constitutions of North Carolina and the United States.

6. The issuance of building permits and the control of building repairs are generally valid exercises of police power, and a municipality may promulgate ordinances to secure the health and safety within its limits even though statutory authority for such ordinances be general in nature.

7. It is therefore, the conclusion of this court that North Carolina General Statute 160-151, Charlotte Charter provisions under sections 6.61 and 6.162, and Charlotte Code provisions 5-6 and 5-7, set forth reasonable procedures for the exercise of police power, and do not violate the Constitutions of North Carolina and the United States, and that the City of Charlotte, pursuant to said provisions, has acted in a valid and constitutional manner.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that North Carolina General Statute 160-151, Sections 6.61 and 6.162 of the Charlotte City Charter, and Sections 5-6 and 5-7 of the Charlotte City Code are valid and constitutional; and a temporary restraining order presently in effect against defendants' removal or demolition of plaintiff's dwelling house located at 1449 South Church Street in the City of Charlotte, be and is hereby dissolved."

The petitioner appealed.

James R. Walker, Jr., Samuel S. Mitchell, for the plaintiff.

W. A. Watts for the defendants.

HIGGINS, J.

The plaintiff in this action seeks to have the court declare unconstitutional as applied to him: (1) the provisions of G.S. 160-151; (2) the Charlotte Building Code, which provides for the inspection of buildings for the purpose of ascertaining whether the standards of safety set up in the Code are being observed and to order correction or removal of structures found to be unsafe; (3) that part of the City Code which authorizes the authorities to correct or remove unsafe buildings or parts thereof in the City which are ascer-

tained to be dangerous to health, safety, lives of the occupants, the general public, or persons passing or living in the vicinity, or dangerous to the security of adjoining property, or especially dangerous to the lives of fire fighters in case of fire.

The plaintiff's first attack on the safety regulations was made by suit in the Superior Court of Mecklenburg County instituted July 23, 1964. From a holding adverse to the plaintiff, he appealed to this Court. The opinion is reported in 262 N.C. 697, 138 S.E. 2d 501, affirming the decision of the Superior Court.

Later, a criminal proceeding against Walker was originated by warrant in the Recorder's Court of the City of Charlotte. The warrant charged the unlawful and wilful violation of the City Code by attempting to make repairs without obtaining a permit from the Building Inspector, in violation of the City Code, and made criminal by G.S. 14-4. At the trial, the defendant moved to quash the warrant and dismiss the prosecution upon the ground the statutes and the Code provisions under which the warrant was drawn violated Article I, Sec. 1, 8, 15 and 34, Constitution of North Carolina and the Fourth and Fourteenth Amendments to the Constitution of the United States.

The Recorder overuled the motion to quash, heard the evidence offered by the prosecution, consisting of the City Code, testimony as to the dilapidated condition of the defendant's residence, the finding it was unfit for habitation, was beyond reasonable repair, and that the defects could not be remedied so as to meet the minimum standards of the Charlotte Housing Code. The Superintendent of Building Inspection, upon the findings, directed the building be demolished or removed. The defendant undertook to do repair work himself without applying for or receiving any permit. The defendant did not testify. The Recorder entered a verdict of guilty. From the judgment, he appealed to the Superior Court of Mecklenburg County.

In the Superior Court the State repeated the evidence offered and the defendant repeated the motions made before the Recorder. The jury returned a verdict of guilty. Judge McLean imposed a sentence of 30 days, suspended on the condition the defendant comply with the City Building and Housing Code and pay costs.

On appeal, this Court held:

> "It is within the police power of the General Assembly and of a city, when authorized, to establish minimum standards, materials, designs, and construction of buildings for the safety of the occupants, their neighbors, and the public at large. G.S.

143-138; *Drum v. Bisaner*, 252 N.C. 305, 113 S.E. 2d 560; *Lutz Industries v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333. The authority to make and to enforce appropriate safety regulations in the public interest arises under the police power. In case of conflicting interests the public good is and must be paramount.

The Charlotte ordinance and the Legislative enactments involved in this case are not shown to be violative either of the Constitution of North Carolina or of the United States. In the trial and judgment below, we find

No Error."

Subsequent to the above decision of this Court, the defendant, James R. Walker, petitioned the District Court of the United States for a writ of habeas corpus by which he challenged his conviction upon the ground the section of the City Code under which he was convicted is unconstitutional and in violation of his vested right to possess, use and maintain his own private property and that any warrant or arrest or verdict or judgment entered against him violates these rights under the Fourteenth Amendment to the Constitution of the United States.

On August 3, 1966, after hearing, the United States District Court for the Western District of North Carolina (Craven, J) held:

"The ordinances and statutes in question here are neither unreasonable nor arbitrary and, therefore, are not repugnant to the federal Constitution. It is not unconstitutional for a municipality to take upon itself a duty to see that repairs to buildings within its domain will be made in such manner as will prevent fire and structural hazards. This duty it is bound to exercise to protect the safety and health of the general public. To require a permit in order to implement such reasonable supervision is not in violation of any provision of the Constitution of the United States.

Petitioner has failed to show a violation of any of his federal constitutional rights, and, for this reason, his petition will be, and hereby is, dismissed."

The decision of the District Court on Walker's appeal was reviewed by the United States Court of Appeals for the Fourth Circuit. In a per curiam opinion, that Court held:

". . . The repair and remodeling work undertaken by Walker was both major and extensive, and within the reasonable reach of the code. For the reasons stated in the opinion of the District

Court, we find no unconstitutional infirmity in the Building Code as applied in this case. Affirmed."

Walker's petition for certiorari was denied by the Supreme Court of the United States. 388 U.S. 917, 18 L. Ed. 2d 1360.

[1, 2] As between the citizen and the public, the citizen's private property rights must be subordinated to such reasonable regulation as the over-riding public interest requires. For the purpose of protecting life, health, safety and welfare, the General Assembly has power to promulgate rules, fix minimum standards, prescribe materials and designs for buildings and other structures so long as they are not arbitrary, capricious or unreasonable and so long as they tend to promote health, safety and welfare. In these matters, property rights must yield to the proper exercise of the police power. Strong's N. C. Index, 2d Ed., Vol. 2, Sec. 11, "Police Power", p. 203, et seq.

[3] The plaintiff has stipulated that he is in violation of the inspector's order of March 24, 1964 and intends to remain in violation. Upon the authorities cited, and for the reasons assigned, the judgment entered in the Superior Court of Mecklenburg County is

Affirmed.

JETTIE BRADY GALLIGAN v. TOWN OF CHAPEL HILL

No. 50

(Filed 6 January 1970)

1. Municipal Corporations § 12— policeman — governmental function

A police officer in the performance of his duties is engaged in a governmental function.

2. Municipal Corporations § 12— waiver of governmental immunity

In the absence of statutory authority a municipality has no power to waive its governmental immunity.

3. Municipal Corporations § 12— waiver of governmental immunity — purchase of liability insurance

In the absence of some affirmative action by a municipality, the purchase of motor vehicle liability insurance constitutes a waiver of its governmental immunity to the extent of the insurance policy so obtained. G.S. 60-191.1.

4. Statutes § 5— statutory construction

The intent of the Legislature controls the interpretation of a statute, and in ascertaining this intent the courts should consider the language of

the statute, the spirit of the Act and what it sought to accomplish, and the changes to be made and how these should be effected.

5. Evidence § 3— facts within common knowledge — renewal of liability insurance

It is common knowledge that liability insurance must be renewed periodically and that a renewal policy often has slight modifications as to the vehicles or employees insured or other similar changes.

6. Municipal Corporations § 12— waiver of governmental immunity — renewal of liability insurance — prior resolution against waiver

Municipality did not waive its governmental immunity for the negligent operation of a police car by its renewal in 1965 of a liability insurance policy on such vehicle, where the municipal governing body had passed in 1951, after the enactment of G.S. 160-191.1, a resolution against waiver of its governmental immunity, the municipality not being required to adopt a new resolution against waiver each time it renews a liability policy or acquires a new policy, since its resolution remains in effect until amended, rescinded or repealed by the governing body.

ON *certiorari* to review the decision of the North Carolina Court of Appeals, reported in 5 N.C. App. 413, 168 S.E. 2d 665, reversing a judgment entered by *Clark, J.*, at the January 20, 1969 Session of Superior Court of ORANGE County, which dismissed the action as to the Town of Chapel Hill.

Plaintiff instituted this action to recover for personal injuries and property damage alleged to have been sustained by her in a vehicular collision on 18 July 1965. She alleges, and the defendant (Town) admits, that at the time of the collision Harold P. Smith was a police officer engaged in his official duties and was operating a car owned by the Town. In its answer the Town pleaded immunity from liability for torts committed by its employees while performing a governmental function and prayed that the action be dismissed as to it. The Town's plea in bar was heard prior to the trial of the case on its merits. After hearing the evidence on this plea, the presiding judge made the following findings of fact and conclusions of law:

> "The plaintiff alleged and the defendant Town of Chapel Hill admitted that at the time of the collision giving rise to the plaintiff's alleged cause of action, the defendant Harold P. Smith was a police officer of the Town of Chapel Hill and that he was acting within the course and scope of his employment at the time of the collision and that in the exercise of its powers as a municipal corporation, it maintained a police force, that Harold P. Smith was a policeman and that at the time of the collision, he was in the performance of his duties as a policeman. The

plaintiff did not contend that the Town of Chapel Hill was not engaged in a governmental function of a municipality at the time of the collision giving rise to the plaintiff's alleged cause of action. On June 25, 1951, the governing body of the Town of Chapel Hill unanimously adopted and enacted a resolution or ordinance to the effect that the governmental immunity from liability for torts by the Town of Chapel Hill was not waived, the ordinance specifically stating that under no circumstances or in any respect as suggested by Chapter 1015, Session Laws of 1951 (G.S. 160-191, et seq.) or in any other manner did the defendant Town of Chapel Hill waive its governmental immunity for damages to property or injury to persons as a result of its activities. The resolution and ordinance has not since been repealed, rescinded or amended. The defendant Town of Chapel Hill had purchased a policy of motor vehicle liability insurance and said policy was in full force and effect at the time the plaintiff's alleged cause of action arose, but by purchasing said motor vehicle liability policy, the defendant Town of Chapel Hill did not waive its governmental immunity from liability for torts under the provisions of G.S. 160-191.1 for that it took affirmative action in passing said resolution and ordinance of June 25, 1951. Based upon the foregoing findings of fact, the Court concludes that the defendant Town of Chapel Hill is immune from liability for torts committed by its agents and employees when engaged in the performance of a governmental function and that the action against the defendant Town of Chapel Hill should be dismissed."

The court thereupon dismissed the action against the Town. Plaintiff then took a voluntary nonsuit as to the individual defendant Harold P. Smith and appealed to the North Carolina Court of Appeals.

Plaintiff did not except to Judge Clark's findings of fact. She assigned as error his ruling that the Town had taken affirmative action retaining its governmental immunity from liability for torts of its agents, servants or employees.

The Court of Appeals reversed the judgment entered by Clark, J., and the Town filed a petition for *certiorari* in this Court, which petition was allowed on September 23, 1969.

Emery B. Denny, Jr., Perry C. Henson, and Daniel W. Donahue for defendant appellant.

Ottway Burton for plaintiff appellee.

MOORE, J.

[1] Prior to the legislative enactment on 14 April 1951 of Chapter 1015 of the Session Laws of 1951, now codified as G.S. 160-191.1 to 160-191.5, the common law rule of governmental immunity prevailed in North Carolina. *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42. Under this common law rule a municipality is not liable for the torts of its employees or agents committed while performing a governmental function. A police officer in the performance of his duties is engaged in a governmental function. As stated in *Croom v. Burgaw,* 259 N.C. 60, 129 S.E. 2d 586:

> "A police officer duly appointed by a municipality is not an agent or servant of the city or town in the sense that the doctrine of *respondeat superior* applies. A municipality is not liable in tort for the wrongful acts of its police officers committed in connection with the performance of their duties as such officers. *McIlhenney v. Wilmington,* 127 N.C. 146, 37 S.E. 187, 50 L.R.A. 470; *Parks v. Princeton,* 217 N.C. 361, 8 S.E. 2d 217; *Gentry v. Hot Springs,* 227 N.C. 665, 44 S.E. 2d 85."

[2] In the absence of statutory authority a municipality has no power to waive its governmental immunity. *Stephenson v. Raleigh,* 232 N.C. 42, 59 S.E. 2d 195.

G.S. 160-191.1 reads in pertinent part as follows:

> "The governing body of any incorporated city or town, by securing liability insurance as hereinafter provided, is hereby authorized and empowered, but not required, to waive its governmental immunity from liability for any damage by reason of death, or injury to person or property, proximately caused by the negligent operation of any motor vehicle by an officer, agent or employee of such city or town when acting within the scope of his authority or within the course of his employment. Such immunity is waived only to the extent of the amount of the insurance so obtained. Such immunity shall be deemed to have been waived in the absence of affirmative action by such governing body."

Following the enactment of this statute, the Board of Aldermen of the Town of Chapel Hill on 25 June 1951 unanimously passed the following resolution:

> "WHEREAS, Chapter 1015 of the Session Laws of 1951 provides a method whereby municipalities may waive their governmental immunity; and WHEREAS, one provision of said law seems to require positive action on the part of this Governing

> Body with respect to whether or not it desires to waive such governmental immunity; and, WHEREAS, it is the opinion of this Governing Body that the waiving of such immunity is not to the best interest of this municipality: NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF ALDERMEN OF THE TOWN OF CHAPEL HILL, N. C. [that the Town] does not under any circumstances or in any respect as suggested by Chapter 1015 of the Session Laws of 1951 or in any other manner waive its governmental immunity for damages to property or injury to persons as a result of its activities."

This resolution has not since been repealed, rescinded or amended.

At the hearing on the plea in bar the evidence before Judge Clark showed that on 11 July 1965 Hartford Accident and Indemnity Company issued a liability insurance policy to the Town effective to 11 July 1966. This policy was a renewal of one which had been in effect since sometime prior to 1951 and was in full force and effect on the date of plaintiff's alleged injuries. Defendant admits that the policy covered the car operated by the policeman Harold P. Smith at the time of the collision in suit and that it protected him from individual liability for the negligent operation of this motor vehicle while he was acting within the course of his employment by the Town.

[6] The question for decision is: Did the Town waive its defense of governmental immunity from the tort alleged in this action to the extent of the liability insurance policy which it purchased effective 11 July 1965, or was this immunity preserved by the resolution adopted by the Board of Aldermen on 25 June 1951?

[3] In the absence of some affirmative action by the Town, the purchase of liability insurance would have constituted a waiver of its governmental immunity to the extent of the insurance policy so obtained. G.S. 160-191.1; *White v. Mote*, 270 N.C. 544, 155 S.E. 2d 75. However, on 25 June 1951 the Town did take affirmative action in a most positive manner by the adoption by its Board of Aldermen of the resolution which contained no time limit. Does this resolution continue in effect until repealed or is affirmative action required each time the Town renews or purchases additional insurance?

[4] The intent of the Legislature controls the interpretation of the statute. To ascertain this intent the courts should consider the language of the statute, the spirit of the Act and what it sought to accomplish, the change or changes to be made and how these should

be effected. It should be construed contextually and harmonized if possible to avoid absurd or oppressive consequences. *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1; *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797; 7 Strong's N. C. Index 2d, Statutes § 5.

In 5 McQuillin, Municipal Corporations § 15.42 (3d Ed., 1969), it is stated that "when bylaws or ordinances are not limited as to the time of their operation they never become obsolete, but continue in force until legally repealed or superseded"; and in 6 McQuillin, Municipal Corporations § 22.33 (3d Ed., 1969) it is stated that "an ordinance properly proved is presumed to have continued in force until the contrary is shown, and the burden of proof is on one who asserts the contrary."

In *Hutchins v. Durham,* 118 N.C. 457, 24 S.E. 723, 32 L.R.A. 706, this Court said:

> ". . . It is not material that the town had the power to repeal its ordinance, when it had never in fact annulled or altered it in the least particular. . . . In the same way succeeding boards of commissioners are deemed to act, subject to the provisions of ordinances passed by their predecessors in authority, until they see fit to repeal them directly or to substitute others inconsistent with the older enactments."

[5, 6] It is common knowledge that liability insurance must be renewed periodically and that a renewal policy often has slight modifications as to the vehicles or employees insured or other similar changes. To require a town to adopt a new resolution each time it renews a liability insurance policy or acquires a new liability policy would place an unnecessary and useless burden upon the town and impose a condition not provided for in the statute or contemplated by the General Assembly. No existing right was taken from its citizens or from others by the passage of the resolution of 25 June 1951 by the Board of Aldermen. To the contrary, the Town, after finding that it was for the public interest, simply sought to retain the immunity which it had always enjoyed. The Town did, however, provide protection to those who might be injured by the negligent acts of its agents or employees.

We conclude that the resolution adopted by the Board of Aldermen on 25 June 1951 was affirmative action within the contemplation of G.S. 160-191.1, and that by the adoption of this resolution the Town retained its governmental immunity until such time as the Board of Aldermen of the Town of Chapel Hill amends, rescinds or repeals this resolution.

We hold, therefore, that the judgment of the trial court dismissing the action as to the Town of Chapel Hill was proper, and that its judgment should have been sustained. The decision of the North Carolina Court of Appeals holding otherwise is

Reversed.

MAURICE DEAN FREEZE, BY HIS NEXT FRIEND, JOHN D. FREEZE, JR. v. BETTY J. CONGLETON

No. 49

(Filed 6 January 1970)

1. Husband and Wife § 14— estate by entireties

A title conveying real estate to a husband and his wife, nothing else appearing, creates an estate by the entireties.

2. Husband and Wife § 15— estate by entireties — condition of the premises

Where a husband and wife own a home as tenants by the entireties, the husband is responsible for the condition of the premises.

3. Negligence § 59— injury to infant licensee — home of defendant — unmarked glass door — nonsuit

In an action for injuries received by a five-year-old social guest when he walked or ran into a clear and unmarked glass door in defendant's home, plaintiff's evidence was insufficient to submit the issue of defendant's negligence to the jury, where it tended to show that plaintiff's mother, who was present, knew that the glass door had been closed and that plaintiff was walking towards it, but that she failed to take timely action to prevent the accident, and there was no evidence that defendant was aware of any danger to plaintiff.

4. Negligence § 59— injury to infant licensee — duty of parents

Ordinarily, when the parent of an infant licensee is present with the infant and has full knowledge of the condition of the premises, the duty to warn of defective conditions falls on the parent.

5. Negligence § 59— duty of owner to infant — dangerous condition on premises — presence of parents

Ordinarily, there is a duty on the owner to exercise ordinary care for protection of one of tender years, after his presence in a dangerous situation is or should have been known, but this duty of care does not apply when the infant is accompanied by his parent or by someone to whom his custody has been committed by the parent.

MOORE, J., did not participate in the decision of this case.

ON certiorari to review the decision of the North Carolina Court of Appeals reported in 5 N.C.App. 472, which reversed a judgment of involuntary nonsuit entered by *Lupton, J.* at the March 24, 1969 Session, CABARRUS Superior Court.

Hartsell, Hartsell & Mills by K. Michael Koontz; Boyd C. Campbell, Jr., for the plaintiff.

Williams, Willeford & Boger by John Hugh Williams, for the defendant.

HIGGINS, J.

The plaintiff, Maurice Dean Freeze, age 5 years, by his next friend, instituted this civil action against Betty J. Congleton to recover damages for injuries he sustained when he "walked or ran" into a clear, unmarked glass door between the living room and the porch of the Congleton home. The accident occurred about 2:30 in the afternoon of October 8, 1967 while the minor plaintiff, his father, his mother, and his older brother were guests of the Congletons in Raleigh. The infant plaintiff's mother and the defendant, Mrs. Congleton, are sisters.

The plaintiff alleged:

"That at all times herein alleged the defendant, Betty J. Congleton and her husband, Albert B. Congleton, were the owners of a certain house and lot located at 4400 Drexel Drive, in the City of Raleigh, Wake County, North Carolina."

The complaint further alleged:

"That the injuries to the plaintiff were due, caused and occasioned by and followed as the sole, direct and proximate result of the negligence of the defendant, Betty J. Congleton, in that: (a) She did, with full knowledge of the plaintiff's age and lack of appreciation of danger, close said sliding glass door and block the doorway through which the minor plaintiff had entered the defendant's residence and did while sitting next to said door fail to warn the minor plaintiff as he approached said door that she had blocked same with an invisible glass.

(b) She did, although other children on previous occasions had walked and run into said sliding glass door, fail to mark said door in any way or manner whatsoever or warn the plaintiff and other young children of the presence and danger of said invisible glass door."

Dr. Altany, a plastic surgeon, testified by letter: "Due to the nature and extent of these residual scars, the patient will always have permanent evidence of facial scarring of the left cheek and left lower lip." The plaintiff's only other witness was his mother, Mrs. Frances Freeze. She testified:

> "On Sunday, October 8, 1967, I was at my sister's home in Raleigh, North Carolina, together with my sons, Maurice and John, and my husband. We spent Saturday night. Sunday was a mild, sunny day. A little after 2:30 p.m. Maurice was involved in an accident at my sister's home. I was in the den when the accident occurred together with my husband, my sister Betty, her husband A. B., and their son Butch.
>
> Immediately prior to the accident, Maurice was in the back yard playing with the other children. The sliding glass doors were open at the time and had been open all afternoon. Maurice had been in and out the door four or five times earlier in the afternoon and each time the door was open.
>
> A little after 2:30 p.m., Maurice came through the screen door onto the back porch which is just outside the sliding glass doors. He then came through the porch, the opening to the den and through the den to go to the bathroom. While Maurice was in the bathroom, my sister who was sitting beside the door reached behind her and pushed the sliding glass door shut. At the time my sister closed the door, there were no markings on it and nothing in front of the door. Maurice came back into the den. When I last saw him, he was walking toward the sliding glass door and approximately five feet from it. At that time a cat jumped in my lap and I looked down at the cat. I then heard a crash and looked up and saw the broken glass. My sister, seated directly beside the door, did not say or do anything as Maurice approached the door, and when Maurice went through the door my sister was seated about one foot from where he went through. There was nothing over this opening that you could see as Maurice walked toward it. It was clear, clean glass."

The plaintiff alleged that the defendant and her husband were the owners of the house and had lived there for five or six years. The witness, her husband and children, including the one injured, had been guests in the home "once or twice a year. During this time, the only change in the construction of the house was that the back porch was screened in."

[1, 2] The allegation that the husband and wife were the owners of the home necessarily implies that as husband and wife they had

title to it. A title conveying real estate to a husband and his wife, nothing else appearing, creates an estate by the entireties. *Nesbitt v. Fairview Farms,* 239 N.C. 481, 80 S.E. 2d 472; *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566; *Morton v. Lumber Co.,* 154 N.C. 278, 70 S.E. 467. ". . . (W)here an estate by the entirety exists, the husband, during coverture, is entitled to full control . . . of the land to the exclusion of his wife." *Williams v. Williams,* 231 N.C. 33, 56 S.E. 2d 20; *Atkinson v. Atkinson,* 225 N.C. 120, 33 S.E. 2d 666. The condition of the premises was the responsibility of the husband.

[3] Under the allegations of the complaint, the plaintiff must make out a case of actionable negligence against the defendant for closing the door and failing to warn the infant plaintiff of the danger. At the time of the injury, the defendant, her husband, their son Butch, and the plaintiff's mother and father were in the den watching a world series baseball game on television.

According to the evidence of Mrs. Freeze, the room was "a combination of kitchen, dining room and den . . . approximately 12 x 15 or 12 x 20 feet." The room contained a refrigerator, a stove, a sink, oven, two tables, lamp, at least one sofa, a television set and numerous chairs. The size of the room, the character and amount of furnishings, the number of persons present, and the progress of the game on television all argue strongly the defendant did not know Maurice had returned to the den. Evidence is lacking, therefore, that she had opportunity to warn him after he re-entered the room. The mother, who was present, had actual knowledge of these pertinent facts and knew he was walking toward the door and was five feet from it. Nevertheless, she permitted a cat to distract her attention. This observation is not intended as a reflection on the mother, but to emphasize the accidental character of the unfortunate mishap which occurred.

[3-5] Under the circumstances here disclosed, should the defendant be held responsible for failure to stop the boy on his approach to the door? "Ordinarily when parents are present, in charge of their children of tender years, the responsibility for their care and safety falls on the parents." *Watson v. Nichols,* 270 N.C. 733, 155 S.E. 2d 154. The plaintiff's witness, Mrs. Freeze, quoted the defendant as having said that other children had run into the door, and that she herself had done so on one occasion. However, there is no evidence either that anyone was injured, or that the door was broken, and no reason to anticipate that a boy five years old would crash into it with such force as to drive himself all the way through the glass and be injured. The parents of the injured boy knew the glass

door was deceptive, hard to see, and easy to run into. They knew the likelihood that one approaching the door space might find it difficult to detect whether the door was open or closed. That others had been deceived added little, if anything, to the knowledge that the danger was there before their eyes, and had been there to their knowledge for five or six years, during which they had been occasional guests in the home. Ordinarily, when the parent of an infant licensee is present with the infant and has full knowledge of the condition of the premises, the duty to warn of defective conditions falls on the parent. Ordinarily, there is a duty on the owner to exercise ordinary care for the protection of one of tender years, after his presence in a dangerous situation is or should have been known. However, ". . . (T)his duty of care as to the infant does not apply when he is accompanied by his parent or by someone to whom his custody has been committed by the parent." 65 C.J.S., Negligence, § 63(68), p. 799; *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154; *Wagoner v. Railroad,* 238 N.C. 162, 77 S.E. 2d 701.

The value of notice of danger to a lively and venturesome boy of five is questionable. To be of value, notice, when due, should be given to the parent or custodian. In this instance, the mother had timely notice — she saw the door closed.

For the reasons herein discussed, we conclude the evidence offered in the trial court was insufficient to warrant its submission to the jury. The judgment of nonsuit should have been sustained. The decision of the North Carolina Court of Appeals, holding otherwise, is

Reversed.

MOORE, J., did not participate in the decision of this case.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BEVERAGES, INC. v. CITY OF NEW BERN

No. 7 PC.

Case below: 6 N.C. App. 632.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 February 1970.

BOARD OF EDUCATION v. LAMM

No. 2 PC.

Case below: 6 N.C. App. 656.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 3 February 1970.

CONWAY v. TIMBERS, INC.

No. 3 PC.

Case below: 7 N.C. App. 10.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 February 1970.

HILLSBOROUGH, TOWN OF v. SMITH

No. 55 PC.

Case below: 4 N.C. App. 316.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 18 June 1969.

IN RE HENNIS

No. 6 PC.

Case below: 6 N.C. App. 683.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 11 February 1970.

LAND CORP. v. STYRON

No. 1 PC.

Case below: 7 N.C. App. 25.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 3 February 1970.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

MORRIS v. PERKINS

No. 98 PC.

Case below: 6 N.C. App. 562.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 February 1970.

OLIVE v. BIGGS

No. 90 PC.

Case below: 6 N.C. App. 265.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 3 February 1970.

QUINN v. SUPERMARKET, INC.

No. 5 PC.

Case below: 6 N.C. App. 696.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 February 1970.

STATE v. MACON

No. 35.

Case below: 6 N.C. App. 245.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 11 February 1970.

STATE v. MARTIN

No. 108 PC.

Case below: 6 N.C. App. 616.

Petition for writ of *certiorari* to North Caroina Court of Appeals denied 3 February 1970.

STYRON v. SUPPLY CO.

No. 4 PC.

Case below: 6 N.C. App. 675.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 February 1970.

STATE OF NORTH CAROLINA v. ROBERT LOUIS ROSEBORO

No. 25

(Filed 30 January 1970)

1. Constitutional Law § 29; Grand Jury § 3— motion to quash indictment — systematic exclusion of members of defendant's economic class and race

In this first degree murder prosecution, the trial court did not err in the denial of defendant's motion to quash the indictment on the ground that persons of defendant's economic class and race were systematically excluded from the grand jury which returned the indictment, where approximately 50% of its members were of defendant's race, and there was no evidence with respect to the economic status of members of the grand jury or of the defendant other than the evidence and finding that all members of the grand jury were employed except one who was retired.

2. Constitutional Law § 29; Jury § 7— jury selection — constitutionality

In this prosecution for first degree murder, the record fails to disclose any violation of defendant's constitutional rights in the selection of the trial jury where the court, pursuant to G.S. 9-12, ordered that a jury be summoned from an adjoining county, and upon defendant's challenge to the array, the court conducted a detailed inquiry and found upon proper evidence that the special veniremen were impartially selected from a properly compiled jury list, the court permitted attorneys for both the State and the defendant to explore in detail the background and fitness of each venireman to serve on the jury, and the court overruled challenges for cause by the State to those who opposed capital punishment, and by defendant to those who favored capital punishment, if the venireman stated he could hear the evidence, the arguments of counsel, the charge of the court, consider all permissible verdicts, and return a verdict based on the evidence and the law as defined by the court.

3. Homicide § 21— first degree murder — sufficiency of evidence

In this prosecution for first degree murder, the State's evidence *is held* sufficient to permit a jury finding that defendant did the killing with malice, after premeditation and deliberation, and in the perpetration or attempt to perpetrate a felony, where it tends to show that the victim's nude body was found on the floor of her shop, that she had four penetrating stab wounds in the chest, one in the abdomen, and numerous head wounds, that her death was caused by the stab wounds in the chest, that defendant was discovered in the shop armed with a pistol and attempting to hide, that when he was forced out by tear gas, defendant had in his pocket the victim's keys to the store doors and to the cash register and the victim's cigarette lighter, that he had blood on his clothing, that the victim's clothes were found in disarray on the floor of the store's bathroom, and that sun glasses which defendant had bought less than two hours before and a knife similar to the one defendant was seen carrying three days before were with the clothes.

4. Homicide § 6— manslaughter defined

Manslaughter is the unlawful killing of a human being without malice,

express or implied, without premeditation and deliberation, and without the intention to kill or to inflict serious bodily injury.

5. Homicide § 30— first-degree murder — necessity for instructions on manslaughter

In this first degree murder prosecution wherein the State's evidence tended to show a killing with malice, after premeditation and deliberation, and in the perpetration or attempt to perpetrate a felony, and defendant offered no evidence, the trial court did not err in failing to charge the jury that it might return a verdict of guilty of manslaughter.

6. Criminal Law § 135— jury finding of guilt in capital case — sentence

Where the jury, after finding guilt of a capital felony, returns as a part of its verdict a recommendation that the punishment shall be imprisonment for life in the State's prison, the court must impose the life sentence and no other; absent a recommendation, the court must impose the death sentence.

7. Constitutional Law § 30; Criminal Law §§ 135, 138— capital case — jury recommendation as to punishment — constitutionality

After guilt in a capital case has been established by the jury, its recommendation as to punishment does not violate the defendant's constitutional rights.

8. Constitutional Law § 30; Criminal Law §§ 135, 138— capital case — jury recommendation of life imprisonment — lack of standard

Provision of G.S. 14-17 which permits the jury to recommend life imprisonment for first degree murder is not unconstitutional in failing to prescribe any standard or rule to govern the jury in determining whether to make a recommendation.

9. Criminal Law § 135; Constitutional Law §§ 29, 30— death penalty for first-degree murder — constitutionality — former statute allowing guilty plea

The case of *United States v. Jackson*, 390 U.S. 570, is not authority for holding that capital punishment for first degree murder was abolished in North Carolina by [former] G.S. 15-162.1, which, prior to its repeal by the 1969 Legislature, permitted a defendant to tender a written plea of guilty to a capital charge and provided that if such plea were accepted by the State and approved by the court, the tender and acceptance had the effect of a jury verdict of guilty with a recommendation of life imprisonment.

10. Criminal Law § 146— appeal from death sentence — questions not involving matters of law

In this appeal from a sentence of death imposed on a sixteen year old defendant, the Supreme Court cannot consider questions and arguments based on defendant's age which do not involve matters of law or legal inference, defendant having offered no evidence indicating or suggesting lack of legal responsibility for his criminal acts.

11. Criminal Law § 146; Constitutional Law § 10— powers of Supreme Court

The Supreme Court hears appeals and determines whether the trial court committed prejudicial error of law or legal inference, but the Court has neither the power to change the law nor to remit the penalty the law exacts after conviction.

12. Constitutional Law §§ 6, 9; Criminal Law § 138— legislative and executive powers — punishment for crime

Appeals for changes in the law should be made to the Legislature; appeals for relief from its penalties after conviction should be made to the Governor.

BOBBITT, C.J., and SHARP, J., dissenting as to death sentence.

APPEAL by defendant from *Thornburg, S.J.*, April 28, 1969 Session, CLEVELAND Superior Court.

In this criminal prosecution the defendant, Robert Louis Roseboro, was indicted for the first degree murder of Mary Helen Kendrick Williams. The bill of indictment, proper in form, charged the killing occurred in Cleveland County on June 22, 1968.

Immediately after the indictment was returned, the court, upon inquiry, found the defendant to be indigent, and appointed attorney Horace Kennedy to represent him.

At the October Session of the court, the defendant, by petition, requested that attorney Kennedy be released as defense counsel and that Julius Chambers of Charlotte be appointed in his stead. The court granted the motion to relieve attorney Kennedy and to substitute attorney Chambers. Mr. Chambers filed a motion for continuance and for an order that the prosecution be required to disclose and make available to the defendant evidence in the possession and control of the State, including a list of all prospective State's witnesses. In response to the motion, the court entered this order:

> ". . . (T)hat the State shall make available to the defendant for inspection and copying the evidence now in the possession of the State; that the State shall further make available to the defendant prospective State's witnesses for the purpose of interview, and the State shall advise said witnesses that defense counsel has the right to interview them and that the State shall further make available police reports and statements of witnesses pertaining to defendant's case."

By consent, the case was continued a number of times. However, at the March, 1969 Session, the defendant filed a written motion to

quash the indictment. In summary, these are the grounds for the motion: (1) That persons of the defendant's economic class and race were systematically excluded from the grand jury which returned the indictment; (2) That G.S. 14-17 under which the defendant was indicted is unconstitutional in that it provides the death penalty upon conviction, but gives the jury the right to recommend life imprisonment without fixing any standards or rules to govern the exercise of the right; (3) That G.S. 15-162.1, in effect at the time of the offense (but repealed before trial), placed an unconstitutional burden on the defendant and chilled his right to plead not guilty and to have a jury trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; (4) That the capital charge provided by G.S. 14-17, absent a jury recommendation of life imprisonment, requires a death sentence which is cruel and unusual punishment, forbidden by the Constitution of the United States.

The court conducted a full inquiry into the manner of selecting the Cleveland County grand jury which returned the indictment. The court found, upon competent evidence:

> "12. That at no time in making up the list of prospective jurors was any consideration given to the race, creed, color, or economic status of any person whose name appeared on said list; that no discrimination on any basis appeared to exist in obtaining names for the jury list; that no discrimination of any kind was practiced in obtaining said list;
>
> 13. That the jury commission in preparing the list used the tax list of the county and the voter registration records as required by law but did not deem it necessary or desirable to seek any other sources of names;
>
> 14. That Grady McArter, Chairman of the Grand Jury that issued the indictment against the defendant remembered the makeup of the Grand Jury to be approximately half black and half white, but recalled only one member of the Grand Jury to be unemployed, he being retired and previously employed."

The court concluded:

> "2. That the grand jury which indicted the defendant, Robert Louis Roseboro, was properly constituted;
>
> 3. That the bill of indictment returned by the grand jury against the defendant, Robert Louis Roseboro, is valid and proper in all respects. . . ."

At the March 6, 1969 Session, the defendant filed a motion to

remove the cause from Cleveland County upon the alleged ground the defendant could not obtain a fair trial either in Cleveland, where the bill was returned, or in the adjoining county of Gaston or Rutherford because of the unfavorable and wide-spread publicity. In lieu of the request to remove the cause to a county other than Gaston or Rutherford, the court, as provided in G.S. 9-12, ordered that a trial jury be summoned from the adjoining county of Burke.

One original and two additional writs of venire facias were required before the trial jury, consisting of twelve regular jurors and one alternate, was empaneled. The defendant filed a challenge to the return of each writ upon the ground that members of his economic class and race were arbitrarily and systematically excluded. Judge Thornburg conducted another hearing and at its conclusion found the challenges were not sustained and that the method of preparing the jury list and drawing the names was not in violation of the defendant's rights. Evidence supported the findings.

The actual selection of the trial jury proceeded according to the North Carolina custom and practice. Each venireman was called and sworn to make true answers to the questions asked by the court or by anyone under its direction touching his fitness to serve as a juror. First the State, then the defendant, and finally the court, proceeded with the interrogation of each venireman as his name was drawn from the hat. After the examination of each venireman was completed, the court heard and passed on challenges for cause. The State attempted to challenge for cause those who opposed capital punishment. The defendant attempted to challenge for cause those who favored capital punishment. The court made individual findings in each case. Challenges for cause were overruled if a venireman stated he could hear the evidence, the arguments of counsel, the charge of the court, consider all permissible verdicts, and could return a verdict based on the evidence and the law as defined by the court.

The record discloses that both the State and the defendant used all peremptory challenges allowed by law. The defendant sought to exercise a fifteenth peremptory challenge, and excepted when the court refused to allow it. The procedure employed in selecting the jury is set out in 416 pages of the record.

The sufficiency of the State's evidence to make out a case of murder in the first degree does not seem to be seriously challenged. Consequently, the evidence, only in short summary, is reported here.

In substance, the evidence disclosed that on June 22, 1968, the deceased, Mary Helen Kendrick Williams, a white woman, operated

"Mary's Custom Towel Outlet" in Shelby, Cleveland County. The one story shop had three doors, one on the north and one on the south of the building, and a double door for loading on the east. The north and south doors apparently had glass panels. The double door on the east was secured from the inside by a 2 x 4 resting in hooks attached to the door facings. The main room of the shop contained display tables. There was a bathroom located off the display room.

Mrs. Lola Williams, mother-in-law of Mary Helen Kendrick Williams, called the towel shop over the telephone at 10:45 on the morning of June 22, 1968. Mary Helen answered. She seemed busy and the mother-in-law did not engage her in any further conversation.

At approximately 11:15 a.m., Mrs. Alberghini, a prospective customer, found the entrance door locked. Through the glass she saw a person, whom she identified as the defendant, inside the display room. She banged on the door in order to ascertain whether the shop would be opened. She turned away for a moment to speak to her daughter who was in an automobile parked near the door. When she looked again, the person inside had disappeared. ". . . I saw him . . . on the floor, looking around a table. . . . His face was right on the floor. . . ." The witness went to a place of business next door and had the police notified.

Officers Blankenship and Lowery arrived at about 11:30. They found all doors locked or barred. They saw the defendant inside the shop with a pistol in his hand. They also saw a human body and blood on the floor. They commanded the defendant to come out with his hands up. Instead, he concealed himself in the building. The officers then broke open a window and threw in a tear gas bomb. After a short interval, the defendant, forced out by the fumes, surrendered. He was unarmed. He had a bunch of keys in his pocket and a cigarette lighter with the letters "Bob" engraved thereon.

As soon as the fumes permitted, the officers entered the building. They found the nude body of Mrs. Williams behind one of the display tables. The body was warm and covered with blood.

The autopsy conducted by Dr. Gentry, a Pathologist, disclosed "gaping" head wounds and four penetrating stab wounds in the chest, and one in the abdomen. The chest wounds were five or more inches deep, two had penetrated the heart. In the opinion of Dr. Gentry, the stab wounds in the chest caused death.

A search of the room disclosed a part of a broken pistol grip near

the body. The articles of clothing which the victim wore to work that morning were found on the floor of the bathroom. The undergarments were in disarray. Some were turned wrongside out. Near the clothing, the officers found a pair of sun glasses, a pocket knife and a pistol with the grip broken. The broken part found near the body fitted the broken grip of the pistol found in the bathroom.

A State's witness testified that three days before the killing, he saw in the defendant's possession a knife similar to the one discovered in the bathroom and introduced in evidence. A clerk, who worked in Blanton's Variety Store near the shop, testified that about 9:30 or 10:00 on the morning of the homicide, she sold the defendant a pair of sun glasses. She exhibited to the jury a card which held eleven pairs of sun glasses — one space was empty. The witness stated the only sale from the card was made to the defendant. When asked whether the glasses found in the shop and introduced in evidence were the glasses she sold the defendant, she replied, "Yes, sir, I think they are."

The victim's daughter identified the cigarette lighter with the engraving "Bob" as belonging to her mother. This lighter was taken from the defendant's pocket after his surrender. The three keys also taken from the defendant's pocket were held together by two rings. One of the keys unlocked the south door, a second unlocked the north door, and the third unlocked the shop's cash register.

An expert in blood analysis testified that the blood splotches found on the defendant's clothing were of group A, the same type as the victim's blood.

At the close of the State's evidence, counsel for defendant moved for a directed verdict of not guilty. The court denied the motion. The defendant did not offer evidence. The court ruled that defense counsel had the right to open and conclude the argument. The defendant waived his right to open the argument, but did conclude. The ruling followed North Carolina practice.

After argument and the court's charge, the jury returned a verdict "guilty of murder in the first degree". The court denied defense motion to set aside the verdict. From the sentence of death in the manner provided by law, the defendant appealed.

Robert Morgan, Attorney General; Burley B. Mitchell, Jr., Staff Attorney, for the State.

Chambers, Stein, Ferguson & Lanning by J. LeVonne Chambers and James E. Ferguson, II, for the defendant.

HIGGINS, J.

The defendant, through his able and experienced counsel, by many objections and exceptions, has challenged the validity of the indictment, the trial, the verdict, and the sentence. The challenge to the indictment was based upon these grounds: (1) The grand jury in Cleveland County which returned the indictment was unlawfully constituted in that members of the defendant's economic class and race were systematically excluded from the jury list; (2) That a charge of murder in the first degree, carrying the death penalty, is cruel and unusual punishment and violates the defendant's Constitutional rights; (3) That G.S. 14-17, which provides the penalty of death for murder in the first degree, and G.S. 15-162.1, in effect at the time of the alleged offense (but later repealed), required the defendant to risk his life in order to exercise his right to a jury trial; (4) That the statute which gives the jury the right to recommend life imprisonment violates the defendant's constitutional rights in that no rules or standards are fixed by which the jury may be guided in determining whether to recommend life imprisonment.

[1] The indictment was returned by a grand jury from Cleveland County. According to the evidence and the court's findings, the grand jury was properly constituted. Actually, approximately 50% of its members were of the defendant's race. There is no evidence with respect to the economic status of the members of the grand jury or of the defendant, other than the evidence and finding that all members of the jury were employed except one who was retired. The motion to quash the indictment on the first ground is not sustained. The other grounds assigned in the motion to quash are hereafter discussed in connection with the defendant's other objections and exceptions.

[2] The defense counsel moved for a change of venue upon the ground of extensive and unfavorable publicity, not only in Cleveland County, but also in the adjoining counties of Gaston and Rutherford. In lieu of an order of removal, the court, as authorized by G.S. 9-12, ordered that a jury be summoned from the adjoining county of Burke. An original and two additional writs of venire facias were issued and returned. The defendant challenged the array of veniremen brought in under the authority of each writ. The ground of the challenge was that members of the defendant's economic class and race were systematically excluded from the jury list in Burke County. The court conducted a detailed inquiry, and upon proper evidence, found that 6 to 8% of the total population of

Burke County were members of the defendant's race. The inquiry disclosed that the special veniremen were impartially selected from a properly compiled jury list. Actually, two members of the colored race were summoned on the original venire, three on the first additional venire, and two on the second additional venire. The record does not disclose with certainty how many veniremen actually reported in obedience to the writs.

In the actual selection of the trial jury, the court permitted attorneys both for the State and for the defendant to explore in detail the background and fitness of each venireman to serve on the jury. The examinations followed the North Carolina practice and custom. Each venireman was individually sworn to make true answers to the court or anyone under its direction on matters touching his fitness to serve as a juror. The record of the examinations by the solicitor and defense counsel, and by the court are fully set out. The examinations and findings leading to the selection of the jury appear on 416 pages of the trial record. Members of the colored race were passed by the court as qualified to sit on the trial panel. The record shows that some of these, possibly all, were removed by peremptory challenge after their fitness to serve had been found by the court. The State did not exceed its number of peremptory challenges.

The jury selection conformed to the pattern approved by both State and Federal decisions. *Witherspoon v. Illinois,* 391 U.S. 510; *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568; *State v. Spence & Williams,* 274 N.C. 536, 164 S.E. 2d 593; *State v. Atkinson,* 275 N.C. 288, 176 S.E. 2d 241; *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885; *State v. Ruth,* 276 N.C. 36, 171 S.E. 2d 897. The record fails to disclose any violation of defendant's constitutional rights in the selection of the trial jury. The court's finding to that effect is sustained by the evidence.

To avoid misunderstanding, we call attention to the form of questions propounded to prospective jurors by counsel for the defendant, by the solicitor for the State, and occasionally by the court, concerning the venireman's attitude regarding the recommendation which the jury may make with respect to punishment in the event a guilty verdict had been agreed upon. Here is a question from the record: "Would you exercise an independent determination yourself, irrespective of how the other jurors felt on the matter of mercy or no mercy?" Here is a typical question: "If your verdict is guilty of murder in the first degree, would you consider recommending mercy?" G.S. 14-17 defines murder in the first degree and upon conviction "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 verdict in a criminal case is a basic part of the record proper. It should be correct. We need not speculate what judgment the court could impose if the jury did no more than recommend mercy.

[3] A short summary of the State's evidence offered before the trial jury appears in the statement of facts. We hold the evidence was amply sufficient to make out a case of murder in the first degree and to sustain a verdict of guilty as charged. The defendant did not offer evidence. The court charged the jury to return one of four permissible verdicts: (1) Guilty of murder in the first degree; (2) Guilty of murder in the first degree with the recommendation that the punishment shall be imprisonment for life in the State's prison; (3) Guilty of murder in the second degree; (4) Not guilty.

[4] The defendant, in addition to the grounds assigned in the motion to quash the indictment, contends the court committed error by failing to charge that the evidence permitted the jury to return a verdict "guilty of manslaughter". Evidence of manslaughter is lacking. The crime is defined as the unlawful killing of a human being without malice, express or implied, without premeditation and deliberation, and without the intention to kill or to inflict serious bodily injury. *State v. Kea,* 256 N.C. 492, 124 S.E. 2d 174; *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889; *State v. Benge,* 272 N.C. 261, 158 S.E. 2d 70.

[3, 5] The evidence permitted the jury to find the defendant had inflicted numerous "club" wounds on his victim's head, four deep stab wounds in the chest, and one in the abdomen. These brutal wounds were inflicted on a helpless woman alone in her shop. The defendant was discovered in the shop armed with a pistol, attempting to hide, and when forced out by tear gas, he had in his pocket the victim's keys to the store doors and to the cash register. He also had in his pocket the victim's cigarette lighter. He had blood on his pockets and on his clothing. The sun glasses which he had bought less than two hours before were found under the victim's clothes in the bathroom. The disarray of the clothing would admit a finding the victim was forced to disrobe. The sun glasses and the knife were with the clothes. Any reasonable interpretation of the evidence permits a finding that the defendant did the killing with malice, after premeditation and deliberation (*State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484), and in the perpetration or attempt to perpetrate a felony (*State v. Hill, supra; State v. King,* 226 N.C. 241, 37 S.E.

2d 684). Evidence of manslaughter or anything from which manslaughter might be inferred is absent. *State v. Ruth, supra; State v. Hill, supra; State v. Atkinson, supra.*

For the correct rule with respect to proof by circumstantial evidence, see *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

[6] This Court, in many cases, has held valid the provision that the jury, after finding guilt of a capital felony, may return as a part of its verdict, a recommendation that the punishment shall be imprisonment for life in the State's prison. The court must impose the life sentence, and no other. The cases also hold that absent a recommendation, the court must impose the death sentence. Reasons for the holding are set forth in detail in *State v. Peele, supra; State v. Spence & Williams, supra; State v. Atkinson, supra; State v. Hill, supra; State v. Ruth, supra.* We adhere to the decisions for the reasons fully stated in the opinions.

[7] We think the General Assembly of 1949, which inserted the provision, intended to give the jury the unencumbered and unconditional right to make the recommendation. The purpose was to permit the jury, after hearing all the evidence, to determine whether the State would take or spare the life of the accused. We see no more objection to giving this power to the jury than to require it to decide between murder in the first degree and murder in the second degree. The former takes — the latter spares — the life of the accused. After guilt in a capital case has been established by the jury, its recommendation as to punishment does not violate the defendant's constitutional rights. "The States are free to allocate functions between the judge and the jury as they see fit." *Jackson v. Denno,* 378 U.S. 368 (Footnote 19); *State v. Hill, supra.*

[8] The defendant's objection to the provision which permits the jury to recommend life imprisonment on the ground that it lacks any standard or rule to govern a jury in determining whether to make a recommendation is not sustained. The very lack of any standard or rule leaves the jury without restriction, free to save the life of the accused as an unfettered act of grace. If rules or standards are prescribed, the right of the jury becomes restricted and fettered, and the chance of a recommendation is reduced. The defendant's claim that he is prejudiced by the provision, or the lack of guidelines for its use, is an empty argument.

[9] At the time the offense was committed and the indictment was returned in this case, G.S. 15-162.1 was in effect. The section permitted a defendant in a capital case to tender to the court a

written plea of guilty to the charge and if the solicitor for the State agreed to accept the plea, and the presiding judge approved, the acceptance had the effect of a verdict of guilty with a recommendation that the punishment should be imprisonment for life in the State's prison. The section was repealed effective March 15, 1969, eight months after the indictment was returned, but 43 days before the trial. The defendant never at any time tendered or attempted to tender to the State any written plea of guilty to the charge. Nevertheless, the defendant argues that G.S. 15-162.1 abolished capital punishment in North Carolina. The defendant cites as authority the Supreme Court decision in *United States v. Jackson,* 390 U.S. 570, and the United States Court of Appeals Fourth Circuit decision in *Alford v. North Carolina,* 405 F. 2d 340.

This Court has repeatedly held that G.S. 15-162.1 (Chapter 616, Session Laws of 1953) did not alter G.S. 14-17. The 1953 Act offered a means by which a defendant charged with a capital felony and his counsel were permitted to tender the plea of guilty, which plea, if and when accepted, had the effect of a conviction with a recommendation that the punishment be imprisonment for life in the State's prison. Neither the prosecutor nor the judge was under any obligation to accept the plea. Clearly, until the plea was offered and accepted, the offer was without legal effect. The Act provided: "Upon rejection of such plea (and of course if it was never tendered) the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance whatever." The repeal in 1969 neither added to, nor took from, G.S. 14-17. As stated by Justice Lake in *State v. Atkinson, supra,* the section, G.S. 14-17 ". . . is capable of standing alone". We do not interpret *United States v. Jackson, supra,* as deciding that capital punishment for first degree murder is abolished in North Carolina by G.S. 15-162.1.

In *Alford v. North Carolina, supra,* the United States Court of Appeals for the Fourth Circuit apparently attempted to pass on the validity of G.S. 14-17 and hold the death penalty invalid. A charge of murder in the first degree includes murder in the second degree and manslaughter. In the *Alford* case the defendant entered a plea of guilty of murder in the second degree and was sentenced to a prison term. We consider the decision neither authoritative nor persuasive.

[10] As in *Hill,* the defendant Roseboro has raised questions and presented arguments other than those which involve matters of law or legal inference, for example, the defendant's age, "around 16". The defendant failed to offer evidence indicating or suggesting lack

of legal responsibility for his criminal acts. Article IV, Section 10 of the North Carolina Constitution fixes the jurisdiction of this Court: "The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference."

[11, 12] This Court has neither the power to change the law nor to remit the penalty the law exacts after conviction. The Court hears appeals and determines whether the trial court committed prejudicial error of law or legal inference. Hence, appeals for changes in the law should be made to the Legislature; appeals for relief from its penalties after conviction should be made to the Governor. *State v. Hill, supra; State v. Atkinson, supra.* The record before us fails to reveal error of law or legal inference in the defendant's indictment, trial, conviction or sentence. We find

No error.

BOBBITT, C.J., and SHARP, J., dissenting as to death sentence.

We vote to vacate the judgment imposing the death sentence. In our 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.

The crime was committed on June 22, 1968, when our statutes relating to capital punishment for murder in the first degree were G.S. 14-17 and G.S. 15-162.1. It was and is our opinion that, until the repeal of G.S. 15-162.1 on March 25, 1969, the 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 (1968), and in *Pope v. United States,* 392 U.S. 651, 20 L. ed. 2d 1317, 88 S. Ct. 2145 (1968), rendered invalid the death penalty provisions of G.S. 14-17. The reasons underlying our opinion have been stated fully in the dissenting opinions in *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593, and in *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241, and in *State v. Hill,* 276 N.C. 1, 171 S.E. 2d 897 (1969). Repetition is unnecessary.

G.S. 15-162.1 was repealed by Chapter 117, Session Laws of 1969. The 1969 Act, if construed to provide greater punishment for murder in the first degree than the punishment provided therefor when the crime was committed, would, in that respect, be unconstitutional as *ex post facto.* 16 Am. Jur. 2d, Constitutional Law § 396. In our view, if the death penalty provisions of G.S. 14-17 were invalid on June 22, 1968, when the crime was committed, they were invalid as to this defendant in April, 1969, when he was tried, convicted and sentenced.

LULA WILSON, EXECUTRIX OF THE ESTATE OF DAMUS B. WILSON v. CRAB ORCHARD DEVELOPMENT COMPANY, INC., LEON OLIVE, LEWIS B. FROST, AND FRED DENSON

No. 45

(Filed 30 January 1970)

1. Pleadings § 38— judgment on pleadings — power of court

A court of record has inherent power to render judgment on the pleadings where the facts shown and admitted by the pleadings entitle a party to such judgment.

2. Pleadings § 38— judgment on pleadings — motion — issue presented

A motion for judgment on the pleadings is in the nature of a demurrer and presents the issue of law, Are the matters set up in the pleading of the opposing party sufficient in law to constitute a cause of action or a defense?

3. Pleadings § 38— judgment on pleadings — admissions by movant

A party who moves for judgment on the pleadings admits, for the purpose of such motion, (1) the truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts, and (2) the untruth of his own allegations controverted by the pleadings of his adversary.

4. Pleadings § 38— judgment on pleadings — admissions — conclusions and epithets

A party who moves for judgment on the pleadings does not thereby admit the conclusions of his adversary or mere epithets such as "fraud" and "fraudulent."

5. Pleadings § 38— judgment on pleadings — consideration of pleadings

In determining the motion for judgment on the pleadings, the court is limited to the facts properly pleaded in the pleadings before it, inferences reasonably to be drawn from such facts, and matters of which the court may take judicial notice.

6. Pleadings § 38— judgment on pleadings — consideration of exhibits

On motion for judgment on the pleadings, an exhibit attached to and made a part of the pleading is properly considered; the terms of such exhibit control other allegations of the pleading attempting to paraphrase or construe the exhibit, insofar as the allegations are inconsistent with the terms.

7. Pleadings § 19; Limitation of Actions § 16— statute of limitations — complaint — demurrer

A complaint is not demurrable for the reason that it shows upon its face that the cause of action alleged is barred by the statute of limitations.

8. Limitation of Actions § 16— plea of statute — the answer — motion for judgment on pleadings

When defendant pleads the statute of limitations in his answer, and

the plaintiff files no reply thereto and the complaint shows upon its face facts which, without more, support such plea in bar, defendant's motion for judgment on the pleadings should be granted on that ground.

9. Pleadings § 38— judgment on pleadings — incorrect reasons

The trial court is not required to specify its reason for allowing a motion for judgment on the pleadings; if it does state a ground for its judgment which is incorrect, but the judgment was nevertheless proper, it will be affirmed on appeal.

10. Limitation of Actions § 16; Assignments for Benefit of Creditors § 1— plea of statute of limitations

Allegations in defendant's further answer (1) that it appears on the face of the complaint that the plaintiff seeks to have defendants' assignment of savings certificates to a corporation on 28 October 1960 declared an assignment for benefit of creditors, (2) that plaintiff had actual knowledge of the assignment almost seven years prior to the institution of the present action, and (3) that plaintiff's claim is barred by the three-year statute of limitations set forth in G.S. 1-52(2), *held* a sufficient plea of the statute as a bar to plaintiff's right of action.

11. Assignments for Benefit of Creditors § 1— sufficiency of complaint — transfer for valuable consideration

Allegations by plaintiff, a judgment creditor of an insolvent defendant, that defendant and his wife assigned savings certificates to a newly-formed corporation in exchange for the simultaneous issue to defendant of shares in the corporation, which shares the defendant then used to satisfy his own creditors, *held* insufficient to constitute an assignment for benefit of creditors, it appearing from the complaint that the transfer of the savings certificates to the corporation was for a valuable consideration, moving to defendant from the corporation, and that the defendant parted irrevocably with all his rights in the certificates.

12. Assignments for Benefit of Creditors § 1— definition

A general assignment for the benefit of creditors is ordinarily a conveyance by a debtor without consideration from the grantee of substantially all his property in trust to collect the amount owing to him, to sell and convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor.

13. Corporations § 21— powers — use of assets

The assets of a corporation, nothing else appearing, are not held by it in trust but may be used by the corporation in the operation of its business.

14. Corporations § 28— dissolution — application of assets

A corporation, upon dissolution, is under a duty first to apply its assets, including the capital acquired by it in the exchange of stock, to the payment of its own debts and then to distribute the remainder to its then stockholders, observing the respective rights of the preferred and common shares.

15. Corporations § 21— powers — acquisition of property in trust

A corporation may receive property, other than its capital, upon its agreement to hold it in trust for designated persons.

16. Pleadings § 38— judgment on pleadings — construction of complaint

Upon motion for judgment on the pleadings, the complaint must be liberally construed in plaintiff's favor.

17. Trusts § 14— constructive trust — assignment of savings certificates to corporation — judgment creditors of assignor — preferences

Allegations that insolvent defendant and his wife assigned to a newly-formed corporation their rights and interests in certain savings certificates in exchange for the simultaneous issue to defendant of shares of stock in the corporation, which shares the defendant then used to satisfy his own creditors, *held* insufficient to give rise to a constructive trust in the savings certificates on behalf of the plaintiff, a judgment creditor of defendant, where (1) there is no allegation of fraud or breach of duty by the corporation, (2) there is no allegation of any prior wrongdoing by the defendant in the acquisition of his title to the certificates, (3) there is no allegation that the transfer was part of a contemplated preference of other creditors over the plaintiff, and (4) there is no allegation of preferential treatment to, or by, the corporation or in which the corporation participated.

18. Trusts § 14— constructive trust — creation

A constructive trust is a duty or relationship imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty, or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

19. Trusts § 14— constructive trust — unjust enrichment

A constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing.

20. Trusts § 14— constructive trust — fraud — breach of duty

A common, indispensable element in the situations out of which a constructive trust is deemed to arise is some fraud, breach of duty, or other wrongdoing by the holder of the property, or by one under whom he claims, the holder himself not being a bona fide purchaser for value.

21. Corporations § 12— knowledge of dominant shareholder imputed to corporation

Where, at the time shareholder assigned to a newly-formed corporation his rights in savings certificates, the corporation was completely dominated by the shareholder and his attorney, and they or their nominees were its only directors and officers, the corporation is deemed to have acquired the interest in the certificates with notice of facts then known to the shareholder, including his then intent as to his own future control or transfer of the stock issued to him in exchange for the savings certificates.

22. Limitation of Actions §§ 12, 18; Assignments for Benefit of Creditors § 2— three-year limitation — accrual of action — pursuit of different remedy

Assuming that transfer in 1960 of savings certificates from insolvent de-

fendant to a newly-formed corporation was an assignment for the benefit of creditors forbidden by G.S. 23-1, an action on that ground instituted in 1967 by a judgment creditor of the defendant is barred by the three-year statute of limitations, G.S. 1-52(2); the fact that plaintiff, in good faith, pursued another remedy between 1961 and 1967, which proved unavailable, does not extend the time allowed for the institution of the present action.

23. Limitation of Actions § 4— time of running of statute — accrual of action

The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues; the cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed.

24. Limitation of Actions § 7— accrual of action — fraud

A cause of action to set aside an instrument for fraud accrues and the statute of limitations thereon begins to run when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of reasonable diligence, such facts should have been discovered.

25. Assignments for Benefit of Creditors § 1— parties liable — attorney — sufficiency of allegations

In judgment creditor's action to have declared as an assignment for benefit of creditors a transfer by insolvent defendant and his wife of savings certificates to a newly-formed corporation, the complaint *is held* to allege no cause of action against defendant's attorney, where the complaint alleges only that the attorney participated in the formation of the corporation for the purpose of "getting creditors off the back of" defendant.

MOORE, J., did not participate in the consideration or decision of this case.

ON certiorari to review the decision of the North Carolina Court of Appeals in 5 N.C. App. 600.

This action was instituted 5 July 1967 in the Superior Court of Mecklenburg County for the purpose of having an assignment of certain savings certificates by the defendant Denson and wife to the defendant Crab Orchard Development Company, Inc., hereinafter called Crab Orchard, declared an assignment for the benefit of the creditors of Denson, including the plaintiff. The record shows there was no service of summons upon the defendants Denson and Frost but Frost demurred to the complaint on the ground that it did not state a cause of action against him and, the demurrer being overruled, answered to the merits, thereby entering a general appearance and conferring jurisdiction over his person upon the court.

The defendants Crab Orchard, Olive and Frost filed a joint

answer, which included a plea of the statute of limitations in bar of the plaintiff's action. No reply was filed by the plaintiff. Upon motion of these defendants for judgment on the pleadings, the court entered judgment dismissing the action on the ground that the plaintiff's action is barred by the three-year statute of limitations. The Court of Appeals affirmed this judgment and certiorari was granted to review its decision.

The long and complex complaint alleges, in substance, the following, the numbering of the allegations being revised:

1. The plaintiff is a judgment creditor of Fred Denson. Execution was issued upon the judgment and returned with the notation that the sheriff of Mecklenburg County was unable to find any assets of Denson upon which to levy.

2. Denson was the owner of savings certificates in the amount of $70,500, subject to a pledge to First Federal Savings & Loan Association.

3. On 19 October 1960, Denson and Olive, his attorney, incorporated and organized Crab Orchard. Upon completion of the organization, Denson, his wife, Olive and Frost were its only stockholders, directors and officers. On 20 October 1960, Denson and wife and Crab Orchard entered into a written agreement. It recited that the Densons were "desirous of assigning their right" in the savings certificates to Crab Orchard in return for the issuance by it of shares of its common and preferred stock. This agreement further recited, "Another consideration of the corporation for the issuance of the said stock is to assist [the Densons] in the payment of his judgment creditors and other creditors." It further recited that the Densons "have agreed with the corporation that all of the stock so issued shall be used for that purpose" and any shares issued to them and not so used would be turned back to the corporation "as treasury stock" except for one share to be retained by the Densons. The agreement, following these recitals, was that the Densons "agree that all of the capital stock of the corporation issued to them and not used for the purpose of satisfying their creditors" would be returned to the corporation and treated as treasury stock.

4. Olive, as attorney for Denson, incorporated and organized Crab Orchard for the purpose of getting "the creditors off the back of Fred Denson." For that purpose the savings certificates were assigned to Crab Orchard and Crab Orchard

agreed to "assign" (i.e., issue) all of its stock to Denson "for the purpose of satisfying all creditors" of Denson, of which the plaintiff was then one. It issued 32,260 shares, of the par value of one dollar each, to Denson.

5. Denson thereupon "reissued" (i.e., transferred) all of these shares as follows: To his creditor Estridge 3,900 shares, to his creditor Carolina Paving Company 6,200 shares, to "unknown creditors" 19,160 shares and to Olive, for services in forming the corporation, 3,000 shares. No shares were offered to or transferred to the plaintiff, who had no knowledge of these transactions until some time after they occurred. At the time of the transfer of the shares, Denson was insolvent so that the transfer of the shares by Denson was a preference of the creditors to whom they were so transferred.

6. The said shares were issued by Crab Orchard to Denson on 28 October 1960, on which date Denson and his wife assigned their right in the savings certificates to Crab Orchard.

7. Crab Orchard accepted the assignment of the savings certificates "upon the condition that Crab Orchard would issue shares of corporate stock in Crab Orchard" to Denson and his wife, who agreed that "all of the stock so issued shall be used" to "assist Fred Denson * * * in the payment of Fred Denson's * * * creditors."

8. On 31 December 1960, Crab Orchard, Denson and wife, Olive, as secretary of Crab Orchard, and stockholders Frost, Olive, S. L. McManus, Helen D. McManus and Burrows (the last three not otherwise identified in the complaint), assigned to R. S. Pate (not a party to this action) the right to receive the first $10,000 collected on the savings certificates, Pate being a creditor of Denson. This assignment recited that Pate had contemplated an action to set aside the assignment to Crab Orchard of the savings certificates, as a preference to creditors other than Pate and fraudulent as to him, but had agreed not to institute such action if the assignment to him of such interest in the certificates was "carried out." This assignment to Pate also provided that the savings certificates would not be used as security for any other loan.

9. The plaintiff had no notice of any of the above assignments or stock issuances and transfers "until after November 24, 1961 when the plaintiff brought supplemental proceedings" and the court ordered Denson and Crab Orchard to be exam-

ined. "All the details" were not known to the plaintiff "until the case on appeal [From the judgment that the plaintiff was not entitled to reach funds in the hands of Crab Orchard by supplemental proceedings. See 270 N.C. 556, 155 S.E. 2d 190] was being made up, some time in 1966."

10. The plaintiff was a creditor of Denson when Crab Orchard was incorporated and when the above mentioned assignments and the issuances and transfers of the shares of stock occurred. Denson was then and still is insolvent.

11. "All of said transfers" were fraudulent as to creditors in that they "prevented this plaintiff from collecting her claim, removed the assets of Denson from execution, prevented any assignment to the plaintiff or the giving of security to the plaintiff," and preferred Pate and other creditors of Denson over the plaintiff. The plaintiff and other creditors of Denson are entitled to share equally in the proceeds of the savings certificates for the reasons that: (a) the assignment to Crab Orchard was "accepted by Crab Orchard upon the trust that it would hold the assigned equity in the certificates for the payment of the then existing creditors"; (b) the assignments were made when the assignees knew Denson was insolvent and knew that the assignment "was made as an assignment for benefit of creditors"; (c) the assignment of the savings certificate to Crab Orchard and the assignment to Pate were secret insofar as the plaintiff is concerned and thereby the plaintiff was prevented from receiving, with the other creditors of Denson, an equal division of his assets.

12. For these reasons the proceeds of the savings certificates are held by Crab Orchard "impressed with a trust or right in the plaintiff to share equally with the other creditors of Fred Denson" and therefrom the defendant should be required to pay to the plaintiff the amount of her judgment against Denson, $5,000 with interest and costs.

13. Prior to any distribution of the proceeds of the savings certificates, the plaintiff notified the defendant of her claim.

The answer of the defendants admits: The plaintiff is a judgment creditor of Denson; Denson did not offer her any shares of Crab Orchard stock; Denson, Olive and Frost became shareholders of Crab Orchard; Denson has disposed of all shares issued to him "except for shares having a par value of $500," of which he is still the record owner; Crab Orchard and Denson entered into the agree-

ment of 20 October 1960; on 28 October 1960 Denson and wife assigned to Crab Orchard the savings certificates and Crab Orchard, in consideration of such assignment, issued to Denson shares of common and preferred stock; on 31 December 1960 Crab Orchard and others named therein executed the agreement with Pate. The remaining allegations of the complaint are denied.

As a first further answer and plea in bar, the defendants allege: The plaintiff seeks to have the assignment of the savings certificates by Denson and wife to Crab Orchard declared an assignment for benefit of creditors; the plaintiff had actual knowledge of the assignment "almost seven years" prior to the institution of the present action; it was recorded in the office of the register of deeds more than six years prior to the institution of the action; and, therefore, the plaintiff's claim is barred by the three-year statute of limitations, G.S. 1-52(2). The defendants also allege that the plaintiff is barred by her laches.

As another further answer and plea in bar, the defendants allege, in substance: In 1960 Denson, a real estate developer, was being pressed by creditors for immediate payment of large debts which, though solvent, he lacked the immediate ability to pay. Denson and wife owned the savings certificates. Pursuant to a plan devised by them, Crab Orchard was organized and their right in the certificates was assigned to it in consideration for its issuance of shares of its common and preferred stock. The original plan was that Crab Orchard would engage in a real estate venture of its own, but that part of the plan was abandoned after Crab Orchard was organized. All of the stock issued by Crab Orchard "to the Densons was subsequently reassigned to various creditors of the Densons in full satisfaction of their respective claims except for a certificate for shares having a par value of $500, which said certificate the Densons still own of record." The only shares issued by Crab Orchard were 32,260 shares to the Densons, 3,000 shares to Frost for $3,000 in cash, and 3,000 shares to Olive for professional services to Crab Orchard. The exchange of Crab Orchard's stock for the interest of the Densons in the savings certificates was a sale of the certificates "for full and fair consideration." No trust relationship between Crab Orchard and the plaintiff or any other person was created thereby. Crab Orchard now holds or will receive as proceeds of the savings certificates approximately $36,700 less certain obligations for attorneys' fees. It has heretofore paid out of such proceeds approximately $14,600 in attorneys' fees, taxes and court costs and approximately $5,700 to R. S. Pate. It is entitled to retain for the benefit of its creditors and shareholders all proceeds of the certificates now held or hereafter re-

ceived by it. None of the defendants is indebted to the plaintiff. Crab Orchard has filed with the Secretary of State articles of dissolution and, as soon as it is permitted to do so, intends to liquidate.

Newitt & Newitt for plaintiff appellant.

Barnes & Dekle for defendant appellees.

LAKE, J.

[1, 2] A court of record has inherent power to render judgment on the pleadings where the facts shown and admitted by the pleadings entitle a party to such judgment. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384; *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; 71 C.J.S., Pleading, § 424. A motion for such judgment is in the nature of a demurrer and presents the issue of law, Are the matters set up in the pleading of the opposing party sufficient in law to constitute a cause of action or a defense? *Jones v. Warren,* 274 N.C. 166, 161 S.E. 2d 467; *Van Every v. Van Every,* 265 N.C. 506, 144 S.E. 2d 603; *Erickson v. Starling, supra; Raleigh v. Fisher, supra.*

[3, 4] A party who moves for judgment on the pleadings thereby admits, for the purpose of the determination of such motion: (1) The truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations controverted by the pleading of his adversary. *Jones v. Warren, supra; Shaw v. Eaves,* 262 N.C. 656, 138 S.E. 2d 520; *Erickson v. Starling, supra; Raleigh v. Fisher, supra.* He does not thereby admit the conclusions of his adversary stated in such pleading or mere epithets such as "fraud" and "fraudulent." *Jones v. Warren, supra; Van Every v. Van Every, supra;* 71 C.J.S., Pleading, § 426.

[5, 6] In determining the motion the court looks only to the pleadings. It hears no evidence, makes no findings of fact and does not take into account other statements of fact in briefs of the parties, or in testimony or allegations by them in a different proceeding. It is limited to the facts properly pleaded in the pleadings before it, inferences reasonably to be drawn from such facts and matters of which the court may take judicial notice. *Erickson v. Starling, supra;* Strong, N.C. Index 2d, Pleadings, § 38; 71 C.J.S., Pleading, § 426. An exhibit, attached to and made a part of the pleading, is so considered. *Van Every v. Van Every, supra.* The terms of such exhibit control other allegations of the pleading attempting to paraphrase or construe the exhibit, insofar as these are inconsistent with its terms.

[7, 8] Although a complaint is not demurrable for the reason that it shows upon its face that the cause of action alleged is barred by the statute of limitations, it is well settled in this State that when the defendant pleads the statute of limitations in his answer, the plaintiff files no reply thereto and the complaint shows upon its face facts which, without more, support such plea in bar, the defendant's motion for judgment on the pleadings should be granted on that ground. *Reidsville v. Burton,* 269 N.C. 206, 152 S.E. 2d 147; *Acceptance Corp. v. Spencer,* 268 N.C. 1, 149 S.E. 2d 570; *Van Every v. Van Every, supra;* McIntosh, North Carolina Practice & Procedure, 2d ed., § 373, and Phillips' 1969 pocket parts thereto.

[9] The trial court is not required to specify its reason for allowing a motion for judgment on the pleadings. Strong, N.C. Index 2d, Pleadings, § 38. If it does state a ground for its judgment which is incorrect, but the judgment was nevertheless proper, it will be affirmed on appeal. *Acceptance Corp. v. Spencer, supra.* In the *Spencer* case, judgment on the pleadings was entered dismissing a counterclaim on the ground that it was barred by the statute of limitations, this being the ground therefor stated in the motion. Affirming the judgment, Parker, C.J., speaking for the Court, said:

> "Original defendants' counterclaim is so fatally deficient in substance as against plaintiff that it presents no material issue of fact to support a recovery from plaintiff of damages in the amount of $50,000, or to operate as a setoff against plaintiff's claim. Consequently, it is subject to a judgment on the pleadings. The judgment on the pleadings should have been granted on the ground that the original defendants' counterclaim is fatally deficient in substance. Therefore, the granting of the judgment on the pleadings in favor of plaintiff was correct, though it was placed on the wrong ground."

[10] In their first further answer, the defendants allege that it appears upon the face of the complaint that the plaintiff seeks to have the assignment by Denson and wife to Crab Orchard on 28 October 1960 declared an assignment for the benefit of creditors, that if such liability exists it is a liability created by statute, that the plaintiff had actual knowledge of the assignment almost seven years prior to the institution of this action and, therefore, her claim is barred by the three-year statute of limitations set forth in G.S. 1-52(2). This is, in form, a sufficient plea of the statute as a bar to the plaintiff's right of action. *Bank v. Warehouse Co.,* 172 N.C. 602, 90 S.E. 698. It far surpasses the mere assertion, without any allegation of facts to support it, that the plaintiff's cause of action is

barred by the statute. Such unsupported assertion has repeatedly been held insufficient to constitute the plea in bar. *Lassiter v. Roper,* 114 N.C. 17, 18 S.E. 946; *Pope v. Andrews,* 90 N.C. 401; *Humble v. Mebane,* 89 N.C. 410.

Consequently, the plaintiff having filed no reply to this plea, we turn to the complaint to see whether: (1) it fails to state facts constituting a cause of action against the defendants, or (2) if it states a cause of action, it also shows facts sufficient in themselves to support the plea that such cause of action is barred by the statute of limitations. If either of these inquiries be answered in favor of the defendants, their motion for judgment on the pleadings was properly allowed, even though the superior court granted it on the second ground only. The Court of Appeals resolved both inquiries in favor of the defendants and affirmed the judgment.

[11] The Court of Appeals said, "We hold that the facts alleged in the complaint do not constitute an assignment for the benefit of creditors." We agree.

G.S. 23-1 provides: *"Debts mature on execution of assignment; no preferences.* — Upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once, and no such deed of trust or deed of assignment shall contain any preferences of one creditor over another, except as hereinafter stated."

[12] It will be observed that this statute does not define an assignment for benefit of creditors but merely forbids a preference in such assignment. We must go, therefore, to the common law, as declared in the decisions of this Court, to determine what constitutes an assignment for the benefit of creditors. In 6 Am. Jur. 2d, Assignments for Benefit of Creditors, § 1, it is said:

> "A general assignment for the benefit of creditors is ordinarily a conveyance by a debtor *without consideration from the grantee* of substantially all his property *in trust* to collect the amount owing to him, to sell and convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor." (Emphasis added.)

[11] The assignment of 28 October 1960 from Denson and wife to Crab Orchard was, according to the complaint, made in exchange for the simultaneous issue to Denson of 32,260 shares of Crab Orchard stock to Denson. The fair construction of the complaint is that Crab Orchard, a newly formed corporation, had no other assets and no liabilities, except perhaps obligations for nominal amounts for

organizational expenses. That being true, the shares issued to Denson, when received by him, had a value equal to the value of the property transferred by him and his wife to Crab Orchard. Thus, at that stage of the proceedings, Denson had available for his creditors as much property as he had prior to the assignment to Crab Orchard. Though he was then insolvent, according to the complaint, it was not unlawful or a violation of any duty owed to the plaintiff or his other creditors for Denson so to change the form of his property, nothing else appearing. *Estridge v. Denson, etc.*, 270 N.C. 556, 565, 155 S.E. 2d 190. The transfer of the certificates to Crab Orchard was for a valuable consideration, moving to Denson from Crab Orchard.

[13] The assets of a corporation, nothing else appearing, are not held by it in trust. They, like the assets of any other person, may be used by the corporation in the operation of its business. The complaint does not state the objects for which Crab Orchard was incorporated, as set forth in its charter. While, upon this motion for judgment on the pleadings, we may not consider the allegation in the answer to the effect that, at that stage of the proceedings, it was contemplated that Crab Orchard would engage in the real estate business, we may reasonably assume that its charter authorized Crab Orchard to conduct some business. Within the limits of its corporate powers, it was free to use for the carrying on of business the capital acquired by it in exchange for the stock which it issued.

[14, 15] Upon dissolution of the corporation, it would be under a duty first to apply its assets, including such capital, to the payment of its own debts and then to distribute the remainder to its then stockholders, observing the respective rights of the preferred and common shares. *Teague v. Furniture Co.*, 201 N.C. 803, 161 S.E. 530. A corporation may, of course, receive property, other than its capital, upon its agreement to hold it in trust for designated persons. There is, however, at least, serious doubt that a corporation may make a valid contract to hold in trust for specified persons, or a specified group of persons, to whom it is not otherwise obligated, the capital it receives in exchange for its issuance of its own stock, so as to defeat the rights of its own creditors and of transferees of such stock therein. See: *Brinson v. Supply Co.*, 219 N.C. 498, 14 S.E. 2d 505; *Teague v. Furniture Co., supra.* That question is not presented in the present case, for it appears from the complaint that the agreement between Crab Orchard and Denson was not that it would hold the proceeds of the certificates of deposit in trust for the

creditors of Denson, but that, in exchange for such certificates, it would issue stock to Denson, which stock he would use to satisfy his own creditors.

The complaint alleges that Denson contracted with Crab Orchard that he would use all of the shares it issued to him for the purpose of satisfying his creditors and would return to it any shares not so used by him. The complaint then alleges that all of the shares issued to Denson by Crab Orchard have been "reissued," *i.e.*, transferred, by him, including "19,160 shares to unknown creditors." (Though the answer alleges that, as of the date of its filing, Denson was still the record owner of a few shares, the brief of the defendants states that these also have now been transferred of record.) Crab Orchard cannot pay over any of its assets to the plaintiff without depleting the fund in which these shareholders are entitled to participate. The complaint does not allege any misconduct or bad faith by any of these shareholders. It does not allege any transfer by Denson to anyone other than a creditor of his. Even if shares of Crab Orchard stock now outstanding are held by or under a transferee from Denson who was not his creditor at the time the stock was issued by Crab Orchard, the complaint alleges no facts which would permit Crab Orchard to deny the right of such person to participate as a shareholder in the final distribution of its assets.

The complaint does not allege that the transfers of the shares by Denson to his creditors were to be on a *pro rata* basis. Apparently, what was contemplated was simply that Denson, not having access to the funds represented by the pledged certificates of deposit, converted his equity therein into 32,260 shares of stock with which he would negotiate, on a case by case basis, settlements with his creditors. It appears from the complaint that this is what he did. In this, there is no basis for an inference that the agreement between Denson and Crab Orchard contemplated that Crab Orchard was to hold the equity in the certificates, or their proceeds, in trust for Denson's creditors and certainly there is in this no basis for an inference that Crab Orchard was, under any circumstances, to return anything to Denson. Denson parted irrevocably with all his rights in the certificates.

There are decisions by this Court holding a mortgage, given by an insolvent person upon substantially all of his property to secure a preexisting debt so as to prefer the beneficiary of the mortgage over his other creditors, is void as a preferential assignment for the benefit of creditors forbidden by G.S. 23-1. *Bank v. Tobacco Co.*, 188 N.C. 177, 124 S.E. 158; *Odom v. Clark*, 146 N.C. 544, 60 S.E.

513; *Bank v. Gilmer,* 117 N.C. 416, 23 S.E. 333; *Bank v. Gilmer,* 116 N.C. 684, 22 S.E. 2. It would seem such mortgage is more closely analogous to a voluntary and preferential deed of trust which is also within the condemnation of G.S. 23-1. In any event, our attention has been called to no decision holding that a transfer, by an insolvent, of substantially all of his property to a newly formed corporation in consideration for its issue to him of all of its shares of stock, is an assignment for benefit of the transferor's creditors, or is otherwise affected by G.S. 23-1.

In 6 C.J.S., Assignments for Benefit of Creditors, § 4k, it is said:

> "In a sale of property there is a fixed price but no trust, while in an assignment there is a trust and no fixed value given to the property. In a sale there is no reversion or return to the seller, while in an assignment, on the satisfaction of the creditors, a trust results in favor of the assignor in the residue of the unappropriated property or its proceeds."

The transaction between the Densons and Crab Orchard, as set forth in the complaint, was a sale by the Densons of their interest in the certificates of deposit, not an assignment of those certificates for the benefit of the creditors of Denson.

[16, 17] The plaintiff contends also that her complaint, liberally construed in her favor, as it must be upon a motion for judgment on the pleadings (*Tilley v. Tilley,* 268 N.C. 630, 151 S.E. 2d 592; *Burton v. Reidsville,* 240 N.C. 577, 83 S.E. 2d 651), is sufficient to state a cause of action for the enforcement of a constructive trust. The Court of Appeals held that the complaint does not allege facts giving rise to a constructive trust. We agree.

[18-20] A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83; *Garner v. Phillips,* 229 N.C. 160, 47 S.E. 2d 845; Strong, N.C. Index 2d, Trusts, § 14. Unlike the true assignment for benefit of creditors, which is an express trust, intended as such by the creator thereof, a constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. It is an obligation or relationship imposed irrespective of the intent with which such party acquired the property, and in a well-nigh unlimited variety of situations. See:

Electric Co. v. Construction Co., 267 N.C. 714, 148 S.E. 2d 856; *Speight v. Trust Co.*, 209 N.C. 563, 183 S.E. 734; *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188; Lee, North Carolina Law of Trusts, § 13a (3rd ed. 1968); 54 Am. Jur., Trusts, § 218; 89 C.J.S., Trusts, §§ 139, 142. Nevertheless, there is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty or other wrongdoing by the holder of the property, or by one under whom he claims, the holder, himself, not being a bona fide purchaser for value.

[17, 21] The complaint alleges no fraud or breach of duty by Crab Orchard. Having issued its stock in return for the interest of the Densons in the certificates of deposit, Crab Orchard is a purchaser of that interest for value. It appears from the complaint that, at the time of the assignment to it by the Densons, Crab Orchard was a newly formed corporation completely dominated by Denson and his attorney. They, or their nominees, were its only directors and officers. Consequently, Crab Orchard must be deemed to have acquired the interest in the certificates of deposit with notice of facts then known to Denson, including Denson's then intent as to his own future control or transfer of the stock issued to him in return for the transfer of his interest in the certificates. See: 54 Am. Jur, Trusts, § 218. However, the complaint does not allege any prior wrongdoing by Denson in the acquisition of his title to the certificates of deposit, nor does it allege any intention by him, at the time of his transfer to Crab Orchard, to deal with the shares of stock unlawfully or in violation of any legal duty owed by him to the plaintiff. Liberally construed in favor of the plaintiff, it alleges that Denson then intended to transfer to his creditors all of the shares issued to him in payment of the claims of such creditors and that he did so.

The allegation in the complaint that Crab Orchard agreed to issue its stock to Denson "for the purpose of satisfying *all* creditors" of Denson clearly goes beyond the terms of the agreement attached to and made part of the complaint. (Emphasis added.) The agreement speaks for itself and controls the more extensive allegation. Assuming, however, that the complaint correctly interprets the agreement, it expressly negatives the existence of any plan or intent to prefer some creditors of Denson over others at the time the transfer to Crab Orchard occurred. Thus, the transfer to Crab Orchard of the Densons' interest in the certificates of deposit, which was not, itself, a preference to any creditor of Denson, is not alleged in the

complaint to have been then intended as a step in carrying out a then contemplated preference.

The preferences of other creditors of Denson over the plaintiff took place when Denson, after his transaction with Crab Orchard, transferred shares of stock, belonging to him, to some of his creditors without making a comparable payment or transfer to the plaintiff. Crab Orchard having acquired its interest in the certificates of deposit for value and without notice of any intent of Denson's to make a preferential transfer of the proceeds of his transaction with it, Crab Orchard's right to hold the property so acquired by it cannot be affected by a wrongful act subsequently planned and executed by Denson. Especially is this true where, as here, to impose a constructive trust upon the property would defeat or impair the right of subsequent bona fide purchasers of the shares from Denson. There is nothing whatever in the complaint to suggest that any of the "unknown creditors" to whom Denson transferred shares did not acquire those shares in complete good faith and in ignorance of any right of the plaintiff. Having accepted the shares in satisfaction of their claims against Denson, they are purchasers for value.

The complaint alleges no preferential transfer to Crab Orchard or by Crab Orchard or in which Crab Orchard participated. Each preference alleged in the complaint occurred when Denson transferred stock to his creditors, which was after Crab Orchard acquired its interest in the certificates of deposit. No such preference can be the basis for a declaration that Crab Orchard now holds as constructive trustee the interest in the certificates of deposit transferred to it by Denson at a time when, according to the complaint, no such preference was contemplated.

The allegations in the complaint, with reference to the transfer to R. S. Pate of a portion of Crab Orchard's interest in the certificates of deposit, do not allege any violation by Crab Orchard of any duty to or right of the plaintiff. Pate, not being a party to this action, no judgment rendered herein could affect his right to retain the property so transferred to him. It appears from the complaint that Crab Orchard made such transfer to Pate in settlement of its own controversy with him, in which Pate threatened to sue Crab Orchard upon a theory similar to that now asserted by the plaintiff. The complaint does not allege that Crab Orchard made its settlement with Pate in bad faith. If, however, such settlement be assumed to have been wrongful, the wrong done thereby was not to the plaintiff but to the creditors, if any, of Crab Orchard and to the stockholders of Crab Orchard. The plaintiff was neither.

[22] The Court of Appeals held that, assuming the transfer by the Densons to Crab Orchard to be an assignment for the benefit of creditors forbidden by G.S. 23-1, the plaintiff's right to maintain this action on that ground is barred by the statute of limitations contained in G.S. 1-52(2), which provides that an action is barred within three years when "upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it." Again, we agree.

[23, 24] Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed. *Jewell v. Price,* 264 N.C. 459, 142 S.E. 2d 1; *Motor Lines v. General Motors Corp.,* 258 N.C. 323, 128 S.E. 2d 413; *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320. The plaintiff contends that this rule does not apply here for the reason that her action is "on the ground of fraud" and so the statute of limitations does not begin to run until the discovery by her of the facts constituting the fraud. See G.S. 1-52(9). In *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d 202, this Court held that a cause of action to set aside an instrument for fraud accrues and the statute of limitations thereon begins to run "when the aggrieved party discovers the facts constituting the fraud, *or when, in the exercise of reasonable diligence, such facts should have been discovered.*" (Emphasis added.)

[22] It is a sufficient answer to the plaintiff's contention in this respect to note that her complaint alleges that she had no notice of the matters of which she complains "until after November 24, 1961 when the plaintiff brought supplemental proceedings under G.S. 1-352 et seq., and Judge Campbell ordered First Federal and Denson and *Crab Orchard* to be examined." (Emphasis added.) It thus appears upon the face of the complaint that the transfer from the Densons to Crab Orchard, of which the plaintiff complains, occurred 28 October 1960 and that the plaintiff acquired knowledge of Crab Orchard's existence and of some connection between Crab Orchard and the certificates of deposit as early as 24 November 1961, nearly six years prior to the institution of this action. If she did not then have actual knowledge of all facts now alleged in her complaint, reasonable diligence would thus have disclosed them to her. The fact that, in the meantime, she, in good faith, pursued another remedy, which turned out to be unavailable (See, *Wilson v. Denson,* 270 N.C. 556, 155 S.E. 2d 190), does not extend the time allowed by the statute for the institution of the present action.

The complaint alleges no cause of action against the defendant Frost. No act of his is mentioned therein except that he, as a stockholder of Crab Orchard, signed the agreement with Pate on 31 December 1960, two months after the transfer from the Densons to Crab Orchard. The only other reference in the complaint to Frost is the statement that at some undesignated time, possibly at the time of the transfer from the Densons to Crab Orchard, he was the treasurer "or other officer" of Crab Orchard and "later" became its president.

[25] The complaint alleges no cause of action against the defendant Olive. No act by him is alleged in the complaint except that, as the secretary of Crab Orchard, he signed its agreement with Pate and, as attorney for Denson, he participated in the formation of Crab Orchard, was one of its incorporators, stockholders and directors and "became" its secretary. The complaint alleges that Olive, as such attorney, formed Crab Orchard "for the purpose of 'getting the creditors off the back of Fred Denson'" and 3,000 shares of Crab Orchard stock were "issued" to Olive "for forming the corporation and the plan," by which it appears to be meant that these shares were transferred to Olive by Denson. It is alleged that, as secretary of the corporation, Olive participated in the "assignment" (i.e., issue) of "all shares of corporate stock in Crab Orchard to Fred Denson and Leitha B. Denson."

Service of summons was not had upon the defendant Denson so no judgment could be rendered in this action against him. In any event, the complaint discloses that the plaintiff has already recovered judgment against Denson for the full amount of her claim.

There was, therefore, no error in the granting of the motion of the defendants Crab Orchard, Olive and Frost for judgment on the pleadings.

Affirmed.

MOORE, J., did not participate in the consideration or decision of this case.

MRS. EVELYN W. ESTRIDGE, PLAINTIFF AND BIVENS FLOOR & CABINETS., INC., AND HAWTHORNE SALES COMPANY, INTERVENORS *v.* CRAB ORCHARD DEVELOPMENT COMPANY, INC., AND R. S. PATE, DEFENDANTS

No. 44

(Filed 30 January 1970)

ON certiorari to review the decision of the North Carolina Court of Appeals in 5 N.C. App. 604.

The plaintiff, a creditor of Fred Denson and wife, brought this action to have a transfer by them to Crab Orchard Development Company of their equity in certain certificates of deposit declared to be an assignment for the benefit of creditors so as to enable the plaintiff to share in the proceeds thereof. The intervenors are judgment creditors of Denson seeking the same relief. They adopt the allegations of the original complaint. The defendants filed answers pleading, among other things, the statute of limitations. No reply was filed. The Superior Court, upon motion of Crab Orchard for judgment on the pleadings, dismissed "the actions of all plaintiffs" on the ground that the cause of action is barred by the three-year statute of limitations. The Court of Appeals affirmed.

Henry E. Fisher, Attorney for the plaintiff; Craighill, Rendleman & Clarkson, by Hugh B. Campbell, Jr., Attorneys for the Intervenors.

Barnes & Dekle, by W. Faison Barnes, Attorneys for the defendant, Crab Orchard Development Company, Inc.

LAKE, J.

This is a companion case to *Wilson v. Crab Orchard Development Company,* decided this day. While not identical, the complaint of the original plaintiff, adopted by the intervenors, is substantially the same as the complaint filed in the *Wilson* case. The position of the intervenors in this action is, in all material respects, the same as that of the plaintiff in the *Wilson* case. The position of the original plaintiff in this action is subject to the further infirmity that she does not allege her own ignorance of the transfer from the Densons to Crab Orchard at the time it was made, 28 October 1960. The answer of the defendant alleges that shares of Crab Orchard stock were actually offered to this plaintiff by Denson and she refused to accept them. The plaintiff filed no reply to this allegation.

Frost, Olive and Denson, who were parties defendant in the

Wilson case, are not parties to the present action. R. S. Pate, who is a party defendant to this action, was not made a party to the *Wilson* case, but, for the reasons mentioned in our opinion in the *Wilson* case, the present complaint alleges no cause of action in this plaintiff against him.

For the reasons set forth in our opinion in the *Wilson* case the judgment in the present action is

Affirmed.

MOORE, J., did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. RICHARD VIRGIL

No. 37

(Filed 30 January 1970)

1. Burglary and Unlawful Breakings § 8— non-burglarious breaking and entering with felonious intent — punishment

The crime of non-burglarious breaking and entering with intent to commit a felony is punishable by imprisonment of not less than four months nor more than ten years. G.S. 14-54.

2. Criminal Law § 138— credit on prison sentence — previous sentence — confinement awaiting trial

While credit must be given for time served under a previous sentence for the same conduct, a defendant is not entitled to credit for time spent in custody while awaiting trial.

3. Criminal Law § 138; Convicts and Prisoners § 1— confinement without bail on capital charge — awaiting trial and retrial — status — credit on subsequent sentence

Status of a defendant confined in the county jail on a capital charge without privilege of bail from the date of his arrest until the conclusion of his third trial, the first trial having resulted in a mistrial and defendant's conviction at the second trial having been reversed on appeal, was that of a person under indictment awaiting trial and not that of a prisoner serving a sentence, and time thus spent may not be credited on defendant's subsequent prison sentence.

4. Criminal Law § 138— credit on prison sentence — confinement pending appeal

Statute requiring credit on a prison sentence for all time spent in custody pending appeal is not retroactive. G.S. 15-186.1.

5. Searches and Seizures § 1; Constitutional Law § 21— unreasonable searches and seizures

The Constitution prohibits only those searches and seizures which are unreasonable.

6. Searches and Seizures § 1; Constitutional Law § 21; Criminal Law § 84— search without warrant — articles in plain view

The constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure without a warrant where no search is required and the contraband matter is fully disclosed and open to the eye and hand.

7. Criminal Law § 84; Searches and Seizures § 1— search without warrant — article in plain view

A piece of chrome with bloodstains on it removed from the exterior of defendant's car without a search warrant was lawfully seized and properly admitted into evidence, where the chrome was fully disclosed and open to the naked eye, and no search was required to obtain it, no search warrant being necessary when an article is in plain view.

8. Searches and Seizures § 1; Criminal Law § 84— search without warrant — consent

Officers lawfully searched defendant's room and the interior of his automobile without a warrant where defendant was present and consented to the search of the room and automobile.

9. Searches and Seizures § 1; Criminal Law § 84— search by consent — Miranda warnings

Warnings required by *Miranda* are inapplicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent.

10. Searches and Seizures § 1; Criminal Law § 84— request to search — warnings

Officers investigating a crime are not required by the Federal Constitution to preface a request to search premises with advice to the occupant that he does not have to consent to a search, that he has a right to insist on a search warrant, and that fruits of the search may be used as evidence against him.

11. Criminal Law §§ 106, 114— negative evidence — probative value — comment by court on weight of evidence

In some cases, where defendant's motion for judgment of nonsuit turns on the sufficiency of certain negative evidence to take the case to the jury, the court must say as a matter of law whether such negative evidence has any probative value, but when the evidence, apart from such negative evidence, is sufficient to take the case to the jury, the trial court may not comment on the weight of evidence, negative or otherwise.

12. Burglary and Unlawful Breakings § 6— instructions — contentions — credibility and weight of evidence

In this prosecution for felonious breaking and entering, the trial court

fully and fairly presented the contentions of both parties and correctly left to the jury the credibility, weight and probative value of all the evidence.

13. Criminal Law § 118— instructions — contentions of the State

The trial court's statement of the State's contentions was not unfair and prejudicial to defendant where the record discloses evidence from which inferences related by the court as contentions of the State could legitimately, fairly and logically be drawn by the jury.

14. Criminal Law § 163— objections to review of evidence and statement of contentions

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal.

15. Burglary and Unlawful Breakings § 6— instructions — State's burden of proof

In this prosecution for felonious breaking and entering, the charge of the court properly required the State to prove beyond a reasonable doubt every essential ingredient of the offense and instructed the jurors to acquit defendant if the State failed to so satisfy them.

BOBBITT, C.J., concurring in part and dissenting in part.

SHARP, J., joins in concurring and dissenting opinion.

ON certiorari to the Superior Court of WAKE County to review judgment of *Carr, J.*, at the March 1965 Criminal Session.

On 9 February 1963 at 7:30 a.m. defendant Richard Virgil was arrested, charged with first degree burglary, and placed in the Wake County Jail. The following events have occurred since that date:

1. Defendant was first tried for first degree burglary at the August 1963 Session of Wake Superior Court. The jury was unable to agree and a mistrial was ordered. Defendant remained in jail on the capital charge.

2. Defendant was again tried for first degree burglary at the April 1964 Session of Wake Superior Court. The jury returned a verdict of guilty with recommendation that the punishment be life imprisonment. Judgment was pronounced accordingly and defendant appealed to the Supreme Court. A new trial was awarded for error in the admission of evidence by decision reported in 263 N.C. 73, 138 S.E. 2d 777. Defendant remained in jail on the capital charge.

3. Defendant was tried on the charge of first degree burglary for the third time at the March 1965 Session of Wake Superior Court.

At the close of all the evidence, Judge Carr announced that he would not submit the case to the jury on the charge of first degree burglary but would submit it on the charge of non-burglarious breaking and entering with intent to commit a felony. The jury returned a verdict of guilty on that charge, and on 26 March 1965 defendant was sentenced to prison for a term of nine to ten years. Defendant gave notice of appeal in open court and was allowed ninety days within which to serve statement of case on appeal. Defendant remained in jail in default of an appearance bond of $5000.00.

4. On 6 October 1965 defendant was served with notice that the solicitor would move on 15 October 1965 for an order dismissing his appeal for failure to serve statement of case on appeal in apt time. When the motion to dismiss was heard, defendant was present in person but his court-appointed counsel did not appear and petitioner was not otherwise represented by counsel. An order was entered dismissing the appeal under G.S. 1-287.1 which provides, in pertinent part, that "[w]hen it appears to the superior court that statement of case on appeal to the appellate division has not been served on the appellee or his counsel within the time allowed, it shall be the duty of the superior court judge, upon motion by the appellee, to enter an order dismissing such appeal; provided the appellant has been given at least five (5) days' notice of such motion. . . ."

5. A commitment was issued on 18 October 1965 and defendant has been an inmate of the State Prison System since that date.

6. Pursuant to a mandate from the Supreme Court of North Carolina, a post conviction hearing was conducted on 4 March 1968 to determine whether or not the defendant instructed his counsel to perfect an appeal to the Supreme Court of North Carolina. Petitioner was present in person and represented by counsel. The court found, *inter alia*, that in July 1965, after receiving the transcript, defendant's counsel delivered the transcript to defendant and informed him in person that counsel found no errors in the trial and advised defendant to begin service of his sentence. Counsel had previously obtained an extension of time within which to serve statement of case on appeal. Defendant informed his counsel that he would retain the transcript, confer with his mother, and then contact counsel. He gave his counsel no further instructions with respect to his appeal, and the time for perfecting the appeal expired while defendant still retained the transcript. Defendant sought certiorari from the Supreme Court of North Carolina and from the Supreme Court of the United States; both applications were denied.

7. Thereafter, on 28 July 1969, defendant again petitioned the Supreme Court of North Carolina for certiorari to the Superior Court of Wake Couonty. We allowed the petition, and the case is now before this Court for review on its merits.

STATE'S EVIDENCE

In the trial before Judge Carr at the March 1965 Criminal Session, the State offered evidence tending to show that on 9 February 1963 at 3:00 a.m. T. W. Matthews was sleeping inside the premises of Matthews & Gentry Service Station and Grocery located in rural Wake County when he was awakened by a tapping noise at one of the outer doors. Shortly thereafter, one Oliver Evans broke a glass panel in an overhead door to the garage portion of the premises, entered the building and, passing through a swinging door, entered the portion of the premises in which Matthews had been sleeping. Matthews stepped into the aisle and was injured when Evans fired his shotgun. Matthews returned the fire and injured Evans who, stumbling and falling, left the building and made his way to the shoulder of the road where a car approached and stopped. When Evans attempted to get in this car, Matthews "fired a pistol over the top of this car 2 or 3 times," and the car sped away leaving Evans lying on the shoulder of the road.

In response to a call made by Matthews while Evans was entering the building, officers arrived and carried both Matthews and Evans to the hospital. At the hospital, officers went through Evans' personal effects and obtained his name and address. Thereafter, they went to a rooming house located at 204 E. Lenoir Street in Raleigh. They arrived at 7:30 a.m. and were admitted by a woman named Dora Briggs who directed them to Evans' room. There officers found Richard Virgil — who shared the room with Evans — and he gave them permission to search. The room contained two beds and one closet. He said that the bed on the left belonged to Oliver Evans and the one on the right belonged to him. Virgil said that part of the clothing in the closet belonged to him and part belonged to Oliver Evans. Virgil identified a jacket hanging at the head of one bed and the keys in the pocket as belonging to Evans. Defendant said the keys unlocked the back door of the house. A suitcase containing shirts, pants, socks, underwear, and four pocket handkerchiefs lay on defendant's bed.

Defendant's car, a 1958 cream colored Oldsmobile bearing license number AP-9672, was "pulled in across the sidewalk with the back of the car sitting almost on the sidewalk" and parked ten feet

from the house. Defendant said he owned the car and gave his consent for the officers to "look into the car." Defendant thereupon took his car keys and unlocked the left door and the trunk. Although the officers at this time had not talked to Evans or Matthews and had not been told about a car stopping on the highway and speeding away when fired upon, one of the officers recognized the car as the same one he had seen parked beside the road near the Matthews and Gentry store about 2:00 a.m. on the morning of the crime. Defendant was then placed under arrest and taken to the county jail.

On the night of 11 February 1963 the officers talked with Evans for the first time concerning what happened the night he was shot. In light of the information he gave them, they returned to 204 E. Lenoir Street, examined the exterior of defendant's 1958 Oldsmobile and observed scratches on the right front door "where there was a very clean place that had been wiped off so that it was cleaner than the rest of the car." The clean spot was six to eight inches in diameter "and we observed on the chrome bolting below the door what appeared to be blood." The chrome molding was removed from the car by the officers and taken to the Identification Bureau. After an expert in the field of blood chemistry testified that an analysis of the stains on the chrome showed them to be human blood, the chrome was admitted in evidence and exhibited to the jury over defendant's objection.

The State's evidence further tended to show that 1962 license number AP-9672 was issued by the Motor Vehicles Department to Richard Virgil of Fayetteville for a 1958 Oldsmobile.

Oliver Evans testified that he had pled guilty to burglary of the Matthews and Gentry store on the night of 9 February 1963 for which he is serving time; that he lived in a room at 204 E. Lenoir Street with Richard Virgil for a while; that on the night of 8 February 1963 he, Richard Virgil and Maceo Stephens borrowed a shotgun from one Foster Curtis and bought shells for the gun at a store near the Curtis home; that they returned to Raleigh where the three of them stayed together during the early part of the night and drank whiskey and beer; that they then went in Virgil's car to the Matthews and Gentry store; that he told Virgil he had been wanting to break in it for a long time because there was "a good lot of money there"; that the car was sixty or seventy feet down Highway 401 on the right side of the road when he pulled off his jacket and laid it on the back seat of the car, took the gun and, leaving Virgil and Stephens in the parked car, walked to the store building and circled around it; that Virgil and Stephens promised to remain

nearby and pick him up when he came out, and it was agreed that the money would be divided; that after circling the building he broke the glass in a push-up door near the grease pit and went in; that shortly thereafter he was shot in the stomach; that he went back through the hole in the push-up door and saw a car coming up the road with lights on; that he struggled to the edge of the road, called Richard's name, and said "I'm shot, take me to the hospital"; that he reached for the car which sped off when a pistol began firing; that he doesn't remember anything after he grabbed at the car until he regained consciousness in the hospital; that the jacket with the key and key ring in the pocket which has been offered in evidence belongs to him and is the same jacket he pulled off and placed on the back seat of Virgil's car; that his intestines were shot out of his body and he was holding them in his hand while reaching and grabbing for the car — "I reckon I was bleeding all that time"; that Virgil's car was a light cream colored 1958 Oldsmobile and Virgil was the driver.

Oliver Evans further testified that when he went into the Matthews and Gentry store he had, besides the shotgun, a pair of gloves, a crowbar and a big screwdriver, twelve to fifteen inches long. The officers found the gloves and shotgun in a side ditch between the store and the highway; Evans identified the gloves as his own and the shotgun as the one they borrowed from Foster Curtis.

Evans admitted on cross examination that he had been convicted of first degree burglary and felonious assault for which he received a life sentence in the State Penitentiary and that he was convicted once in Alabama for breaking and entering.

DEFENDANT'S EVIDENCE

Defendant as a witness in his own behalf testified that on 8 February 1963 he lived at 204 E. Lenoir Street in Raleigh and "was in the process of paying for a 1958 Oldsmobile"; that he was working with Willis Lee, a wallpaper contractor, and worked on the 8th of February until 5:00 p.m. at which time he went home and ate supper; that Oliver Evans, who shared the room with him for a few weeks, went after some whiskey; that Maceo Stephens came to his room before Evans left; that when Evans returned they rode around in defendant's car, saw two girls from Shaw University and agreed to meet them at the Peoples Cafe; that he returned to his room and put on a gray suit and then all three of them (defendant, Stephens and Evans) went to the Peoples Cafe between 8:15 and 8:30 p.m.; that they stayed there until about 9:20 p.m. drinking

whiskey and beer and talking to the girls; that after the girls left he also left and went to Eddie Winston's place where he stayed from 10 until 12 o'clock midnight playing records, talking to girls and dancing; that he left there about 12:30 a.m. and returned to his room on E. Lenoir Street; that he parked his 1958 Oldsmobile on the north side of E. Lenoir Street facing west across from the house where he lives; that he locked the car and went to his room and slept until 7:00 a.m. the following morning at which time he arose, put on his work clothes for painting and went to his car; that his car was parked on the same side of the street but he noticed it had been moved and was not in the same spot where he had left it the night before; that he drove to Willis Lee's house on Western Boulevard; that Mr. Lee told him to return home and change into clean clothes because he wanted him to work at the N. C. Bank Building that morning and wanted all his men to be clean; that he returned to his room about 7:30 a.m. and was shaving when officers arrived ten minutes later; that Oliver Evans was not in his bed that morning or the night before; that he left Evans and Maceo Stephens at the Peoples Grill about 9:20 the night before and never saw them again until after he was arrested.

Defendant testified further concerning the two beds and other furniture in the room where he and Evans lived. He stated that his suitcase was on his bed; that he kept clothes in it because he goes to Fayetteville every weekend; that he calls Fayetteville his home.

Defendant further testified that his sister had three sets of car keys made because he had experienced difficulty in starting his car by turning the switch key; that he had all three sets, keeping one on a chain and the other two in his pocketbook in case he accidentally locked his chain key in the car; that about two weeks before February 8 he gave Oliver Evans a set of keys he had in his billfold so Evans and a girl named Marilyn Jackson could sit in the car; that he had requested the return of his keys but Evans had not returned them.

Defendant further testified that when he went to his room to put on a gray suit before meeting the girls at the Peoples Cafe, Oliver Evans also changed clothes and was not wearing a field jacket. Defendant emphatically denied that he was with Oliver Evans and Maceo Stephens or with anyone else at the Matthews and Gentry store when it was broken into around 3:00 a.m. on the morning of February 9.

On cross examination defendant admitted that he had been convicted of an offense in Chicago for which he served one year; that

he "pulled an army term, the Air Force"; that in Fayetteville, N. C., he received two sentences of five to seven years for breaking and entering in 1958; that on 20 April 1959 he received a four to five year sentence in Fayetteville for breaking, entering and larceny.

Mrs. Dora Briggs testified that Richard Virgil and Oliver Evans lived at her house on 8 February 1963; that around 4:00 a.m. an officer came to her door asking whether Oliver Evans lived there and inquiring about Evans' car; that she informed the officer Evans didn't drive a car but rode around with Richard Virgil; that the officer asked what kind of car Virgil had and she said it was a light colored Oldsmobile; that she had never seen Oliver Evans drive — that he usually rode with Richard Virgil; that she went to the room to see if Evans was there; that Richard Virgil was there in his bed but Evans was absent; that both Virgil and Evans had a key to the back door of the house; that she had gone to bed early and did not see Virgil come in that night.

Defendant's motion for judgment of nonsuit was denied. The case was submitted to the jury on the charge of non-burglarious breaking and entering with intent to commit a felony, and the jury returned a verdict of guilty. Defendant was sentenced to prison for a term of nine to ten years. From this judgment he appealed to the Supreme Court assigning errors as noted in the opinion.

King V. Cheek, Samuel S. Mitchell, and Romallus O. Murphy, Attorneys for defendant appellant.

Robert Morgan, Attorney General, by William W. Melvin, Assistant Attorney General, and T. Buie Costen, Staff Attorney, for the State.

HUSKINS, J.

[1] Defendant was convicted of non-burglarious breaking and entering with intent to commit a felony. This is a felony punishable by imprisonment for not less than four months nor more than ten years. G.S. 14-54. Defendant contends the trial court erred in imposing a sentence of nine to ten years *without giving him credit for time already served.* We now examine the validity of that contention.

In *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633, at the May 1963 Session of Alamance Superior Court, defendant pled nolo contendere to a charge of felonious assault and a prison sentence of five to seven years was imposed. On 9 May 1963 defendant was com-

mitted to State's Prison to serve said sentence. On 25 September 1964, after a habeas corpus hearing in the United States District Court, the judgment was vacated and the five to seven year sentence set aside. Defendant was returned to the Alamance County Jail to await retrial in default of an appearance bond. Upon retrial at the December 1964 Session of Alamance, defendant was convicted of assault with a deadly weapon, a misdemeanor, for which he received the maximum statutory sentence of two years. G.S. 14-33. Defendant appealed. Held: (1) Defendant's service of sentence from 9 May 1963, the date he was committed to the State's Prison system, until 25 September 1964, the date said sentence was vacated, must be considered as service on the maximum two-year sentence pronounced at the December 1964 Session; and (2) "defendant is not entitled as a matter of right to credit for the period from September 25, 1964 until the date of the judgment pronounced at December 1964 Session. During this period, while in custody in default of bond, defendant was not serving a sentence as punishment for the conduct charged in the bill of indictment." Accord, *Williams v. State,* 269 N.C. 301, 152 S.E. 2d 111; *State v. Foster,* 271 N.C. 727, 157 S.E. 2d 542; *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522; *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371; *North Carolina v. Pearce,* 395 U.S. 711, 23 L. ed 2d 656, 89 S. Ct. 2072. See Annotation, 35 A.L.R. 2d 1283.

[2, 3] Thus North Carolina requires that credit be given for *time served* under a previous sentence for the same conduct but holds that a defendant is not entitled to credit for time spent in custody while awaiting trial. Until the date of his commitment on 18 October 1965, defendant's status was that of a person under indictment awaiting trial and not that of a prisoner serving a sentence. *State v. Weaver, supra.* The fact that defendant was held on a capital charge without privilege of bail from the date of his arrest on 9 February 1963 until the conclusion of his third trial on 26 March 1965 when a $5,000 appearance bond was set pending appeal did not change his status to that of a prisoner serving a sentence. He was simply awaiting trial in the county jail, and time thus spent may not be credited on a subsequent prison sentence.

[4] Recent enactments designed to require credit on a prison sentence for all time spent in custody *pending appeal* are not retroactive and therefore do not apply to this case. G.S. 15-186.1 (1969 cc. 266, 888). Defendant's first assignment of error is overruled.

[7] Defendant assigns as error the admission into evidence of a piece of chrome with bloodstains on it removed from his automobile

without a search warrant on 15 February 1963 (State's Exhibit 10). Defendant contends this amounted to an unreasonable search and seizure prohibited by the Fourth Amendment to the Constitution of the United States.

The automobile in question was parked "ten feet from the house and it was pulled across the sidewalk with the back of the car sitting almost on the sidewalk." No interior search of the car was undertaken at the time the chrome was removed. None was necessary. The officers merely inspected its exterior and "observed on the chrome bolting below the door what appeared to be blood." The chrome strip was thereupon removed from the exterior of the car and taken to the Identification Bureau. Expert testimony confirmed the presence of human blood on the chrome.

[5, 6] The Constitution prohibits only those searches and seizures which are unreasonable. *Carroll v. United States,* 267 U.S. 132, 69 L. ed 543, 45 S. Ct. 280; *Elkins v. United States,* 364 U.S. 206, 4 L. ed 2d 1669, 80 S. Ct. 1437. "Furthermore, under circumstances requiring no search, the constitutional immunity never arises. This principle is aptly stated in 47 Am. Jur., Searches and Seizures § 20, as follows: 'Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand.' " *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376. Accord, *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495; *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. Coffey,* 255 N.C. 293, 121 S.E. 2d 736; *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394.

[7] Applying these principles to State's Exhibit 10, we hold that no search warrant was required. The bloodstained strip of chrome on the exterior of defendant's car was fully disclosed and open to the naked eye. No search was required to obtain it. It was legally acquired and properly admitted into evidence.

[8] Defendant complains that the officers searched his room and the interior of his automobile on 9 February 1963 without a search warrant and without warning him of his constitutional rights. It suffices to say in that connection, however, that defendant was present and consenting. The record shows that the door to his room was open; that the officers requested permission to search it, "and Virgil said that we could, to go ahead and help ourselves." With respect

to the car, he not only permitted the officers to search it but he himself unlocked the car door and the trunk so they could do so. "An individual may waive any provision of the Constitution intended for his benefit, including the immunity from unreasonable searches and seizures; and where such immunity has been waived and consent given to a search . . ., an individual cannot thereafter complain that his constitutional rights have been violated." *State v. Colson, supra.*

Defendant's further contention that he should have been advised of his constitutional rights (not itemized or otherwise described) before he was asked for consent to search his room and car has not heretofore been considered by this Court. Other jurisdictions, however, have had occasion to deal with the subject.

In *Washington v. Lyons,* 76 Wash. 2d 502, 458 P. 2d 30, the Supreme Court of Washington, in passing on a similar contention, said: "No cases are cited nor have we found any that require officers investigating a crime to preface a request to search premises with a recital to the owner or occupants of their constitutional rights. . . . The courts which have had occasion to deal with this issue have with complete unanimity decided it adversely to the appellant's contention."

[9, 10] Warnings required by *Miranda* are inapplicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent. It was so held in *State v. Oldham,* 92 Idaho 124, 438 P. 2d 275; *People v. Trent,* 85 Ill. App. 2d 157, 228 N.E. 2d 535; *State v. McCarty,* 199 Kan. 116, 427 P. 2d 616; *Lamot v. State,* 2 Md. App. 378, 234 A. 2d 615; *State v. Forney,* 182 Neb. 802, 157 N.W. 2d 403, cert. den. 393 U.S. 1044, 21 L. ed 2d 593, 89 S. Ct. 640. We adhere to that view. Furthermore, appellant has cited no decision, nor have we found any, holding that officers investigating a crime are required by the Federal Constitution to preface a request to search premises with *advice* to the occupant that he does not have to consent to a search, that he has a right to insist on a search warrant, and that the fruits of the search may be used as evidence against him.

In *State v. McCarty, supra,* the Supreme Court of Kansas said:

> "*Miranda* deals only with the compulsory self-incrimination barred by the Fifth Amendment, not with the unreasonable search and seizure proscribed by the Fourth Amendment. There is an obvious distinction between the purposes to be served by these two historic sections of the Bill of Rights. The Fifth

Amendment prohibits the odious practice of compelling a man to convict himself; the Fourth guards the sanctity of his home and possessions as those terms have been judicially interpreted. An indispensable element of compulsory self-incrimination is some degree of compulsion. The essential component of an unreasonable search and seizure is some sort of unreasonableness.

"No responsible court has yet said, to our knowledge, that before a valid voluntary consent to a search can be given, the person consenting must first be warned that whatever is discovered through the search may be used as evidence against him. We decline to be the first judicial body to espouse so dubious a theory."

The quoted language is appropriate here. We also decline the distinction. Defendant was not in custody at the time, and there was nothing in the circumstances to suggest that his consent to the search was coerced or otherwise involuntary. Defendant's second assignment is overruled.

Finally, defendant contends the learned trial judge committed prejudicial error in the charge by (1) giving undue emphasis to "negative" testimony, (2) deploying evidence favorable to defendant in such manner as to destroy its value, and (3) failing to charge clearly that the State is required to prove beyond a reasonable doubt every necessary ingredient of the crime.

[11, 12] An extended discussion of the distinctions between positive and negative evidence is not required and could serve no useful purpose here. In *Murray v. Wyatt,* 245 N.C. 123, 95 S.E. 2d 541 (1956), defendants insisted that the trial court, even in the absence of special request, should have instructed the jury concerning the probative value, weight and effect of "negative testimony." Bobbitt, J., now C.J., writing for the Court, said: "In some cases, where defendant's motion for judgment of nonsuit turns on the sufficiency of certain negative evidence to take the case to the jury, the court must say *as a matter of law* whether such negative evidence has *any* probative value. *Johnson & Sons, Inc. v. R. R.,* 214 N.C. 484, 199 S.E. 704. But when the evidence, apart from such negative evidence, is sufficient to take the case to the jury, the rule is that the trial court may not comment on the weight of evidence, negative or otherwise." Accord, *Carruthers v. Railroad,* 218 N.C. 49, 9 S.E. 2d 498; *Rosser v. Bynum,* 168 N.C. 340, 84 S.E. 393. In a charge which fully and fairly presented the contentions of both parties, Judge Carr wisely and correctly left to the jury the credibility, weight and probative value of all the evidence.

[13, 14] Defendant further assigns as unfair and prejudicial the court's statement of the State's contentions. An examination of the record, however, discloses evidence from which inferences related by the court as a contention of the State could legitimately, fairly and logically be drawn by the jury. A statement of a valid contention based on competent evidence is not error. *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198. Furthermore, it is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477; *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429; *State v. Rhodes,* 252 N.C. 438, 113 S.E. 2d 917; *State v. Holder,* 252 N.C. 121, 113 S.E. 2d 15; *State v. Shumaker,* 251 N.C. 678, 111 S.E. 2d 878; *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1; *State v. Moore,* 247 N.C. 368, 101 S.E. 2d 26; *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876.

[15] Defendant's exception to the mandate contained in the charge is without merit. It requires the State to prove beyond a reasonable doubt every essential ingredient of the offense and instructs the jurors to acquit defendant if the State has failed to so satisfy them. This fully complies with the requirements of G.S. 1-180.

Evidence of defendant's guilt is plenary and persuasive. In the trial below we find

No error.

BOBBITT, C.J., concurring in part and dissenting in part.

I concur in that portion of the decision which upholds the trial, verdict and judgment. The judgment upheld, which was pronounced at March 1965 Session of Wake Superior Court, imposed a prison sentence of nine to ten years. Defendant, charged with the capital felony of burglary in the first degree, was confined in Wake County Jail, awaiting trial or retrial, from his arrest on February 9, 1963, until his (third) trial at said March 1965 Session, at which time the charge was reduced to non-burglarious breaking and entering. In my opinion, defendant is entitled to credit for this period when he was confined, without privilege of bond, on the capital charge. I dissent from that portion of the decision which adjudges that defendant is not entitled to such credit.

SHARP, J., joins in this opinion.

MURLE B. JONES, MARY H. JONES, GEORGE W. JONES, EDRIE B. JONES, THOMAS G. GINN, VIRGINIA P. GINN, MR. & MRS. ROGER D. GINN, W. JACK WINGATE, PEARL D. WINGATE, L. P. WOFFORD, GWENDOLYN B. WOFFORD, MR. & MRS. MARION O. CAUTHEN, MR. & MRS. J. DOUGLAS HOWELL, MR. & MRS. GLENN L. SCHRUM, H. L. HARGETT, JEAN R. HARGETT, MRS. MARTHA A. HUNT, DREW G. MIDDLETON, DOROTHY B. MIDDLETON, HENRY BAUCOM, JR., GLENDA C. BAUCOM, JERRY W. YORK, SUDIE J. YORK, MR. & MRS. W. T. BOWMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHER RESIDENTS OF THE DISTRICTS ZONED "RESIDENTIAL" AND ADJOINING AND LYING BETWEEN NEW DIXIE ROAD, AIRPORT DRIVE, MORRIS FIELD DRIVE AND TAGGART CREEK, IN MECKLENBURG COUNTY, WHO ARE SIMILARLY SITUATED v. QUEEN CITY SPEEDWAYS, INC.

No. 56

(Filed 30 January 1970)

1. Nuisance § 1— operation of motor vehicle speedway

While the operation of a motor vehicle speedway is a lawful enterprise and is therefore not a nuisance *per se*, it may, under varying circumstances, be a private nuisance *per accidens*.

2. Nuisance §§ 2, 7— operation of racetrack — violation of anti-noise ordinance

In this action to enjoin operation of a motor vehicle racetrack as a nuisance, the jury's verdict and court's findings of fact clearly show that defendant, by the operation of its racetrack, violated the terms of a municipal ordinance prohibiting in residential districts regularly recurring noises above a certain level from activities in adjoining business or industrial districts.

3. Nuisance § 1— violation of municipal ordinance

The mere violation of a municipal ordinance does not constitute a nuisance, but if the actual thing is a nuisance or in the nature thereof and it is done or maintained in violation of a municipal ordinance, it may constitute a nuisance against which relief may be obtained by one who suffers special and peculiar injury of an irreparable nature therefrom.

4. Nuisance §§ 2, 7— operation of motor vehicle racetrack — abatement of nuisance

In this action to enjoin the operation of a motor vehicle racetrack as a nuisance, wherein plaintiffs alleged and the jury by its verdict found that the noise of the racing vehicles on defendant's track was so loud as to cause plaintiffs discomfort and annoyance, to cause them to lose sleep at night, and to impair use and enjoyment of their homes, and that lights and dust from the racetrack, coupled with the noise, caused plaintiffs' property to depreciate in value and made their homes virtually uninhabitable while the races were in progress, the trial court erred in failing to abate the nuisance as found by the jury and in permitting defendant to continue operation of the racetrack under regulations imposed by the court.

BOBBITT, C.J., concurs in result.

APPEAL by plaintiffs from *Ervin, J.,* and jury. February 17, 1969 Schedule C Civil Session of MECKLENBURG. Upon plaintiffs' petition for *certiorari,* this case was certified for review before determination by the Court of Appeals.

Plaintiffs instituted this action on 10 October 1968 to enjoin the operation of a motor vehicle race track owned and operated by defendant. The complaint alleges: The track is located in Mecklenburg County on the south side of New Dixie Road (also called West Boulevard) immediately across from the residential area where plaintiffs live. In August, 1968, defendant began conducting automobile and motorcycle races on its track at the rate of about one per week. Usually the races were run after dark and lasted late into the night. The races were a nuisance to plaintiffs in that the dust and noise created by the racing vehicles and the glare of the lights from the track caused them discomfort and annoyance, prevented them from sleeping, and rendered their homes virtually uninhabitable while the races were in progress. Plaintiffs also allege that the noise from the races was a violation of Section 23-30 of the Code of the City of Charlotte captioned "Noises."

Defendant denies that the operation of the race track created a nuisance and that the noise of the races was a violation of Section 23-30 of the Code of the City of Charlotte.

At the trial the jury answered the issue in favor of the plaintiffs, and the court signed the following judgment:

> "THIS ACTION coming on to be heard and being heard by the Honorable Sam J. Ervin, III, Judge Presiding, and a jury at the February 17, 1969, Schedule C Civil Session of the Superior Court of Mecklenburg County, North Carolina, and the issue having been submitted to the jury and answered as follows:
>
> "Did the defendant so locate, use and operate its race track so as to constitute a nuisance?
>
> ANSWER: Yes.
>
> "It was thereupon stipulated by counsel for the parties that judgment might be signed out of term and after the Court and the parties had had an opportunity to give additional consideration to the content and the form of the judgment necessary to abate the nuisance. It was further stipulated that any motions and appeal entries available upon the coming in of the verdict and upon the signing of the judgment might be made to the Court out of term.

"After having given consideration to the admissions and stipulations, evidence introduced at the trial, the jury verdict, the authorities submitted to the Court and after considering the arguments of counsel, the Court concludes that the plaintiffs are entitled to an injunction restraining the continued use and operation of the defendant's property in such a way as to injure the plaintiffs.

"The Court finds the following facts from the admissions, the stipulations and the evidence presented at the trial and at the hearing held on March 18, 1969, subsequent to the trial:

"1. That the plaintiffs are residents of apartments owned by Stonewall Jackson Housing Association, Inc., and Gardner-Webb Junior College, Inc., which are situated adjacent to each other on the northerly side of West Boulevard in Mecklenburg County, and which were constructed prior to the construction of defendant's race track.

"2. That the defendant owns and has been operating a dirt surface motor vehicle race track immediately across West Boulevard from the apartments in which the plaintiffs reside, and about 300 feet from some of said apartments.

"3. That approximately 300 people, approximately 80 of whom are of school age or under, live in the apartments of the Stonewall Jackson Housing Association, Inc., and more than 500 people live in the apartments of Stonewall Jackson Housing Association, Inc., and Gardner-Webb College, Inc.

"4. That plaintiffs' residences and defendant's race track lie within one (1) mile of the City limits of the City of Charlotte, North Carolina, and are within the perimeter zoning area of the City of Charlotte.

"5. That the plaintiffs' homes lie within a district zoned 'residential' by a duly adopted ordinance of the City of Charlotte. The defendant's race track lies in an adjacent district zoned 'light industrial' by a duly adopted ordinance of the City of Charlotte.

"6. That the defendant, upon completion of the construction of its race track and beginning about the middle of August, 1968, and continuing for a period of approximately 2½ months until further racing was prevented by winter weather, conducted automobile races on its race track at approximately weekly intervals, sometimes on Thursday nights, sometimes on Friday nights, and on one occasion on Sunday afternoon.

"7. That on the nightly occasions the movement of automobiles on the race track began at 7 p.m. and usually continued until after 11 p.m. and frequently until after midnight, and on one occasion until after 1:00 a.m.

"8. That roughly half of that interval of time would be taken up with actual racing of automobiles so that there would be periods of loud racing noise interspersed by periods of relative quiet, frequently broken by loud speaker announcements at the race track.

"9. That as many as 30 automobiles sometimes race at the same time, all without mufflers and at speeds sometimes reaching 90 miles per hour.

"10. That the racing automobiles on defendant's race track produce a very loud, rough and irritating noise, which because of the number of vehicles, the absence of mufflers and the high speeds at which the vehicles are operated greatly exceed the noise made by ordinary automobiles.

"11. That the noise of the races at the plaintiffs' places of residence is greatly in excess of the level of noise which is customarily heard in residential districts and which is made by the uses which are prevailing in residential districts.

"12. That the more cars that race the more noise that is made, but only about 7 or 10 automobiles racing without mufflers on defendant's race track make enough disagreeable noise to substantially interfere with plaintiffs in carrying on normal conversations and other normal pursuits in their homes and in yards and in attempting to sleep and to materially bother and annoy the plaintiffs.

"13. That noise is a part of the attraction and automobile racing would have no crowd appeal without the noise, according to the testimony of defendant's own witnesses.

"14. That the defendant's race track has been so operated that regularly recurring noises, as detected by the human sense of hearing, without instruments, at the adjoining residential district boundary lines within which plaintiffs' homes are located did exceed the normal noise level generated by uses prevailing in residential districts to the injury and detriment of the plaintiffs.

"15. That the racing vehicles on defendant's race track, operating on a dirt surface and at high speeds for long periods

of time, have produced great quantities of dust, some of which has been taken in the air to the vicinity of plaintiffs' homes where it has dirtied the interior of the plaintiffs' homes, as well as plaintiffs' automobiles and other property on the outside of plaintiffs' homes.

"16. That the efforts which the defendant has made to control the dust have not been effective, the evidence indicating that the dust was the worst of all at the last race which was conducted in 1968 and that some dust is unavoidable, especially after a race has been in progress for some time.

"17. That the dust created by the motor vehicles racing on the defendant's race track cause substantial and material annoyance, disturbance and physical injury to the plaintiffs.

"18. That the defendant's race track as presently constructed is illuminated by high powered lights located on 40-foot high poles, some of which shine directly toward the residences of the plaintiffs and constitute an annoyance, an inconvenience and detriment to the plaintiffs.

"19. That the evidence indicates that these lights were incorrectly installed by the contractor and that some action could be taken with respect to their location and construction to avoid or minimize the damage done to the plaintiffs by these lights.

"20. That shortly after defendant announced its plans for the construction of its automobile race track facility, the plaintiffs publicly stated that they would do everything necessary to stop construction of the track; that plaintiffs did not institute suit against defendant at that time; that defendant voluntarily delayed construction for a period of time of approximately one (1) month for purposes of trying to find another comparable site; that no such site was located and since plaintiffs had not instituted suit, defendant resumed construction of its race track facility from November, 1967, and on a daily basis through mid-August, 1968, making substantial and valuable improvements on the land; that plaintiffs observed and knew that defendant was continuing construction of its race track facility and making substantial and valuable improvements thereon and that suit was not instituted until after defendant had completed its said automobile race track facility and had begun conducting automobile races thereon.

"21. That the racing events consisted of six heat races last-

ing from seven to ten minutes each and three main events lasting fifteen minutes each and that in between each heat race and main event race, there was a period of relative quiet of between ten and fifteen minutes; that some races lasted longer than stated because of interruption by wrecks.

"22. That some eight to twelve automobiles participated in each heat and that usually no more than twenty-four automobiles participated in each main event and that such cars ran without mufflers and at speeds averaging between 45 and 60 miles per hour.

"23. That defendant offered evidence indicating that any light glare suffered by plaintiffs from its lighting system could be completely eliminated by the relocation of the lights complained of and that the initial placement of such lights is one of the bases for a suit against the defendant's contractor.

"24. That defendant leased its race track for the construction of two motorcycle races and one 'demolition derby,' in addition to the nine (9) automobile races conducted by defendant on said track; that one motorcycle race was conducted on Saturday night and the other on a Sunday afternoon; that the noise created by the racing motorcycles was not as loud as that created by the racing automobiles, as described by plaintiffs' testimony; and that the 'demolition derby' event created loud banging noises.

"25. That the apartments in which plaintiffs reside are located about one-fourth (¼) of a mile from the nearest point of the North-South runway of the Charlotte Douglas Municipal Airport; that plaintiffs often heard jet aircraft taking off and landing on a daily basis the year round.

"26. That the noise made by the automobile races was measured at five points on the property of Stonewall Jackson Housing Association, Inc., by plaintiffs' expert electrical engineer on November 3, 1968; that the maximum decibel reading taken during the race was 98 decibels and that it was obtained outside and that the average decibel reading obtained from inside said apartments during a race was 80-87 decibels and that either the apartment windows or doors were open when such decibel readings were taken.

"27. That plaintiffs' expert electrical engineer testified that ninety-eight (98) decibels of noise is equivalent in loudness to the inside of a weave room of a textile mill during its operation;

and that the decibel level inside an airplane ranges from 80-90 decibels and that conversation can be carried on therein.

"From the foregoing findings of fact, the Court makes the following conclusions of law:

"1. That the defendant's use and operation of its automobile race track facility can be so regulated and supervised so as not to constitute a nuisance as to the plaintiffs.

"2. That the Court in its equitable jurisdiction can prescribe regulation and supervision for the future operation of the track so as to abate the nuisance to the plaintiffs as found by the verdict of the jury.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant, its officers, agents and servants, and all persons in active concert or participation with them, be and they are hereby absolutely enjoined and restrained from using the property of the defendant as above described as a motor vehicle race track, except as hereinafter regulated and restricted:

"(1) The surface of the race track shall first be completely paved by the use of asphalt or other hard, solid material used in the paving of race tracks; that all entrances and exits to the track shall first be paved by the use of tar and gravel by the process of 'black-topping' as such term is used in the highway construction business in North Carolina; any dirt parking area utilized in connection with the race track shall be oiled or wet down with water prior to each use that is made of the parking areas as such areas need not be paved so long as there is not much movement in them except at the beginning and end of the race.

"(2) That no more than one race per week, such week being Monday through Sunday, shall be conducted on defendant's track and that these races may be conducted only between April 15 and October 15 in each year; that no more than eight of such races may be conducted at night in each calendar year; that no more than two night races may be held in any calendar month; that all night races must be over or ended not later than 11 p.m. o'clock at the latest, and all races will be stopped promptly at such hour whether finished or not; there will be no night races conducted on defendant's track except on Friday and Saturday nights; that day races can be held only on Saturday, Sunday or legal holidays as such legal holidays are de-

cleared by the General Statutes of North Carolina; day races must be over or ended no later than 7 p.m. o'clock; that motorcycle races may be run in lieu of a weekly automobile race, not in addition to such automobile race; defendant is hereby enjoined from conducting any demolition derby on defendant's track; defendant is enjoined from operating more than twenty-four cars or motor vehicles in any given heat or race at the same time.

"(3) The lights around defendant's track must be relocated and directed downward toward the track in such fashion as to eliminate glare and reflection into the area of plaintiffs' residences, and if it is necessary to prevent glare and reflection into the area of the Stonewall Jackson Homes, such lights must be shielded or covered with some type of cover that will keep light from shining in that direction; all such lights must be turned off no later than 11:30 p.m. o'clock.

"(4) The Court shall retain jurisdiction of this matter for all purposes and the undersigned Judge shall retain jurisdiction of it at least until the first day of July, 1969.

"(5) Another hearing shall be held in this matter on the 5th day of June, 1969, at 2 p.m. o'clock, at which time all parties will have the right to come into Court and offer any testimony as to what has transpired in the interim under this Order, and that at that time the Court may, after hearing evidence, modify this Order in any respect.

"(6) That the defendant is permitted to use its property for motor vehicle races only so long as said races are conducted in a manner as to not constitute a nuisance as to plaintiffs.

"(7) That the costs of this action be taxed against defendant.

[Paragraphs 8 and 9 concerning taxing of costs and expert witness fee are omitted.]

"This decree is ordered to be entered nunc pro tunc as of the February 17, 1969, Schedule C Civil Session of the Superior Court of Mecklenburg County, North Carolina, this 25th day of April, 1969."

As provided in the foregoing judgment, a hearing was held on 5 June 1969. When it appeared that no races had been held on defendant's race track and none of the improvements mentioned in said judgment had been made, Judge Ervin ordered that the regulations not be modified, and the plaintiffs appealed. They assign as

error: (1) The trial judge's failure to enjoin the defendant's operation of the race track; (2) the adjudication that the race track could be regulated and supervised so as not to constitute a nuisance as to the plaintiffs; and (3) the holding of the court that in its equitable jurisdiction it could prescribe regulations and supervision for the future operation of the track so as to abate the nuisance to the plaintiffs.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston by Gaston H. Gage and Joseph W. Grier, Jr., for plaintiff appellants.

Berry and Bledsoe by Louis A. Bledsoe, Jr., and C. Ralph Kinsey, Jr., for defendant appellee.

MOORE, J.

The question presented is: Did the trial court err in not abating the nuisance as found by the jury and by permitting the defendant to continue operation under the regulations imposed by the judgment?

[1] The operation of a motor vehicle speedway is a lawful enterprise, and therefore its operation is not a nuisance *per se*. However, under varying circumstances, the operation of a speedway could be a private nuisance *per accidens*. *Hooks v. Speedways, Inc.*, 263 N.C. 686, 140 S.E. 2d 387. In *Hooks* the defendant proposed to build a motor vehicle race track some 2500 feet from a rural church. The church sought to permanently enjoin an alleged prospective private nuisance. In affirming an order continuing a temporary injunction against the construction of the track until the trial on the merits, the Court said:

> "Where a nuisance is private and arises out of the manner of operating a legitimate business or undertaking, a court of equity will, of course, do no more than point to the nuisance and decree adoption of methods calculated to eliminate the injurious features. *Rohan v. Detroit Racing Asso., supra* [314 Mich. 326, 22 N.W. 2d 433, 166 A.L.R. 1246 (1946)]. In other words, a court of equity will not outlaw the entire operation if a decree restricting the time or method of operation will eliminate the injury. *But if regulation will not abate the nuisance, the entire operation will be enjoined.*
>
> "Mere noise may be so great at certain times and under certain circumstances as to amount to an actionable nuisance and entitle the party subjected to it to an injunction. *Kohr v.*

Weber, supra [402 Pa. 63, 166 A. 2d 871 (1960)]. To amount to a nuisance, noise must be unreasonable in degree. Where noise accompanies an otherwise lawful pursuit, whether such noise is a nuisance depends on the locality, the degree of intensity and disagreeableness of the sounds, their times and frequency, and their effect, not on peculiar and unusual individuals but on ordinary, normal and reasonable persons of the locality." (Emphasis added.)

[2, 3] The following ordinance of the city of Charlotte applies to the perimeter zoning area within which plaintiffs' homes and defendant's race track are located:

"Section 23-30. Noises. Every use, activity and process shall be so operated that regularly recurring noises are not disturbing or unreasonably loud, and do not cause injury, detriment or nuisance to any person. Every use, activity and process in business and industrial districts shall be so operated that regularly recurring noises, as detected by the human sense of hearing, without instruments, at the adjoining residential or office district boundary lines, shall not exceed the normal noise level generated by uses permitted in residential and office districts. (Ord. No. 62, 1-29-62)."

Although the trial court did not specifically refer to this ordinance or find that defendant by the operation of its race track had violated its terms, the jury's verdict and the court's findings of fact Nos. 11 and 14 clearly show a violation. The mere violation of a municipal ordinance does not constitute a nuisance, but if the actual thing is a nuisance or in the nature thereof and it is done or maintained in violation of a municipal ordinance, it may constitute such nuisance as against which relief may be obtained by one who suffers special and peculiar injury of an irreparable nature therefrom. 66 C.J.S. Nuisances § 78.

In *Barrier v. Troutman*, 231 N.C. 47, 55 S.E. 2d 923, the jury found that an airport was so located and used that planes operating to and from it constituted a nuisance to the plaintiff. The Court held:

"In the case at bar the verdict of the jury established the fact that the airport of the defendants was so located and used that planes operating to and from it constituted a nuisance 'as alleged in the complaint.' This finding was without exception by the defendants. The complaint alleged a private nuisance as distinguished from a public nuisance, that is, that the described injuries, discomforts, and annoyances resulted from violation of

plaintiff's private rights rather than those common to the public generally. . . . Hence, we think the plaintiff was entitled to the remedy by injunction, restraining the continued use and operation of the airport in such a way as to injure the plaintiff in the manner alleged in his complaint."

Recent cases from other jurisdictions deal with situations similar to the case at bar. In the Pennsylvania case of *Kohr v. Weber,* 402 Pa. 63, 166 A. 2d 871 (1960), the Court found:

"[The defendant] owns in Manor Township, Lancaster County, a piece of land equipped with facilities for an airport and a race track, the latter consisting of a macadam strip approximately three thousand feet long and wide enough to accommodate two racing automobiles or four motorcycles. The track is known as a 'drag strip.' On Saturday nights, as well as on Fridays when a holiday falls on either Friday or Saturday, races are run on the 'drag strip' from 6 p.m. until midnight. Occasionally the races are in operation as late as 2 a.m. Sunday. The loud noises, glaring illumination, and swirling dust clouds which inevitably accompany an operation of this character caused such annoyance and discomfort to residents of the area that sixteen of them applied to the Court of Common Pleas of Lancaster County for an injunction against [defendant] and the operator of the race track. . . ."

In *Kohr* the Court also found that there were some two hundred dwellings located within a radius of one-half mile of the race track. In affirming the injunction against the racing operation,the Pennsylvania Court said:

"The appellants argue that if the Court was disposed to impose some restraint on the defendants, the injunction should apply only to a diminution of the noise and illumination. But noise and artificial light are as integral parts of night-drag-racing as smoke, sound and color make up the phenomenon of fireworks. For spectators to view the races after sundown, artificial illumination is indispensable and to think of a silent automobile or motorcycle race is to conjure up what is mechanically impossible. Thus, the only remedy possible under the circumstances was to restrain the drag racing completely."

To like effect, in *Town of Bedminster v. Vargo Dragway, Inc.,* 434 Pa. 100, 253 A. 2d 659 (1969), the Pennsylvania Court permanently enjoined the operation of a drag strip which was located in an area primarily residential and farming in character with about

62 houses within one mile of the track. With reference to the equities involved, the Court made the following statement:

> "While the record shows that the [defendants] expended a sum in excess of $80,000.00 in connection with the construction of this track and other improvements, they took a 'calculated' risk in so doing. Granting that drag strip racing is not a nuisance *per se*, yet the instant record speaks clearly and emphatically to the effect that the operation of this track has become a nuisance in fact. Balancing the equities between the parties, we believe that the rights of those occupying properties adjoining or in the neighborhood of this track are paramount to the rights of the [defendants], and that the former must be protected by equity in the enjoyment of their homes."

In the instant case, in setting out the requirements and conditions upon which he was willing to authorize the defendant to operate its track, the learned trial judge was undoubtedly seeking to "balance the equities" between the parties and to follow the dictum stated in *Hooks v. Speedways, Inc., supra:* "In other words, a court of equity will not outlaw the entire operation if a decree restricting the time or method of operation will eliminate the injury." This statement must be restricted to the facts of that case. In *Hooks* a rural church was situated some 2500 feet from the proposed track and an order which would have prevented races while church services were being held might well have provided all the protection needed. The Court did not envision the quoted statement as authorizing the Superior Court either to blueprint or supervise the operation of a race track, particularly where, as in the case at bar, the verdict of the jury had established the fact that the defendant had located, used, and operated its race track so as to constitute a nuisance.

There is no assurance that these conditions can or will be corrected by the regulations imposed in the judgment of the trial court. For instance, noise is one of the most objectionable features of a motor vehicle race. Judge Ervin sought to control this only by changing the hours and reducing the number of races. Yet the judgment entered would permit a total of 25 races each season — more than double the number found by the jury to be a nuisance in 1968.

[4] Since issues arise on the pleadings when supported by the evidence, we interpret the jury's answer to the issue to mean that the nuisance found was as alleged in the complaint. The plaintiffs alleged and the jury by its verdict found that the noise of the racing vehicles on defendant's track was so loud as to cause the plain-

tiffs discomfort and annoyance, to cause them to lose sleep at night, and to impair the plaintiffs' use and enjoyment of their homes, and that the lights and dust from the race track, coupled with the noise, caused the plaintiffs' property to depreciate in value and made plaintiffs' homes virtually uninhabitable while the races are in progress.

The jury having found that defendant was operating its race track so as to constitute a nuisance, we hold that plaintiffs were entitled to a judgment restraining its operation in the manner which caused the nuisance. This case is, therefore, remanded to the Superior Court of Mecklenburg County for entry of a judgment on the verdict restraining the nuisance alleged in the complaint.

Error and remanded.

BOBBITT, C.J., concurs in result.

INTERNATIONAL SERVICE INSURANCE COMPANY v. IOWA NATIONAL MUTUAL INSURANCE COMPANY

No. 33

(Filed 30 January 1970)

1. Automobiles § 5— transfer of automobile title — pre-1961 law

Prior to 1961, a purchaser of a motor vehicle acquired title notwithstanding the vendor's failure to deliver a certificate of title or the purchaser's failure to make application for a new certificate to the Department of Motor Vehicles.

2. Statutes § 7— construction of amendments — presumptions — legislative intent

In construing a statute with reference to an amendment it is presumed that the legislature intended either to change the substance of the original act or to clarify the meaning of it.

3. Statutes § 7; Automobiles § 5— transfer of automobile title — statutory amendments — presumption

Where decisions of the Supreme Court had made it perfectly clear that the purchaser of a motor vehicle prior to 1 July 1961 acquired title notwithstanding vendor's failure to deliver a certificate of title or vendee's failure to make application to the Department of Motor Vehicles for a new certificate, it is logical to conclude that the 1961 amendments to G.S. 20-72(b) and G.S. 20-75, which added to each section the proviso that transfer of ownership in a vehicle by an owner or dealer is not

effective until provisions of the statutes have been complied with, were intended to and did change the law with respect to transfer of ownership of motor vehicles.

4. Automobiles § 5— transfer of automobile title — prerequisites — post-1961 law

After 1 July 1961, the effective date of amendments to G.S. 20-72(b) and G.S. 20-75, no title passes to the purchaser of a motor vehicle until the certificate of title has been assigned by the vendor and delivered to the vendee or his agent, and application has been made for a new certificate of title.

5. Automobiles § 5— transfer of automobile title — compliance with G.S. Ch. 20 — accident — ownership of car

Where the vendor of an automobile involved in an accident on 27 May 1963 had transferred possession of the automobile to the vendee prior to the date of the accident, but vendor did not transfer title to vendee or execute and acknowledge an application for a new certificate of title until the day after the accident, the ownership of the automobile remained in the vendor on the date of the accident. G.S. 20-72(b), G.S. 20-75.

6. Appeal and Error § 67— decision of Supreme Court — interpretation

A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case.

7. Insurance § 87— use of automobile — express permission

Where express permission to use an automobile is relied upon, it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference.

8. Insurance § 87— use of automobile — implied permission

Implied permission to use an automobile involves an inference arising from a course of conduct or relationship between the parties in which there is mutual acquiescence or lack of objection under circumstances signifying assent.

9. Insurance § 88— automobile dealer's liability insurance — coverage — use of automobile — permission of vendor — sufficiency of evidence

Evidence *held* insufficient to support a finding that prospective purchaser of automobile had the vendor's permission, express or implied, to operate the automobile at the time purchaser's brother wrecked the automobile in an accident, and consequently the purchaser was without authority to extend driving privileges to his brother and thereby bind the vendor's liability carrier, where the evidence was to the effect that the automobile, with dealer tags removed, had been delivered to the purchaser's home with the understanding that the purchaser would obtain liability insurance over the weekend and return to the vendor with an FS-1 form in order to obtain the title certificate and license tags.

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

ON certiorari to the Court of Appeals to review its decision upholding the judgment of *Armstrong, J.*, at the 6 January 1969 Civil Session, FORSYTH Superior Court.

Action under Declaratory Judgment Act for declaration of rights arising under separate policies of liability insurance issued by plaintiff and defendant. The trial court heard the case on an agreed statement of facts as summarized below:

1. The plaintiff (International) is a corporation organized and existing under the laws of Texas and is authorized to do business and is doing business in North Carolina.

2. Prior to 27 May 1963 International issued to James Walter Zimmerman (James) its assigned risk liability policy number 791565-12 on a 1955 Ford automobile owned by James. This policy was in full force and effect on 27 May 1963.

3. The defendant (Iowa) is a corporation organized and existing under the laws of Iowa and is authorized to do business and is doing business in North Carolina.

4. Prior to 27 May 1963 Iowa issued to Piedmont Auto Finance Company of High Point, North Carolina, (Piedmont) its automobile liability policy number CGA19107879. This policy was in full force and effect on 27 May 1963.

5. On or prior to 24 May 1963 Piedmont took lawful possession from John Wesley Tuttle of a 1958 Ford automobile, serial number G8NT106432. The date of repossession shown on the Affidavit of Repossession was 27 May 1963. The date of notarization of said affidavit is recited on it as 28 May 1963.

6. On Saturday, 25 May 1963, John Wesley Zimmerman (John) negotiated with and agreed to purchase from Piedmont said 1958 Ford for $695, made a $100 down payment, received a bill of sale, and signed a note for the balance of the purchase price and interest charges.

7. On the same date, 25 May 1963, an official of Piedmont signed in blank the assignment of title on the back of the title certificate of said automobile, and John signed in blank the purchaser's application for new certificate of title on the back of the title of said automobile. The title certificate was not given to John on that date, but remained in the possession of Piedmont.

8. John did not have automobile liability insurance on 25 May 1963. It was understood by Piedmont that John would obtain liability insurance over the weekend and return to Piedmont on Tues-

day, 28 May 1963, with an FS-1 form at which time the title certificate was to be completed and turned over to John and he would then purchase license tags for said 1958 Ford automobile.

9. On Saturday, 25 May 1963, said 1958 Ford automobile was delivered to John's home and parked behind his house. The dealer tags were removed from the automobile and it was left on John's premises without tags on it.

10. Application by John for liability insurance under the North Carolina Assigned Risk Plan was dated 25 May 1963 and shows Statewide Insurance Agency of High Point as producer of record. Said application was mailed to the North Carolina Department of Insurance.

11. On 25 May 1963 John purchased through Piedmont collision insurance on said automobile with American Security Insurance Company.

12. James is the brother of John and both were over twenty-one years of age at all times pertinent to this action. They did not reside in the same household.

13. On 27 May 1963 James was driving said 1958 Ford automobile with the permission of John and was involved in an accident with a vehicle operated by James Floyd Pendry. John was not present in the 1958 Ford automobile at the time of the accident.

14. At the time of the accident said 1958 Ford automobile displayed a set of license tags which had been previously issued to James on a 1955 Ford, being 1963 North Carolina tags B-2827.

15. On Tuesday, 28 May 1963, John received by mail an FS-1 form dated 27 May 1963 and showing effective date of 28 May 1963, notifying him that his application for insurance had been approved and assigned to American Motorist Insurance Company. On 28 May 1963 the transfer of title and application for new title certificate on the back of the title to said 1958 Ford were completed and notarized. Shortly thereafter, John took the FS-1 form to Piedmont, picked up the completed title certificate and purchased license tags for said 1958 Ford. He did not notify Piedmont that the automobile had been involved in an accident on the previous day.

16. In August 1963 International was notified of possible claims arising out of the aforesaid accident. Pendry instituted a civil action against James Walter Zimmerman in November 1963 alleging damages in excess of $5,000. In December 1963 attorneys retained by International filed answer on behalf of James. International's inves-

tigation revealed that the date shown on the transfer of title was 28 May 1963, the day after the accident; and International took the position that at the time of the accident title to said automobile was in Piedmont. The first notice of the accident received by Iowa was 8 April 1964 when International notified Iowa of this finding and that International was taking the position that Iowa had primary coverage. On 5 May 1964 Iowa declined coverage and notified International accordingly. On 22 May 1964 International forwarded to Iowa copies of the complaint and answer in the Pendry action and again contended that primary coverage was with Iowa. On 23 October 1964 International sent notice to Iowa by certified mail that the case was scheduled for trial on 26 October 1964 and that there was a possibility of settlement; and that unless International's attorney heard from Iowa by 26 October 1964 the case would be settled if possible. Iowa continued to deny coverage and International continued to insist that its coverage was secondary. Nevertheless, International defended the action on behalf of James in order to protect its alleged secondary liability. On 26 October 1964 the case was settled by International for $3800. They paid said judgment on behalf of James and, in addition, paid court costs of $32.75 and counsel fees for defense of said action in the sum of $738.08.

17. The amount of the settlement in the Pendry action and the costs and counsel fees paid by International were fair and reasonable.

18. Employees of Piedmont had not met James prior to the accident, and James had no part in the dealings between John and Piedmont.

The trial judge made findings of fact consistent with the foregoing enumeration and reached the following conclusions of law:

1. Ownership of the 1958 Ford automobile involved in the accident passed from Piedmont to John prior to 27 May 1963.

2. Ownership having passed from Piedmont prior to the date of the accident, said automobile was not owned by Piedmont on the date of the accident and the Iowa policy does not afford coverage on said automobile.

3. Further, irrespective of ownership, the agreed facts and reasonable inferences to be drawn from them do not establish that James was operating the automobile at the time of the accident with the permission, express or implied, of Piedmont and for this additional reason no coverage is afforded by the Iowa policy.

Upon the foregoing findings of fact and conclusions of law, judgment was rendered in favor of defendant and plaintiff appealed to the Court of Appeals. That court affirmed by decision appearing in 5 N.C. App. 236, 168 S.E. 2d 66. We allowed certiorari.

Deal, Hutchins and Minor by William K. Davis and Edwin T. Pullen, Attorneys for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by J. Robert Elster, Attorneys for defendant appellee.

HUSKINS, J.

The policy of liability insurance issued by Iowa to Piedmont Auto Finance Company affords coverage not only to Piedmont and its officers and agents but also to "any person while using an owned automobile . . . provided the actual use of the automobile is by the named insured or with his permission. . . ."

Plaintiff contends (1) that the provisions of G.S. 20-72(b) relating to transfer of ownership were not complied with until 28 May 1963, one day after the accident, so that ownership of the 1958 Ford remained in Piedmont until that date; and (2) that Piedmont gave "broad and unfettered custody, dominion and control" of the vehicle to John Wesley Zimmerman on 25 May 1963 and thus impliedly permitted him to allow his brother James Zimmerman to use the vehicle thereby bringing James within the coverage of defendant's policy. Since the question of permission arises only if ownership remained in Piedmont at the time of the accident on 27 May 1963, we look first at the question of ownership.

[1] It is well settled, we think, that, prior to 1961, a purchaser of a motor vehicle acquired title notwithstanding the vendor's failure to deliver a certificate of title or the purchaser's failure to make application for a new certificate to the Department of Motor Vehicles. *Corporation v. Motor Co.*, 190 N.C. 157, 129 S.E. 414; *Finance Co. v. Pittman*, 253 N.C. 550, 117 S.E. 2d 423; *Godwin v. Casualty Co.*, 256 N.C. 730, 125 S.E. 2d 23; *Credit Co. v. Norwood*, 257 N.C. 87, 125 S.E. 2d 369; *Indemnity Co. v. Motor Co.*, 258 N.C. 647, 129 S.E. 2d 248; *Luther v. Insurance Co.*, 262 N.C. 716, 138 S.E. 2d 402; *Bank v. Motor Co.*, 264 N.C. 568, 142 S.E. 2d 166.

In *Corporation v. Motor Co., supra,* decided in 1925, it was held that a sale of personal property is not required to be evidenced by any written instrument in order to be valid, and that a statute requiring issuance of a "certificate of title" to the purchaser of an au-

tomobile, and making failure to do so a misdemeanor, was merely a police regulation to protect the general public from fraud, imposition and theft of motor vehicles. In *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745, the lower court charged: "Now, the law does not prohibit the sale of a motor vehicle without transfer and delivery of certificate of registration of title; in other words, one can sell a motor vehicle on one day and the title pass, and deliver or transfer the paper certificate of title on a later date." In approving that instruction, this Court said: "[I]t is observed that the instruction as given is precisely in accord with the decision in *Corporation v. Motor Co.*, 190 N.C. 157, 129 S.E. 2d 414."

In *Bank v. Motor Co., supra* (264 N.C. 568, 142 S.E. 2d 166), Rodman, J., reviewed the history of this question and noted that "[n]otwithstanding the conclusion reached in 1925, litigants continued their efforts to secure a judicial declaration that certificates of title for motor vehicles issued under then existing statutes were analagous to statutory certificates of title for real estate, registered as to title, pursuant to the provisions of c. 43 of the General Statutes." We had last answered these contentions in *Finance Co. v. Pittman, supra* (253 N.C. 550, 117 S.E. 2d 423), decided in December 1960, when we said: "The interpretation given in 1925 has not been rejected by the Legislature. If public policy now requires a different system of establishing ownership and encumbrances on motor vehicles, such policy must be declared by the Legislature. It can enact laws to accomplish that purpose. We have neither the power nor the desire to usurp its prerogative."

[2, 3] Following the *Pittman* decision in 1960, the General Assembly (which convened in February 1961) amended G.S. 20-72(b) and G.S. 20-75, effective 1 July 1961, by adding at the end of each section the following sentence: "Transfer of ownership in a vehicle by an owner (by a dealer) is not effective until the provisions of this subsection have been complied with." See sections 8 and 9, Chapter 835, Session Laws 1961. The prompt enactment of these amendments following our decision in *Pittman* impels the conclusion that it was the legislative intent to change what was formerly the law. "In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it." *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481. Here, there was no ambiguity to clarify. Decisions of this Court had made it perfectly clear that the purchaser of a motor vehicle prior to 1 July 1961 acquired title notwithstanding vendor's failure to deliver a certificate

of title or the vendee's failure to make application to the Department of Motor Vehicles for a new certificate. It is therefore logical to conclude that the 1961 amendments to G.S. 20-72(b) and G.S. 20-75 were intended to and did change the law with respect to transfer of ownership of motor vehicles. 1 Sutherland, Statutory Construction § 1930 (1968 Cum. Supp. to Horack's 3d ed., 1943).

The foundation for this decision was laid in 1925 in our decision in *Corporation v. Motor Co., supra,* when we said:

> "Plaintiff cites *Miller v. Ins. Co.*, 230 Pac., 1039, from Kansas; *Curry v. Iowa Truck & Tractor Co.*, 187 N.W., 36, from Iowa; *Crandall v. Shay*, 214 Pac., 450, from California. These cases hold with much clarity of reasoning and support in numerous precedents, that the sale and transfer of title are void when the statute prohibits such unless in compliance with its requirements. *Miller v. Ins. Co., supra,* deals with the Missouri statute which says: 'Any sale or transfer of such motor vehicle without complying with the provisions of this section shall be fraudulent and void.' The provisions referred to are similar to the requirements in the North Carolina statute in detail.
>
> "In *Curry v. Iowa Truck & Tractor Co., supra,* the Iowa statute provides: 'Until said transferee has received said certificate of registration, and has written his name upon the face thereof, delivery and title to said motor vehicle shall be deemed not to have been made and passed.'
>
> "In *Crandall v. Shay, supra,* the quoted section of the statute is the same as in the *Curry case, supra,* with this in addition: 'And said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose.'
>
> "The pivotal provision of the statutes in these cases are absent from our statute. The North Carolina statute contents itself with penal provisions, operative on the persons who violate them, including the prohibition of the use of the vehicle on the highways, and no more. Our Legislature could have provided, as did Iowa, Missouri and California, but it is clear that it did not, and we cannot extend the act beyond its provisions, however laudable the purpose, or beneficent the desired result."

The Legislature took positive action on 15 June 1961 to include in our statutes this "pivotal provision" lacking in 1925 by amending G.S. 20-72(b) and G.S. 20-75, effective 1 July 1961 to provide: "Transfer of ownership in a vehicle by an owner (by a dealer) is not effective until the provisions of this subsection have been complied with."

[4] We hold therefore that after 1 July 1961, the effective date of the amendments, no title passed to the purchaser of a motor vehicle until (1) the certificate of title has been assigned by the vendor, (2) delivered to the vendee or his agent, and (3) application made for a new certificate of title. This accords with prior decisions in *Bank v. Motor Co., supra,* and *Credit Co. v. Norwood, supra.*

Cases relied on by the Court of Appeals are not controlling. *Luther v. Insurance Co., supra* (262 N.C. 716, 138 S.E. 2d 402), involved the sale and purchase of an automobile in 1957 and its involvement in an automobile accident prior to the effective date of the 1961 amendments. The court necessarily applied the former law to the facts of that case. *Indemnity Co. v. Motors, Inc., supra* (258 N.C. 647, 129 S.E. 2d 248), is factually distinguishable. There, the facts affirmatively show that on 16 September 1961 the dealer (vendor) had, as required by the statute, delivered the duly assigned certificate of title together with the purchaser's application for a new certificate to the purchaser's agent, Smart Finance Company. It then became the legal duty of the vendee to make application for a new certificate of title within twenty days; and even though the certificate of title was delivered to a lien holder, it was nonetheless the duty of the purchaser to see that it was forwarded to the Department of Motor Vehicles within twenty days. G.S. 20-73; G.S. 20-74. This was not done. The purchaser failed to perform his statutory duty, and the certificate of title and application for a new certificate had not been presented to the Department of Motor Vehicles on 4 November 1961 when the purchaser, operating said vehicle, was involved in a collision. It was held that dealer should not be penalized because of the failure of the purchaser to perform his duty. The dealer had done all the law required of him.

[5, 6] In the case before us, however, vendor had not executed and acknowledged an application for a new certificate of title. Vendor had not parted with possession of the certificate of title and could still have used it to entrap the unwary or for any other purpose. "A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case." *Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897; accord, *Carpenter v. Carpenter,* 244 N.C. 286, 93 S.E. 2d 617.

We now consider whether James Zimmerman was driving the 1958 Ford with the permission, express or implied, of its owner, Piedmont, at the time of the accident.

[7, 8] "Where express permission is relied upon it must be of an

affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, implied permission involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent. *Hinton v. Indemnity Insurance Co. of North America,* 8 S.E. 2d 279 (Va. 1940)." *Hawley v. Insurance Co.*, 257 N.C. 381, 126 S.E. 2d 161; accord, *Hooper v. Casualty Co.*, 233 N.C. 154, 63 S.E. 2d 128.

It is disclosed by the agreed statement of facts that employees of Piedmont had not met James prior to the accident and James had no part in the dealings between John and Piedmont. This conclusively rebuts any suggestion of express permission. In fact, plaintiff makes no such contention. Rather, plaintiff contends John had express permission to do with the vehicle as he pleased because Piedmont had attempted to make a sale to John and maintains that ownership had been transferred to him. Therefore, plaintiff says, no limitations whatever were placed upon John's use of the automobile by Piedmont; rather, exclusive possession and control were given to John, including the implied permission for John to allow his brother James to drive.

[9] The fallacy of plaintiff's position lies in the assumption that John had Piedmont's permission to operate the vehicle upon the public highways. When the vehicle was delivered to John's home, Piedmont parked it and removed the dealer tags. It was understood that John would obtain liability insurance over the weekend and return to Piedmont on Tuesday with an FS-1 form at which time the title certificate would be delivered to John so he could purchase license tags. These facts negative the suggestion that John had Piedmont's permission to operate the vehicle, illegally or otherwise, until after he had obtained his insurance and purchased license tags. Piedmont's erroneous argument that ownership had been transferred to John does not alter these facts. The clear inference is that Piedmont neither intended nor anticipated that John — much less anyone else — would operate the vehicle until insurance and license tags had been obtained. Its illegal operation under the circumstances here disclosed cannot be characterized as a permissive use within the meaning of Piedmont's liability policy. Any other interpretation requires reaching and stretching which we are unwilling to do. For an exhaustive discussion of cases in which the courts have considered the extent of coverage afforded by the omnibus clause, see Annotation: Omnibus Clause of Automobile Liability Policy as Covering

Accidents Caused by Third Person who is Using Car with Consent of Permittee of Named Insured, 4 A.L.R. 3d 10.

Since John had no permission, express or implied, to operate the car at the time in question, we hold that he was without authority to extend driving privileges on illegal terms to his brother James and thereby bind the owner and the owner's liability carrier. "Failure to show coverage requires nonsuit." *Bailey v. Insurance Co.*, 265 N.C. 675, 144 S.E. 2d 898; *Kirk v. Insurance Co.*, 254 N.C. 651, 119 S.E. 2d 645; *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438.

It should be noted that, effective 1 July 1963, G.S. 20-72(b) and G.S. 20-75 were again materially changed by Chapter 552, Session Laws 1963.

The decision of the Court of Appeals is modified to conform with this opinion.

Modified and affirmed.

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

STATE OF NORTH CAROLINA v. BOYD STRICKLAND

No. 24

(Filed 30 January 1970)

1. Constitutional Law § 33— self-incrimination

The privilege against self-incrimination relates only to testimonial or communicative acts of the person seeking to exercise the privilege and does not apply to acts not communicative in nature.

2. Criminal Law § 43— admissibility of motion pictures

Generally, the basic principles which govern the admissibility of photographs apply to motion pictures, and where they are relevant and have been properly authenticated, they are admissible in evidence.

3. Constitutional Law § 33; Criminal Law § 43— self-incrimination — sound motion pictures of defendant

Talking motion pictures of an accused in a criminal prosecution are not *per se* testimonial in nature, and where they are properly used to illustrate competent and relevant testimony of a witness, their use does not violate an accused's privilege against self-incrimination.

4. Criminal Law § 43— admissibility of illustrative motion pictures — slight variation

The State cannot introduce substantive evidence or add to the testimony of a witness under the guise of using a moving picture to illustrate the testimony of the witness, but if the testimony of the witness is generally consistent with the illustrative moving picture, a slight variation only affects the credibility of the evidence.

5. Criminal Law §§ 43, 76— motion pictures containing in-custody statement — necessity for voir dire

In this prosecution for operating a motor vehicle upon the public highways while under the influence of intoxicating liquor, defendant's automobile having wrecked and the driver having left the scene, the trial court erred in the admission, over defendant's objection, of sound motion pictures containing an in-custody statement by defendant which placed defendant at the scene of the wreck and destroyed his contention that his intoxication resulted from drinking subsequent to the wreck, where the trial court did not conduct a *voir dire* hearing in the absence of the jury to determine whether defendant's statement contained in the sound pictures was voluntarily and understandingly made after he had been fully advised of his constitutional rights.

6. Criminal Law § 76— in-custody statements — admissibility — necessity for voir dire hearing

In-custody statements attributed to a defendant, when offered by the State and objected to by the defendant, are inadmissible for any purpose unless, after a *voir dire* hearing in the absence of the jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised of his constitutional rights.

7. Criminal Law § 43— admissibility of illustrative motion pictures — duties of trial judge

The trial judge is required to examine carefully into the authenticity, relevancy and competency of a motion picture offered to illustrate a witness' testimony, and if he finds it to be competent, to give the jury proper limiting instructions at the time it is introduced.

8. Criminal Law § 43— admission of motion picture — preview by defense counsel

When a moving picture is offered into evidence, upon defendant's request the trial judge should allow defendant's counsel to preview it so that he can intelligently enter objections to those portions which he may deem uncorroborative or otherwise objectionable.

9. Criminal Law §§ 43, 76— sound motion picture containing incriminating statement by defendant — necessity for voir dire

When a sound motion picture offered into evidence contains incriminating statements made by defendant from his knowledge of the offense, upon defendant's objection the trial judge must conduct a *voir dire* to determine the admissibility of the in-custody statements or admissions contained in the sound picture.

10. Criminal Law § 43— photographs and motion pictures of misdemeanants — G.S. 114-19

G.S. 114-19 does not prohibit the admission of photographs or motion pictures of a defendant charged with a misdemeanor, the statute being concerned with the compilation and preservation of statistics and records rather than the creation of a new rule of evidence.

MOORE, J., did not participate in the consideration or decision of this case.

APPEAL by defendant pursuant to G.S. 7A-30(1) from decision of the Court of Appeals (5 N.C. App. 338), which found no error in his trial before *Seay, J.*, at 3 March 1969 Criminal Session of FORSYTH Superior Court.

Defendant was charged with the offense of operating a motor vehicle upon the public highways while under the influence of intoxicating liquor. He entered a plea of not guilty.

The State offered evidence which tended to show:

On the night of 1 December, 1967, at approximately 7:00 o'clock, Deputy Sheriff John Taylor, who was off-duty, saw an automobile run off the road, cross an embankment, and strike a tree. He asked the driver to step out of the car. He smelled the odor of alcohol on the driver, who told the Deputy that he had drunk two beers. Deputy Taylor directed the driver to sit down on the embankment and noticed that he staggered when he walked. The Deputy had someone call the Highway Patrol and began to direct traffic because of a "live" power line lying in the road. He later noted that the driver had left the scene.

When Patrolman W. A. Ballard arrived, it was determined that the automobile was registered in defendant's name. Patrolman Ballard then proceeded to defendant's home, and upon his arrival at about 8:15 he found defendant in a "very intoxicated condition." Defendant voluntarily went to the scene of the accident with the officer, and went from there to the Clerk's office. On the way to the Clerk's office Patrolman Ballard advised defendant that if an eyewitness identified him as the driver of the wrecked car, he would be charged with driving under the influence. The officer also testified: "I at that time, advised him of his rights." Defendant was identified by Deputy Sheriff Taylor as being the driver of the wrecked automobile and defendant was thereupon placed under arrest.

Patrolman Ballard further testified:

"I read the warrant to him and offered him a test. At that time his speech was rambling, mumbled. I have his speech marked on my report here. I have 'mumbled' and 'slurred" marked.

"As to Mr. Strickland's balance, he needed support. When he was walking, he was stumbling. Several times I had to take hold of him to support him. I only gave Mr. Strickland the balance, the walking test. I asked him. I gave him the finger-to-nose test. He completely missed with both hands. Coins: he fumbled with them. . . .

"A movie was made of the defendant at the station there. I saw the movie some time in December of '67, before this case came up in Traffic Court. I haven't seen it since. To the best of my remembrance of the movie, it fairly represents the defendant at that time it was taken."

The Solicitor offered the sound moving picture of defendant, made at the station approximately two hours after the wreck, "to illustrate the testimony of Officer Ballard."

Defendant entered an "objection to the movie." After a brief recess, the court overruled the objection and instructed the jury as follows: ". . . you are to consider these motion pictures that are going to be shown, solely for the purpose of illustrating and explaining the testimony of this witness, and you are not to receive the pictures or view these motion pictures as substantive evidence."

Defendant offered evidence which tended to show that he was not the driver of the automobile when it was wrecked; that Patrolman Ballard arrested him at his home at about 10:00 o'clock P.M., and that he had been drinking beer at that time. He also offered evidence of his good reputation.

The jury returned a verdict of guilty as charged in the warrant. Defendant appealed.

Attorney General Morgan and Staff Attorney Giles for the State.

White, Crumpler and Pfefferkorn for defendant.

BRANCH, J.

The question presented for decision by this appeal is whether the North Carolina Court of Appeals erred in holding that sound motion pictures, taken of defendant approximately two hours after he was alleged to have operated an automobile upon the public highways of North Carolina while under the influence of intoxicating liquor, were properly admitted into evidence.

Defendant contends that the use of the sound moving pictures violated his Fifth Amendment privilege guaranteeing that a person

cannot be "compelled in a criminal case to be a witness against himself" and the guarantee of Article I, Section 11 of the North Carolina Constitution that a person shall "not be compelled to give self-incriminating evidence."

[1] The Federal courts have recognized that the Fifth Amendment privilege against self-incrimination relates only to testimonial or communicative acts of the person seeking to exercise the privilege and does not apply to acts not communicative in nature. *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908; *Holt v. United States,* 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed. 1021.

In the case of *Schmerber v. California, supra,* a physician withdrew blood from the defendant at the direction of a State officer, over objection of the accused, and in a State prosecution for driving an automobile while under the influence of intoxicating liquor offered in evidence an analysis of the blood so taken for the purpose of showing intoxication of accused. The defendant objected to the introduction of this evidence, contending that this violated his Fifth Amendment privilege against self-incrimination. Holding the blood test evidence competent because it was not his testimony or his communicative act, the United States Supreme Court stated:

> "(B)oth federal and state courts have usually held that it (Fifth Amendment) offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

Another leading case in the federal court structure is *Holt v. United States, supra,* in which there was evidence that prior to the trial the accused, over his objection, was compelled to put on a blouse that "fitted" him. Mr. Justice Holmes, speaking for the Court, rejected the argument that this was a violation of Holt's right against self-incrimination as "based upon an extravagent extension of the Fifth Amendment," and went on to say:

> "(T)he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be ma-

terial. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." 218 U.S. at 252-253, 54 L. Ed. at 1030.

[2] Generally, the basic principles which govern the admissibility of photographs apply to motion pictures, and where they are relevant and have been properly authenticated, they are admissible in evidence. They have been used in both criminal and civil trials for many purposes, e. g., civil cases: *Lehmuth v. Long Beach Unified School Dist.,* 53 Cal. 2d 544, 348 P. 2d 887, 2 Cal. Rptr. 279 (1960) (motion picture depicting condition of personal injury victim); *McGoorty v. Benhart,* 305 Ill. App. 458, 27 N.E. 2d 289 (1940) (motion pictures admissible to discredit the testimony of a personal injury claimant by showing activity inconsistent with alleged injury); *Sparks v. Employers Mut. Liab. Ins. Co. of Wis.,* 83 So. 2d 453 (La. Ct. App. 1955) (motion picture admissible to show condition of a person, place, object, or activity). E. G., Criminal cases: *People v. Hayes,* 21 Cal. App. 2d 320, 71 P. 2d 321 (1937) (sound motion picture of confession held admissible); *People v. Dabb,* 32 Cal. 2d 491, 197 P. 2d 1 (1948) (sound pictures of re-enactment by defendants of a crime). 41 Notre Dame Lawyer, 1009, 1010, n. 6 (1965-66); Scott, Photographic Evidence, § 624; 62 A.L.R. 2d 686. However, there is very little authority on the precise question of using moving pictures in cases in which a person is charged with driving on the public highways while under the influence of intoxicating liquor and asserts his constitutional right against self-incrimination. According to our research only one jurisdiction, Oklahoma, has adopted the view supporting defendant's position.

In *Spencer v. State,* Okla. Cr., 404 P. 2d 46, defendant appealed from a conviction of operating a motor vehicle while under the influence of intoxicating liquor, contending that films of coordination tests performed by him at police direction and without his knowledge violated his constitutional right against self-incrimination. Holding that defendant's constitutional rights were violated, the Court said:

> "Before it can be said that defendant waived his constitutional rights against self-incrimination, it must be shown that the defendant — of his own volition, freely and voluntarily — posed for the pictures after being advised that the tests were optional; and that films were being taken of his actions; and advised as to his rights against self-incrimination.
>
> "In absence of such a showing, the pictures admitted in evi-

dence at the trial over objections of defendant, would constitute reversible error."

Accord: *Ritchie v. State,* Okla. Cr., 419 P. 2d 176; *Stewart v. State,* Okla. Cr., 435 P. 2d 191.

It is noted that there was evidence in the instant record, both in the testimony of patrolman Ballard and in the moving picture itself, that defendant had been warned of his constitutional rights and that he understood them.

A view contrary to that adopted by the court in the State of Oklahoma has been expressed in the states of Colorado, Texas and Ohio. In *Piqua v. Hinger,* 15 Ohio State 2d 110, 238 N.E. 2d 766, defendant was arrested and subsequently charged with operating a motor vehicle while under the influence of intoxicating liquor. He was taken to the police station, where he was ordered to perform certain physical tests. Unknown to him, motion pictures were made of the tests. After the tests he was advised of his constitutional rights. The films were offered into evidence at his trial. Defendant was convicted and appealed, contending that the films should have been suppressed by authority of *Miranda v. Arizona, supra.* The Court rejected this contention and, holding that *Schmerber v. California, supra,* was dispositive of the issue, stated:

"The evidence introduced in the trial of the instant case, in respect to the physical tests made and filmed, did not constitute matter communicated by the accused from his knowledge of the offense. On the contrary, it was real or physical evidence of the kind designated in *Schmerber* as unprotected by the Constitution. Such evidence is constitutionally admissible, even if compelled, and irrespective of whether the warnings required by *Miranda* are given."

The case of *Housewright v. State (Texas),* 154 Cr. 101, 225 S.W. 2d 417, is an appeal from conviction of operating a motor vehicle while under the influence of intoxicating liquor. The defendant, contending that admission of moving pictures of a scene at the jail while defendant was being booked and taken without his consent, was violative of his constitutional protection against self-incrimination. The court held that the moving pictures when properly identified were admissible, and declared:

"Evidently the witnesses could delineate the peculiarities of appellant at the scene of the alleged offense and his demeanor and actions in order to give a basis of their opinion as to his intoxicated condition and it seems to us to be but a clearer de-

lineation of what they saw and described to the jury if such a scene could thus be shown by a series of pictures taken immediately after his apprehension instead of the eyewitnesses testifying only from memory."

In *Lanford v. People,* 159 Colo. 36, 409 P. 2d 829, defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor. Sound moving pictures were taken shortly after his arrest which showed, among other things, his refusal to take sobriety and coordination tests. Over his objection, the sound moving pictures were introduced into evidence at his trial. The court held the sound movies to be admissible, but that at defendant's request the court must caution the jury as to the limiting purpose of the evidence and, upon request, instruct the jury as to its limiting purpose.

[1] North Carolina has long recognized the distinction between compulsory testimonial evidence and compulsory physical disclosure. The North Carolina view is summarized in *State v. Paschal,* 253 N.C. 795, 117 S.E. 2d 749, by Bobbitt, J. (now C.J.) as follows:

"The established rule in this jurisdiction is that '(t)he scope of the privilege against self-incrimination, in history and in principle, includes only the process of testifying by word of mouth or in writing, *i.e.*, the process of disclosure by utterance. It has no application to such physical evidential circumstances as may exist on the accused's body or about his person.' *S. v. Rogers,* 233 N.C. 390, 399, 64 S.E. 2d 572, where Ervin, J., reviews prior decisions of this Court. See also *S. v. Grayson,* 239 N.C. 453, 458, 80 S.E. 2d 387, opinion by Parker, J., and cases cited.

"Where this rule applies, it is held that the admission of evidence of a defendant's *refusal to submit* to a chemical test designed to measure the alcoholic content of his blood does not violate his constitutional right against self-incrimination."

See also *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343; *State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873.

Both better reasoning and the prevailing weight of authority lead us to follow the views adopted by Colorado, Texas and Ohio.

[3, 4] Brock, J., speaking for the Court of Appeals, correctly and concisely stated:

"Talking motion pictures of an accused in a criminal action are not per se testimonial in nature, and, where they are prop-

erly used to illustrate competent and relevant testimony of a witness, their use does not violate accused's privilege against self-incrimination."

However, the State cannot introduce substantive evidence or add to the testimony of a witness under the guise of using a moving picture to illustrate the testimony of the witness. Nevertheless, if the testimony of a witness is generally consistent with the illustrative evidence, a slight variation only affects the credibility of the evidence. *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354.

[5] The burden here was upon the State to prove that defendant operated his motor vehicle upon the public highways or streets while he was under the influence of intoxicating liquor. Defendant admitted that he had been drinking, but denied that he was operating his automobile when it was wrecked. He also defended upon the ground that even if the jury should find that he was the operator of the motor vehicle, his intoxication resulted from consuming alcoholic beverages in the two-hour period which elapsed between the wreck and the time when the sound moving pictures were made.

In the instant case the moving picture not only depicted defendant's physical condition and his ability (or inability) to coordinate his movements; its sound track recorded the following incriminating statement — "communicated by the accused from his knowledge of the offense": "Q. Have you had anything to drink since they stopped you? A. No, sir."

This question and answer presented testimony from defendant which tended to show not only that he was driving the motor vehicle but that he was under the influence of intoxicating liquor at that time. It placed him at the scene of the wreck and completely destroyed his contention that his intoxication resulted from drinking subsequent to the wreck. The statement was clearly substantive evidence, competent as an admission if competent at all. It certainly did not illustrate the testimony of any other witness.

[6] It is the law in this state "that in-custody statements attributed to a defendant, when offered by the State and objected to by the defendant, are inadmissible *for any purpose* unless, after a *voir dire* hearing in the absence of the jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional rights." *State v. Catrett,* 276 N.C. 86, 171 S.E. 2d 398, filed 6 January 1970. *Accord: State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53; *State v. Gray,* 268

N.C. 69, 150 S.E. 2d 1; *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569; and *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. This statement from *Catrett* was made with reference to the defendant's in-custody statements which were offered for *impeachment* purposes. *A fortiori,* it is applicable to the statement which defendant made in consequence of the interrogation quoted above.

The Oklahoma case of *Stewart v. State, supra,* cited as being contrary to the view adopted by this Court, is in partial accord with this decision, in that it holds that sound motion pictures taken of a defendant are inadmissible in evidence without a showing that prior to the taking he was advised of his right to counsel and given the admonitions required by *Miranda v. State of Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and *Escobedo v. State of Illinois,* 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977.

[5] In the instant case, since no *voir dire* was held, there must be a new trial.

[7-9] Aside from the constitutional and procedural questions here presented, we think it appropriate to observe that the use of properly authenticated moving pictures to illustrate a witness' testimony may be of invaluable aid in the jury's search for a verdict that speaks the truth. However, the powerful impact of this type of evidence requires the trial judge to examine carefully into its authenticity, relevancy, and competency, and — if he finds it to be competent — to give the jury proper limiting instructions at the time it is introduced. When a moving picture is offered into evidence, upon defendant's request the trial judge should allow defendant's counsel to preview it so that he can intelligently enter objections to those portions which he may deem uncorroborative or otherwise objectionable. Furthermore, when the sound motion picture contains incriminating statements by the defendant — made "from his knowledge of the offense" — upon defendant's objection, the judge must conduct a *voir dire* to determine the admissibility of the in-custody statements or admissions contained in the sound picture.

[10] We find no fallacy in the reasoning of the North Carolina Court of Appeals to the effect that G.S. 114-19 did not create a new rule of evidence. Even a cursory reading of this statute in connection with the chapter and article in which it is found leads to the conclusion that the statute is concerned with the compilation and preservation of statistics and records rather than the creation of a new rule of evidence.

For reasons stated, the decision of the Court of Appeals is re-

versed and the cause is remanded to that Court with direction to award a new trial, to be conducted in accordance with the principles herein set forth.

Reversed and remanded.

MOORE, J., did not participate in the consideration or decision of this case.

C. J. WHITLEY v. MONROE M. REDDEN, EXECUTOR OF THE ESTATE OF LEON D. HYDER

No. 57

(Filed 30 January 1970)

1. Trial § 40— form of issues — amount of recovery

The issue, "How much, if anything, is plaintiff entitled to recover," is not sufficient when other issues of fact are raised, since submission of the single issue may omit controverted facts upon which the right to recover is based.

2. Trial § 40— issue on amount of indebtedness

Failure to submit an issue on amount of indebtedness is not error when it appears that the amount is exclusively a matter of calculation.

3. Trial § 40— sufficiency of issues

Issues are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute and afford the parties opportunity to introduce pertinent evidence and to apply it fairly.

4. Trial § 40— submission of issue — pleadings and evidence

An issue should not be submitted to the jury unless the pleadings unequivocally raise such issue and the issue is supported by the evidence.

5. Bills and Notes § 20— action on notes — prima facie case

Where plaintiff introduced in evidence past-due notes under seal, he made out a *prima facie* case as to the entire amount of the notes, which precluded nonsuit even though defendant asserted affirmative defenses.

6. Bills and Notes § 20— submission of issues — amount owing plaintiff

In an action to recover on two sealed notes, one in the sum of $120,000 and the other $65,000, the trial court did not err in failing to submit to the jury an issue on the amount defendant owed plaintiff — although it might have been the better practice to do so — where the notes were introduced into evidence without objection, the defendant offered no evidence controverting the amount due, and the other issues submitted were

sufficient to present the contentions of the parties and to allow the court to enter judgment on the verdict.

7. Appeal and Error § 53; Bills and Notes § 20— submission of issues — notice of maker's incapacity — error cured by verdict

In an action to recover on two notes executed by defendant's testator, failure of the trial court to submit issues, tendered by defendant, which would have required a jury finding whether the payees had notice of testator's mental incapacity and whether payees took unfair advantage of the decedent, *held* cured by the jurors' verdict declaring the testator to have been mentally competent at the time he executed the notes.

8. Evidence § 11— dead man's statute — action on note executed by decedent — evidence of decedent's mental competency

In an action against an executor to recover on two notes allegedly executed and delivered by the decedent to the plaintiff and to plaintiff's witness, who later assigned his note to plaintiff, testimony by plaintiff and his witness, offered in support of their opinion concerning decedent's mental competency to execute the note, that decedent had been in serious financial trouble and had requested their help in obtaining a loan for one million dollars, that decedent gave them the notes in settlement for their help in obtaining the loan, and that decedent had sufficient mental capacity in his transactions with them to know what he was doing, *held* incompetent and inadmissible under the Dead Man's statute, G.S. 8-51, notwithstanding the trial court restricted the testimony to the issue of mental competency, since the testimony of plaintiff's transactions with decedent also tended to establish the execution and delivery of the notes.

9. Evidence § 11— dead man's statute — mental competency of decedent — admissibility of evidence

Where there is an issue of the mental capacity of a decedent or a lunatic, an interested witness may relate personal transactions and communications between himself and the decedent or lunatic as a basis for his opinion as to the mental capacity of the decedent or the lunatic; but such evidence will be rejected when it is offered for the purpose of proving, and does tend to prove, vital and material facts which will fix liability against the representative of the deceased person, or the committee of a lunatic, or anyone deriving his title or interest through them.

10. Trial § 15; Appeal and Error § 30; Evidence § 11— general objection to evidence — evidence admissible for more than one purpose — exception to rule

The rule that evidence is admissible over a general objection if it is competent for any purpose, *held* inapplicable in the case where the challenged testimony as to the mental competency of a decedent also tended to establish the plaintiff's claim in violation of the Dead Man's statute, G.S. 8-51.

ON certiorari to the North Carolina Court of Appeals to review its decision reported in 5 N.C. App. 705.

This is a civil action by which plaintiff seeks to recover on two

sealed notes, payable on demand, the first dated 11 June 1965 in the sum of $120,000, and the second dated 2 August 1965, in the sum of $65,000. Plaintiff alleges that the two notes were executed for value received and were delivered by defendant's testator, Leon D. Hyder (Hyder), to C. J. Whitley (Whitley) and E. R. Flowers (Flowers). Flowers subsequently assigned his interest in the notes to Whitley by the following language: "FOR VALUE RECEIVED, the undersigned hereby sell, assign and transfer his interest in this Note to C. J. Whitley." No other notations appear upon the notes. Plaintiff by his complaint, among other things, alleged:

"7. That on or about the 28th day of December, 1967, the plaintiff made demand upon the defendant for payment of said promissory notes attached hereto and marked Exhibits "A" and "C" respectively, but the defendant has failed and refused to pay the same or any part thereof.

"8. That there is now due and owing to the plaintiff from the defendant the sum of One Hundred Eighty-five Thousand ($185,000.00) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from December 28, 1967, no part of which amount has been paid."

Defendant's answer contained the following:

"7. The allegations of paragraph 7 are not denied.

"8. That the allegations contained in paragraph 8 of the complaint are untrue and are denied."

Defendant, by his answer, also alleged a lack of consideration, denied execution and delivery of the notes, and asserted the defense that, upon the dates the respective notes were executed, Hyder did not have sufficient mental capacity to execute and deliver either of said notes. The notes were, without objection, introduced into evidence, and at the close of all the evidence the court submitted and the jury answered issues as follows:

1. Did Leon D. Hyder sign the note dated June 11, 1965, payable to C. J. Whitley and E. R. Flowers, in the sum of $120,000.00 and deliver same to them, as alleged in the complaint?

ANSWER: Yes.

2. Did Leon D. Hyder on June 11, 1965, have sufficient mental capacity to sign and deliver said note?

ANSWER: Yes.

3. Was said promissory note issued for valuable consideration?

ANSWER: Yes.

4. Did Leon D. Hyder sign the note dated August 2, 1965, payable to C. J. Whitley and E. R. Flowers in the sum of $65,000.00 and deliver same to them, as alleged in the complaint?

ANSWER: Yes.

5. Did Leon D. Hyder on August 2, 1965, have sufficient mental capacity to sign and deliver said note?

ANSWER: Yes.

6. Was said promissory note issued for valuable consideration?

ANSWER: Yes.

Upon the verdict of the jury the court entered the judgment which in pertinent part provided:

"IT IS THEREFORE ORDERED ADJUDGED AND DECREED that plaintiff have and recover of the defendant the sum of One hundred and eighty-five thousand ($185,000.00) Dollars, together with interest thereon at the rate of 6% per annum from December 28, 1967."

Defendant appealed to the North Carolina Court of Appeals. The Court of Appeals found error and ordered a new trial. Plaintiff filed petition for writ of certiorari to the North Carolina Court of Appeals to review its decision pursuant to G.S. 7A-31(c)(3). The petition was allowed by order dated 16 October 1969.

Bailey & Davis for plaintiff appellant.

Redden, Redden & Redden for defendant appellee.

BRANCH, J.

[1-4] Defendant contends that the trial judge erred in failing to submit an issue as to the amount defendant owed plaintiff, if anything. The often-used issue, "How much, if anything, is plaintiff entitled to recover," is not sufficient when other issues of fact are raised. This is true because submission of the single issue may omit controverted facts upon which the right to recover is based. *Yates v. Body Co.*, 258 N.C. 16, 128 S.E. 2d 11. However, it is not error for the trial court to fail to submit to the jury an issue as to the amount

of indebtedness where it appears that the amount is exclusively a matter of calculation. *Indemnity Co. v. Perry,* 200 N.C. 765, 158 S.E. 560. Issues are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute and afford the parties opportunity to introduce pertinent evidence and to apply it fairly. *Cherry v. Andrews,* 231 N.C. 261, 56 S.E. 2d 703. An issue should not be submitted to the jury unless the pleadings unequivocally raise such issue, *Henderson v. R. R.,* 171 N.C. 397, 88 S.E. 626, and unless such issue is supported by the evidence. *Carland v. Allison,* 221 N.C. 120, 19 S.E. 2d 245.

[5, 6] Here, the notes became past due after plaintiff's demand for payment on 28 December 1967. The pleadings admit that demand had been made on both notes and that defendant had refused to pay any part of the amount due. When plaintiff introduced the past-due sealed notes, he made out a prima facie case as to the entire amount of the notes, which precluded nonsuit even though defendant asserted affirmative defenses. *Parks v. Allen,* 210 N.C. 668, 188 S.E. 100; *Trust Co. v. Smith Crossroads, Inc.,* 258 N.C. 696, 129 S.E. 2d 116. Defendant offered no evidence to controvert the amount due, but supported with evidence his main defenses of failure of delivery, lack of consideration, and lack of sufficient mental capacity on the part of his testator to execute and deliver the notes. Although it might have been better practice to have included with the other necessary issues an issue fixing the amount due, we conclude, after considering the pleadings and the evidence, that the issues submitted were sufficient to present all the contentions of the parties and to allow the court (even without necessity of calculation) to enter judgment upon the verdict which settled the rights of the parties.

[7] Defendant assigns as error the refusal of the court to submit issues tendered by defendant as to each note, as follows:

> "Did C. J. Whitley and E. R. Flowers on June 11, 1965, have notice of such incapacity as would put a reasonably prudent person upon inquiry about his mental capacity to transact business?
>
> "Was Leon D. Hyder paid a fair and full consideration for said note by C. J. Whitley or E. R. Flowers?
>
> "Did C. J. Whitley and E. R. Flowers on June 11, 1965, take unfair advantage of Leon D. Hyder?"

Defendant argues that the court erred in failing to submit these issues, and relies upon the case of *Chesson v. Insurance Company,* 268 N.C. 98, 150 S.E. 2d 40, which was an action to rescind a cancella-

tion of a life insurance policy on the ground that plaintiff's intestate was mentally incompetent. There, the court submitted issues similar to those above quoted, in addition to the issues of the intestate's mental capacity. *Chesson* may be distinguished from the instant case in that the jury, in *Chesson,* by its answer to the issue of competency, established the intestate to be incompetent. In the case before us the jury's answer to the issue of mental capacity established the testate to be competent. Had the jury by its verdict established defendant's testator to be incompetent, it would have been error for the trial court to refuse to submit the tendered issues and to charge thereon. The failure of the trial judge to submit the tendered issues and to charge thereon was cured by the verdict of the jury declaring testator to be competent.

[8] Defendant, relying on G.S. 8-51, contends that the trial court erred in admitting the testimony of plaintiff Whitley and his assignor, Flowers, regarding their personal communications and transactions with the deceased, Hyder. Flowers testified for plaintiff that in his opinion Hyder was mentally competent in November 1964, on 11 June 1965, and on 2 August 1965. The witness was first questioned about a conversation between himself and Hyder in a Lakeland, Florida hospital during November 1964. Upon defendant's objection, the court instructed the jury:

> "Members of the jury, this evidence is offered and admitted for the sole purpose of disclosing the basis of this witness' opinion as to the mental capacity of the deceased, and assisting you in determining the credibility, or worthiness of belief of that opinion, if you find that it does, or tends to do so, and for no other purpose. The objection is OVERRULED. EXCEPTION FOR THE DEFENDANT."

Flowers then testified that Hyder told him and Whitley that he was in serious financial trouble and that in consideration for a commitment of one million dollars to save his company he wanted Whitley and Flowers each to have a one-third interest in the company.

The witness related several conversations which allegedly occurred between himself and Hyder. The following quotations from the record are representative:

> "I next had a conversation with Mr. Hyder, over the phone, the following week.
>
> Q. All right, what did he tell you during that conversation?
>
> MR. REDDEN: OBJECTION.

THE COURT: Members of the jury, this evidence is offered and admitted for the limited purpose previously discussed in the court's instructions, and you will consider it only in the light of those instructions, for that restrictive purpose. OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 25.

THE COURT: Answer the question and tell what Mr. Hyder told you. OBJECTION. OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 26.

A. He said, 'You really got a commitment for a million dollars? MOTION TO STRIKE ANSWER. MOTION DENIED."

— — — — —

"Mr. Hyder met me at the airport when he came to Charlotte June 11, 1965. We went from the airport to the Manger Inn.

Q. What did Mr. Hyder say to you at the Manger Inn? OBJECTION. OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 47.

THE COURT: Admitted under the same instructions previously given, concerning the testimony of this witness.

A. He said he wanted to discuss my participation for consideration of securing the one million dollar commitment, and the note that he had with him, he wanted to discuss that, and he wanted to discuss that, he wanted to go to a local bank and —MOTION TO STRIKE ANSWER. MOTION DENIED. DEFENDANT EXCEPTS."

— — — — —

". . . I had occasion to see Mr. Hyder on August 2, 1965, in Charlotte. Mr. Whitley was there other than Mr. Hyder and myself. We had a conversation with him on that date.

Q. What did he say to you? OBJECTION. OVERRULED. EXCEPTION. DEFENDANT'S EXCEPTION NO. 53.

THE COURT: This is admitted with the instructions previously given you by the Court, concerning the witness' testimony, members of the jury.

A. Mr. Hyder told us that he had with him a note for the remainder and final consideration for us, for consideration of the commitment that we obtained for him. . . ."

— — — — —

Plaintiff Whitley testified that in his opinion Hyder had sufficient mental capacity to know what he was doing and to understand

the nature and effects of his acts on November 12, 1964 and during the period of January to June 1965. He then testified, over objection, that he had a conversation with Hyder in Lakeland, Florida, in a hospital room on 12 November 1964, and at that time Hyder stated he would give Whitley and Flowers one-third of his business if they would help him obtain a million dollars for his business. One additional example of his testimony is as follows:

> "On August 2, 1965, I had another conversation with Hyder in Charlotte, North Carolina. Mr. Flowers was present. We met at Manger Motel.
>
> Q. Tell the jury what Mr. Hyder said to you on that date?
>
> Objection. Overruled. Exception. This is DEFENDANT'S EXCEPTION NO. 102.
>
> THE COURT: This evidence is offered and admitted under the instructions previously given concerning the testimony of this witness.
>
> A. Mr. Hyder said that he was going to finish making settlement with us, and he said that he arrived at a figure of sixty-five thousand dollars for what we had done. He said when he found out where he stood with the company, he was going to give an additional sixty-five thousand dollars."

Plaintiff and Flowers also testified to transactions and conversations with Hyder which tended to prove the execution and delivery of the notes upon which this action was founded.

Applying G.S. 8-51 as analyzed by this Court, it appears that Whitley, a party to the transactions, and Flowers, the person under whom plaintiff derived a part of his interest, were testifying in Whitley's interest and against the representative of a deceased person concerning personal transactions and communications between each of them and the deceased person. It does not appear that defendant has "opened the door" so as to come within the statutory exception. Ordinarily, both of the witnesses would have been disqualified by the statute, G.S. 8-51. *Bunn v. Todd,* 107 N.C. 266, 11 S.E. 1043; *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542. However, plaintiff contends that this evidence is competent by virtue of an exception to the statute, created by case law interpretation, to the effect that a person (who would otherwise be precluded from testifying by the statute), after testifying as to the mental capacity of a deceased person may testify to transactions and communications with deceased in order to show the jury that the opinion was well

founded. Plaintiff relies upon the cases of *McLeary v. Norment,* 84 N.C. 235; *Rakestraw v. Pratt,* 160 N.C. 436, 76 S.E. 259; *Bissett v. Bailey,* 176 N.C. 43, 96 S.E. 648; *Plemmons v. Murphy,* 176 N.C. 671, 97 S.E. 648; *In re Hinton,* 180 N.C. 206, 104 S.E. 341; *In re Will of Brown,* 194 N.C. 583, 140 S.E. 192; *In re Will of Brown,* 203 N.C. 347, 166 S.E. 72; *In re Will of Lomax,* 226 N.C. 498, 39 S.E. 2d 388; *In re Will of Kestler,* 228 N.C. 215, 44 S.E. 2d 867; *Goins v. McLoud,* 231 N.C. 655, 58 S.E. 2d 634.

We deem it necessary to briefly review the North Carolina case law in order to properly delineate the rule and apply it to the facts before us.

The landmark case of *McLeary v. Norment, supra,* was a suit to set aside a deed. An interested party was allowed to testify in plaintiff's behalf as to plaintiff's lack of mental capacity and to relate conversations had with plaintiff to show the opinion was well founded. However, the court in so holding stated:

> "The proviso proceeds upon the idea that, unless both can be heard, it is best to hear neither. But the conversations offered are not to prove any fact stated or implied, but the mental condition of the plaintiff . . . The declarations are not received to show the truth of the things declared, but as evidence of a disordered intellect, of which they are the outward manifestations."

This Court, considering the statute, G.S. 8-51, in the case of *In re Will of Lomax, supra,* stated:

> "It has been frequently held that as between the propounder or an interested executor and a person who is interested in the result of the trial, the statute now known as G.S. 8-51, rendering an interested survivor incompetent as a witness to a personal transaction with a deceased person, applies in a contest over a will, notwithstanding the proceeding is *in rem.* (Citations omitted) There is an exception when the evidence is *directed solely* towards the question or issue of mental condition or testamentary capacity. In that case, it is competent for the interested witness to give testimony of such transaction or conversation, *solely,* however, as a basis for the opinion formed as to the mental condition or capacity of the deceased." (Citations omitted (Emphasis added).

The case of *In re Will of Chisman,* 175 N.C. 420, 95 S.E. 769, considered the testimony of the chief beneficiary of a will, who was offered as a witness by the propounder and questioned as follows:

"What do you know about the preparation of this will, if anything?

"Objection by caveators. Overruled. Exception by caveators.

"A. She told me she had made her will willing me her property; that she had changed the first will leaving my sister out, and that she copied this from the first will so that she would know that it was written correctly."

The Court held that the objection should have been sustained and, after recognizing holdings in *McLeary v. Norment, supra,* and *Rakestraw v. Pratt, supra,* stated:

"This case, however, does not come within the scope of those precedents.

"The evidence of the witness tended directed to establish the will and to prove that it was the free and voluntary act of the testatrix and also to contradict the charge of undue influence alleged by the caveators and submitted to the jury under the issue.

. . . .

"The conversation with the testatrix testified to by the witness was not a casual conversation upon some indifferent subject, admitted in evidence as a basis for forming an opinion upon the sanity of the testatrix, but the declarations constitute very vital evidence tending to establish the will and to rebut the charge of undue influence. Such declarations may not be proven by a witness interested in the result of the action. *Bunn v. Todd,* 107 N.C. 266."

Accord: *Bissett v. Bailey,* 176 N.C. 43, 96 S.E. 648; *Hathaway v. Hathaway,* 91 N.C. 139.

[9] We conclude that North Carolina is one of those states which has a "Dead Man's" statute and allows an interested witness, where there is an issue of mental capacity, to relate personal transactions and communications between the witness and a decedent or lunatic as a *basis for his opinion as to the mental capacity of the decedent or lunatic;* however, such evidence will be rejected when it is offered for the purpose of proving and does tend to prove vital and material *facts* which will fix liability against the representative of a deceased person, or committee of a lunatic, or anyone deriving his title or interest through them.

[8] The rule set forth in the case of *In re Hinton,* 180 N.C. 206, 104 S.E. 341, that evidence is admissible over a general objection if

it is competent for any purpose, is not applicable to the testimony here challenged. The challenged testimony was so directed and weighted towards proving facts essential to establishing plaintiff's claim, rather than the basis of witnesses' opinions as to sanity, that it became impossible for the trial court to effectively remove the prejudice to defendant by a limiting instruction. Therefore, a limiting instruction by the court could not make the evidence admissible.

The trial judge erred in admitting the testimony of plaintiff Whitley and Flowers regarding their personal communications and transactions with the deceased Hyder.

The decision of the Court of Appeals is affirmed as modified and the case is remanded to that court with direction to award a new trial, to be conducted in accordance with the principles herein set forth.

Modified and affirmed.

STATE OF NORTH CAROLINA v. WILLIE J. TOMBLIN, LARRY ALLEN GAITHER AND MICHAEL EUGENE KIRKSEY

No. 13

(Filed 30 January 1970)

1. Criminal Law § 113— joint trial — instructions — conviction of one or all defendants

When two or more defendants are jointly tried for the same offense, a charge which is susceptible to the construction that the jury should convict all if it finds one guilty is reversible error.

2. Criminal Law § 168— construction of charge as a whole

The charge must be construed as a whole in the same connected way in which it was given, and if it fairly and correctly presents the law when thus considered, it will afford no ground for reversing the judgment, even if an isolated expression should be found technically inaccurate.

3. Criminal Law § 113— joint trial — instructions — consideration of guilt or innocence of each defendant

In this consolidated trial of three defendants for the crimes of kidnapping and rape, the charge of the court, when considered as a whole, is not subject to the construction that the jury should convict all three defendants if it found one defendant guilty of the particular crime charged, notwithstanding an isolated portion of the charge on rape may have been subject to such construction, where the court in other portions of the charge carefully instructed the jury that it should determine individually

and separately the guilt or innocence of each defendant as to each of the charges.

APPEAL by defendants under G.S. 7A-27(a) from *Crissman, J.*, 24 February 1969 Session of ROWAN.

Defendants were tried upon two bills of indictment which charged (1) that on 1 September 1968 the three defendants kidnapped Carolyn Euart and (2) that on the same day they raped her. The jury found each defendant guilty of kidnapping and guilty of rape with the recommendation that his sentence be life imprisonment. From consecutive sentences of twenty years for kidnapping and life imprisonment for rape, each defendant appealed. Upon their affidavits of indigency Judge Crissman entered an order allowing each to appeal in forma pauperis and appointing their trial attorneys to perfect the appeal. Rowan County was directed to pay the costs thereof.

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General; D. M. Jacobs, Staff Attorney for the State.

John H. Rennick and W. B. Nivens for defendant appellants.

SHARP, J.

In brief summary, omitting its more sordid details, the evidence of the State tended to show: About 8:00 p.m. on 1 September 1968 the three defendants came upon Carolyn Euart (17) and her boyfriend, Tony Morgan (16) in the Salisbury City Park. They were parked in an automobile under a light in the picnic area. Defendants proclaimed that they were armed with guns and knives. By the use of force and threatening to shoot Tony, defendants took charge of the automobile and transported him and Carolyn to Kelsey Park, about three miles away. There each defendant raped her. Thereafter defendants took Carolyn and Tony to the Penn-Dixie Cement Company's loading platform, where each defendant again raped Carolyn. Defendants then returned the girl and boy to the City Park, where they surrendered Tony's car to him. He immediately took Carolyn to the police station and reported what had occurred. Two policemen took her to the hospital, where she was examined and treated by Dr. Joel Goodwin, a gynecologist. He testified that she had been forcibly entered and described the multiple injuries, blood and stains that he found on her body. Tony and Carolyn were seniors at East Rowan High School. Their teachers testified to their good character and reputation.

Each defendant testified in his own behalf. Gaither said that he had had intercourse with prosecutrix at Kelsey Park and at the cement platform. Tomblin denied having had intercourse with her at all. He said that he had attempted it at both places but had failed. Kirksey said he had had intercourse with her only at the platform. Each defendant testified that Carolyn had consented to have intercourse with him and also with the other two, and that Tony had stood by and watched without protest or interference.

Defendants assign as error the following portions of the charge:

"Now, members of the jury, on the charge of rape, the court charges you that if you are satisfied from the evidence and beyond a reasonable doubt that either one or all of these defendants had carnal knowledge, had sexual intercourse, forcibly and against the will of Carolyn Euart on this occasion, that is, if either of these or all of these had carnal knowledge of Carolyn Euart without her consent and against her will, she putting up as much resistance as she could under the circumstances, the court charges you that it would be your duty to return a verdict of guilty of rape as charged in the bill of indictment, and that you may find either of them guilty of rape as charged in the bill of indictment, or you may find them guilty of rape with the recommendation of life imprisonment. (Exception No. 14)

"* * *

"Now, members of the jury, as to the charge of kidnapping the court charges you that if you are satisfied from the evidence and beyond a reasonable doubt that these defendants, either of them, one of them, two of them, or three of them, *considering each man's case individually and separately,* that he, or they, unlawfully and wilfully took and carried away this girl, Carolyn Euart, by force and against her will, then the court charges you that he or they would be guilty of kidnapping. (Exception No. 15) (Our italics.)

"* * *

"So, the court charges you as to this matter of kidnapping that if you are satisfied from the evidence and beyond a reasonable doubt that these defendants, either of them or one of them, or two of them, or all three, unlawfully and wilfully — and it is against the law to kidnap a person — that is, if they deliberately and with a purpose put Carolyn Euart in fear of her life or in fear of great bodily harm, and in this matter forced her to go to these places, then the court charges you that it would be equivalent to actual force and that it would be your duty to return a verdict of guilty

of kidnapping as charged in the bill of indictment as to the defendant, or the defendants." (Exception 16)

Defendants contend that the foregoing instructions were a mandate to the jury to convict all defendants if they found one guilty of the particular crime charged.

[1] This Court has repeatedly held that, when two or more defendants are jointly tried for the same offense, a charge which is susceptible to the construction that the jury should convict all if it finds one guilty is reversible error. *State v. Williford,* 275 N.C. 575, 169 S.E. 2d 851; *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230; *State v. Harvell,* 256 N.C. 104, 123 S.E. 2d 103; *State v. Miller,* 253 N.C. 334, 116 S.E. 2d 790; *State v. Meshaw,* 246 N.C. 205, 98 S.E. 2d 13; *State v. Wolfe,* 227 N.C. 461, 42 S.E. 2d 515; *State v. Walsh,* 224 N.C. 218, 29 S.E. 2d 743; *State v. Norton,* 222 N.C. 418, 23 S.E. 2d 301. The question for decision here is whether Judge Crissman's charge is susceptible to such construction.

The charge on kidnapping certainly does not reflect "the clarity of thought and conciseness of statement" which is desirable in a judicial mandate to the jury. It is obvious, however, that the judge meant to tell the jurors that they would return a verdict of guilty of kidnapping only as to the defendant about whose guilt they had no reasonable doubt. The jurors were told very clearly to consider "each man's case individually and separately." We do not believe that they were confused.

[2] If that portion of the instruction with reference to rape, which is the subject of Exception 14, constituted the judge's only precept on the point it purported to cover, its ambiguity could not be condoned. *State v. Wolfe, supra.* However, a charge must be construed "as a whole in the same connected way in which it was given." When thus considered, if it "fairly and correctly presents the law, it will afford no ground for reversing the judgment, even if an isolated expression should be found technically inaccurate." *State v. Valley,* 187 N.C. 571, 572, 122 S.E. 373, 374. *Accord, State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548; 1 Strong, N. C. Index *Criminal Law* § 161 (1957).

At the beginning of his instructions to the jury, the judge said:

"In this charge of rape against each of these defendants, the court charges you that there are five possible verdicts. You may find one, two, or three of the defendants guilty of rape. You may find one, two or three of the defendants guilty of rape with the recommendation of life imprisonment, or guilty of assault with in-

tent to commit rape, or guilty of an assault upon a female person, or not guilty. You will remember that there are three defendants, they being charged, each are charged with rape, but they are separate cases and you will give each of the defendants consideration in light of this evidence and in determining whether or not there is sufficient evidence for a conviction, or whether or not he should be acquitted.

"Now, the same is true, of course, as to the charge of kidnapping as to each defendant being entitled to have his case considered individually and passed upon as far as he is concerned. And, as to the charge of kidnapping there are two possible verdicts. You may find them guilty as charged in the bill of indictment, or not guilty."

Toward the end of the charge, and after having given the instruction to which Exception 14 refers, the judge told the jury:

"The court again reminds you that you may find one of these defendants guilty, you may find two guilty, you may find three guilty. You may find one of the defendants not guilty, you may find two not guilty, or you may find all three not guilty. You may find one not guilty and two guilty. You may find two guilty and one not guilty, or you may find all three not guilty. This is true as to rape and assault with intent to commit rape, also."

In concluding his instruction, the judge charged:

"Now, I want to make it clear -- and crystal clear — that you're trying each of these defendants — that while we are trying them together each are charged separately — and you are trying them separately."

[3] The foregoing excerpts make it quite clear that the jury could not have understood that if they found one defendant guilty they would find all three guilty. Considering the whole charge, we are convinced that the jurors were not misled by the portion of the charge to which defendants except. The assignment of error based upon Exceptions 14, 15, and 16 is not sustained. Defendants' other assignments of error have been carefully considered and found to merit no discussion.

No error.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1970

GASTONIA PERSONNEL CORPORATION v. BOBBY L. ROGERS, A MINOR, REPRESENTED HEREIN BY HIS GUARDIAN AD LITEM, W. MARSHAL LaFAR, DEFENDANT

No. 23

(Filed 11 February 1970)

1. Infants § 1— duration of infancy

Under the common law, persons, whether male or female, are classified and referred to as infants until they attain the age of twenty-one years.

2. Infants § 2— contractual liability — disaffirmance of contract

An infant's contract, unless for "necessaries" or unless authorized by statute, is voidable by the infant, at his election, and may be disaffirmed during infancy or upon attaining the age of twenty-one.

3. Infants § 2— contractual liabilities — concept of "necessaries"

The concept of "necessaries" of an infant is enlarged to include such articles of property and such services as are reasonably necessary to enable the infant to earn the money required to provide the necessities of life for himself and those who are legally dependent upon him, a minor being liable for the reasonable value of such property or services.

4. Infants § 2— contract for services of employment agency — necessaries — sufficiency of evidence — issues for jury

In this action by an employment agency to recover upon an infant's contract for services rendered in assisting the infant to find employment as a draftsman, plaintiff's evidence tending to show that defendant, when he contracted with plaintiff, was nineteen years of age, emancipated, married, a high school graduate, within a quarter or 22 hours of obtaining his

degree in applied science, that defendant and his wife were expecting a child, and that defendant had to quit school and go to work and was capable of holding a job at a starting annual salary of $4,784, *is held* sufficient for submission to the jury for its determination of issues as to whether defendant's contract with plaintiff was an appropriate and reasonable means for defendant to obtain suitable employment, and if the jury should find that it was, the reasonable value of the services received by defendant pursuant to the contract.

LAKE, J., dissenting.

HUSKINS, J., dissenting.

BRANCH, J., joins in dissenting opinion of HUSKINS, J.

ON writ of *certiorari* to review the decision of the Court of Appeals reported in 5 N.C. App. 219, which affirmed the judgment of nonsuit entered by *Mason, J.*, at the close of plaintiff's evidence, in the District Court of GASTON County, docketed and argued as No. 36 at Fall Term 1969.

Plaintiff, in support of its allegations, offered evidence tending to show the facts narrated below.

Defendant had graduated from high school in 1966. On May 29, 1968, he was nineteen years old, emancipated and married. He needed only "one quarter or 22 hours" for completion of the courses required at Gaston Tech for an A.S. degree in civil engineering. His wife was employed as a computer programmer at First Federal Savings and Loan. He and she were living in a rented apartment. They were expecting a baby in September. Defendant had to quit school and go to work.

For assistance in obtaining suitable employment, defendant went to the office of plaintiff, an employment agency, on May 29, 1968. After talking with Maurine Finley, a personnel counselor, defendant signed a contract containing, *inter alia*, the following: "IF I ACCEPT employment offered me by an employer as a result of a lead (verbal or otherwise) from you within twelve (12) months of such lead even though it may not be the position originally discussed with you, I will be obligated to pay you as per the terms of the contract." Under the contract, defendant was free to continue his own quest for employment. He was to become obligated to plaintiff only if he accepted employment from an employer to whom he was referred by plaintiff.

After making several telephone calls to employers who might need defendant's services as a draftsman, Mrs. Finley called Spratt-

Seaver, Inc., in Charlotte, North Carolina. It was stipulated that defendant, as a result of his conversation with Mrs. Finley, went to Charlotte, was interviewed by Spratt-Seaver, Inc., and was employed by that company on June 6, 1968, at an annual salary of $4,784.00. The contract provided that defendant would pay plaintiff a service charge of $295.00 if the starting annual salary of accepted employment was as much as $4,680.00.

Prior to his contract with plaintiff, defendant had unsuccessfully sought employment with two other companies.

Plaintiff sued to recover a service charge of $295.00. In his answer, defendant admitted he had paid nothing to plaintiff; alleged he was not indebted to plaintiff in any amount; and, as a further answer and defense, pleaded his infancy.

The sole question presented is whether plaintiff offered evidence sufficient to withstand defendant's motion for nonsuit.

Joseph B. Roberts, III, for plaintiff appellant.

T. Lamar Robinson, Jr., and Henry M. Whitesides for defendant appellee.

BOBBITT, C.J.

[1] Under the common law, persons, whether male or female, are classified and referred to as *infants* until they attain the age of twenty-one years. 42 Am. Jur. 2d, Infants § 3; 43 C.J.S., Infants § 2.

"By the fifteenth century it seems to have been well settled that an infant's bargain was in general void at his election (that is voidable), and also that he was liable for necessaries." 2 Williston, Contracts § 223 (3rd ed. 1959).

An early commentary on the common law, after the general statement that contracts made by persons (infants) before attaining the age of twenty-one "may be avoided," sets forth "some exceptions out of this generality," to wit: *"An infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries,* and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards." (Our italics.) Coke on Littleton, 13th ed. (1788), p. 172. The italicized portion of this excerpt from Coke on Littleton was quoted by Pearson, J. (later C.J.), in *Freeman v. Bridger,* 49 N.C. 1 (1856). It appears also in later decisions of this Court: *Turner v. Gaither,* 83 N.C. 357

(1880); *Cole v. Wagner,* 197 N.C. 692, 150 S.E. 339 (1929); *Barger v. Finance Corp.,* 221 N.C. 64, 18 S.E. 2d 826 (1942). If the infant married, "necessaries" included necessary food and clothing for his wife and child. *Freeman v. Bridger, supra.*

[2] In accordance with this ancient rule of the common law, this Court has held an infant's contract, unless for "necessaries" or unless authorized by statute, is voidable by the infant, at his election, and may be disaffirmed during infancy or upon attaining the age of twenty-one. *Chandler v. Jones,* 172 N.C. 569, 90 S.E. 580 (1916), and cases cited; *Barger v. Finance Corp., supra,* and cases cited; *Fisher v. Motor Co.,* 249 N.C. 617, 107 S.E. 2d 94 (1959).

In *Freeman v. Bridger, supra,* the opinion, referring to "such other necessaries," states: "These last words embrace boarding; for shelter is as necessary as food and clothing. They have also been extended so as to embrace schooling, and nursing (as well as physic) while sick. In regard to the quality of the clothes and the kind of food, &c., a restriction is added, that it must appear that the articles were suitable to the infant's degree and estate."

In *Freeman,* the Court held that timber for the construction of a house on an infant's land was not a "necessary" and therefore the infant could disaffirm his contract for the purchase thereof.

In *Turner,* the Court held that money for a professional (medical) education was not a "necessary" and therefore the infant could disaffirm his contract to repay money he had borrowed and used for that purpose. In this connection it is noted: (1) In the excerpt from Coke on Littleton, it is stated that "necessaries" for which "an infant may bind himselfe" included "good teaching or instruction, whereby he may profit himselfe afterwards." (2) The 1969 statute, now codified as G.S. 116-174.1, authorizes all minors in North Carolina of the age of seventeen years and upwards to enter into written contracts of indebtedness and to execute unsecured notes evidencing such indebtedness "(f)or the sole purpose of borrowing money to obtain post-secondary education at an accredited college, university, junior college, community college, technical institute, industrial education center, business or trade school provided, however, that none of the proceeds of such loans shall be used to pay for any correspondence courses."

In *Skinner v. Maxwell,* 66 N.C. 45 (1872), it was held that an infant, who had purchased a stock of goods for use in carrying on a mercantile business, had the right to disaffirm his contractual obligations with reference thereto. The thrust of this decision was to

preserve fully the infant's common-law right to disaffirm contracts involving business transactions. Accord: *McCormick v. Crotts,* 198 N.C. 664, 153 S.E. 152. In *McCormick,* it was held that the defendant, a minor, who had purchased "One Superior Machine complete and Snaplite Lens" for use in the Garden Theatre at Biscoe, N. C., was entitled (1) to disaffirm all his contractual obligations with reference to payment of the purchase price, and (2) to recover all amounts he had previously paid to the plaintiff. The plaintiff was adjudged entitled to the possession of the machine in its used and depreciated condition.

In *Jordan v. Coffield,* 70 N.C. 110 (1874), the plaintiff recovered for articles sold an infant "just before her marriage, consisting of her bridal outfit, and among other things a suite of chamber furniture costing $55; all of which articles were received and used by defendants, and still are in their service and use, except such of the same as are worn out." Settle, J., for the Court, said: "There is an exception to the general rule that an infant is incapable of binding himself by a contract made, not in favor of tradesmen, but for the benefit of the infant himself, in order that he may obtain necessaries on credit. As is well said in *Hyman v. Cain,* 48 N.C. 111, 'infants had better be held liable to pay for necessary food, clothing, etc., than for the want of credit, to be left to starve.' Nor are we to understand by the word necessaries only such articles as are absolutely necessary to support life, but it includes also such articles as are suitable to the state, station and degree in life of the person to whom they are furnished." The thrust of this decision is to expand slightly the concept of "necessaries" and to enable some infants to contract for somewhat more than the bare or minimum necessities of life.

When an infant purchased a motor vehicle, whether for pleasure or as necessary for use in his occupation or employment, the ancient rule of the common law was applied with full vigor. *Morris Plan Co. v. Palmer,* 185 N.C. 109, 116 S.E. 261 (1923); *Collins v. Norfleet-Baggs,* 197 N.C. 659, 150 S.E. 177 (1929); *Barger v. Finance Corp., supra; Fisher v. Motor Co., supra.*

In *Morris Plan Co.,* the defendant purchased a truck and by using it (hauling lumber) made a substantial amount of money. Later, the finance company repossessed and sold the truck. When he purchased the truck and executed a note and chattel mortgage for the purchase price, the defendant was emancipated, married, had the appearance "of a man of full age" and represented falsely that he was over twenty-one. Notwithstanding, the defendant was per-

mitted to disaffirm his contractual obligations and to recover the full amount of the payments he had made to the automobile dealer and to the finance company.

In *Collins,* the plaintiff, a minor, traded a Chevrolet truck for a Dodge sport roadster and gave the defendant a note and mortgage on the Dodge for the balance of the purchase price. The Dodge was destroyed in a wreck. The plaintiff elected to disaffirm his contract. In an action in his behalf by his general guardian, the plaintiff was permitted to recover from the defendant the fair market value of the Chevrolet truck and in addition the amount he had paid on the balance purchase price note.

In *Barger,* the plaintiff, when a minor, bought a Graham-Paige car and paid a portion ($38.45) of the purchase price therefor. He traded this car for a Nash and agreed to pay a difference of $257.00. The papers evidencing this additional obligation were purchased by a finance company. The plaintiff paid $116.50 and then defaulted. The finance company repossessed the Nash. When he became twenty-one, the plaintiff disaffirmed these contractual obligations and was permitted to recover from the dealer and the finance company, respectively, the sum he had paid to each of them. The opinion concludes: "The evidence in the instant case tends to show that the ownership of an automobile was advantageous to the plaintiff and that he would not have been promoted without an automobile available for his use. Nevertheless it does not appear that an automobile was necessary for him to earn a livelihood. Hence we are of opinion and hold that an automobile is not among those necessaries for which a minor may be held liable."

In *Fisher,* the plaintiff, a minor, bought a 1953 Oldsmobile. The purchase price was $750.00, of which $600.00 was provided by the plaintiff. This car, while operated by the plaintiff, was involved in a wreck. Its value, after the wreck, was $50.00. The plaintiff elected to disaffirm his contract. In an action instituted in his behalf by a next friend, the plaintiff recovered $550.00 (the $600.00 he had paid less the value of the wrecked car).

The basis of decision in the cases considered in the four preceding paragraphs is stated by Stacy, C.J., in *McCormick v. Crotts, supra,* as follows: "The case may seem to be a hard one, as the plaintiff was not aware of the defendant's minority at the time of the sale . . . but the dominant purpose of the law in permitting infants to disaffirm their contracts is to protect children and those of tender years from their own improvidence, or want of discretion, and from the wiles of designing men."

Decisions in other jurisdictions which hold that a motor vehicle, under particular circumstances, may be a "necessary" for a minor, are reviewed in an article, *Infant Contractual Responsibility: A Time for Reappraisal and Realistic Adjustment?* Mehler, 11 University of Kansas Law Review 361, at 370 *et seq.* (1963).

In addition to G.S. 116-174.1, discussed above, modifications of the common-law rule by our General Assembly include those set forth below.

1. G.S. 20-309.1, a codification of Chapter 934, Session Laws of 1967, provides that "(a)ny minor 18 years of age or over shall be competent to contract for automobile insurance of any kind, to enter into an agreement to finance such insurance, to execute a power of attorney in connection with such financing, and also to execute a power of attorney in connection with an application for insurance with the assigned risk plan, to the same extent and with the same effect as though he had attained the age of 21 years." Thus, if *Barger v. Finance Corp., supra,* and similar decisions, are followed, an infant eighteen years of age or over can elect to avoid his contract for the purchase of a car and recover any amounts previously paid as purchase price but is bound absolutely on his contract for automobile insurance and the financing thereof.

2. G.S. 53-43.5 authorizes banks to deal with minors, in respect of deposit accounts and the rental of safe deposit boxes, as if they were twenty-one. With reference to bank deposits, see also G.S. 53-53.

3. G.S. 54-18 authorizes minors of the age of twelve years and upwards to become shareholders in building and loan associations and federal savings and loan associations and to deal with reference thereto as if they were twenty-one.

4. G.S. 58-205.1 authorizes minors of the age of fifteen years and upwards to make contracts of insurance or annuity with any life insurance company authorized to do business in this State as if they were twenty-one.

5. G.S. 39-13.2, in the circumstances to which it applies, authorizes married minors to execute contracts, conveyances or mortgages relating to real or personal property as if they were married persons of the age of twenty-one or older.

6. Article 2, Chapter 165, of the General Statutes, entitled "The Minor Veterans Enabling Act," confers upon veterans "eighteen years of age or over, but under twenty-one years of age," the authority to enter into contracts for the purposes of obtaining rights

and benefits under the Service Men's Readjustment Act as if such minors were twenty-one years of age or older.

In addition to the foregoing, it is noteworthy: (1) All unmarried persons of eighteen years, or older, unless otherwise disqualified by statute, may lawfully marry. G.S. 51-2. (2) Persons of eighteen years, or older, are eligible for employment in the (hazardous) occupations in which minors under sixteen (G.S. 110-6) and minors under eighteen (G.S. 110-7) are not "permitted or allowed to work."

With reference to statutory modifications of the common-law rule in other States, see 41 Indiana Law Journal 140, at 149 *et seq.* (1965); V Vernier, American Family Laws, Section 273.

It is noted that, under "The Family Law Reform Act 1969" (1969, c. 46, Part I), applicable to England and Wales, a person attains full age "on attaining the age of eighteen instead of attaining the age of twenty-one." Halsbury's Statutes of England, Third Edition, Interim Service re 1969 Statutes.

This statement commands respect and approval: "Society has a moral obligation to protect the interests of infants from overreaching adults. But this protection must not become a straightjacket, stifling the economic and social advancement of infants who have the need and maturity to contract. Nor should infants be allowed to turn that protective legal shield into a weapon to wield against fair-dealing adults. It is in the interest of society to have its members contribute actively to the general economic and social welfare, if this can be accomplished consistently with the protection of those persons unable to protect themselves in the market place." Comment, *Infants' Contractual Disabilities: Do Modern Sociological and Economic Trends Demand a Change in the Law?* 41 Indiana Law Journal 140 *et seq.* (1965). Also, see Comment, *The Status of Infancy as a Defense to Contracts*, 34 Virginia Law Review 829, at 831 (1948), and Comment, *Contracts — Capacity of the Older Minor,* 30 University of Kansas City Law Review 230 *et seq.* (1962).

Admittedly, the decisions of the District Court and of the Court of Appeals rest squarely on the ancient rule of the common law as applied in prior decisions of this Court. However, without awaiting additional statutory changes, whether general or piecemeal, it seems appropriate that this common-law rule, which is rooted in decisions made by judges centuries ago, should be modified at least to the extent set forth below.

In *State v. Culver,* 129 A. 2d 715 (1957), Vanderbilt, C.J., in accord with cited quotations from impressive legal authorities, in-

cluding Coke's Fourth Institute, Professor Williston, Dean Pound, Mr. Justice Holmes and Mr. Justice Cardozo, said: "One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court. There is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common law of centuries ago as different as day is from night. The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice."

[3] In general, our prior decisions are to the effect that the "necessaries" of an infant, his wife and child, include only such necessities of life as food, clothing, shelter, medical attention, etc. In our view, the concept of "necessaries" should be enlarged to include such articles of property and such services as are reasonably necessary to enable the infant to earn the money required to provide the necessities of life for himself and those who are legally dependent upon him.

The record before us contains only plaintiff's evidence and the stipulation. It may be that defendant can defeat plaintiff's claim on grounds other than the plea of infancy. His motion for nonsuit having been allowed, defendant has not offered evidence.

[4] The evidence before us tends to show that defendant, when he contracted with plaintiff, was nineteen years of age, emancipated, married, a high school graduate, within "a quarter or 22 hours" of obtaining his degree in applied science, and capable of holding a job at a starting annual salary of $4,784.00. To hold, as a matter of law, that such a person cannot obligate himself to pay for services rendered him in obtaining employment suitable to his ability, education and specialized training, enabling him to provide the necessities of life for himself, his wife and his expected child, would place him and others similarly situated under a serious economic handicap.

[3] In the effort to protect "older minors" from improvident or unfair contracts, the law should not deny to them the opportunity and right to obligate themselves for articles of property or services which are reasonably necessary to enable them to provide for the proper support of themselves and their dependents. The minor should be held liable for the reasonable value of articles of property or services received pursuant to such contract.

[4] Applying the foregoing legal principles, which modify *pro tanto* the ancient rule of the common law, we hold that the evidence offered by plaintiff was sufficient for submission to the jury for its determination of issues substantially as indicated below.

To establish liability, plaintiff must satisfy the jury by the greater weight of the evidence that defendant's contract with plaintiff was an appropriate and reasonable means for defendant to obtain suitable employment. If this issue is answered in plaintiff's favor, plaintiff must then establish by the greater weight of the evidence the reasonable value of the services received by defendant pursuant to the contract. Thus, plaintiff's recovery, if any, cannot exceed the reasonable value of its services to defendant.

Accordingly, the judgment of the Court of Appeals is reversed and the cause is remanded to that Court with direction to award a new trial to be conducted in accordance with the legal principles stated herein.

Error and remanded.

LAKE, J., dissenting:

The defendant, a young man nineteen years old, with better than average education, has benefited from his use of the plaintiff's services for which he promised to pay an agreed amount. Now, having received the full benefit he desired, he refuses to pay for it. He does not contend, and there is nothing in the record before us to suggest, that the plaintiff overcharged him, or otherwise took any advantage of him. Nothing in this record arouses sympathy for the defendant. This is one of those hard cases which so frequently have turned out to be "quicksands of the law." In my view, the majority, in its proper desire to avoid an injustice to this plaintiff, has taken a step into quicksand.

As the majority opinion shows clearly, since a time prior to Columbus' discovery of America, it has been the well settled rule of the common law, repeatedly stated by this Court, that an infant's contract may be disaffirmed by him without liability, unless it is a contract for what the law calls "necessaries." If the contract is one for necessaries, the infant is liable for the reasonable value of what he received.

The reason for this rule, in both its aspects, is the desire of the law to protect the infant. His liability to pay for necessaries is not imposed so as to protect an adult supplier against a shrewdly scheming infant. It is imposed solely because otherwise the infant,

honest or not, might be unable to acquire that which he must have for the support of himself and his dependents. The rule permits the infant to refuse to carry out other contracts irrespective of the particular infant's intelligence, education or experience in business. It does not depend upon whether the particular contract was fair or unfair. It is immaterial, under this rule, that the application of it results in a loss to an adult who dealt in good faith with an unscrupulous infant.

For five hundred years English and American societies and economies have thrived under this rule and infants have found employment. It may well be that a better rule can be devised. I find nothing in this record, or in current social and economic conditions, to support the conclusion that either our society or our economy would suffer substantially if we adhere to the rule for one more year. Then the General Assembly of 1971 will be in session and can make such changes as may be necessary.

Stripped of emotional aspects, this case presents but one question, assuming the rule heretofore established is to be followed: Is an infant's contract for the services of an employment agency, under the circumstances disclosed in this record, a contract for necessaries? I do not think it is. That is, infants will not be seriously threatened with denial of employment if we hold they may disaffirm their contracts with employment agencies.

In the five hundred year life of this rule it has become well settled that whether goods or services are a necessary depends upon the facts in each case. What may be a necessary for one infant may not be for another differently situated. What was a necessary in 1770 may not be so in 1970, and vice versa. It is, however, equally well settled that a "necessary" is something more urgently needed than a thing or a service which is merely a convenience or an assistance to the infant. This is the established rule both in America and England, apart from statute.

In Williston on Contracts, 3rd ed., § 241, it is said:

> "Necessaries are limited by the courts as closely as possible, and generally come under the heads of food, or clothing of a reasonable kind, purchased for the use of the infant or of his family."

In Pollock's Principles of Contracts, pp. 49-50, it is said:

> "It is obvious, however, that it is in truth a question of common sense and experience what is or is not reasonably required by a person in a given station and circumstances, and one on

which not much light can be thrown by the statement in a general form of rules founded on extreme cases. *It is to be borne in mind * * * that the question is not whether the things are such that a person of the defendant's means may reasonably buy and pay for them, but whether they can reasonably be said to be so necessary for him that, though an infant, he must obtain them on credit rather than go without.* For the purpose of deciding this question the Court will take judicial notice of the ordinary customs and usages of society.

"If, on these preliminary considerations, the Court decides that there is evidence on which the supplies in question may reasonably be treated as necessaries, then it is for the jury to say whether they were in fact necessaries for the defendant under all the circumstances of the case." (Emphasis added.)

These principles are reflected in the former decisions of this Court cited in the majority opinion.

That the services of the employment agency in giving this defendant names of prospective employers was a convenience and an aid to him in getting a job with a minimum of inquiry and search from door to door is no doubt true. In the present eagerness of industry to find trained engineers, I cannot agree that such services are a "necessary" for an engineering student nearing graduation from Gaston Tech and seeking employment in the Charlotte area.

The majority opinion says: "Admittedly, the decisions of the District Court and of the Court of Appeals rest squarely on the ancient rule of the common law as applied in prior decisions of this Court."

After reciting several instances in which the Legislature of this State has modified the common law rule, the majority, "without awaiting additional statutory changes, whether general or piecemeal," now changes the law upon which the decisions of the lower courts "rest squarely." In justification, the majority opinion quotes former Chief Justice Vanderbilt of the Supreme Court of New Jersey as saying: "The nature of the common law requires that *each time* a rule of law is applied it be carefully scrutinized to make sure *that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice.*" (Emphasis added.)

This is not my conception of the nature of the common law, nor is it my understanding of the authority conferred upon this Court by the people of North Carolina. The authority of the people,

through their representatives in the State Government, to change the common law when conditions and needs have so changed as to render the law unjust or unwise is clear. They have, however, seen fit to vest this authority in the Legislature and not in us. N. C. Constitution, Art. I, § 8; Art. II, § 1. This power to change established law to meet changes in conditions is the essence of the legislative power.

The tragic turmoil in our public schools had its beginning in the decision of another court to assume the power to change the law of the land to conform to its conception of justice in a new time. No such social upheaval will result from the decision of the majority in this case, of course, but it is the same kind of error. It weakens, however so slightly, the wall of separation which the people of this State built between the proper functions of the several divisions of their government. The majority opinion, itself, shows this step is unnecessary for it cites at least six instances in which the Legislature has acted in recent years to make changes in this small field of the law. I am not persuaded that there is such an urgent necessity for the change now made by this decision that it cannot safely wait another year. The majority opinion shows that in England the change felt desirable there was made by Act of Parliament.

If some change is necessary, the majority opinion gives the trial courts no standard to guide them in other cases. The majority opinion expressly approves this statement from 41 Indiana Law Journal 140: "But this protection must not become a straightjacket stifling the economic and social advancement of infants who have the need and maturity to contract." How are the trial judges tomorrow to distinguish between the infant who does and the infant who does not have "maturity"? What is the test of an infant's "need" to contract? Again, the majority opinion says the previously accepted concept of "necessaries" should be enlarged to include "articles" and "services" which are "reasonably necessary" to enable the contracting infant to earn money to provide necessities of life for himself and his dependents. Are the services of an employment agency more necessary for this purpose than is an automobile for use in going from home to work? Is a nineteen year old, who has almost finished an engineering course, more in need of such an automobile than a seventeen year old drop-out from high school?

I am unable to find in current events overwhelming evidence that today's nineteen year olds have more maturity of judgment than did those of a century ago and so have less need of protection. The present defendant, an exceptionally well educated one, has evaluated

his economic credit and reputation for integrity in business transactions at something less than $295. In this I find little evidence of maturity of judgment.

HUSKINS, J., dissenting:

I respectfully dissent from the majority opinion which enlarges the concept of "necessaries" to include "such articles of property and such services as are reasonably necessary to enable the infant to earn the money required to provide the necessities of life for himself and those who are legally dependent upon him." To this end the ancient rule of the common law is modified *pro tanto.*

Inferentially, this modification of the common law rule applies only to "older minors," although what age group this embraces is not clear. Presumably, the jury in each case must now determine what articles of property and what services an infant may obtain by enforceable contract. Thus with respect to contracts with minors, it now becomes impossible for the legal profession to advise clients with any degree of certainty. What is a "necessary" in any given case is largely unknown until the jury speaks. Furthermore, what factual situation a trial judge should nonsuit at the close of the evidence and what he should submit to the jury under appropriate instructions becomes a judicial game of chance. It would be better, in my opinion, simply to apply long established legal principles and leave this area of the law undisturbed. Accordingly, I vote to affirm the decision of the Court of Appeals sustaining the judgment of nonsuit in the court below.

BRANCH, J., joins with this dissent.

G. D. HOYLE v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION

No. 18

(Filed 11 February 1970)

1. Aviation § 4; Estates § 1— ownership of property — rights in airspace

In adjudicating the relative property rights in the airspace, the courts generally have found it necessary to modify the ancient maxim of real property, "he who owns the soil owns it to the heavens," so that the general rule now deducible from the authorities is that the justiciable right

to the exclusive possession of land extends upward only to that point necessary for the full use and enjoyment of the land and the incidents of its ownership, the balance being regarded as open and navigable airspace.

2. Aviation § 1— landing and taking off — municipal airport — authority of FAA

The Federal Aviation Agency has, and exercises, full responsibility for the actual operations that cause planes to land and take off at a municipal airport, including the use of runways and the manner of approach and departure. 49 U.S.C.A. § 1101 *et seq.*

3. Aviation § 1— airports — state law — federal regulations

Chapter 63 of the General Statutes, entitled "Aeronautics," contemplates full cooperation and compliance with federal statutes and rules and regulations of appropriate federal agencies.

4. Aviation § 1— municipal airport — grant of use — approach areas

A grant, by lease or otherwise, of the right to use a municipal airport includes the right to use the approach areas necessary to land and take off in the manner prescribed by the Federal Aviation Agency.

5. Aviation § 4; Eminent Domain § 2— municipal airport — overflights — private property — "taking" — inverse condemnation

If overflights in taking off from and landing on municipal airport in accordance with the rules and regulations of the Federal Aviation Agency constitute a direct and immediate interference with the enjoyment and use of a plaintiff's property to such extent as to impair substantially the fair market value thereof, such overflights constitute a "taking" by the municipality of an air easement as appurtenant to the operation of its airport, notwithstanding municipality failed to initiate easement condemnation proceedings pursuant to G.S. 63-5.

6. Eminent Domain § 1— taking by inverse condemnation — landowner's remedy

When private property is taken for a public purpose by a municipality or other agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor.

7. Aviation § 1; Eminent Domain § 4— municipal airport — flight easement — power of condemnation

Municipal airport, by the exercise of the power of eminent domain conferred by G.S. 63-5, had authority to condemn an easement of flight over all of landowner's property for all type aircraft at minimum altitudes of 79, 80 or 90 feet above the surface of the ground and higher.

8. Aviation § 4— inverse condemnation of airspace — flight easement — municipal airport — sufficiency of evidence

In landowner's action to recover compensation for alleged inverse condemnation by a municipality, incident to its ownership and operation of an airport, of a flight easement through the airspace over plaintiff's property above an elevation of 90 feet, landowner's evidence *is held* sufficient

to permit a jury finding that, beginning in January or February 1962 and occurring continuously thereafter, the recurring noise, vibrations, air pollution, and air currents from frequent overflights by commercial jets at altitudes ranging from 80 feet to 500 feet substantially and adversely affected the reasonable market value of his property, thereby constituting a "taking" by the municipality of a flight easement over landowner's property and entitling landowner to compensation therefor.

9. Trial § 26; Pleadings § 36— variance between pleading and proof

Variances between pleading and proof do not require nonsuit where there is no indication that defendant was misled or otherwise prejudiced.

10. Aviation § 4; Eminent Domain § 13— municipal airport — condemnation of flight easement — time of "taking" — compensation — instructions

Where landowner's evidence was to the effect that defendant municipality appropriated a flight easement over his airspace beginning in January or February 1962 with the frequent and regular overflights of commercial jet aircraft at low altitudes when taking off and landing on a runway of the municipal airport, and that municipality has since then used the easement and will continue to do so, the flight easement effectively vested in the municipality as of January or February 1962, and the amount of landowner's compensation must be determined as of that date; consequently, trial court erred in instructing the jury that compensation was determinable with reference to the market value of landowner's property at the time of the trial in December 1968.

11. Aviation § 4; Eminent Domain § 13— inverse condemnation — airspace — time of taking — pleadings

In an action to recover compensation for the inverse condemnation of airspace over the landowner's property, the landowner should allege with reasonable specificity when the alleged appropriation or taking occurred and the lower and upper altitudes of the airspace above his property to which the easement relates.

12. Limitation of Actions § 5— trespass to realty — three-year limitation

The three-year statute of limitations is applicable to an action for trespass upon real property. G.S. 1-52(3).

13. Aviation § 4; Limitation of Actions § 4— inverse condemnation — flight easement — accrual of action

Landowner's cause of action for inverse condemnation against a municipality for the taking of a flight easement over landowner's property accrued in January or February 1962, with the beginning of frequent and regular overflights of commercial jet aircraft at low altitudes; and the cause of action, instituted in 1967, was not barred by statute of limitations.

14. Aviation § 4; Eminent Domain § 5— "taking" of airspace — amount of compensation

The compensation to which a landowner is entitled for the inverse condemnation of a flight easement through his airspace is the difference in the

value of his property immediately before and immediately after the "taking" by a municipal airport of the flight easement.

15. Eminent Domain § 5— inverse condemnation — time of compensation

A plaintiff cannot, by deferring the institution of his action for inverse condemnation, select a later date for the determination of the compensation to which he is entitled.

MOORE, J., did not participate in the consideration or decision of this case.

APPEAL by defendant from *Ervin, J.*, December 9, 1968 Civil Session of MECKLENBURG Superior Court, certified pursuant to G.S. 7A-31 for review by the Supreme Court before determination by the Court of Appeals, docketed and argued as No. 10 at Fall Term 1969.

This action was instituted September 21, 1967, to recover compensation in the amount of $47,500.00 for the alleged inverse condemnation by defendant, incident to its ownership and operation of Douglas Municipal Airport (Airport), of a flight easement of the airspace over plaintiff's property above an elevation of 90 feet.

Plaintiff owns a 4.8-acre tract of land located roughly seven-tenths of a mile (3,695.29 feet) northeast of the northeast end of the northeast-southwest runway of Douglas Municipal Airport. Plaintiff acquired this tract by two purchases, the first in 1928 and the second in 1944. The buildings thereon consist of the dwelling where plaintiff resides and a duplex which he rents.

The Airport is owned and operated by defendant. Its construction in 1936 and 1937 was financed jointly by a grant of the Works Progress Administration of the United States and the proceeds of a bond issue approved by the voters of defendant. Operations commenced on June 1, 1937.

As originally designed and laid out by defendant, the Airport consisted of a north-south runway, an east-west runway and a northeast-southwest runway. The northeast end of the northeast-southwest runway is the same distance from plaintiff's property now as it was in 1937. The original length of the northeast-southwest runway was 3,500 feet. It has been twice extended to the southwest. In the fiscal year 1939-1940, its length was increased to 5,000 feet; in 1952-1953, to 7,503 feet. The center line of the northeast-southwest runway, if extended northeast from the northeast end thereof, would bisect plaintiff's property, passing between plaintiff's residence and his garage.

Beginning in 1937, there have been uninterrupted flights of planes over plaintiff's property.

As a basis for his general allegation that defendant "ha(d) taken an air easement over the property of the plaintiff for an altitude ranging between 90 and 300 feet above the ground over the entire area" of his property, plaintiff alleged, *inter alia,* the following: (1) Defendant "is now and has for some time past caused large numbers of aircraft both civilian and military to take off and land on said airport at all times of the day and night." (2) Defendant "is and for some time past has been causing and directing numerous and ever-increasing flights of aircraft of all types over the entire area of the plaintiff's above-described property at elevations ranging from 90 feet to 300 feet above the ground." (3) "(S)uch flights will continue to increase in number and will fly even lower than at present when larger jet planes are introduced and used at the Douglas Municipal Airport." (4) "(A)ll of the plaintiff's property . . . is . . . located in the 100-decibel zone with sound intensity so great as created by the noise and vibration from jet aircraft and other aircraft flying over said property at the dangerously low altitudes hereinabove-mentioned that it is unbearable to a normal human being and has rendered the plaintiff's property unsaleable and almost unliveable by the plaintiff himself in spite of his having conditioned himself to the noise and vibrations . . ."

Answering, defendant denied it had taken a flight easement over the plaintiff's property, and denied that the flights of airplanes over plaintiff's property had affected adversely the fair market value thereof.

Defendant, as further answers and defenses, alleged the following: (1) It "ha(d) nothing to do with the landing and taking off of aircraft from Douglas Municipal Airport, excepting to provide the runways and the physical facilities," the operation of aircraft to and from the Airport being entirely in the hands of and under the control and direction of the Federal Aviation Agency and the owners and operators of the various planes which land and take off at said Airport. (2) ". . . the Federal Government and the State Government have preempted the air space above the plaintiff's property and have made and constituted it a part of the public domain, and the public has the right to use said space for air travel without any duty to compensate the plaintiff for such use." (3) Any invasion of the airspace over plaintiff's property by aircraft was "inconsequential" and insufficient to constitute a taking of plaintiff's property. (4) Plaintiff's action is barred by the 20-year (G.S. 1-40), the 10-year (G.S. 1-56), and the 3-year (G.S. 1-52) statutes of limitation.

Evidence was offered by plaintiff and by defendant. The evi-

dence, in addition to testimony and documentary evidence, includes "Stipulations" and attached exhibits.

Evidence offered by plaintiff includes evidence tending to show the following: During World War II, the United States leased the Airport from defendant and there operated a military base known as Morris Field Airbase. The lease, according to its terms, was to expire on June 30, 1966. Hostilities having ended in 1945, the lease was cancelled May 13, 1946, upon terms set forth in a quitclaim deed and agreement then executed. Thereupon defendant resumed the operation of the Airport. During the period the Airport was operated as Morris Field Airbase, many jet propelled military planes flew over plaintiff's property. In 1967 and 1968, Globemasters made flights over plaintiff's property. The Globemaster, also known as C-124, is a four-motor propeller type aircraft, "the largest propeller driven transport that the Air Force or military has."

Evidence offered by defendant includes evidence tending to show the following: Beginning at the end of 1953 and continuing into 1961, many F-86 fighter jets and T-33 jet trainers, operated by the Air National Guard, flew over plaintiff's property. In 1962 and thereafter, the Air National Guard "had no jets." On and after February 1, 1967, the Air National Guard, from time to time, operated Globemasters over plaintiff's property.

Commercial airlines first commenced operating jet aircraft at the Airport in January or February, 1962. Prior thereto, flights by *commercial airlines* were by propeller-type aircraft.

On direct examination, plaintiff testified: "In my opinion the frequency of commercial jet aircraft flights first became so substantial as to materially affect, adversely affect, the market value of my property in 1962. The flights first began adversely affecting the then market value of my property shortly after they began flying commercial jet flights over it as a continuous thing, increasing the planes. By shortly after, I mean within a year's time." On cross-examination, plaintiff testified: "I did not consider my property was devalued or that I was inconvenienced by the flights of planes over my property until 1962 or 1963." A witness for plaintiff, whose property adjoins that of plaintiff, testified: "I would think my property would have been suitable for industrial use prior to 1962. If the jets were not flying out there today, my property would be an ideal place for a motel."

Plaintiff's evidence also tended to show that, during the period from January or February, 1962, until the trial at December 9,

1968 Session, the frequent and regular overflights of commercial jet aircraft at low altitudes, when taking off from and landing on the Airport's northeast-southwest runway, constituted a direct and immediate interference with the enjoyment and use of his property to such extent as to impair the reasonable market value thereof.

Plaintiff's property, although zoned as industrial property prior to and since 1962, has been and is being used by plaintiff and his tenants for residential purposes.

On direct examination, plaintiff was asked this question: "Mr. Hoyle, do you have an opinion satisfactory to yourself as to the fair market value of your property at the present time free from jet aircraft and other type aircraft flying over it regularly and repeatedly at altitudes ranging from ninety feet above the ground upward to 500 feet above the ground?" Over defendant's objections, plaintiff was permitted to answer he had such opinion, namely, "$52,500."

Thereupon, this question was asked: "Mr. Hoyle, do you have an opinion satisfactory to yourself as to the fair market value of your property in its present condition subject to the over-flight of jet aircraft and other type aircraft at regular and repeated intervals at elevations ranging from ninety feet upward to 500 feet in the manner that you have described them here to the jury?" Over defendant's objections, plaintiff was permitted to testify that he had such opinion, namely, "$6,000."

Witnesses Luna, Broyles and Waggoner were permitted, over objections by defendant, to give their opinions in answer to substantially the same questions. In Luna's opinion, the difference was $43,500.00 ($48,300.00 v. $4,800.00). In the opinion of Broyles, the difference was $43,500.00 ($48,000.00 v. $4,500.00). In Waggoner's opinion, the difference was $53,500.00 ($59,500.00 v. $6,000.00).

Other evidential matters will be discussed in the opinion.

The jury returned the following verdict:

"1. Has the Defendant, City of Charlotte, taken a flight easement over the plaintiff's property, as alleged in the complaint? ANSWER: Yes.

"2. What amount of compensation, if any, is the plaintiff entitled to recover of the City of Charlotte as the result of the taking of such flight easement? ANSWER: $16,800."

After preliminary recitals, in which the verdict was quoted, the court entered the following judgment:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND

DECREED that the plaintiff have and recover of the defendant the sum of $16,800.00 as full compensation for the taking of the flight easement over the plaintiff's property as hereinafter described, AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon payment of this judgment the defendant shall hereafter have an easement of flight in perpetuity over all of the property of the plaintiff described in the complaint in this action for all type aircraft at minimum altitudes of seventy-nine feet above the surface of the ground and higher;

"IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon payment of this judgment, together with the costs of this action by the defendant, that the plaintiff will execute a deed conveying to the defendant such an easement;

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant pay the costs of this action to be taxed by the Clerk."

Defendant excepted and appealed.

Carswell & Justice, by James F. Justice and C. J. Leonard, Jr., for plaintiff appellee.

Ervin, Horack & McCartha, by Paul R. Ervin and William E. Underwood, Jr., for defendant appellant.

BOBBITT, C.J.

[1] "In keeping with the expansion and development of air navigation and commerce, but recognizing the dominant right of the surface owner to fully use and enjoy his land, the courts, generally, in adjudicating the relative property rights in the airspace, have found it necessary to modify the ancient maxim of real property, 'he who owns the soil owns it to the heavens.' The general rule now deducible from the authorities is that the justiciable right to the exclusive possession of land extends upward only to that point necessary for the full use and enjoyment of the land and the incidents of its ownership, the balance being regarded as open and navigable airspace. Stated affirmatively, a landowner has a dominant right of occupancy for purposes incident to his use and enjoyment of the surface, superior to any claimed rights of aerial navigators which conflict therewith." 8 Am. Jur. 2d, Aviation § 3.

Pursuant to authority conferred by Congress, 49 U.S.C.A. § 1341 and § 1348, the administrator of the Federal Aviation Agency has prescribed regulations which, in pertinent part, provide: "Ex-

cept when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes: (a) . . . (b) . . . (c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure. (d) . . ." The Code of Federal Regulations, Title 14 — Aeronautics and Space — Part 60 to 199 (Revised as of January 1, 1969) § 91.79. In a non-congested area, airspace to an altitude of 500 feet or more is deemed within the public domain. Under the federal statutes and regulations, the airspace over plaintiff's property to an altitude of 500 feet is not a part of the public domain. *United States v. Causby,* 328 U.S. 256, 90 L. ed. 1206, 66 S. Ct. 1062 (1946).

We consider now the facts pertinent to defendant's contention that its ownership of the airport should not subject it to liability to plaintiff.

[2] The Federal Aviation Agency, 49 U.S.C.A. § 1101 *et seq.,* has, and exercises, full responsibility for the actual operations that cause planes to land and take off at the Airport. The runways to be used and the manner of approach and departure are determined and prescribed by employees of the Federal Government. Development of the Airport, including the extension of the northeast-southwest runway, was in conformity with plans approved by the Federal Aviation Agency. Overflights of which plaintiff complains were and are made in accordance with regulations prescribed by the Federal Aviation Agency.

Upon the cancellation on May 13, 1946, of the lease of the Airport to the United States Government for use as Morris Field Airbase, defendant entered into certain contractual obligations with the United States with reference to defendant's operation of the Airport. To qualify for assistance in making improvements at the Airport in conformity with the National Airport Plan, defendant was required to make "Sponsor's Assurances" which provide, *inter alia,* (1) that the Airport "shall be used for public airport purposes on reasonable terms and without unjust discrimination," and (2) that the United States, as specifically provided, "shall at all times have the right to use the airport in common with others." Commercial airlines, under the terms of their leases from defendant, are granted the right to use the Airport for enumerated specific purposes, including "landing" and "taking off" of their aircraft.

Defendant pays all costs of maintaining the Airport. Its income

consists of landing fees, gasoline and oil sales, hangar and terminal facility rentals, income from concessions, maintenance services, etc.

In *Griggs v. Allegheny County,* 369 U.S. 84, 7 L. ed. 2d 585, 82 S. Ct. 531 (1962), reh. den., 369 U.S. 857, 8 L. ed. 2d 16, 82 S. Ct. 931 (1962), the Greater Pittsburgh Airport, owned and operated by Allegheny County, was involved. The opinion of Mr. Justice Douglas states: "The airport was designed for public use in conformity with the rules and regulations of the Civil Aeronautics Administration within the scope of the National Airport Plan provided for in 49 U.S.C. §§ 1101 et seq." Again: "The airlines that use the airport are lessees of respondent; and the leases give them, among other things, the right 'to land' and 'take off.' No flights were in violation of the regulations of C.A.A.; nor were any flights lower than necessary for a safe landing or take-off. The planes taking off from the northeast runway observed regular flight patterns ranging from 30 feet to 300 feet over petitioner's residence; and on let-down they were within 53 feet to 153 feet." It was held, in accordance with *United States v. Causby, supra,* that there had been *a taking* of an easement *by Allegheny County* for which Griggs was entitled to compensation. The basis of the dissent of Mr. Justice Black, with whom Mr. Justice Frankfurter concurred, is that the United States of America rather than Allegheny County should pay for an easement necessary for the landing and taking off of aircraft in accordance with federal statutory provisions and rules and regulations of federal agencies.

In *Griggs,* Mr. Justice Douglas summarizes pertinent portions of the National Airport Plan provided for in 49 U.S.C.A. §§ 1101, *et seq.,* as follows:

"By this Act the federal Administrator is authorized and directed to prepare and continually revise a 'national plan for the development of public airports.' § 1102(a). For this purpose he is authorized to make grants to 'sponsors' for airport development. §§ 1103, 1104. Provision is made for apportionment of grants for this purpose among the States. § 1105. The applications for projects must follow the standards prescribed by the Administrator. § 1108.

"It is provided in § 1108(d) that: 'No project shall be approved by the Administrator with respect to any airport unless a public agency holds good title, satisfactory to the Administrator, to the landing area of such airport or the site therefor, or gives assurance satisfactory to the Administrator that such title will be acquired.' The United States agrees to share from 50% to 75% of the 'allow-

able project costs,' depending, so far as material here, on the class and location of the airport. § 1109.

"Allowable costs payable by the Federal Government include 'costs of acquiring land or interests therein or easements through or other interests in air space. . . .' § 1112(a)(2)."

[3] Our statutes, codified as G.S. Chapter 63, entitled "Aeronautics," contemplate full cooperation and compliance with federal statutes and rules and regulations of appropriate federal agencies.

[4, 5] In our view, when defendant, by lease or otherwise, grants the right to use the Airport, this grant includes the right to use the approach areas necessary to land and take off in the manner prescribed by the Federal Aviation Agency. Hence, if overflights in taking off and landing *in accordance with the rules and regulations of the Federal Aviation Agency* constitute a direct and immediate interference with the enjoyment and use of plaintiff's property to such extent as to impair substantially the fair market value thereof, such overflights would constitute a "taking" *by defendant* of an air easement as appurtenant to the operation of its Airport.

[6] This is *an action* to recover compensation for the alleged "inverse condemnation" of a flight easement. In this jurisdiction, where private property is taken for a *public purpose* by a municipality or other agency *having the power of eminent domain* under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain *an action* to obtain just compensation therefor. *Charlotte v. Spratt,* 263 N.C. 656, 663, 140 S.E. 2d 341, 346, and cases cited. "Inverse condemnation is a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so." Bohannon, Airport Easements, 54 Va. L. R. 355, 373 (1968).

[5, 7] Defendant, by the exercise of the power of eminent domain conferred by G.S. 63-5, could have condemned an easement of flight over all of the property of plaintiff for all type aircraft at minimum altitudes of 79, 80 or 90 feet above the surface of the ground and higher. Notwithstanding defendant failed to initiate condemnation proceedings to acquire such easement of flight, plaintiff asserts defendant actually appropriated such easement of flight and by reason thereof is required to pay just compensation for the impairment of the reasonable market value of his property on account thereof.

At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence, defendant moved for nonsuit on the ground

"there is insufficient evidence to take the case to the jury." Defendant excepted to, and now assigns as error, the denial of these motions.

[8] The evidence, when considered in the light most favorable to plaintiff, was sufficient to permit a jury to find that, beginning in January or February, 1962, and continuously thereafter, the recurring noises, vibrations, air pollution, air currents, etc., from frequent overflights by commercial jets at altitudes ranging from 80 feet above the ground upward to and including 500 feet above the ground substantially and adversely affected the reasonable market value of plaintiff's property. If so, under *Griggs v. Allegheny County, supra,* and as held obliquely in *Charlotte v. Spratt, supra,* this constituted an appropriation or "taking" by defendant of an easement of flight over plaintiff's property and entitled plaintiff to compensation therefor. Accord: *Ackerman v. Port of Seattle,* 348 P. 2d 664, 77 A.L.R. 2d 1344 (Wash. 1960); *Thornburg v. Port of Portland,* 376 P. 2d 100 (Ore. 1962); *Jacksonville v. Schumann,* 167 So. 2d 95 (Fla. Dist. Ct. of Appeal 1964); *Johnson v. City of Greeneville,* 435 S.W. 2d 476 (Tenn. 1968); *Henthorne v. Oklahoma City,* 453 P. 2d 1013 (Okla. 1969); Bohannon, Airport Easements, *supra;* 8 Am. Jur. 2d, Aviation § 7, p. 624; Annotation, 77 A.L.R. 2d 1355 *et seq.*

In *City of Atlanta v. Donald,* 143 S.E. 2d 737 (Ga. 1965), cited by defendant, the Supreme Court of Georgia held the facts alleged in the amended complaint were insufficient to state a cause of action. The opinion pointed out, *inter alia,* the following: "It is utterly impossible for this Court to determine whether or not it was in fact necessary for aircraft using the defendant's airport to pass directly over her property at low altitudes as she alleges." Suffice to say, the allegations and evidence in the present case present an entirely different factual situation.

[9] On appeal, defendant asserts in its brief that the court should have nonsuited the case because of a material variance between plaintiff's pleading and proof. It is asserted that the complaint (1) alleges overflights by aircraft generally, and (2) it fails to allege when the alleged taking occurred, but the evidence tends to show the taking was caused by overflights of commercial airline jets which began in January or February, 1962. As set forth in our preliminary statement, the allegations of the complaint include specific references to jet aircraft. The variances between plaintiff's pleading and proof were not of such nature as to require nonsuit. Nothing indicates that defendant was misled or otherwise prejudiced. *McCrillis v. Enterprises,* 270 N.C. 637, 643, 155 S.E. 2d 281, 285, and cases

cited. This view is supported by the fact that defendant, at trial, did not assert material variance as a ground for his motions for nonsuit.

The assignments of error directed to the court's denial of defendants motions for nonsuit are without merit and are overruled.

With reference to overflights by jets, the following facts are noted: (1) Overflights by military jets in connection with the Government's operation of Morris Field Airbase ended upon cancellation of the lease on May 13, 1946. Without elaboration, plaintiff testified these planes had "disturbed" him. See *Causby v. United States,* 75 F. Supp. 262 (Ct. Cl. 1948), where Causby, the owner of land adjacent to the Greensboro-High Point Municipal Airport recovered for the temporary easement of flight taken during the period the airport was operated under lease as an airbase. (2) Plaintiff's testimony includes no reference to the F-86 fighter jets and T-33 jet trainers operated by the Air National Guard over plaintiff's property from 1953 until 1961. The only evidence with reference thereto was offered by defendant. Suffice to say, nothing in plaintiff's evidence indicates he considered the overflights by these planes constituted such material interference with the enjoyment of his property as to impair substantially the reasonable market value thereof.

[10] Plaintiff's testimony and evidence are to the effect that the direct and immediate interference with the enjoyment and use of his property to such extent as to impair the fair market value thereof began in January or February, 1962, with the frequent and regular overflights of commercial jet aircraft at low altitudes when taking off from and landing on the Airport's northeast-southwest runway. However, plaintiff did not commence this "inverse condemnation" action until September 21, 1967. A portion of plaintiff's evidence relates to occurrences between February, 1962, and September 1, 1967. An equal or greater portion thereof relates to what occurred between September 21, 1967, and the trial at December 9, 1968 Civil Session.

With reference to the first issue, the court's final instruction (mandate) was in these words: "(I)f you find from the evidence and by its greater weight, the burden being upon the plaintiff . . . to so satisfy you, that the flights to and from Douglas Municipal Airport were so low and so frequent or regular as to be a direct and immediate invasion of and interference with the use and enjoyment of the plaintiff's land, and . . . that by reason of said overflights, the reasonable market value of the plaintiff's property was substantially reduced, if you find all of these things and find them by the greater weight of the evidence, the burden being upon the plaintiff to

so satisfy you, then the Court instructs you that this would constitute a taking of a flight or air easement by the defendant City over the lands of the plaintiff and in that event, it would be your duty to answer the first issue, Yes. On the other hand, the Court also instructs you that if you fail to so find it would be your duty to answer the first issue, No."

With reference to the second issue, the court gave this final instruction (mandate) to the jury: "(I)n answering the second and final issue, if you reach it, the Court instructs you that you . . . should first determine the reasonable fair market value of the entire tract of land belonging to the plaintiff *at the present time* without jets and other aircraft flying over it regularly and repeatedly at altitudes ranging from 80 feet above the ground upward to and including 500 feet above the ground and you should then proceed, having determined the fair market value of the property *at the present time* free of a flight or air easement, you would then proceed to determine the reasonable fair market value of the entire tract of land belonging to the plaintiff . . . *at the present time* with jet and other aircraft flying over it regularly and repeatedly at elevations ranging from 80 feet above the ground upward to 500 feet, including 500 feet above the ground. The difference, if any, would be your answer to this issue, if you reach this issue and if you consider it. The answer to this issue, if you reach it and consider it, may be nothing or it may be any amount that you, the jury, find to be just and correct according to the rules of law which I have laid down for your guidance in this process. After you have arrived at the fair market value of the entire tract of land *at the present time* with the flight or air easement of the kind that I have described, if there is no difference in the two values, that is, if those two figures are the same, then you would answer the issue submitted to you, if you reach this second issue, nothing or none. If you find that the fair market value of the entire property *at the present time* in its present condition, that is, with the flight easement of the nature that I have described, and that that reasonable market value has not been and is not now in anywise reduced or diminished by the present situation and present overflights, then you would also answer the second issue nothing or none." (Our italics.)

The jury's answer to the first issue purports to establish that defendant appropriated a flight easement over plaintiff's property *as alleged in the complaint.* The complaint contains no allegation as to *when* the alleged "taking" occurred. Moreover, plaintiff alleged defendant had "taken" a flight easement over his property "for an alti-

tude ranging between *90* feet and 300 feet above the ground over the entire area." (Our italics.) The opinion evidence as to values, referred to in our preliminary statement, relates to altitudes "ranging from *ninety* feet above the ground upward to 500 feet above the ground." (Our italics.) The charge with reference to the second issue relates to altitudes from *80* feet upward to and including 500 feet above the ground. (Note: The judgment refers to *79* feet as the minimum altitude.)

Plaintiff's failure to allege *when* he asserts the flight easement was "taken" by defendant, and the discrepancies between plaintiff's pleadings and evidence with reference to the extent of the airspace defendant had taken, cast doubt upon the significance of the jury's answers to the issues.

[11] Plaintiff's pleadings should have been amended so as to conform to his contentions and proof at trial. A motion for leave to amend prior to the next trial would seem in order. In actions for inverse condemnation, the plaintiff should allege with reasonable specificity when the alleged appropriation or taking occurred and the lower and upper altitudes of the airspace above his property to which the easement relates.

Plaintiff has resided on his property from 1937 until the present time. His testimony is to the effect that the direct and immediate interference with the enjoyment and use of his property to such extent as to impair the fair market value thereof began in January or February, 1962, with the frequent and regular overflights of commercial jet aircraft at low altitudes, when taking off from and landing on the Airport's northeast-southwest runway. However, plaintiff did not commence this "inverse condemnation" action until September 21, 1967. Plaintiff's damages were assessed as of the date of trial in December, 1968.

Assuming a "taking" of an air easement over plaintiff's property *by defendant*, these questions arise: (1) When did the "taking" occur? (2) If the "taking" occurred prior to the date the action was commenced, is the amount of compensation to which plaintiff is entitled determinable as of the date of the taking or as of the date of the commencement of the action? (3) If the "taking" is deemed to have occurred when plaintiff first asserted his right to compensation by the commencement of the action, is the amount of compensation determinable as of the date of the commencement of the action or as of the date of the trial?

Before undertaking to answer these questions, we advert briefly to the statutes of limitation pleaded by defendant. It is first noted

that there is neither allegation nor proof that defendant had acquired a flight easement over plaintiff's property by adverse user for a period of twenty years. Indeed, defendant alleged that any invasion of the airspace over plaintiff's property by aircraft was "inconsequential" and insufficient to constitute a taking of plaintiff's property. Plaintiff has never sought to acquire any flight easement over plaintiff's property by condemnation.

[12, 13] The three-year statute of limitations would be applicable if plaintiff had elected to sue for damages sustained prior to the commencement of this action "(f)or trespass upon real property." G.S. 1-52(3). However, plaintiff elected to institute this action for "inverse condemnation," charging defendant with having theretofore appropriated a permanent flight easement over his property and that he is entitled to compensation for such permanent easement. Plaintiff's evidence was insufficient to establish a "taking" of such flight easement prior to January or February, 1962. Hence, plaintiff's cause of action, if any, for inverse condemnation accrued in January or February, 1962, and is not barred by any statute of limitations. See *Ackerman v. Port of Seattle, supra.*

[10, 14, 15] The compensation to which plaintiff is entitled is the difference in the value of his property immediately before and immediately after the "taking" by defendant of the flight easement involved in this action. *Gallimore v. Highway Comm.*, 241 N.C. 350, 353, 85 S.E. 2d 392, 395, and cases cited; *DeBruhl v. Highway Commission*, 247 N.C. 671, 676, 102 S.E. 2d 229, 234, and cases cited; *Charlotte v. Spratt, supra,* at 662; *Johnson v. Airport Authority of City of Omaha*, 115 N.W. 2d 426, 431 (Neb. 1962); *A. J. Hodges Industries, Inc. v. United States*, 355 F. 2d 592, 597 (Ct. Cl. 1966); 8 Am. Jur. 2d, Aviation § 7, p. 625. Plaintiff's evidence is to the effect that defendant appropriated the flight easement in January or February, 1962, and since then has used it continuously and will continue to do so. If this be true, the flight easement so appropriated should be adjudged vested in defendant as of January or February, 1962, and the compensation to which plaintiff is entitled will be determined as of January or February, 1962. A plaintiff cannot, by deferring the institution of his action for inverse condemnation, select a later date for the determination of the compensation to which he is entitled.

Had he elected to do so, plaintiff could have sued for and, subject to a plea of the three-year statute of limitations, recovered damages on account of trespasses occurring prior to the commencement of this action. Having sued to recover compensation for a

flight easement, he waived his right to recover for trespasses subsequent to the date of taking.

[10] The conclusion reached is that the compensation to which plaintiff was entitled for a flight easement "taken" by defendant in January or February, 1962, and used continuously thereafter was the difference between the fair market value of plaintiff's property in January or February, 1962, with and without the overflights of jets and other aircraft at altitudes of 80 feet and upward to and including 500 feet. Compensation is not to be determined as of the date plaintiff instituted his action. *A fortiori*, it is not to be determined as of the date of the trial. Hence, the court erred in instructing the jury compensation was to be determined on the basis of the difference of the fair market value of plaintiff's property with and without overflights by jets or other aircraft at the time of the trial and in admitting opinion evidence with reference to such market values at the time of the trial.

For the errors indicated, defendant is awarded a new trial.

New trial.

MOORE, J., did not participate in the consideration or decision of this case.

STATE v. BILLIE CLEM McRAE

No. 27

(Filed 11 February 1970)

1. Criminal Law § 75— admissibility of a confession

An extra-judicial confession of guilt by a defendant is admissible against him only when it is made voluntarily and understandingly.

2. Criminal Law § 75— admissibility of confession — right to counsel — privilege against self-incrimination — waiver — unfamiliarity with rules of law

In this prosecution for first degree murder and armed robbery, defendant's contention that he did not voluntarily, understandingly and intelligently make incriminating statements or intelligently waive his right to counsel while in police custody because he was unaware of the rule of law which could make him guilty of first degree murder even though he did not actually commit the act which ended deceased's life is without merit, since a defendant need not be familiar with the rules of law in order to intelligently waive his right to counsel and his privilege against self-incrimination.

3. Criminal Law § 75— admissibility of confession

The trial court properly admitted into evidence incriminating statements made by defendant while in police custody, where the court found upon competent evidence on *voir dire* that defendant's statements were made freely, knowingly and understandingly after he had been fully advised of his constitutional rights and after he had freely, knowingly, understandingly and voluntarily waived the same.

4. Criminal Law § 76— admissibility of a confession — findings of fact — appellate review

When the trial judge's findings as to the voluntariness of a confession are based on competent evidence in the record, they are conclusive, and the reviewing court cannot properly set aside or modify such findings.

5. Criminal Law § 75; Constitutional Law §§ 32, 37— capital offense — waiver of counsel during interrogation

A defendant charged with a capital offense may waive his right to counsel during an in-custody interrogation.

APPEAL by defendant from *Thornburg, S.J.*, 21 July 1969 Criminal Session of RICHMOND Superior Court.

Defendant was tried upon bills of indictment charging him with first degree murder and robbery with firearms. The jury returned verdicts of guilty of murder in the first degree with recommendation that his punishment be imprisonment for life in the State's Prison, and guilty of robbery with firearms. Defendant appealed from judgments entered on the verdicts. This appeal was docketed and argued in the Supreme Court as Case No. 58 at the Fall Term 1969.

The State offered evidence which tended to show that on 12 November 1968 the body of Braxton Crawford Quick was found lying on the floor of a truck which was parked on a rural road five miles north of Hamlet, North Carolina. His pants were torn at the pockets, and his money belt, containing only two checks, was lying on top of his body. The body was removed to a hospital, where the coroner of Richmond County found a wound in the left side of decedent's chest, caused by a .22 bullet which, in the coroner's opinion, caused Quick's death.

State's witness Nathaniel Allred, alias Bernard Brown, testified, in substance, that he was with defendant on 12 November 1968; that after defendant had a conversation with Quick, the witness, defendant and Eddie McRae followed a truck operated by Quick on a rural road until Eddie McRae blew the horn of the automobile which he was operating and the truck stopped. Defendant went to the truck alone, and after about four minutes the witness walked to the truck and found Quick lying on his back and defendant in the act of driv-

ing the truck away. Defendant had a .22 pistol. Upon defendant's order, Allred removed money from Quick's body and gave it to defendant. The witness never saw Quick move. Defendant and Allred returned to the car and Eddie McRae drove them from the scene. Defendant gave Allred $50 of the money taken from Quick's body.

SBI Agent Everette L. Norton, Jr., testified that on 14, 15 and 18 November 1968 he had conversations with defendant while he was in custody. At this point the record shows:

> (Motion by Mr. Sharpe, for the defendant that the statement, State's Exhibit "4" not be admissible into evidence. Motion heard while jury was not present.)

The court thereupon conducted a voir dire examination in the absence of the jury and thereafter admitted into evidence before the jury a written statement (Exhibit "4") allegedly signed by defendant, and also allowed SBI Agent Norton to testify before the jury as to custodial statements made to him by defendant.

Defendant offered evidence of his good character and offered Bobbie J. McRae, who testified that he went to Washington with officers to identify Thaddus Nathaniel Allred and that Allred stated that he "was going to get me." Defendant did not testify before the jury.

Attorney General Morgan and Dale Shepherd, Staff Attorney, for the State.

Benny S. Sharpe for defendant.

BRANCH, J.

Defendant contends that the trial judge erred by admitting into evidence inculpatory statements alleged to have been made by him to police officers while in police custody.

[1] When defendant interposed his objection to evidence concerning custodial statements made by him to police officers, the trial judge, in accordance with procedure approved by this Court and the United States Supreme Court, excused the jury and in its absence conducted a voir dire hearing to determine the voluntariness of the alleged statements. *Jackson v. Denno,* 378 U.S. 368, 12 L. ed. 2d 908, 84 S. Ct. 1774; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Catrett* (No. 52, Fall Term, 1969, filed January 6, 1970). This procedure is vital because of the unquestioned rule in North Carolina that an extra-judicial confession of guilt by a defendant is admissible against him only when it is made voluntarily and under-

standingly. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481; *State v. Gray, supra; State v. Roberts,* 12 N.C. 259.

On voir dire, Everette L. Norton, an agent of the State Bureau of Investigation, and defendant Billie Clem McRae testified. Agent Norton, in substance, testified that he talked with defendant while he was in custody on a charge of first degree murder; that at the times he talked with defendant he appeared to be in a normal, rational condition; that defendant was in no way coerced or offered any reward to make a statement; he was warned verbally and in writing of his "constitutional rights," and, prior to making the statement, he stated orally and in writing that he understood his rights. The written document signed by defendant consisted of two parts, entitled "Your Rights" and "Waiver of Rights," respectively. Under the section entitled "Your Rights" appears the following:

> "Before we ask you any questions you must understand your rights. You have the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. If you cannot afford a lawyer one will be appointed for you before any questioning if you wish. If you decide to answer questions now, without a lawyer present, you will still have the right to stop answering at any time. You also will have the right to stop answering at any time until you talk to a lawyer."

The section entitled "Waiver of Rights" states:

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

According to Agent Norton, defendant signed said waiver before any questioning took place and it was witnessed by the Deputy Clerk of the Superior Court.

On cross-examination, Agent Norton indicated that he had not discussed with defendant the charges against him before the incriminating statement was made, but that Chief Deputy Earl Dunn (of the Richmond County Sheriff's Office) had explained the charges to defendant sometime prior to defendant's signing the waiver and making the statement in question.

Defendant testified, in substance, that he was arrested on the

morning of 14 November 1968. He stated that the warrant (charging him with murder) was read to him, but that he did not understand the charge of murder against him and that no one explained the doctrine of "felony-murder" to him. He further testified that, though he read the statement of his rights, he did not really know what he was signing when he signed the statement. Asked if he read the statement, he said, "Well, I read what — some words, I couldn't make them out. Didn't know the word."

On cross-examination, defendant again stated that he did not understand what his rights were. He said, however, "I told them I was willing to make a statement and answer questions." When asked whether he understood the part of the waiver which indicated that he did not want a lawyer before he made the statement, defendant responded, "Well, I didn't think I needed one at the time." Defendant stated:

> "I said that I understood what I was doing and that no promises or threats had been made against me. I signed voluntarily. I think I had been served with the warrant charging me with murder. I signed Exhibit '4' (the incriminating statement) and I was trying to tell the truth about all of us coming down from Washington and the things that took place. I can't remember if the statement says the same thing that I told Mr. Norton. I signed it freely and voluntarily. . . ."

Upon completion of the evidence for the State and defendant on voir dire, the trial judge made full findings of fact. He found that defendant was fully apprised of his constitutional rights and read the paper writing quoted above entitled "Your Rights" and "Waiver of Rights," and thereupon stated to the officers that he was willing to make a statement and answer questions; that he did not want a lawyer at that time and understood and knew what he was doing. The court further found:

> "That the defendant understood that he had a right to remain silent; that anything that he said could be used against him; that he had a right to talk to a lawyer before answering any questions and to have one with him during questioning; that he understood that if he could not afford one, one would be appointed for him, and further understood that if he decided to answer questions he could stop at any time and request the presence of an attorney; that no one offered any reward to the defendant to cause him to make the statement; that he was not threatened or coerced in any way; that there is no indication, either by the defendant, who chose to take the stand in his own

behalf in this inquiry, nor by cross examination of the Officer Norton to indicate that the defendant was mistreated in any way;

". . . That the defendant prior to the time the questioning was begun had been read the charges against him and knew and understood that he was charged with murder of one Braxton Crawford Quick; . . ."

Based upon his findings of fact, the trial judge concluded that the challenged statement was "freely, knowingly and understandingly given by the defendant, after having been fully forewarned of his constitutional rights, and after having freely, knowingly, understandingly and voluntarily waived same." Thereupon the court ordered that the statement be admitted into evidence before the jury.

[2] Defendant argues that he did not voluntarily, understandingly and intelligently make incriminatory statements or knowingly and intelligently waive his right to counsel, because he was unaware of the rule of law which could make him guilty of murder in the first degree although he did not actually commit the act which ended Quick's life. He relies upon the familiar cases of *Escobedo v. Illinois*, 378 U.S. 478, 12 L. ed 2d 977, 84 S. Ct. 1758, and *Miranda v. Arizona*, 384 U.S. 436, 16 L. ed 2d 694, 86 S. Ct. 1602. In *Escobedo* a young Mexican boy was taken to police headquarters for interrogation on a murder charge and, after prolonged questioning, made inculpatory statements. He was not advised of his right to remain silent and, although he made several requests to see his lawyer, and although his lawyer, who was in the building, made persistent efforts to see his client, he was denied the right to have his counsel present. His custodial statement was used at his trial and Escobedo was convicted of murder. The United States Supreme Court, reversing the trial court, stated:

"We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the *suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent*, the accused has been denied 'The Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S., at 342, 9 L. ed 2d at 804, 93 ALR 2d 733, and

that no statement elicited by the police during the interrogation may be used against him at a criminal trial." (Emphasis ours)

In the case of *Miranda v. Arizona, supra,* the Court held that, unless other fully effective means are adopted to assure a person of his rights, certain procedural safeguards are essential. These, in effect, require that a suspect be warned: (1) that he has the right to remain silent, (2) that any statement he does make may be used as evidence against him in court, (3) that he has the right to counsel, either appointed or retained, prior to and during the interrogation, and (4) that if he is indigent, counsel will be appointed for him prior to any questioning, if he so desires.

It is pertinent to our decision of instant case to note that immediately following the pronouncement of these required safeguards, the Court then stated:

"After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

[2, 3] The very cases upon which defendant relies recognize the rule that a person may intelligently, knowingly and voluntarily waive his privilege against self-incrimination and his right to legal counsel. This principle is firmly established in North Carolina. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581; *State v. Gray, supra; State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511. We do not interpret the authorities — state or federal — to hold that a defendant must be familiar with the rules of law in order to intelligently waive his right to counsel and his privilege against self-incrimination. In the case before us for decision there was plenary competent evidence to support the findings by the trial judge that defendant's statement "was freely, knowingly, and understandingly given by defendant, after having been fully forewarned of his constitutional rights, and after having freely, knowingly, understandingly and voluntarily waived same."

[4] When the trial judge's findings are based on competent evidence in the record, they are conclusive, and the reviewing court cannot properly set aside or modify such findings. *State v. Wright, supra; State v. Gray, supra.* We therefore hold that the trial judge properly admitted into evidence the custodial statements made by defendant to police officers.

[5] Defendant also contends that since he was charged with a capital felony, he could not waive his right to counsel at any time after his arrest. We will consider some of the more recent decisions on this question, including some of those cited by defendant in support of his contention.

In the case of *State v. Wright, supra,* defendant was charged with the capital crime of rape. Upon trial, the trial judge admitted inculpatory statements made by defendant to police officers while he was in custody, no counsel being present at the time to represent him. The Court, holding the statements were properly admitted, stated:

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

The defendant in the case of *State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171, was charged with the capital felony of first degree burglary. The evidence tended to show that defendant was a retarded, uneducated youth, and that he was questioned by officers who failed to advise him of his right to counsel during the in-custody interrogation. Defendant Thorpe's inculpatory statement was admitted into evidence over objection. Holding that the statement was erroneously admitted, the Court stated:

> *"The Court, at the conclusion of the voir dire examination, did not make any findings with respect to counsel. The evidence before the Court was not sufficient to justify a finding that counsel at the interrogation was offered, or the defendant's right thereto was understandably waived.* In concluding the defendant was entitled to have counsel at his interrogation, and the right was not waived, we are no longer permitted to rely on the presumption that a confession is deemed to be voluntary until and unless the contrary is shown." (Emphasis ours)

The case of *Carnley v. Cochran,* 369 U.S. 506, 8 L. ed 2d 70, 82 S. Ct. 884, presented the question of waiver of counsel where defend-

ant was charged with a serious non-capital crime. The United States Supreme Court there said:

> "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."

This quotation was approved in *Miranda v. Arizona, supra.*

These recent and well documented cases clearly stand for the rule that even in capital offenses a defendant may intelligently and understandingly waive counsel during an in-custody interrogation.

In the instant case there is plenary evidence in the record to support the conclusion of the trial judge that defendant McRae intelligently and understandingly waived counsel.

In the trial below we find

No error.

W. E. KING, EDWARD A. GLASGOW, W. EARL PRIDGEN AND WALKER MATHIS v. FRANK BALDWIN, RALPH I. BASS, F. B. COOPER, JR., FRED E. HARRIS AND HENRY M. MILGROM, BEING ALL THE INDIVIDUAL MEMBERS OF THE BOARD OF COMMISSIONERS OF NASH COUNTY, NORTH CAROLINA; J. CURTIS ELLIS, TAX SUPERVISOR AND TAX COLLECTOR OF NASH COUNTY, NORTH CAROLINA; WILLIS WARD, ASSISTANT TAX SUPERVISOR, NASH COUNTY, NORTH CAROLINA; AND CARROLL-PHELPS APPRAISAL COMPANY

No. 28

(Filed 11 February 1970)

1. Taxation § 25; Administrative Law § 2— ad valorem taxes — undervaluation of rural realty — taxpayers' action — mandamus — exhaustion of administrative remedies

In taxpayers' action seeking (1) a writ of mandamus to compel the county commissioners to revalue all real property in the county at its true value in money and (2) an injunction to restrain the commissioners from assessing real property according to an adopted schedule of values, the taxpayers contending that the schedule undervalued rural property in the county by at least fifty percent, the superior court has no authority to issue mandamus commanding the commissioners to revalue all real property in the county at its true value in money, since taxpayers must first exhaust the statutory administrative remedies in the county board of equalization and review and in the State Board of Assessments; thereafter the taxpayer may resort to the courts, but only to obtain review for errors of law or abuse of discretion by the Board. G.S. 105-327, G.S. 105-329, G.S. 105-275(3). The decision in *Stocks v. Thompson*, 1 N.C. App. 201, is expressly disapproved.

2. Mandamus § 1— clear legal right — enforcement

Mandamus issues only to enforce a clear legal right.

3. Mandamus § 2— control of administrative discretion

Mandamus will not lie to control the discretion vested in a governmental agency or official.

4. Mandamus § 1— when issued — alternative remedies

Mandamus cannot be employed if other adequate means are available to correct the wrong for which redress is sought; e.g., when the legislature has provided an effective administrative remedy.

5. Taxation § 25— ad valorem taxes

The assessment, listing, and collection of ad valorem taxes is governed by the Machinery Act, G.S. 105-271 *et seq.*

6. Statutes § 5— presumption that legislature acted with common sense

It is presumed that the legislature acted in accordance with reason and common sense and that it did not intend an unjust or absurd result.

7. Taxation § 25— ad valorem tax — taxpayers' remedy — statutory agencies — exhaustion of remedies

By virtue of the statutes which provide for appeals to the county board of equalization and to the State Board of Assessment, the legislature has provided adequate means whereby the individual taxpayer may contest not only the valuation which the county commissioners have placed upon his own property but the entire tax list or assessment roll, and the taxpayer must exhaust this administrative remedy before he can resort to the courts. The decision in *Stocks v. Thompson*, 1 N.C. App. 201, is expressly disapproved.

MOORE, J., did not participate in the consideration or decision of this case.

APPEAL by defendants from *Hubbard, J.*, May 1969 Civil Session of NASH, certified pursuant to G.S. 7A-31 for review before determination by the Court of Appeals. This appeal was docketed and argued in the Supreme Court as Case No. 61 at the Fall Term 1969.

In this action plaintiffs, resident taxpayers owning real estate in Nash County, seek (1) a writ of mandamus compelling defendants, the county commissioners, tax supervisor and collector, and the assistant tax supervisor, to revalue all real property in the county at its true value in money, and (2) an injunction restraining them from assessing property according to the schedule of values adopted by the commissioners on 6 December 1969.

The following facts are undisputed: On 1 January 1969 Nash County was required by G.S. 105-278 to make the octennial revaluation of its taxable property. As authorized by G.S. 105-291, on 12 September 1967, defendant-commissioners employed Carroll-Phelps

Appraisal Company, expert appraisers, to assist in revaluing approximately 23,000 parcels of land. Appraisal Company's investigation of property and land values in Nash County began in November 1967 and continued through January 1968. Then, after frequent consultations with defendants, Appraisal Company prepared and submitted a uniform schedule of values to be used in appraising rural land. (This schedule is attached to the complaint as Exhibit A.)

The schedule classified rural land as (1) cleared — tillable 1, tillable 2, other; (2) woodland; (3) Swamp or wasteland; (4) homesites. To the base per-acre valuation of any tract of tillable land would be added the value of its tobacco and peanut allotments. Tobacco allotments were appraised at eighty cents per pound and peanut allotments at $300.00 per acre.

In arriving at land values Appraisal Company used three approaches: costs, income, and sales. It first recommended to defendants that tobacco allotments be valued at $1.10 per pound and peanuts at $400.00 per acre. Defendants believed these valuations were too high. In consequence, the value of the tobacco allotment was reduced to eighty cents and peanuts to $300.00, and the schedule (Exhibit A) was adopted by the commissioners on 15 November 1968. Appraisal Company's experts thought this schedule "approximated equality" and told defendants that they were willing to defend it.

Immediately after the adoption of the schedule rural landowners expressed much dissatisfaction. The Farm Bureau requested a hearing, which was held on November 25th. At that time Appraisal Company's representative explained the schedule and the methods by which the valuations were derived. Notwithstanding, the commissioners continued to receive complaints, particularly with respect to the valuations on tobacco and peanut allotments. On 6 December 1968, after another public hearing, the commissioners reduced the valuation of a tobacco allotment to forty cents per pound and of a peanut allotment to $150.00 per acre. They made no change in the base per-acre valuation which they had previously approved.

On 31 December 1968 plaintiffs brought this action. In a lengthy complaint, containing many evidentiary averments, they allege in effect: The schedule of values adopted by defendants on 6 December 1969 undervalued rural land by at least 50%. Tobacco allotments should have been valued at not less than $1.50 a pound and peanuts at not less than $500.00 an acre. In adopting the schedule (Exhibit A), defendant-commissioners acted upon a misunderstanding of the law in that (1) they thought "market-value," as used in G.S. 105-294, was merely one factor to be considered along with those enum-

erated in G.S. 105-295 in determining the tax value of land, (2) they believed that decreasing farm income justified a valuation of tobacco and peanut allotments at less than their true value in money. Defendants knew that the valuations which they adopted would not produce an appraisal of rural property at its fair-market value. They acted arbitrarily, deliberately, and intentionally as a result of economic and political pressures. In consequence, defendants have discriminated against plaintiffs and all other owners of nonrural land, who will be required to bear a disproportionate share of the tax burden.

Answering the complaint defendants aver that the adopted schedule was designed to appraise all property at its true value in money in accordance with G.S. 105-294 and G.S. 105-295. They deny that they acted arbitrarily, unlawfully, and as a result of economic and political pressures.

Appraisal Company, originally made a party-defendant, was dismissed from the action when its demurrer, interposed on the ground that the complaint stated no cause of action against it, was sustained.

At the May 1969 Session, by consent, the case was heard by Hubbard, J., without a jury. Both parties offered evidence. In addition to the facts already stated herein, plaintiffs' evidence — which consisted largely of the adverse examinations of defendants and Mr. Allen G. Carroll, a general partner of Appraisal Company —, tended to show:

No property in Nash County is appraised at its full sales or market value. Rural property is appraised at fifty-five to sixty percent of fair-market value; nonrural property, about ninety percent. In adopting the schedule (Exhibit A) on 6 December 1969, after considering such factors as "dropping farm prices" and the rural taxpayer's ability to pay, defendant-commissioners used their judgment as businessmen and landowners to fix the value of rural land and crop allotments. In the opinion of each defendant the schedule is in accord with the ability of all taxpayers to pay the taxes.

Defendants' evidence, largely repetitive and explanatory of plaintiffs', tended to show: Land appraising, especially mass appraisals, is not an exact science but a matter of personal opinion. Appraisal Company's experts thought that the schedule which defendants adopted on November 15th took into consideration not only the prices at which farmlands were being sold but also the diminution of farm income resulting from increased costs and the "cigarette scare," and it constituted a fair valuation. However, on the basis of further consideration between November 25th and December 6th,

defendant-commissioners felt that Appraisal Company had leaned too heavily on the sales-price approach. The company concedes that if credence is to be given to the income approach the schedule adopted on December 6th results in a reasonable equity in all classes of property, and the reduction to forty cents on tobacco and $150.00 on peanuts was not necessarily wrong. In the opinion of the tax supervisor the schedule of values which the commissioners adopted on December 6th "reflected a reasonable equality as far as it is possible to obtain uniformity in mass tax appraisals."

At the conclusion of the evidence Judge Hubbard overruled defendants' motion for judgment of nonsuit. Thereafter he combined findings of fact and conclusions of law, which we summarize as follows:

(a) On 6 December 1968 defendant-commissioners (and many farmers) were genuinely concerned about the future value of tobacco allotments, and this concern caused them to reduce the valuations which they had adopted on November 25th. However, as of 1 January 1969, these fears had not materially affected the sales price of rural land.

(b) Defendants have appraised no rural land in Nash County at its true and actual value in money as required by G.S. 105-295. (Judge Hubbard stated that he would make no finding as to whether urban property was appraised at its market value.)

(c) In adopting the schedule of values for rural land defendant-commissioners erroneously applied that portion of G.S. 105-295 relating to "probable future income."

(d) The values placed upon tobacco and peanut allotments are so far below their sales value on 1 January 1969 as to render the entire schedule irrelevant.

(e) The court is without authority to change the schedules of values or the appraisal of rural property.

(f) Plaintiffs have no clearly defined and adequate remedy, other than by this action, to force a correction of the assessment of rural land and cause the commissioners to comply with G.S. 105-294 and G.S. 105-278.

Upon the foregoing findings and conclusions Judge Hubbard entered a judgment commanding the commissioners to appraise rural land and all other real property in Nash County at its true value in money and thereafter to correct all listings and appraisals based upon former valuations. He directed them to file with the Clerk of

the Superior Court a certificate of compliance with his judgment not later than 1 February 1970.

Defendants excepted to the judgment and appealed.

Keel & Keel; Valentine & Valentine; and Joyner, Moore & Howison for defendant appellants.

Battle, Winslow, Scott & Wiley and Meadows & Batts for plaintiff appellees.

John T. Morrisey, Sr., General Counsel, North Carolina Association of County Commissioners, Amicus Curiæ.

SHARP, J.

[1] The first question presented by this appeal is whether the Superior Court had authority to issue a writ of mandamus to compel the county commissioners to revalue all real property in Nash County.

[2-4] The nature of mandamus and the limitations upon its use have been stated often. *Safrit v. Costlow,* 270 N.C. 680, 155 S.E. 2d 252; *Hospital v. Wilmington,* 235 N.C. 597, 70 S.E. 2d 833; 3 Strong, N. C. Index *Mandamus* §§ 1, 2 (1960); 2 McIntosh, N. C. Practice and Procedure § 2445 (2d ed. 1956). It suffices here to say that mandamus issues only to enforce a clear legal right. The writ will not lie to control the discretion vested in a governmental agency or official. It cannot be employed if other adequate means are available to correct the wrong for which redress is sought. Thus, when the legislature has provided an effective administrative remedy, it is exclusive. *Snow v. Board of Architecture,* 273 N.C. 559, 160 S.E. 2d 719; *Young v. Roberts,* 252 N.C. 9, 112 S.E. 2d 758; *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885; *Harris v. Board of Education,* 216 N.C. 147, 4 S.E. 2d 328; *Moreland v. Wamboldt,* 208 N.C. 35, 179 S.E. 9; *Hickory v. Catawba Co.,* 206 N.C. 165, 173 S.E. 56; *Bunn v. Maxwell,* 199 N.C. 557, 155 S.E. 250.

At the hearing before Judge Hubbard, plaintiffs' evidence tended to show that in the 1969 revaluation no land in Nash County had been appraised at its true value in money as required by G.S. 105-294, and that all rural property had been grossly undervalued. Defendants' evidence tended to show that, in their opinion, they had appraised all land at its true value "as far as practicable," and that the schedule adopted would result in reasonable equality.

[5] Plaintiffs are entitled to an adjudication of their charges that rural property has been undervalued and that a disproportionate

share of the tax burden will fall upon urban property owners unless the assessment roll is corrected and inequalities eliminated. Defendants assert, however, that the Superior Court cannot determine this controversy in an action for mandamus; that the legislature has made an administrative agency, the State Board of Assessment (State Board), the arbiter of disputes pertaining to the valuation and assessment of property for ad valorem taxes. To determine which tribunal has jurisdiction of the matters alleged in the complaint, we must review those sections of the Machinery Act (G.S. 105-271 *et seq.*) which govern the assessment, listing, and collection of taxes. *See In Re Appeal of Broadcasting Corp.*, 273 N.C. 571, 160 S.E. 2d 728.

Every eighth year G.S. 105-278 requires each county to revalue and reassess, as of January first, all real property for ad valorem tax purposes "at its true value in money." *True value* is defined as the amount of cash or receivables which can be obtained for property when it is sold in the usual manner. G.S. 105-294. (In other than revaluation years, reassessment is governed by G.S. 105-279. *See In Re Pine Raleigh Corp.*, 258 N.C. 398, 128 S.E. 2d 855.)

Prior to each octennial revaluation it is the duty of the tax supervisor, subject to the review and approval of the county commissioners, to compile "standard uniform schedules of values to be used in appraising real property in the county." Thereafter "a competent appraiser" is required to visit every tract. In fixing its value assessors must consider "its advantages as to location, quality of soil, quantity and quality of timber, waterpower, water privileges, mineral or quarry or other valuable deposits, fertility, adaptability for agriculture, commercial or industrial uses, the past income therefrom, its probable future income, the present assessed valuation, and any other factors which may affect its value." Similarly, appropriate criteria are specified for the appraisal of buildings on the land. G.S. 105-295.

After property has been listed and valued, the county commissioners sit as a board of equalization and review. G.S. 105-327. (In at least five counties a special board of equalization and review has been created by local act.) The board of review is required to hear any taxpayer who considers himself aggrieved in respect to the valuation of his own property *or that of others*. In the performance of its duty to equalize valuations in the county "to the end that all property shall be listed on the tax records at the valuation required by law," the Board is required to increase or decrease the assessed value of any taxable property which, in its opinion, has been returned

below or above its true value. (As to reassessment in other than revaluation years see G.S. 105-279.)

By complying with the provisions of G.S. 105-329, "[a]ny property owner, taxpayer, or member of the board of county commissioners may except to the order of the board of equalization and review and appeal therefrom to the State Board of Assessment." Prior to 14 February 1969 each taxpayer or ownership interest was required to appeal separately unless the State Board consented to joint appeals. Since the passage of Ch. 7 § 2, S. L. of 1969, however, "taxpayers and ownership interest may file separate and distinct appeals or joint appeals at the election of one or more of the taxpayers."

The State Board is required by G.S. 105-275 to "exercise general and specific supervision over the valuation and taxation of property throughout the State," and it is constituted "a State Board of Equalization and Review of valuation and taxation of property in this State." It is authorized to employ valuation and appraisal specialists and such other assistants as may be needed for the performance of its duties. G.S. 105-273(c). It has access to all municipal, county, and departmental records and may prescribe the forms and methods of record-keeping. G.S. 105-276. The Board's administrative assistant, *inter alia,* is required to prepare and distribute instructions to the boards of county commissioners and all those engaged in the valuation and assessment of property; to advise them with reference to all their duties; and to make studies of the ratio of appraised value of real and personal property to market value in each county in the year of revaluation. G.S. 105-277.1.

In addition to the right of appeal conferred in G.S. 105-329, the State Board is empowered by G.S. 105-275(3) "[t]o hear and adjudicate appeals from the boards of county commissioners and county boards of equalization and review as to property liable for taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, to investigate the same, and if error, inequality, or fraud is found to exist, to take such proceedings and to make such orders as to correct the same." This same section provides that if the State Board finds the tax list or assessment roll of any county to be grossly irregular, or any property to be unlawfully or unequally assessed as between individuals, sections of the county, or counties, it shall correct such irregularities "and shall equalize and make uniform the valuation thereof upon complaint by the board of county commissioners under rules and regulations prescribed by it. . . . Provided, further, that taxpayers

and ownership interests may file separate and distinct appeals or joint appeals at the election of one or more of the taxpayers. . . ."

Prior to the enactment of Ch. 7 § 1, S. L. of 1969, the last proviso of G.S. 105-275(3) (like a similar provision in G.S. 105-329) permitted joint appeals by taxpayers only with the consent of the State Board.

The preceding resumé discloses an integrated and adequate procedure for the assessment of taxable property and for administrative review of questioned evaluations. It likewise manifests the legislature's intent that the agency designated to hear appeals in all matters pertaining to tax valuations should also be the one empowered to make the final valuation. The State Board — unlike the courts — has the staff, the specialized knowledge and expertise necessary to make informed decisions upon questions relating to the valuation and assessment of property. This case demonstrates the wisdom and practicality of the requirement that an aggrieved taxpayer or other party exhaust all available administrative remedies before resorting to the courts for relief.

In bringing this action plaintiffs relied upon *Stocks v. Thompson*, 1 N.C. App. 201, 161 S.E. 2d 149. The plaintiffs, in that case, sought a writ of mandamus to compel the county commissioners to include tobacco allotments as an element of value in the appraisal and assessment of Columbus County real estate for taxes. The judge overruled the defendants' motion to dismiss the action because of plaintiffs' failure to exhaust the administrative remedies provided in G.S. 105-327, G.S. 105-329, and G.S. 105-275(3). The Court of Appeals granted defendants' petition for certiorari to review the ruling. In that court the defendants demurred *ore tenus* to the complaint on the ground that plaintiffs had stated no cause of action for mandamus.

The Court of Appeals overruled the demurrer, holding that mandamus would issue to compel defendants to consider the value of tobacco allotments in assessing property but not to direct the manner or amount of the valuation. It affirmed the Superior Court's refusal to dismiss the action on the ground that the administrative remedies were so totally inadequate that individual citizens were not required to exhaust them before resorting to the courts. The rationale was: (1) In appeals from county boards of review to the State Board, G.S. 105-329 and G.S. 105-275(3) (as then written) required each taxpayer to file a separate appeal and prohibited joint appeals except with the consent of the State Board. (2) The statutes gave individual taxpayers seeking review of the valuation of a particular tract an adequate remedy but not citizens contesting the assessment

roll for an entire county. The second sentence in G.S. 105-275(3) directs the State Board of Assessment, *upon complaint by the board of county commissioners,* to correct any grossly irregular tax list or assessment roll and the valuation of any property unequally assessed as between individuals, counties or sections of counties. The Court of Appeals construed this sentence as limiting the right of appeal in such instances to the Board of County Commissioners. We do not agree.

[6] It is presumed that the legislature acted in accordance with reason and common sense and that it did not intend an unjust or absurd result; and, in construing a statute, the court always looks to its purpose. *State v. Humphries,* 210 N.C. 406, 186 S.E. 473; *Ikerd v. R. R.,* 209 N.C. 270, 183 S.E. 402; 82 C. J. S., *Statutes* §§ 316, 323, 325, 344 (1953). After giving the State Board "general and specific supervision" over valuations and taxation through the State, the legislature would hardly prevent it from correcting a grossly irregular assessment roll or an unlawful or unequal assessment as between individuals or sections of a county until it received a complaint from the Board of County Commissioners — ordinarily the very agency responsible for the alleged irregularities! In the few counties in which the board of commissioners does not sit as the board of equalization and review, and in proceedings brought to equalize values as between counties, the board of county commissioners might be expected to appeal to the State Board. In any other situation, however, the possibility of such an appeal seems remote. The records of the State Board of Assessment, going back to 1950, disclose no appeal by a board of county commissioners.

The decision in *Stocks v. Thompson* would nullify G.S. 105-327, which specifically allows *any property owner* dissatisfied with the valuation placed upon his property *or the property of others* to seek redress from the county board of equalization and review. The designation *property of others* is broad enough to include every piece of rural land or the county's entire tax list if the commissioners have failed to value it as required by law. Furthermore, the final proviso of G.S. 105-275(3) specifically refers to appeals by individual taxpayers. This section is not a model of legislative draftsmanship, but its first sentence clearly imposes upon the State Board the duty to hear and adjudicate *all* appeals from the county boards as to property which has been "improperly assessed through error or otherwise." This language encompasses appeals by individuals as well as boards. The second sentence, which authorizes appeals by boards of county commissioners, did not deprive the individual taxpayer of the right granted in the first.

The defendants in *Stocks v. Thompson* did not petition this Court for certiorari to review that decision. With all deference to the Court of Appeals and the learned author of the opinion, we think that case was wrongly decided.

[7] We hold that in G.S. 105-327, G.S. 105-329, and G.S. 105-275(3), the legislature has provided adequate means whereby the individual taxpayer may contest not only the valuation which the county commissioners have placed upon his own property but the entire tax list or assessment roll, and that he must exhaust this administrative remedy before he can resort to the courts.

[1] If defendant-commissioners have failed to value rural land in Nash County at its true value in money — be the failure deliberate, an error in judgment, or caused by a misconception of the law —, plaintiffs' initial step is to complain to the county board of equalization and review and request a hearing. If they are dissatisfied with the action taken by that board they may except to its order and appeal to the State Board. *Power Co. v. Burke County,* 201 N.C. 318, 160 S.E. 173. Thereafter plaintiffs may resort to the courts, but only to obtain judicial review *for errors of law or abuse of discretion* by the State Board.

The decision is that the Superior Court had no authority to issue the writ of mandamus. The judgment from which defendants appeal is

Reversed.

MOORE, J., did not participate in the consideration or decision of this case.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BARRINGER v. WEATHINGTON

No. 9 PC.

Case below: 7 N.C. App. 126.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 February 1970.

ETHERIDGE v. R. R. CO.

No. 16 PC.

Case below: 7 N.C. App. 140.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 March 1970.

INSURANCE CO. v. DAVIS

No. 17 PC.

Case below: 7 N.C. App. 152.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 March 1970.

MORSE v. CURTIS

No. 7.

Case below: 6 N.C. App. 591.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 22 January 1970.

MORSE v. CURTIS

No. 8.

Case below: 6 N.C. App. 620.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied and purported appeal as of right dismissed 22 January 1970.

SHIPYARD, INC. v. HIGHWAY COMM.

No. 8 PC.

Case below: 6 N.C. App. 649.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 March 1970.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. FOWLER

No. 105 PC.

Case below: 1 N.C. App. 438.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 February 1970.

STATE v. HUFFMAN

No. 11 PC.

Case below: 7 N.C. App. 92.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 February 1970.

STATE v. LEWIS

No. 37.

Case below: 7 N.C. App. 178.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied and purported appeal as of right dismissed 3 March 1970.

SUTTON v. DUKE

No. 13 PC.

Case below: 7 N.C. App. 100.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 3 March 1970.

GENE C. SMITH, ANCILLARY ADMINISTRATOR OF THE ESTATE OF CAROL MARIE CUPIC v. ALFRED MERCER, JAMES LOYS KEOWN, KRIEBEL'S, INC., AND CHARLES RUDOLPH KRIEBEL, JR., ADMINISTRATOR CTA OF THE ESTATE OF CHARLES RUDOLPH KRIEBEL

No. 2

(Filed 11 March 1970)

1. Death § 3— wrongful death action — damages recoverable — pre-1969 law

Prior to the 1969 Act rewriting the wrongful death statute, the measure of damages recoverable under the statute for the loss of a human life was the present value of the net pecuniary worth of the deceased based upon his life expectancy. G.S. 28-174; Chapter 215, Session Laws of 1969.

2. Death § 3— 1969 wrongful death statute — date of application — pending litigation

The 1969 Act rewriting the wrongful death statute *ex vi termini* does not apply retroactively where the death occurred prior to April 14, 1969, and an action therefor was instituted on or before April 14, 1969, and was pending on that date.

3. Death § 3— wrongful death action — damages recoverable — 1969 Act — retroactive application

The 1969 Act rewriting the wrongful death statute, which now permits the recovery of (1) expenses for care, treatment and hospitalization incident to the injury resulting in death, (2) compensation for pain and suffering of the decedent, (3) the reasonable funeral expenses of decedent, (4) punitive damages, (5) *nominal* damages, and (6) the present monetary value of decedent to persons entitled to receive the damages recovered, *held* to create a new right of action for wrongful death; and the Act does not have retroactive application to an action for wrongful death where the death occurred prior to April 14, 1969, the effective date of the Act. Chapter 215 of the Session Laws of 1969.

4. Statutes § 8— retroactive effect of statute — rule of construction

Ordinarily, an intention to give a statute a retroactive operation will not be inferred; if it is doubtful whether the statute was to operate retrospectively, the doubt should be resolved *against* such operation.

5. Statutes § 8— retroactive effect of statutes — rule of construction

Where the effect of giving a statute a retroactive operation would be to create a new liability in connection with a past transaction, or to invalidate a defense which was good when one statute was passed, or to render the statute or amendment unconstitutional, the statute will be regarded as operating prospectively only.

6. Statutes § 8— retroactive law defined — application to remedial or procedural statutes

A retrospective law is one which creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or

considerations already passed; hence, remedial statutes, or statutes relating to remedies or modes of procedure, do not come within the legal conception of a retrospective law.

7. Deaths § 3; Statutes § 8— wrongful death action — 1969 Act — retroactive effect

Where the 1969 Act rewriting the wrongful death statute related solely to changes in substantive rights and did not affect procedural requirements, a section of the Act providing that the Act is inapplicable to pending litigation will not be construed so as to have retroactive application to those deaths which occurred prior to the effective date of the Act but were not the subject of pending litigation. G.S. 28-174; Chapter 215, Session Laws of 1969.

ON *certiorari* to review an order entered by *Carr, J.*, at the August 18, 1969 Session of WAKE County Superior Court.

The writ of *certiorari* was issued by the Court of Appeals. Thereafter, pursuant to G.S. 7A-31, the cause was certified for review by the Supreme Court before determination by the Court of Appeals.

Plaintiff's intestate was killed as a result of a collision that occurred on U. S. Highway I-95 on March 16, 1968, between a Buick car and a tractor-trailer. The Buick car, in which intestate was a passenger, was owned by Kriebel's, Inc., and operated by Charles R. Kriebel. The tractor-trailer was owned by Alfred Mercer and was operated by James Loys Keown.

No service was obtained upon defendants Mercer and Keown.

The hearing before Judge Carr was on the motion of defendants Kriebel's, Inc., and Charles Rudolph Kriebel, Jr., administrator c.t.a. of the estate of Charles Rudolph Kriebel, to strike from the complaint designated allegations relating solely to damages. Paragraphs 24, 25 and 26 of the complaint are as follows:

"24. That the said decedent was twenty-nine years of age at the time of her death on March 16, 1968, and then had a life expectancy of approximately 41.29 years; that the said decedent was at the time of the fatal collision in excellent health, possessed high intelligence, and had an excellent expectation of being able to live out her life expectancy and being able to perform profitable and useful work for a great number of years; *that had she lived, she would have provided substantial service, protection, care and assistance to her family, as well as security, companionship, guidance, kindly offices and advice.*

"25. *That as a result of the death of the intestate, the plaintiff administrator has sustained damages for funeral expenses of his intestate in a large sum.*

"26. That by reason of the wrongful death of the said decedent, the said plaintiff, in his representative capacity, has been severely and grievously damaged and is entitled to recover of the defendants, jointly and severally, *a lump sum sufficient to compensate plaintiff for the present monetary value of the total compensation represented by such net income, services, protection, care and assistance, society, companionship, comfort, guidance, kindly offices and advice and funeral bills, all in* the amount of Two Hundred Fifty Thousand ($250,000) Dollars."

Judge Carr's order, which allows said motion, strikes from the complaint the allegations italicized above, being all of Paragraph 25 and the indicated portions of Paragraphs 24 and 26.

Yarborough, Blanchard, Tucker & Denson for plaintiff appellant.

Dupree, Weaver, Horton, Cockman & Alvis, by F. T. Dupree, Jr., and John E. Aldridge, Jr., for defendant appellees Kriebel.

BOBBITT, C.J.

Plaintiff's intestate was killed on March 16, 1968. Chapter 215, Session Laws of 1969, entitled "AN ACT TO REWRITE G.S. 28-174, RELATING TO DAMAGES RECOVERABLE FOR DEATH BY WRONGFUL ACT," was ratified April 14, 1969. This action was instituted on July 3, 1969.

G.S. 28-173 confers upon an administrator the right of action to recover for the wrongful death of his intestate. G.S. 28-174 relates to the basis on which the amount of damages recoverable is to be determined. With reference to the origin and import of these statutes, see *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49; *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793; *Bryant v. Woodlief,* 252 N.C. 488, 114 S.E. 2d 241, 81 A.L.R. 2d 939.

[1] On March 16, 1968, the date plaintiff's intestate was killed, G.S. 28-174 provided: "The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death." In numerous decisions, this Court had held that the measure of the damages recoverable under G.S. 28-174 for the loss of a human life is the *present value* of the *net pecuniary worth* of the deceased based upon his *life expectancy. Bryant v. Woodlief, supra,* and cases cited. The successive steps by which the jury was to arrive at the amount of its award are set forth in *Caudle v. R. R.,* 242 N.C. 466, 469, 88 S.E. 2d 138, 140.

G.S. 28-174 did not permit the assessment of punitive damages

or the allowance of nominal damages. *Armentrout v. Hughes, supra,* at 632. Nor did it permit the recovery of funeral expenses. *Davenport v. Patrick,* 227 N.C. 686, 691, 44 S.E. 2d 203, 206. As stated by Reid, J., in *Collier v. Arrington,* 61 N.C. 356, and quoted with approval in *Armentrout v. Hughes, supra,* at 633: "(O)ur statute, which gives an action to the representative of a deceased party, . . . confines the recovery to the amount of *pecuniary injury.* It does not contemplate *solatium* for the plaintiff, nor punishment for the defendant. It is therefore in the nature of pecuniary demand, the only question being, how much has the plaintiff (estate) lost by the death of the person injured?" Although the administrator, in a separate personal injury action, could recover for pain and suffering and for hospital and medical expenses between the date of injury and death, these were not proper elements of damage in a wrongful death action. *Hoke v. Greyhound Corp.,* 226 N.C. 332, 38 S.E. 2d 105; *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585.

Chapter 215, Session Laws of 1969, provides:

"Section 1. G.S. 28-174 is hereby rewritten to read as follows:

"'Sec. 28-174. *Damages recoverable for death by wrongful act; evidence of damages.* (a) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death.

(2) Compensation for pain and suffering of the decedent.

(3) The reasonable funeral expenses of the decedent.

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

(i) Net income of the decedent.

(ii) Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

(iii) Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered.

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence.

(6) Nominal damages when the jury so finds.

"'(b) All evidence which reasonably tends to establish any of the elements of damages included in subsection (a), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.'

"Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 3. This Act shall not apply to litigation pending on its effective date.

"Sec. 4. This Act shall become effective upon ratification."

[2] The 1969 Act *ex vi termini* does not apply retroactively where the death occurred prior to April 14, 1969, *and* an action therefor was instituted on or before April 14, 1969, and was pending on that date. The question for decision is whether the 1969 Act applies retroactively where the death occurred prior to April 14, 1969, but no action therefor was pending on that date.

If this action is to be tried in accordance with the provisions of G.S. 28-174 in effect on March 16, 1968, and the decisions of this Court with reference thereto, the portions of the complaint challenged by defendants' motion were properly stricken. On the other hand, if the 1969 Act, which rewrote 28-174, applies to actions based on deaths occurring prior to April 14, 1969, for which no litigation was pending on that date, the challenged allegations were permissible.

[3] On March 16, 1968, when plaintiff's intestate was killed, G.S. 28-173 and G.S. 28-174 conferred upon the personal representative of a decedent a right of action to recover "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." G.S. 28-173 and G.S. 28-174 *as rewritten by the 1969 Act* confer upon the personal representative of a decedent a new right of action for wrongful death. Although the procedural remedy, an action by the personal representative, is the same, the substantive rights of the parties are different. The 1969 Act provides for the recovery in the personal representative's action of (1) expenses for care, treatment and hospitalization incident to the injury resulting in death; (2) compensation for pain and suffering of the decedent; (3) the reasonable funeral expenses of the decedent; (4) punitive damages; and (5) nominal damages. Prior to the 1969 Act, the administrator had no right of action to recover such damages. Moreover, the 1969 Act provides for the recovery of "(t)he present monetary value of the decedent *to the persons entitled to receive the damages recovered,*" including but not limited to compensation for enum-

erated items. (Our italics.) We do not undertake now to define the legal significance of this provision. Suffice to say, damages determinable in accordance with this provision of the 1969 Act are quite different from damages determinable on the basis of the pecuniary injury suffered *by the decedent's estate* as the result of his death. In our view, the 1969 Act created a cause of action for wrongful death that did not exist on March 16, 1968, when plaintiff's intestate was killed. Questions relating to the elements of such new cause of action will be decided when directly presented in subsequent litigation.

Our conclusion that the 1969 Act created a new cause of action is supported by the decisions considered below.

In *Keeley v. Great Northern Ry. Co.*, 121 N.W. 167 (Wisc. 1909), a Wisconsin statute in effect when the death occurred limited the damages recoverable to $5,000.00. Thereafter, during the pendency of the action, a statute was enacted which permitted a recovery up to $10,000.00. In holding there could be no recovery in excess of $5,000.00, Winslow, C.J., for the Supreme Court of Wisconsin, said: "When this accident happened, the plaintiff had a claim for the recovery of not exceeding $5,000. Beyond this amount she had no claim or cause of action. When the Legislature afterward said that in such cases there might be a recovery up to the sum of $10,000, they in effect created a new cause of action for the second $5,000. It was not a mere change in remedy, but to all practical purposes it created a new right of action. If it created a new right, and did not merely change the remedy, it is not applicable to prior transactions."

In *Monroe v. Chase*, 76 F. Supp. 278 (D.C. Ill. 1947), the wrongful death action was pending when the Illinois statute was amended by increasing the maximum recoverable damages from $10,000.00 to $15,000.00. Denying the plaintiff's application for leave to amend the complaint so as to increase the demand for damages from $10,000.00 to $15,000.00, District Judge Wham said: "(T)he amendment in question amended the right given by the statute rather than the remedy or the procedure by which the statutory right might be ripened into judgment. The amendment increases the liability of one who is guilty under the statute. The amendment is one of substantive law and not one of adjective law. It affects the relief provided by the statute and not the mode of obtaining relief. To give the amendment effect in this case which involves a prior death would be contrary to the well established rule in Illinois that statutes are prospective and will not be considered to have retroactive operation unless the language employed in the enactment is so clear that it will admit of no other construction. (Citations.) Whether or

not, under the law of Illinois, the statutory right to relief in a death case may be said to be a vested right, no persuasive authority appears for the position that a statutory increase in the maximum liability may be retroactive or given a retrospective application in the absence of clear language that the lawmakers so intended."

In *Theodosis v. Keeshin Motor Express Co.*, 92 N.E. 2d 794 (Ill. App. 1950), the limit of liability was $10,000.00 when the death occurred. Thereafter, the limit was increased to $15,000.00. The verdict and judgment for plaintiff were for $15,000.00. Justice Schwartz put the question for decision in these words: "(T)he pertinent inquiry is not whether the legislature can take away a plaintiff's rights in such cases, but whether they can create a liability against a defendant for a prior wrongful death. In other words, could the first Lord Campbell's Act have been applied retroactively, and if so, how far back?" Holding the statute did not apply retroactively, the cause was remanded for the entry of a judgment in the plaintiff's favor for $10,000.00.

In *Field v. Witt Tire Co. of Atlanta, Ga.*, 200 F. 2d 74 (2d Cir. 1952), a Connecticut wrongful death statute in effect prior to October 1, 1951, provided for the recovery of "just damages not exceeding twenty thousand dollars" plus medical, hospital, nursing and funeral expenses. An action to recover for a death that occurred on June 15, 1950, was pending when a substitute wrongful death statute was passed, effective October 1, 1951, which provided for the recovery of "just damages" plus medical expenses, without limit as to amount. A separate Connecticut statute provided: "The passage or repeal of an act shall not affect any action then pending." It was held, based on Connecticut decisions, "that legislation is not to be applied retroactively unless the legislation unequivocally expresses a contrary intent," with the exception of "statutes which are general in their terms and affect matters of procedure." Pertinent to the case *sub judice* is this excerpt from the opinion of Circuit Judge Frank: "However, this exception does not include a statute which, although in form providing but a change in remedy, actually brings about 'changes involving substantive rights.' (Connecticut citations.) We think the new statute *so markedly affects 'substantive rights'* that the Connecticut Supreme Court would interpret it as not retroactive." (Our italics.)

In *Herrick v. Sayler*, 245 F. 2d 171 (7th Cir. 1957), the plaintiff-father instituted this action April 5, 1955, in a United States District Court, to recover damages in the amount of $5,500.00 for the death on March 25, 1955, of his minor child. The action was based on an

Indiana statute which provided that a father may maintain an action for the injury or death of a child. When the death occurred, the statute provided that "the damages, if any recovered, shall not exceed the reasonable medical, hospital or funeral expenses incurred, and a sum not to exceed one thousand dollars . . . for any and all other loss, if sustained." A statute which became effective June 30, 1955, prior to the commencement of the action, increased the amount recoverable to $5,000.00 in addition to the previously recoverable expenses. Holding the statute did not apply retroactively to a cause of action which accrued prior to June 30, 1955, its effective date, the diversity action was dismissed on the ground the amount involved, exclusive of interest and costs, did not exceed $3,000.00. The opinion of Circuit Judge Swain includes the following: "Indiana follows the general rule that statutes will not be given a retroactive operation, unless the legislature unequivocally expresses a contrary intent, if by making them so operate vested rights and obligations will be affected. (Citations.) An exception to this general rule is recognized with regard to remedial statutes — where retroactive operation is necessary to carry out the purpose of the law and no new rights are given or existing rights taken away, but only a new remedy is afforded for the enforcement of an existing right. (Citations.)"

In *Conn v. Young,* 267 F. 2d 725 (2d Cir. 1959), the federal court's jurisdiction was based on diversity of citizenship. The death occurred July 21, 1956, and was the result of an automobile accident in New Hampshire. At that time, under the New Hampshire statute, recovery for wrongful death was limited to $15,000.00. An amendment which became effective June 30, 1957, raised the limit to $25,000.00. The trial judge instructed the jury that a recovery might be had up to $25,000.00. On the defendant's appeal from a verdict and judgment in the plaintiff's favor for $25,000.00, Circuit Judge Medina said: "We are convinced that New Hampshire would follow its usual rule of applying legislation only prospectively. (Citation.) Indeed, New Hampshire appears to carry this rule even further than do most jurisdictions, for it is applied at least to some matters of procedure as well as to substantive rights. (Citation.). . . . The instruction permitting recovery up to $25,000 was plain error . . . ."

Also see: *Regan v. Davis,* 138 A. 751, 54 A.L.R. 1073 (Pa. 1927); *Zontelli Brothers v. Northern Pacific Railway Co.,* 263 F. 2d 194 (8th Cir. 1959); *Muckler v. Buchl,* 150 N.W. 2d 689 (Minn. 1967); Annot., 98 A.L.R. 2d 1105 at 1110-1113.

If the General Assembly had provided that the 1969 Act was to apply retroactively and confer upon a personal representative a right of action that did not exist when the death occurred, serious questions as to the constitutionality of such retroactive application would be presented.

In *Minty v. State,* 58 N.W. 2d 106 (Mich. 1953), a tort action, it was held the plaintiff had a vested right in his cause of action when his right of action became complete and could not be deprived thereof by a repealing statute passed thereafter. When the plaintiff was injured, he had a cause of action against the State because a Waiver of Immunity Act was then in effect. Thereafter, the Waiver of Immunity Act was repealed.

In *Lewis v. Pennsylvania R. Co.,* 69 A. 821 (Pa. 1908), under the 1868 statute then in force, no recovery against the railroad company could be based upon the negligence of a fellow servant. Thereafter, the 1868 Act was repealed by an act of June 10, 1907, which abolished the fellow-servant doctrine. The court held the law in force when death occurred, that is, when the cause of action became complete, was determinative. The rationale of the opinion is that the 1907 Act, if construed "to impose a liability for a past occurrence where none existed at the time, or, what is the same thing, take away a legal defense available at the time," would exceed constitutional limitations.

General principles relating to whether statutes should be construed to apply prospectively or retroactively include the following:

[4, 5] *"Ordinarily, an intention to give a statute a retroactive operation will not be inferred. If it is doubtful whether the statute or amendment was intended to operate retrospectively, the doubt should be resolved against such operation.* It is especially true that the statute or amendment will be regarded as operating prospectively only, where it is in derogation of a common-law right, or where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right, *or create a new liability in connection with a past transaction, invalidate a defense which was good when the statute was passed, or, in general, render the statute or amendment unconstitutional."* (Our italics.) 50 Am. Jur. Statutes § 478. Accord: 82 C.J.S. Statutes § 413; *Ashley v. Brown,* 198 N.C. 369, 372, 151 S.E. 725, 727; *Waddill v. Masten,* 172 N.C. 582, 584, 90 S.E. 694, 695; *Hicks v. Kearney,* 189 N.C. 316, 319, 127 S.E. 205, 207.

[6] "A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, *or*

creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already passed. Hence, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against a retrospective operation of statutes. To the contrary, statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention." (Our italics.) 50 Am. Jur. Statutes § 482. Accord: 82 C.J.S. Statutes § 416; *Ashley v. Brown, supra; Tabor v. Ward,* 83 N.C. 291, 295; *Waddill v. Masten, supra; Byrd v. Johnson,* 220 N.C. 184, 187, 16 S.E. 2d 843, 846.

[3] Applying the foregoing principles, we hold the 1969 Act has no application to an action for wrongful death where the death occurred prior to April 14, 1969, the date it became effective.

[7] There remains for disposition plaintiff's contention that the decision in *Spencer v. Motor Co.,* 236 N.C. 239, 72 S.E. 2d 598, is authority for the position that the General Assembly intended that the 1969 Act should be applied to deaths which had occurred prior to its effective date. In *Spencer,* this Court held the 1951 statute, which is now codified as G.S. 20-71.1, applied in the trial of all actions except actions which were pending when the 1951 statute became effective. This 1951 statute related solely to the *prima facie* effect of certain evidence. It did not confer any right of action. It did not enlarge or diminish the substantive rights of any party. Under the general rule, the 1951 statute, which related solely to a mode of procedure, would have applied to all trials thereafter conducted except for the explicit statement therein that "the provisions of this Act shall not apply to pending litigation." The 1969 Act, which provides solely for substantive changes, to wit, the creation of a new right of action for wrongful death, would not apply retroactively to deaths occurring prior to its effective date without regard to whether such deaths were the subject of litigation then pending. We take notice of this excerpt from the opinion in *Spencer:* "Moreover, the maxim *expressio unius est exclusio alterius,* that is, that the expression of one thing is the exclusion of another, applies. From the fact that the Legislature expressly provided that the provisions of the Act shall not apply to pending litigation, it may be implied that it should apply in all other cases." Seemingly, this statement was appropriate where the statute under consideration related to procedural remedies rather than to substantive rights. However,

we hold it may not be considered authoritative with reference to a statute such as the 1969 Act which relates solely to substantive rights and creates a new right of action.

For the reasons stated, the judgment of Judge Carr is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. ERNEST RAY PERRY

No. 13

(Filed 11 March 1970)

1. Criminal Law § 53; Homicide § 15— competency of evidence — cause of death — pathologist

It was competent for the pathologist who performed an autopsy on the body of deceased to testify in a homicide prosecution that the death of deceased was caused by a projectile, or bullet, which entered through deceased's lower lip and lodged in his right tonsil.

2. Criminal Law §§ 34, 169— inadvertent testimony of other crime — prejudicial effect — instruction to jury

Where an officer, in response to the solicitor's question whether he had a warrant for defendant's arrest for felonious assault, inadvertently stated that he had two warrants charging defendant with felonious assault, any harmful effect from the officer's reference to a second warrant was corrected by the court's instruction to the jury to disregard the evidence of a second warrant.

3. Criminal Law §§ 75, 76— incriminating statements to jailmate — admissibility — voir dire hearing

Where a defendant charged with homicide told his jailmate that he had shot the deceased, the jailmate's testimony of defendant's incriminating statement was admissible in evidence without the necessity of a *voir dire* hearing to determine whether the statement was freely and voluntarily made.

4. Homicide § 14— presumption of malice — intentional use of pistol

In a prosecution for homicide committed with a pistol, malice may be presumed from evidence which satisfies the jury beyond a reasonable doubt that the death of deceased proximately resulted from a pistol shot intentionally fired at him by defendant.

5. Homicide § 21— first degree murder — sufficiency of evidence

To sustain a verdict of murder in the first degree, the evidence must be sufficient to support a finding that the fatal shot was fired after premeditation and deliberation.

6. Homicide § 4— premeditation defined

Premeditation means thought beforehand for some length of time, however short.

7. Homicide § 21— first degree murder — motion to dismiss — question presented

On motion to dismiss a charge of murder in the first degree, 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.

8. Homicide § 4— premeditation and deliberation — length of time

No fixed length of time is required for the mental process of premeditation and deliberation, and it is sufficient if these processes occur prior to, and not simultaneously with, the killing.

9. Homicide § 4— premeditation — circumstantial proof

Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances.

10. Homicide §§ 18, 21— first degree murder — nonsuit — evidence of premeditation and deliberation — shooting of stranger in another car

In the first degree murder prosecution of a defendant, a passenger in one car, who fired a pistol at a stranger driving another car in a parallel lane, thereby fatally wounding him, there was sufficient evidence of defendant's premeditation and deliberation to take the case to the jury, where there was no evidence of excuse or provocation, and where the State offered the testimony of defendant's fellow passengers that as the two cars came abreast of each other the defendant exchanged words with the deceased, a Negro; that the defendant reached for the pistol and fired three shots at the deceased; and that defendant told his driver to back up and let him "finish off" the deceased.

APPEAL by defendant from *Carr, J.*, September 8, 1969 Session, WAKE Superior Court.

The defendant, Ernest Ray (Buddy) Perry, was charged, by a grand jury indictment, with the first degree murder of George Edward Kitchen. The offense occurred on January 19, 1969. Upon arraignment and before plea in the Superior Court, the defendant, through his court appointed counsel, made three consecutive motions: (1) To quash the bill of indictment, (2) To remove the cause to another county for trial, (or in the alternative) (3) To summon the trial jury from another county. The court, in turn, overruled each motion and ordered the trial jury drawn from Wake County.

At the trial, which began on September 8, 1969, the State's evidence, summarized or quoted, disclosed the following. On Sunday

evening, January 19, 1969, George Edward Kitchen left home to go to Tops Service Station on Peace Street to have his automobile serviced so that his wife might drive it to work early Monday morning. From an apartment window near the intersection of Peace and Wilmington Streets, Leroy Turner saw two automobiles in parallel lanes moving west on Peace Street. A light colored vehicle was on the left, the Kitchen car was on the right. While the vehicles were abreast of each other, Turner saw a flash from the light colored automobile, and heard pistol shots, after which the light colored vehicle left the scene at high speed. Kitchen drove to Tops, a short distance from the intersection. When Kitchen drove up to the service station, he was bleeding, groggy, and able to stand with difficulty. The attendant at the station called the police. An ambulance carried the wounded man to Rex Hospital.

Dr. Sparrow's examination at the hospital disclosed a fresh bullet wound which entered Kitchen's mouth through the left lower lip, shattered three teeth on the left under jaw, passed through the tongue and became embedded in the right tonsil. Dr. Sparrow, by the use of forceps, removed the bullet from the tonsil. He testified that immediately back of the right tonsil is located the right carotid artery which feeds a section of the brain. "The internal carotid is not right up against the tonsil. There is a muscle between the tonsil and the artery and there is fascaial . . . ligament type material, and there is also a sheath around the carotid artery . . . a protective sheath. I was able to tell that there was no penetration any further than the position of the bullet itself. I would not be able to observe any effects of compression beyond that point unless the compression were severe enough to completely block the artery. . . ."

After examination and tests, Dr. Sparrow found "He did not show any weakness of any part. He did not show any signs of any complications, and he was not bleeding so that it did not appear that his condition required hospitalization. . . . The teeth were broken. Some fragments were hanging in the gum. . . . the upper teeth were not involved." Being of the opinion "this work required the attention of a dentist" Dr. Sparrow referred the patient to his dentist with a request he (Dr. Sparrow) be given notice of any complications. After the dental treatment Sunday night, the deceased went home but did not rest well and did not appear normal. On Monday morning, January 20, he was admitted to Wake Memorial Hospital where he died about Noon on January 23, 1969.

Dr. Pate, Pathologist, performed an autopsy on the body of

George Edward Kitchen. After qualifying as an expert in the field of Pathology, Dr. Pate described his findings and testified: "If I excluded everything from my consideration except what I saw upon my examination, I would say with medical certainty that whatever projectile had entered the channel that I observed caused the death of the deceased."

After the shooting, but before the victim's death, the officers obtained a warrant charging the defendant with a felonious assault on Kitchen. While Officer Johnson was on the stand, the solicitor asked whether at the time of arrest he had a warrant for the defendant charging the felonious assault on Kitchen. The officer volunteered the statement that he had two warrants charging the defendant with assault with a deadly weapon. The defendant objected and moved for a mistrial. The court cautioned the jury not to consider the second warrant and overruled the motion.

The State called as witnesses Bobby Ray Stallings and Larry Wilson, who were the defendant's companions at the time of the shooting. Stallings is a brother-in-law of the defendant. In substance, Stallings testified that he, Larry Wilson, the defendant, and others, had been driving around town during the afternoon. All were drinking. The other members of the original party went home, leaving the three. Stallings was driving his gold colored automobile, Wilson was seated in the middle, and the defendant was on the right, in the front seat. They were driving north on Wilmington Street toward its "T" intersection with Peace Street. As they turned left on Peace they came abreast of the deceased's vehicle on their right. Stallings testified:

> "The first thing I heard was him and Buddy having words. I don't remember who started them. They had words off and on — I think I was staying along close to him, just to argue with him. He was a colored man. I did not say anything to him. Larry did not say anything that I know of. Nobody said anything to him except Buddy. After the shots rang out, Larry said the man had fell over the wheel, and I hollered at Buddy and said, 'Buddy, you have killed that man.' And Buddy said, 'If you will back up, I will finish it.' "

Larry Wilson, as a witness for the State, testified:

> ". . . When we got down towards the end of Wilmington is when this car was beside us; we were on the inside and the other car outside, and we turned on Peace to the left, still were on the inside lane, and the other car was in the righthand lane, on the outside lane.

Bobby Stallings was driving his car. I was sitting in the center, defendant was sitting on the right-hand on the outside, right-hand side, in the front. There was no one in the back seat. We got down there and after we turned the corner off Wilmington, as we approached Peace Street, we were just riding along, and Buddy was saying something, or the man said something to Buddy; I don't know which way it was; and when we turned to the street, they was still talking among each other; when we turned the corner and headed down Peace Street then Buddy just reached for a gun and he started firing, shot at him three times; I heard the gun go off three times.

The man in the car was a colored man. I told Buddy after he fired three times I seen the man slumping over the steering wheel; I said, 'I believe you killed a man.' He said to back up to see if he'd done a good job, finish him off. And then from there, after Buddy had shot him, Bobby just went on between cars trying to get out of the way — going east (sic) on Peace Street, towards Cameron Village. There were other cars in the eastbound lane of Peace Street. We had to pull out in the left lane to go on Salisbury Street to get around the cars in front of us."

The State, as one of its witnesses, called Bobby Wayne Pierce who testified that he was confined in the Wake County Jail during the summer of 1969. The defendant, Ernest Ray Perry, was also confined in the jail awaiting trial. Over objection, Pierce was permitted to testify: "He (the defendant) told me he shot Mr. Kitchen. . . . He said Mr. Kitchen pulled up on his right-hand side; and he told me they had been drinking that day. Ernest and the two people with him; and the colored man pulled up — Mr. Kitchen — told them why don't they behave theirselves and go on home; and Ernest told me, 'That black son of a bitch told me to behave myself and go home and I shot him.' "

At the conclusion of the State's evidence, the defendant first moved for a directed verdict of not guilty, and then that a verdict of not guilty be directed on the charge of murder in the first degree. The court overruled the motions. The defendant did not offer evidence. After the argument and charge of the court, the jury returned the verdict "guilty of murder in the 1st degree with recommendation that punishment be imprisonment for life in the State Prison." After denying the motion to set the verdict aside, the court imposed the mandatory life sentence. The defendant appealed.

Robert Morgan, Attorney General, Ralph Moody, Deputy Attorney General, for the State.

Russell W. DeMent, Jr., for the defendant.

HIGGINS, J.

The defendant argues here that the trial court committed four prejudicial and reversible errors. He contends: (1) Dr. Pate, the Pathologist who performed the autopsy on the body of George Edward Kitchen, was permitted to testify as to the cause of death, necessarily basing his opinion in part on facts not within his personal knowledge, which should have been the subject of a hypothetical question; (2) The defendant's motion for mistrial should have been allowed when Detective Johnson testified before the jury that at the time he arrested the defendant, he had two warrants, each of which charged assault with a deadly weapon; (3) The witness Pierce was permitted, over objection, to repeat to the jury certain admissions the defendant made while both were prisoners in the Wake County Jail; (4) The court should have withdrawn the charge of murder in the first degree because of the failure of the State to offer sufficient evidence of premeditation and deliberation.

Dr. Sparrow, who first treated the victim of the assault, actually traced the channel made by the bullet beginning at the left lower lip, through the teeth, through the tongue, and into the right tonsil, where the projectile was imbedded. He removed a lead bullet from the tonsil by means of forceps without the necessity of any cutting operation. He did not discover any damage beyond the tonsil wall. Only a complete blockage of the artery would have been discoverable at the time and by the type of examination he made.

[1] Dr. Pate, who qualified as a pathology expert, performed the autopsy. He traced the channel left by a projectile beginning at the left lower lip, through the teeth, tongue, and into the right tonsil. He dissected the artery just behind the tonsil and found that pressure had built up in front of the projectile which made the channel and had damaged the wall of the carotid artery, causing a blood clot within the artery. A part of the clot was carried to the brain, causing paralysis and death. The damage was revealed only by the autopsy. Dr. Pate testified: "If I excluded everything from my consideration except what I saw upon my examination, I would say with medical certainty that whatever projectile had entered the channel that I observed caused the death of the deceased. I can say this because of what I was able to find at the time of autopsy." In nonmedical terms, the autopsy told him all he needed to know as to the

cause of death. As an expert in his field, Dr. Pate was qualified to testify as he did. *State v. Feaganes,* 272 N.C. 246, 158 S.E. 2d 89; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Rhodes,* 252 N.C. 438, 113 S.E. 2d 917; *State v. Knight,* 247 N.C. 754, 102 S.E. 2d 259; *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494. The challenge to the testimony of Dr. Pate is not sustained.

[2] During the course of the trial, the arresting officer in this case apparently had in his possession a warrant for the arrest of the defendant charging a felonious assault on Mr. Kitchen. This warrant was issued after the assault and before Kitchen's death. Apparently the officer also had a warrant for the defendant on another assault charge. When the solicitor asked the witness the question whether he had a warrant for the defendant's arrest, he volunteered the information that he had two warrants charging assault. After objection, Judge Carr instructed the jury to disregard the statement there was a second warrant. Any harmful effect of the officer's inadvertence, if error, was corrected by the court's instruction to the jury not to consider the testimony there was a second warrant. *State v. Battle,* 269 N.C. 292, 152 S.E. 2d 191; *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216; *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334; *State v. Lane,* 166 N.C. 333, 81 S.E. 620. The objection on the ground the trial court committed error in denying the motion for a mistrial is not sustained.

[3] As his third ground of challenge, the defendant contends the court committed error in permitting the witness Pierce to testify the defendant admitted he had shot Kitchen and his reasons for the shooting. Specifically, the defendant contends the court should have conducted a voir dire examination to determine whether the admissions to Pierce were freely and voluntarily made.

The defendant misinterprets the necessity for the voir dire examination to determine the voluntariness of his admissions to his jailmate Pierce. As a general rule, voluntary admissions of guilt are admissible in evidence in a trial. To render them inadmissible, incriminating statements must be made under some sort of pressure. Here we quote from the Supreme Court of the United States in *Hoffa v. United States,* 385 U.S. 293, 17 L. Ed. 2d 374: "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. . . . 'The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human

society. It is the kind of risk we necessarily assume whenever we speak.' (A)ll have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion." The court did not commit error in permitting the witness Pierce to repeat the incriminating admissions the defendant voluntarily made to him while both were prisoners.

The fourth ground of objection to the trial (sufficiency of the evidence of premeditation and deliberation) is somewhat more troublesome than the three objections already discussed. The court, in a clear, concise and accurate charge (to which there is no objection) instructed the jury under what circumstances it should return one of these possible verdicts: (1) Guilty of murder in the first degree; (2) Guilty of murder in the first degree with the recommendation that 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.

[4-6] The court's instruction and the jury's verdict must be supported by evidence which permits the jury to find beyond a reasonable doubt that the defendant, with malice, after premeditation and deliberation, intentionally shot and killed George Edward Kitchen. In this case, malice may be presumed from evidence which satisfies the jury beyond a reasonable doubt that Kitchen's death proximately resulted from a pistol shot intentionally fired at him by the defendant. The finding would warrant a verdict of murder in the second degree. To sustain a verdict of murder in the first degree, the evidence must be sufficient to support a finding the fatal shot was fired after premeditation and deliberation. The courts define premeditation as "thought beforehand for some length of time, however short". Strong's N.C. Index 2d., Vol. 4, p. 196; *State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484; *State v. Benson,* 183 N.C. 796, 111 S.E. 869. "Deliberation means . . . an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation." *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769.

[7, 8] On a motion to dismiss a count in the indictment charging murder in the first degree, 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 de-

liberation, 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, *supra.*

[9] "Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances. . . ." *State v. Walters, supra.* The court determines as a matter of law what is evidence. The jury must find from that evidence, beyond a reasonable doubt, that premeditation and deliberation anteceded the fatal shot.

[10] The evidence as to what actually occurred before, at the time of, and following the killing comes from Stallings, brother-in-law of the defendant, and from Wilson, his companion and friend. Neither claimed the deceased started the difficulty. Both said that Stallings, driving the light colored automobile, overtook the deceased, and that discussion occurred between the defendant and the deceased as the vehicles were side by side. All the evidence disclosed the deceased admonished the defendant's party to go home and behave themselves. Nothing else is claimed to have come from the deceased.

The evidence disclosed the defendant fired three shots at a defenseless man who was at a place where he had a right to be and doing that which he had a right to do. Want of provocation, absence of excuse or justification, the number of shots fired, and the request of the defendant that they go back so he could finish the job permit a legitimate inference of premeditation and deliberation. This evidence was sufficient to go to the jury and be considered by it on the issue of murder in the first degree. *State v. Faust, supra; State v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188.

The defendant did not offer evidence.

We conclude the evidence permitted and will support a finding that the defendant, with malice, premeditation and deliberation, shot and killed George Edward Kitchen. In the verdict and judgment, we find

No error.

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR, C. T. A. OF THE ESTATE OF HERBERT GILLESPIE BARNES, DECEASED v. WESTCHESTER FIRE INSURANCE COMPANY

No. 5

(Filed 11 March 1970)

1. Insurance § 6— construction of policy — question of law

The meaning of language used in a policy of insurance is a question of law.

2. Insurance § 6— resolving ambiguity in insurance policy

Since the words used in an insurance policy have been selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company.

3. Insurance § 6— ambiguity in policy terms — contentions by insured and company

Ambiguity in the terms of an insurance policy is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning.

4. Insurance § 6— construction of policy — ambiguity — enforcement of contract

No ambiguity exists in an insurance policy unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend; if it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay.

5. Insurance § 6— objective of policy construction

The objective of construction of terms in an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued.

6. Insurance § 6— meaning of term defined in policy

When the policy contains a definition of a term used in it, such meaning must be given to that term wherever it appears in the policy, unless the context clearly requires otherwise.

7. Insurance § 6— meaning of nontechnical words not defined in policy

In the absence of a definition in the policy, nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise; if such word has more than one meaning in its ordinary usage and if the context does not indicate clearly the one intended, it is to be given the meaning most favorable to the policyholder, or beneficiary, since the insurance company selected the word for use.

8. Insurance § 6— construction of policy terms — resort to other portions of policy

Where the immediate context in which words are used is not clearly indicative of the meaning intended, resort may be had to other portions of the policy, and all clauses of it are to be construed, if possible, so as to bring them into harmony.

9. Insurance § 6— *effect given each word in policy*

Each word is deemed to have been put into the policy for a purpose and will be given effect if possible by any reasonable construction.

10. Insurance § 6— construction of exclusions, conditions and limitations

Exclusions from, conditions upon and limitations of undertakings by the company, otherwise contained in the policy, are to be construed strictly so as to provide the coverage which would otherwise be afforded by the policy.

11. Insurance § 68— automobile liability policy insuring two vehicles — medical payments coverage — one contract

Automobile liability policy providing medical payments coverage for two described vehicles is one contract, not two separate contracts, the policy provision that the terms of the policy apply "separately" to each automobile merely having the effect of repeating, as to each automobile, all of the terms applicable to the medical payments coverage provision.

12. Insurance § 68— medical payments provision of automobile liability policy — definition of "struck by an automobile"

The term "struck by an automobile," as used in the medical payments provision of an automobile liability policy, includes, nothing else appearing, one who is injured when the vehicle, occupied by him, is struck by another automobile and is not limited to collisions between automobiles and pedestrians, or to other situations involving physical contact between the body of the claimant and the automobile in question.

13. Insurance § 68— medical payments provision of automobile liability policy — "owned automobile" — "non-owned automobile" — "struck by an automobile"

Where automobile liability policy provided medical payments coverage for bodily injuries received by insured in an accident (a) while he occupied "the owned automobile," (b) while he occupied "a non-owned automobile," or (c) if he was "struck by an automobile," assuming the policy dealt with but one "owned automobile," the intent of the policy was (1) to provide medical payments coverage to insured for any injury sustained by him as the result of an accident while he was occupying that automobile, whether the cause of the accident be the striking of his vehicle by another vehicle or not, (2) to afford such coverage to him while he was occupying a "non-owned automobile," whatever the cause of the accident from which the injury resulted, and (3) to afford coverage to the insured when "struck by an automobile" while he was neither the occupant of the "owned automobile" nor the occupant of a "non-owned automobile."

14. Insurance § 68— medical payments coverage — policy on automobile — pickup truck owned by insured

Although a Ford pickup truck was owned by insured in the ordinary meaning of that term, it would not have been an "owned automobile" or a "non-owned automobile" within the terms of the medical payments provision of a liability policy on a Pontiac automobile, those terms having been defined in the policy, had there been no separate premium paid for the Ford pickup truck in connection with medical payments coverage, and insured, members of his family and others riding in the pickup truck would not have had the benefit of the medical payments coverage unless the accident which caused their injury was due to the truck's being struck by another automobile.

15. Insurance § 68— liability policy on automobile and pickup truck — purpose of inclusion of truck on declarations page and of separate medical payments premium for truck

The purpose of the inclusion of a Ford pickup truck in the declarations page of a liability policy on a Pontiac automobile and of the payment of a separate medical payments premium on account of the pickup truck was to provide medical payments coverage to insured, members of his family and others if they should be injured in an accident while riding in the truck, irrespective of the cause of the accident, the purpose not being to double the amount of medical payments coverage afforded by the policy to insured, members of his family and others while occupying the Pontiac automobile.

16. Insurance § 68— liability policy on two automobiles — medical payments coverage for each automobile

By virtue of the provision for separate application of the terms of an automobile liability policy to each automobile designated on the declarations page, the limit of liability for medical payments of "$5,000 each person" must be deemed to have been repeated as to each such automobile.

17. Insurance §§ 6, 68— liability policy on two automobiles — provision limiting amount of liability to one person — omission of such provision from medical payments section

Insertion of a provision in the liability section of an automobile policy that "the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability," and the omission of such provision from the medical payments section of the policy, did not make the medical payments section ambiguous or clearly show an intent to provide double coverage for an injury to the insured in a collision with the vehicle of another while the insured was riding in one of the "owned automobiles" covered by the policy.

18. Insurance §§ 6, 68— medical payments coverage — two automibiles — provision limiting amount of medical payments to one person — previous ambiguity

The fact that an insurance company now includes a provision in the medical payments section of an automobile liability policy that, regardless of the number of automobiles to which the policy applies, the company's liability for medical payments to each person, stated on the declarations page of the policy, is the limit of its liability for all damages sustained by

one person as the result of any one occurrence, does not show that the company recognized a preexisting ambiguity therein.

19. Insurance § 68— liability policy on two vehicles — accident while occupying owned automobile — medical payments coverage

Where insured paid separate medical payments premiums for a Pontiac automobile and a Ford pickup truck under an automobile liability policy providing medical payments coverage of "$5,000 each person" for bodily injuries received by insured in an accident (a) while he occupied the "owned automobile," (b) while he occupied a "non-owned automobile,'" or (c) "if he was struck by an automobile," and insured sustained bodily injuries in a collision with the vehicle of another while occupying the Pontiac automobile, *held*, (1) the insured's accident did not result from being "struck by an automobile" within the meaning of the policy, and (2) the policy limits the company's liability for medical expense for injuries sustained by insured in an accident while he was occupying the Pontiac, an "owned automobile," to $5,000.

BOBBITT, C.J., dissenting.

SHARP, J., joins in dissenting opinion.

ON certiorari to the Court of Appeals to review its decision in 6 N.C. App. 277, 170 S.E. 2d 72.

The Court of Appeals reversed the judgment of the District Court of Wake County. The District Court sustained the defendant's demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action and dismissed the action. The complaint alleges in substance:

The plaintiff is the administrator of the estate of Herbert Gillespie Barnes, who owned a 1960 Pontiac automobile and a 1957 Ford pickup truck. The defendant issued to Mr. Barnes an automobile liability insurance policy, a copy of which is attached to and made a part of the complaint. The policy provided medical payments coverage for each of the Barnes vehicles, for which coverage he paid a separate premium for each vehicle. While it was in effect, the Pontiac, driven by Mr. Barnes, was in a head-on collision with another automobile not described in the policy (said in the briefs to have been owned and operated by "a third party"). In this collision, Mr. Barnes sustained bodily injuries, from which he died, necessitating expenditures for medical, hospital, nursing and funeral services of $13,389.37. The plaintiff filed its claim for $10,000 under the Medical Payments provision of the policy. The defendant paid $5,000 without prejudice to the remainder of the claim and denied liability for such remainder. The plaintiff prays judgment for such remainder.

The declarations page of the policy shows a medical payments

premium of $8.80 on account of Car No. 1 (the Pontiac) and $8.00 on account of Car No. 2 (the Ford pickup) and states:

"The insurance afforded is only with respect to such of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

COVERAGES AND LIMITS OF LIABILITY
C — MEDICAL PAYMENTS

$5,000
each person"

The policy contained also the following provisions material to this appeal:

"The company * * * agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all the terms of this policy:

* * *

PART II — EXPENSES FOR MEDICAL SERVICES

"Coverage C — Medical Payments: To pay all reasonable expenses incurred * * * for necessary medical * * * hospital, professional nursing and funeral services:

"Division 1. To or for the named insured and each relative who sustains bodily injury * * * caused by accident,

(a) while occupying the owned automobile,

(b) while occupying a non-owned automobile, but only if such person has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission, or

(c) through being struck by an automobile or by a trailer of any type; * * *

"*Definitions:* The definitions under Part I apply to Part II, and under Part II:

'*occupying*' means in or upon or entering or alighting from.

[From Part I] '*named insured*' means the individual named in Item 1 of the declarations [Herbert Gillespie Barnes] * * *

'*owned automobile*' means

(a) a private passenger, farm or utility automobile described

in this policy for which a specific premium charge indicates that coverage is afforded * * *

'non-owned automobile' means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile;

* * *

"*Limit of Liability:* The limit of liability for medical payments stated in the declarations as applicable to 'each person' [$5,000] is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident.

* * *

CONDITIONS

* * *

"4. Two or More Automobiles — Parts I, II, III: When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each * * *

* * *

PART I — LIABILITY

* * *

"The insurance afforded under Part I applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability."

Prior to filing its demurrer, the defendant filed answer in which it admitted all of the allegations of the complaint material to the present inquiry, and for a further answer and defense alleged certain of the above quoted provisions of the policy which the defendant, in its answer, asserts limit its liability to the plaintiff to the amount of $5,000, which has heretofore been paid.

Upon the filing of this answer, the plaintiff demurred to such further answer on the ground that it does not state facts sufficient to constitute a defense to the plaintiff's cause of action and moved for judgment upon the pleadings. The District Court overruled the plaintiff's demurrer to the answer and denied the motion for judgment on the pleadings.

Young, Moore & Henderson, by B. T. Henderson II and John C. B. Regan III for defendant appellant.

Dupree, Weaver, Horton, Cockman & Alvis, by F. T. Dupree, Jr., and John E. Aldridge, Jr. for plaintiff appellee.

LAKE, J.

[1] The sole question before us is, What is the meaning of the language used in this policy of insurance? This is a question of law. *Lowe v. Jackson*, 263 N.C. 634, 140 S.E. 2d 1; *Parker v. Insurance Co.*, 259 N.C. 115, 130 S.E. 2d 36. The rules for determining it have long been established.

[2-4] The words used in the policy having been selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company. *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102; *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410; *Mills v. Insurance Co.*, 261 N.C. 546, 135 S.E. 2d 586. However, ambiguity in the terms of an insurance policy is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning. No ambiguity, calling the above rule of construction into play, exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. *Squires v. Insurance Co.*, 250 N.C. 580, 108 S.E. 2d 908. If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay. *Williams v. Insurance Co., supra; Huffman v. Insurance Co.*, 264 N.C. 335, 141 S.E. 2d 496; *Motor Co. v. Insurance Co.*, 233 N.C. 251, 63 S.E. 2d 538.

[5-7] As in other contracts, the objective of construction of terms in an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued. *Motor Co. v. Insurance Co., supra; Kirkley v. Insurance Co.*, 232 N.C. 292, 59 S.E. 2d 629. When the policy contains a definition of a term used in it, this is the meaning which must be given to that term wherever it appears in the policy, unless the context clearly requires otherwise. *Kirk v. Insurance Co.*, 254 N.C. 651, 119 S.E. 2d 645. In the absence of such definition, nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise. *Peirson v. Insurance Co.*, 249 N.C. 580, 107 S.E. 2d 137. If such a word has more than one meaning in its ordinary usage and if the context does not indicate clearly the one intended, it is to be given the meaning most favorable to the policyholder, or beneficiary, since the insurance company selected the word for use.

[8-9] Where the immediate context in which words are used is not clearly indicative of the meaning intended, resort may be had to other portions of the policy and all clauses of it are to be construed, if possible, so as to bring them into harmony. *Peirson v. Insurance Co., supra.* Each word is deemed to have been put into the policy for a purpose and will be given effect, if that can be done by any reasonable construction in accordance with the foregoing principles. *Williams v. Insurance Co., supra.*

[10] Subject to these principles of construction, exclusions from, conditions upon and limitations of undertakings by the company, otherwise contained in the policy, are to be construed strictly so as to provide the coverage, which would otherwise be afforded by the policy. *Insurance Co. v. Insurance Co.,* 269 N.C. 341, 152 S.E. 2d 436; *Thompson v. Accident Association,* 209 N.C. 678, 184 S.E. 695.

[11] We turn now to the application of these principles of construction to the terms of this policy. The policy is one contract, not two separate contracts. Under it, two automobiles are insured. By its express provision, the terms of the policy apply "separately" to each automobile. This does not make two separate contracts out of the policy. It merely has the effect of repeating, as to each automobile, all of the terms applicable to the medical payments coverage provision (or such other coverage as may be in question). These terms, as applied with reference to each vehicle, must be interpreted in the context of the entire policy unless the immediate context requires otherwise.

The Court of Appeals took the contrary view (i.e., that this policy is to be construed as if it were two separate, independent policies), which finds support in the following authorities: *Greer v. Associated Indemnity Corp.,* 371 F. 2d 29 (the parties being in agreement upon this proposition, it was not presented to the court as a question in controversy); *Travelers Indemnity Co. v. Watson,* 111 Ga. App. 98, 140 S.E. 2d 505; *Southwestern Fire and Casualty Co. v. Atkins,* 346 S.W. 2d 892 (Tex. Civ. App.); *Cockrum v. Travelers Indemnity Co.,* 420 S.W. 2d 230 (Tex. Civ. App.); 8 Appleman, Insurance Law and Practice, § 4896, 1969 pocket parts. See also: *Kansas City Fire & Marine Insurance Co. v. Epperson,* 234 Ark. 1100, 356 S.W. 2d 613, and the dissenting opinion of Tate, J., in *Odom v. American Insurance Co.,* 213 So. 2d 359 (La. Ct. App.). To the contrary, see *Pacific Indemnity Co. v. Thompson,* 56 Wash. 2d 715, 355 P 2d 12. We do not have before us the question of the maximum recovery afforded by two separate policies written by the

same insurance company upon two separate automobiles owned by the same insured and we express no opinion thereon.

In this policy, the company undertook to pay expenses incurred by or for Mr. Barnes for medical and other services rendered to or for him in consequence of bodily injuries sustained by him as the result of an accident of any one of the following three types: (a) While he occupied "the owned automobile"; (b) while he occupied "a non-owned automobile"; or (c) if he was "struck by an automobile."

[12] The term "struck by an automobile" is not defined in the policy. Consequently, it is to be given the meaning most favorable to the insured which is consistent with the use of the term in ordinary speech. In strict accuracy, the term is limited to a situation in which there is direct, physical contact between the body of the insured and an automobile. In normal speech the term has, however, a broader coverage and would include one who sustains bodily injury through the striking by an automobile of another vehicle or other object, in or upon which the injured person was. Thus, the term "struck by an automobile," as used in this policy, includes, nothing else appearing, one who is injured when the vehicle, occupied by him, is struck by another automobile and is not limited to collisions between automobiles and pedestrians, or to other situations involving physical contact between the body of the claimant and the automobile in question. *Bates v. United Security Insurance Co.*, 163 N.W. 2d 390 (Iowa); *Hale v. Allstate Insurance Co.*, 162 Texas 65, 344 S.W. 2d 430; *Cockrum v. Travelers Indemnity Co., supra.*

We do not agree, however, with the conclusion of the Supreme Court of Texas in *Hale v. Allstate Insurance Co., supra,* to the effect that the three types of accident covered by this policy are not mutually exclusive but are overlapping coverages. While the term "struck by an automobile," standing alone, would include injury sustained by the insured when "the owned automobile" occupied by him was struck by the automobile of another, we think the context in which the term appears in this policy clearly shows it was not so intended here.

[13] Assuming the insured owned but one automobile and that, therefore, the policy dealt with but one "owned automobile," it seems clear to us that the purpose of this policy was to provide medical payments coverage to the insured for any injury sustained by him as the result of an accident while he was occupying that automobile, whether the cause of the accident be the striking of his vehicle by another automobile or not. Similarly, the intent of the

policy was to afford such coverage to him while he was occupying a "non-owned automobile," whatever the cause of the accident from which the injury resulted. The purpose of provision (c), therefore, seems clearly to have been to afford coverage to the insured when "struck by an automobile," while he was neither the occupant of "the owned automobile" nor the occupant of "a non-owned automobile."

[14, 15] The policy defines "owned automobile" and "non-owned automobile." Therefore, these terms must be so construed in the coverage clause of the policy. Had there been no separate premium paid for the Ford pickup truck in connection with medical payments coverage, though the pickup was owned by the insured in the ordinary meaning of that term, it would not have been "the owned automobile" within the coverage of the policy, nor would it have been a "non-owned automobile." Thus, in that event, the insured, the members of his family and others riding in the Ford pickup truck would not have had the benefit of the medical payments coverage afforded by this policy, unless the accident which caused their injury was due to the truck's being struck by another automobile. The purpose of the inclusion of the Ford pickup truck in the declarations page of this policy and of the payment of the premium on account of the truck was to provide medical payments coverage to Mr. Barnes, members of his family and others if they should be injured in an accident while riding in this truck, irrespective of the cause of the accident. We deem it unrealistic to hold that such inclusion of the truck upon the declarations page of the policy and such premium paid on account thereof were for the purpose of doubling the amount of medical payments coverage afforded by the policy to Mr. Barnes, members of his family and others while occupying the Pontiac automobile.

The declarations page of the policy states that the limit of the company's liability for medical payments is "5,000 each person." The declarations page states that this limit is "subject to all the terms of this policy having reference thereto." What are they?

The only other provision of the policy "having reference" to the limit of the company's liability for medical payments is:

> "*Limit of Liability:* The limit of liability for medical payments stated in the declarations as applicable to 'each person' is the limit of the company's liability for *all* expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident." (Emphasis added.)

[16] By virtue of the provision for separate application of the

terms of the policy to each automobile designated on the declarations page, this "limit of liability" must be deemed to have been repeated as to each such automobile. We find nothing in the terms of this policy "having reference" to the limit of the company's liability which indicates, or which could reasonably have been interpreted by the insured at the time he received the policy to indicate an intention to afford to him a coverage of $10,000 for medical payments on account of bodily injuries sustained by him in a collision with the vehicle of another person while he was occupying the Pontiac automobile.

Part I of the policy, dealing with the coverage of the insured against liability to others, contains the express statement that "the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability." We are advised by the plaintiff's brief that the "1967 standard provisions" of such policies now include a similar provision to the effect that, regardless of the number of automobiles to which the policy applies, the company's liability for medical payments to each person, stated on the declarations page of the policy, is the limit of its liability for all damages sustained by one person as the result of any one occurrence. For the language so used by one company, at least, see: *Hansen v. Liberty Mutual Fire Insurance Co.*, 116 Ga. App. 528, 157 S.E. 2d 768.

[17, 18] Obviously, had such a provision been inserted in the medical payments coverage provision of the policy issued to Mr. Barnes, there would be no basis whatever for the plaintiff's present contention. It does not follow, however, that the insertion of such provision in the liability section of the policy and the omission of such provision from the medical payments section made the latter ambiguous, or clearly showed an intent to provide double coverage for an injury to the insured in a collision with the vehicle of another while the insured was riding in the Pontiac automobile. Nor does the fact that the company has now included such provision in the medical payments section show that it recognized a preexisting ambiguity therein. To insert a provision which will eliminate the remotest possibility of litigation upon a given theory is not to be deemed a recognition of the reasonableness of such theory in the absence of such provision in the policy.

We are not unmindful of the fact that, as stated by the Court of Appeals, the view we take of this matter is contrary to decisions of other courts for whose views we entertain great respect. See: *Kansas City Fire and Marine Insurance Co. v. Epperson, supra; Southwestern Fire and Casualty Co. v. Atkins, supra; Government*

Employees Insurance Co. v. Sweet, 186 So. 2d 95, 21 A.L.R. 3rd 895 (Fla. Ct. App.); *Travelers Indemnity Co. v. Watson, supra; Lavin v. State Farm Mutual Automobile Insurance Co.,* 193 Kansas 22, 391 P 2d 992 (three separate policies on three different automobiles); *Central Surety and Insurance Corp. v. Elder,* 204 Va. 192, 129 S.E. 2d 651. See also: *Greer v. Associated Indemnity Corp., supra; Allstate Insurance Co. v. Mole,* 414 F 2d 204 (in which the Court of Appeals for the Fifth Circuit, in a Florida case before it on the ground of diversity of citizenship, refused to apply the Florida construction of medical payments coverage to liability coverage); 8 Appleman, Insurance Law and Practice, § 4896, 1969 pocket parts.

Cases reaching the same result herein reached by us are *Sullivan v. Royal Exchange Assurance,* 181 Cal. App. 2d 644, 5 Cal. Rptr. 878; *Guillory v. Grain Dealers Mutual Insurance Co.,* 203 So. 2d 762 (La. Ct. App.); *Odom v. American Insurance Co., supra.*

The briefs of the parties and our own research indicate that this question has not been presented to the courts of any jurisdiction other than those above noted. As appears in the annotation upon this subject in 21 A.L.R. 3rd 895, the courts which have allowed additional recovery because of more than one car being covered by the policy are not in agreement as to the reason for such conclusion. We do not find any of the reasons suggested therein persuasive.

In the Arkansas (*Epperson*), Texas (*Atkins*) and Georgia (*Watson*) cases, the courts rested their decisions, at least in part, upon the theory, which we reject, that the single policy is to be construed as if there were a separate, independent policy on each automobile of the policyholder. In the Kansas (*Lavin*) case, there actually were three such separate, independent policies, which the court said created "a situation where two constructions may be placed on the exclusion clauses in regard to insuring agreements."

In the Arkansas case (*Epperson*), the medical payments clause did not specify, as does the policy before us, the three types of accident for which coverage was afforded. There the court said: "[T]he policy afforded other coverage [i.e., other than liability insurance] having no connection with either insured automobile. The present claim falls in the second category; that is, medical services were to be provided if Epperson or certain members of his family should be injured in any automobile accident, regardless of whether either insured vehicle was involved. The record does not tell us whether Miss Epperson was in one of the insured cars when she was hurt. Under the terms of the contract that fact was immaterial."

Likewise, the Florida case (*Sweet*), the Georgia case(*Watson*), the Texas case (*Atkins*) and the Virginia case (*Elder*) involved policies not identical with the one before us. In each of those policies medical payments coverage was afforded to the policyholder and members of his family "while occupying or through being struck by an automobile."

The Florida Court allowed recovery up to the stated limit multiplied by the number of vehicles designated in the policy on the ground that there was "no way to relate coverage to either" automobile of the policyholder since the policy made no distinction between injuries "sustained while the named insured was occupying or struck by either one or the other of the automobiles described in the policy or by an automobile not described in the policy."

The Texas Court said that, unless it multiplied the stated limit of coverage by the number of automobiles designated in the policy, the insured would be "no better off for having taken out medical payments on both cars than on one car." Under the terms of the policy there involved, the insured, without payment of the second premium, would have had coverage if injured by accident while occupying the second vehicle designated in the policy even though the cause of the accident was not the striking of such vehicle by the automobile of another. As above stated, under the policy before us this would not have been true and by paying the premium for the second car the policyholder and members of his family and other occupants of that car were insured against medical expense due to injuries by accident not caused by a collision with another vehicle. This additional coverage purchased with the second premium was a substantial consideration therefor and distinguishes the case before us from those above mentioned.

In the *Elder* case, the wife of the policyholder was injured while a passenger in a vehicle owned and operated by another. Since the policy afforded medical payments coverage "while occupying * * * an automobile," she was covered. The conclusion of the Virginia Court that the provision in the policy limiting the amount recoverable was ambiguous was quite obviously influenced by the fact that the insurance company's own claim superintendent, in a letter written to the plaintiff's counsel after the filing of her claim, construed the policy as providing coverage up to the stated limit multiplied by the number of cars designated in the policy.

[19] In our view the plain and ordinary meaning of the words used in the policy before us, construed pursuant to the above stated rules for construction of insurance policies, leads inescapably to these

conclusions: (1) The accident in which Mr. Barnes sustained his injuries was not of the type covered by Item (c) of the medical payments coverage provision; and (2) the policy limits the company's liability for medical expenses for injuries sustained by him in an accident while he was occupying "the owned automobile" (the Pontiac) to $5,000. Consequently, we hold that the judgment of the District Court of Wake County was correct and its reversal by the Court of Appeals was error.

Reversed.

BOBBITT, C.J., dissenting.

The policy provides: "When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each. . . ." A separate premium was established and paid for a medical payments clause in respect of each of the two motor vehicles described in the policy. In my view, defendant's liability is the same as if defendant had issued a separate policy on each motor vehicle. Hence, for the reasons stated by Campbell, J., in his opinion for the Court of Appeals and in accord with the weight of authority in other jurisdictions, I vote to affirm the decision of the Court of Appeals. Under the rule adopted by the majority, a person who owns two or more motor vehicles would do well to have each *separately insured* by the same or different companies.

SHARP, J., joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOSE RIERA

No. 6

(Filed 11 March 1970)

1. Narcotics § 4— possession for purpose of sale — prima facie case — sufficiency of evidence

In a prosecution for possession of barbiturates for the purpose of sale, the State's evidence *is held* sufficient to be submitted to the jury under the provision of G.S. 90-113.2(5) making the possession of 100 or more capsules *prima facie* evidence that such possession is for purpose of sale, where the evidence tends to show that 205 capsules were found concealed in defendant's home, that an SBI chemist tested three or four of the capsules and found them to contain barbiturates, and that all of the capsules

were of identical coloration and had the same code number "Lilly F65" impressed on them.

2. Evidence § 8— prima facie case

A *prima facie* case does nothing more than carry the case to the jury for its determination.

3. Evidence § 8; Criminal Law § 32— prima facie evidence

Prima facie evidence is no more than sufficient evidence to establish the vital facts without further proof, if it satisfies the jury.

4. Criminal Law § 103— the trial — function of jury — proof of guilt

In a criminal case the jury is at full liberty to acquit the defendant if it is not satisfied from all the evidence — including *prima facie* evidence — that defendant's guilt has been proven beyond a reasonable doubt.

5. Criminal Law § 32— inferences created by statute — effect

The inference or conclusion which may be drawn from certain facts recited in a criminal statute may justify, but not compel, a verdict adverse to the defendant.

6. Criminal Law § 32— prima facie evidence — burden of proof

Ordinarily, the establishment of *prima facie* evidence does not shift the burden of the issue from the State to the defendant.

7. Narcotics § 1; Criminal Law § 32— prosecution — negativing of exceptions

In a prosecution under Article 5A of G.S. Ch. 90, the Uniform Narcotic Drug Act, it is not necessary for the State to offer proof negativing any exception, excuse, proviso, or exemption contained in Article 5A. G.S. 90-113.4.

8. Indictment and Warrant § 9— charge of crime

An indictment must allege all the elements of the offense charged.

9. Constitutional Law § 28— defendant's right to be informed of crime

A defendant is entitled to be informed of the accusation against him and to be tried accordingly.

10. Criminal Law § 115— conviction on lesser included offense

A defendant indicted for a criminal offense may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment. G.S. 15-170.

11. Criminal Law § 115— lesser included offense — necessity for instructions

Where there is evidence of defendant's guilt of a lesser included offense, the court must charge thereon even when there is no specific prayer for the instruction; error in failing to do so will not be cured by a verdict finding defendant guilty of a higher degree of the same crime.

12. Narcotics § 1— elements of the offenses — defenses — exemptions and exceptions

The exceptions to and the exemptions from the provisions of G.S. 90-113.2(3) and G.S. 90-113.2(5) are not constituent elements of the statutory crimes, but are matters which defendant may prove as defenses to the charges created by the respective statutes.

13. Narcotics § 1— felony prosecution — lesser included offense of possession for purpose of sale

The misdemeanor of the unlawful possession of barbiturates, G.S. 90-113.2(3), is a lesser included offense of the felony of possession of barbiturates for the purpose of sale, G.S. 90-113.2(5).

14. Narcotics § 4— felony prosecution — evidence of misdemeanor — submission of issue

In a prosecution on indictment charging defendant with the felony of possession of 205 capsules of a barbiturate for the purpose of sale, there was ample evidence to support a jury finding that defendant was guilty of the lesser included misdemeanor of unlawful possession of barbiturates, and the trial court erred in failing to submit the misdemeanor issue to the jury.

15. Indictment and Warrant § 9— charge of statutory crime — use of "and"

Where a statute sets forth several ways by which the offense may be committed, the warrant or indictment correctly charges conjunctively.

ON certiorari to North Carolina Court of Appeals to review its decision, reported in 6 N.C. App. 381.

Defendant was tried before a jury in Cumberland County Superior Court on the following bill of indictment:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Jose A. Riera, late of the County of Cumberland, on or about the 14th day of October, 1968, with force and arms, at and in the County aforesaid, unlawfully, willfully and feloniously did possess and have under his control at 312 Elizabeth Street, Fayetteville, North Carolina, a barbiturate drug, to wit: 205 capsules of a barbiturate preparation known as Tuinal, for the purpose of sale, barber (sic), exchange, supplying, giving away and furnishing, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State."

The State offered evidence which tended to show that police officers, armed with a search warrant, conducted a search of defendant's home and found a box containing 205 capsules. The box also contained several small cellophane-type envelopes and several manila-

type envelopes. Each of the 205 capsules was of identical coloration — half red and half blue. Each had the identical code number "Lilly F 65" impressed upon it. State's witness William S. Best, who was qualified as an expert witness in the field of chemical analysis, testified that he received 205 capsules from SBI Agent Stewart, that he tested some of them and found that they contained a combination of two separate and distinct barbiturates, amytal and seconal. He stated that the code number "65" on the Eli Lilly product indicated that the capsules were "Tuinal", a brand name adopted by Eli Lilly for capsules containing amytal sodium and seconal sodium. He stated that he did not test all 205 capsules and that he did not know exactly how many he did test. The witness said that he usually tested three or four and looked at the others to see if they all had the same physical appearance.

The State further offered evidence which tended to show that the capsules tested by the witness Best were the same capsules found in defendant's home.

Defendant's evidence tended to show that he was a member of the armed services, stationed at Fort Bragg, and that he found the box containing the capsules and envelopes behind a service club at the training center some three or four weeks before the search; he did not intend to use or sell them and he did not know what they were; that it was his intention to throw them out, but after putting them in the dresser he had forgotten all about them.

The jury returned a verdict of "guilty of possession of narcotic drugs for the purpose of sale." The jury was polled, and all the jurors assented to the verdict. The court thereupon entered judgment committing defendant to the custody of the Commissioner of Corrections for not less than two nor more than four years, to be assigned to do labor as provided by law.

Defendant appealed to the North Carolina Court of Appeals and that court found no error in the trial below. Defendant petitioned this Court for certiorari to the North Carolina Court of Appeals to review its decision pursuant to G.S. 7A-31(c)(1) and (2). The petition was allowed by order dated 10 December 1969.

Attorney General Morgan and Trial Attorney James E. Magner, Jr., for the State.

Downing, Downing and David for defendant.

BRANCH, J.

Defendant assigns as error the trial court's failure to allow his motion for judgment as of nonsuit.

The portions of the statute relevant to decision in this case are as follows:

"§ 90-113.2. Prohibited acts. — It shall be unlawful:

"(3) For any person to possess a barbiturate or stimulant drug unless such person obtained such barbiturate or stimulant drug in good faith on the prescription of a practitioner in accordance with subdivision (1)a or in accordance with subdivision (1)c of this section or in good faith from a person licensed by the laws of any other state or the District of Columbia to prescribe or dispense barbiturate or stimulant drugs.

. . . .

"(5) For any person to possess for the purpose of sale, barter, exchange, dispensing, supplying, giving away, or furnishing any barbiturate or stimulant drugs; and, provided, the possession of one hundred or more tablets, capsules or other dosage forms containing either barbiturate or stimulant drugs, or a combination of both, shall be prima facie evidence that such possession is for the purpose of sale, barter, exchange, dispensing, supplying, giving away, or furnishing."

"§ 90-113.8. Penalties. — (a) Any person who violates, or who conspires with, aids, abets, or procures another to violate, G.S. 90-113.2(5) relating to the illegal possession for the purpose of sale, barter, exchange, dispensing, supplying, giving away, or furnishing of barbiturate or stimulant drugs, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than six months, nor more than five years. Upon a second or subsequent conviction for a violation of G.S. 90-113.2(5) the punishment shall be imprisonment for not less than one nor more than ten years.

"(b) Any person who violates, or conspires with, aids, abets, or procures another to violate, any provision of this article, other than G.S. 90-113.2(5), shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars ($1,000.00), or by imprisonment for not more than two years, or both, in the discretion of the court. Upon a second or subsequent conviction for a violation of any provision of this article, other than G.S. 90-113.2(5), the de-

fendant shall be guilty of a felony and shall be fined or imprisoned, or both, in the discretion of the court."

G.S. 90-113.2 and G.S. 90-113.3 enumerate certain specific exceptions to and exemptions from the prohibited acts contained in Article 5A, Chapter 90.

[1] Defendant does not challenge the testimony of witness William Best to the effect that the capsules actually tested contained the barbiturate prohibited by statute. He simply contends that, without testing 100 or more of the capsules, the testimony of the witness does not create prima facie evidence that defendant's possession of the capsules was for the purpose of sale, barter, exchange, dispensing, supplying, giving away, or furnishing, and that the State's other evidence is not sufficient, standing alone, to carry the case to the jury.

The well-recognized rules regarding sufficiency of evidence to withstand nonsuit are stated in *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374, as follows:

> "The test of its sufficiency to withstand the motion for nonsuit, however, is the same whether the evidence is circumstantial, direct, or both. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. '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. . . . 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."

An examination of the Addendum to the Record and the transcript of evidence taken in this case reveals testimony by the witness Best that he selected at random some of the capsules delivered to him for testing, and by chemical test found the capsules to contain two barbiturates, namely, seconal and amytal, which are the constituent parts of a drug sold under the name Tuinal; the remaining capsules were all identical in coloration, each had an identical code number — "Lilly F 65" — impressed upon it, and the code number indicated that it contained Tuinal, the brand name adopted by the Eli Lilly Company for its product containing component parts identical to those found by Mr. Best in the capsules tested.

From this evidence the jury could find that defendant had in his possession 100 or more tablets containing barbiturate drugs. If this finding be made, the fact so found is prima facie evidence that the possession was for the purpose of sale, barter, exchange, dispensing, supplying, giving away, or furnishing.

[2-7] A prima facie case does nothing more than carry the case to the jury for its determination. *Owens v. Kelly,* 240 N.C. 770, 84 S.E. 2d 163. Likewise, prima facie evidence is no more than sufficient evidence to establish the vital facts without further proof, if it satisfies the jury. In a criminal case the jury is at full liberty to acquit the defendant if it is not satisfied from all the evidence — including prima facie evidence — that defendant's guilt has been proven beyond a reasonable doubt. In short, the inference or conclusion which may be drawn from certain facts recited in the statute may justify, but not compel, a verdict adverse to the defendant. Ordinarily, the establishment of prima facie evidence does not shift the burden of the issue from the State to the defendant. *State v. Bryant,* 245 N.C. 645, 97 S.E. 2d 264; *State v. Wilkerson,* 164 N.C. 431, 79 S.E. 888. However, defendant is indicted under Article 5A, Chapter 90, of the General Statutes, and G.S. 90-113.4 (contained in Article 5A) specifically provided:

> "In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this article, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant."

Thus it is not necessary for the State to offer proof negativing any such exception, excuse, proviso or exemption contained in Article 5A. G.S. 90-113.4; *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165.

In the instant case the prima facie evidence relating to possession of the barbiturate drugs for the purpose of sale, barter, exchange, dispensing, supplying, giving away, or furnishing is reinforced by other evidence showing concealment and the presence of envelopes within the box containing the capsules, which permits further inference consistent with barter, sale, exchange, dispensing, supplying, giving away, or furnishing.

[1] We hold that the Court of Appeals properly decided that "There was ample evidence to require submission of the case to the jury."

Defendant next assigns as error the failure of the trial judge to

submit to and instruct the jury upon the question of defendant's guilt of the misdemeanor, possession of barbiturate drugs, G.S. 90-113.2(3).

[8-11] It is a universal rule that an indictment must allege all the elements of the offense charged. A defendant is entitled to be informed of the accusation against him and to be tried accordingly. *State v. Wilkerson, supra; State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917. It is also well recognized in North Carolina that when a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment. G.S. 15-170; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. Rorie,* 252 N.C. 579, 114 S.E. 2d 233; Wharton's Criminal Law and Procedure, Vol. 4 Sec. 1799, at 631. Further, when such lesser included offense is supported by some evidence, a "defendant is entitled to have the different views arising on the evidence presented to the jury upon proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge." *State v. Childress,* 228 N.C. 208, 45 S.E. 2d 42. *State v. Burnett,* 213 N.C. 153, 195 S.E. 356; *State v. Keaton,* 206 N.C. 682. 175 S.E. 296. When there is evidence to support the milder verdict, the court must charge upon it even when there is no specific prayer for the instruction. *State v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83.

Thus, in order to sustain this assignment of error it must be established (1) that the misdemeanor of possession of barbiturate or stimulant drugs (G.S. 90-113.2(3)) is a lesser included offense of the felony of possession of barbiturate or stimulant drugs for sale, barter, exchange, dispensing, supplying, giving away, or furnishing (G.S. 90-113.2(5)) and (2) there must be some evidence that the lesser degree of the crime has been committed.

The Court of Appeals, in deciding that G.S. 90-113.2(3) was not a lesser included offense of G.S. 90-113.2(5), relied upon the case of *State v. Cofield,* 247 N.C. 185, 100 S.E. 2d 355. There the Court, in construing G.S. 18-50, which makes it a general misdemeanor to possess intoxicating liquor for the purpose of sale, and G.S. 18-48, which makes it a general misdemeanor to possess whiskey upon which taxes imposed by the United States Congress or the State of North

Carolina have not been paid, held that "Each statute creates a specific criminal offense, and a violation of G.S. 18-48 is not a lesser offense included in the offense defined in G.S. 18-50." In *Cofield* the Court cited *State v. Morgan*, 246 N.C. 596, 99 S.E. 2d 764; *State v. Daniels*, 244 N.C. 671, 94 S.E. 2d 799; *State v. Hall*, 240 N.C. 109, 81 S.E. 2d 189; *State v. Peterson*, 226 N.C. 255, 37 S.E. 2d 591; *State v. McNeill*, 225 N.C. 560, 35 S.E. 2d 629. An examination of these cited cases discloses that each cites as authority and relies upon the reasoning contained in the case of *State v. McNeill, supra.* In *McNeill* the defendant was charged by warrant with possession of illicit liquor for the purpose of sale, a violation of G.S. 18-50. There was no other count or charge contained in the warrant. The Court, holding that there was insufficient evidence to go to the jury as to possession for the purpose of sale and that defendant could not be convicted of possessing nontaxpaid liquor, stated:

> ". . . (T)he charge contained in the warrant under which the defendant was held to answer was possession of illicit liquor for the purpose of sale. There was no other count or other charge in the warrant. Manifestly the defendant was charged with violation of G.S., 18-50. She could not be convicted under 18-48. These two statutes define misdemeanors and are on equal footing. Neither prescribes or includes a lesser offense or one of lesser degree. G.S., 18-48, may not be regarded as constituting a lesser or different offense embraced in G.S., 18-50."

This line of cases is distinguishable from the instant case, because in the cases construing G.S. 18-48 and 18-50 there was no *lesser* offense to be included. Both statutes create misdemeanors of the same dignity, and a violation of either of the statutes would warrant identical punishment.

[12] The indictment in the instant case, in part, charged that defendant "unlawfully, wilfully and feloniously did possess and have under his control . . . a barbiturate drug . . . for the purpose of sale, barter, exchange, dispensing, supplying, giving away, and furnishing." The exceptions to and exemptions from the provisions of the two statutes here considered are not constituent elements of the crimes which they create, but are matters which defendant *may* prove as defenses to the charges created by the respective statutes. *State v. Cooke, supra.* Thus, to prove the felony as charged, the State must prove (1) unlawful possession of the barbiturate and (2) that it was possessed "for the purpose of sale, barter, exchange, . . ." To prove the misdemeanor, G.S. 90-113.2(3), the State must only prove unlawful possession of the drug.

[13] Although not separately stated, the indictment in the instant case charging the felony, G.S. 90-113.2(5), included all the elements necessary to prove the misdemeanor, G.S. 90-113.2(3), and these elements could be proven by proof of the facts alleged in the indictment. We therefore hold that the misdemeanor created by G.S. 90-113.2(3) is a lesser included offense of the crime alleged in the bill of indictment.

[14] There was ample evidence which would allow the jury to find that the included crime of less degree was committed by the defendant. Thus, the trial court erred when it failed to submit to and instruct the jury upon the question of defendant's guilt of the misdemeanor, G.S. 90-113.2(3).

[15] Finally, defendant requests the court, in the exercise of its supervisory jurisdiction, to examine the bill of indictment. He contends that there was jurisdictional failure because the bill alleges that the defendant possessed the barbiturates for the purpose of sale, barter, exchange, supplying, giving away, *and* furnishing. The statute has the word *"or"* between the words "giving away" and the word "furnishing."

This contention is without merit. The rule in North Carolina is that where a statute sets forth several ways by which the offense may be committed, the warrant or indictment correctly charges conjunctively. *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297; *State v. Albarty,* 238 N.C. 130, 76 S.E. 2d 381; *State v. Anderson and State v. Brown,* 265 N.C. 548, 144 S.E. 2d 581.

This case is remanded to the North Carolina Court of Appeals with direction that it remand it to Superior Court of Cumberland County for a new trial in accordance with the principles herein stated.

New trial.

PATRICIA MORSE v. KATHRYN F. CURTIS DOING BUSINESS AS CAMP ILLAHEE

— AND —

BLEECKER MORSE v. KATHRYN F. CURTIS DOING BUSINESS AS CAMP ILLAHEE

No. 7

(Filed 11 March 1970)

1. Courts § 3— superior court — jurisdiction — actions for personal injuries

The superior court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute. Article IV, § 2, N. C. Constitution; G.S. 7A-240; G.S. 7A-242.

2. Courts § 3— superior court — jurisdiction — workmen's compensation

By statute the superior court is divested of original jurisdiction of all actions which come within the provisions of the Workmen's Compensation Act.

3. Master and Servant § 85— jurisdiction of Industrial Commission

The Industrial Commission is not a court of general jurisdiction but is an administrative board with quasi-judicial functions, and has only that jurisdiction conferred by statute, which jurisdiction may not be conferred or enlarged by act or consent of the parties.

4. Master and Servant § 93— workmen's compensation claim — determination of jurisdiction by Industrial Commission

When the jurisdiction of the Industrial Commission is invoked by the filing of a workmen's compensation claim with it, the Commission's first order of business is to determine if the claim is properly before it and then proceed according to law.

5. Master and Servant § 87— workmen's compensation claim — admission of liability under Compensation Act — subsequent common-law tort action

Where plaintiff had filed a workmen's compensation claim with the Industrial Commission and defendant had admitted liability under the Workmen's Compensation Act, plaintiff was not precluded from thereafter filing in the superior court a civil action for personal injuries, absent an unchallenged determination of jurisdiction by the Industrial Commission coupled with action resulting in recovery by plaintiff, or a challenge to its jurisdiction resulting in a final appellate holding establishing the Commission's jurisdiction.

6. Master and Servant § 87; Pleadings § 15; Courts § 2— action for personal injuries — plea in bar — workmen's compensation action — procedure by trial court

Where defendant alleged as a plea in bar to plaintiff's action for personal injuries that plaintiff was an employee of defendant at the time she

was injured and was limited to an action in the Industrial Commission under the Workmen's Compensation Act, the trial court, sitting without a jury by consent of the parties, followed the proper procedure in determining the plea in bar by hearing evidence offered by the parties, finding facts, reaching conclusions of law and thereupon entering judgment, since the court's determination of the plea in bar necessarily exercised the inherent judicial power of the court to determine its jurisdiction.

7. Appeal and Error § 57— review of findings of fact

Findings of fact by a trial judge are conclusive when supported by competent evidence, even when there is a conflict in the evidence, but an exception to a finding of fact not supported by competent evidence must be sustained.

8. Master and Servant § 87; Pleadings § 15; Appeal and Error § 57— action for personal injuries — plea in bar — workmen's compensation action — employee or independent contractor — sufficiency of evidence to support court's findings

In this hearing upon defendant's plea in bar to plaintiff's action for personal injuries on the ground that plaintiff was an employee of defendant at the time she was injured and was limited to an action in the Industrial Commission under the Workmen's Compensation Act, the record evidence does not support the trial judge's findings of fact upon which he based his conclusions of law that plaintiff, who had contracted to work as a counselor and head of the saddle seat riding program at defendant's summer camp, was not an employee of defendant but was an independent contractor, and that the superior court had jurisdiction of the subject matter, and defendant's plea in bar was improperly overruled.

ON appeal from, and on certiorari to North Carolina Court of Appeals to review its decision reported in 6 N.C. App. 591.

Patricia Morse instituted her civil action in Henderson County Superior Court on 6 June 1967, by which she seeks damages for personal injuries sustained by her on 15 August 1964 at Camp Illahee near Brevard, North Carolina. On the same day her father, Bleecker Morse, instituted a civil action in the same court to recover for medical expenses incurred by him as a result of the injuries incurred by Patricia Morse and for his loss of his daughter's services during her minority.

On 26 July 1966 Patricia Morse and her father had instituted civil actions in Henderson County Superior Court by issuance of summons, by which each sought similar relief as in the present actions. Upon issuance of summons, an order was obtained in each case granting an extension of time to file complaint. Complaints were never filed in those actions, and on 3 August 1966 Patricia Morse filed a claim with the North Carolina Industrial Commission for compensation under the Workmen's Compensation Act for the in-

juries sustained by her on 15 August 1964. On 6 June 1967, each plaintiff took a voluntary nonsuit as to the actions commenced on 26 July 1966, and on the same day instituted the civil actions now pending in Henderson County Superior Court. Defendant duly filed answer in each case and by her First Further Answer and Defense and as a plea in bar in each case, alleged:

"1. That at the time and on the occasion complained of in the complaint, plaintiff was an employee of the defendant in the conduct of the operation of Camp Illahee and was at the time and on the occasion complained of in the complaint within the course and scope of her employment and about the business of the defendant as employer, and both parties were thereby bound by and subject to the Workmen's Compensation Act of the State of North Carolina.

"2. That by reason of the fact that plaintiff was an employee and the defendant her employer subject to the provisions of the North Carolina Workmen's Compensation Act, the rights and remedies therein granted exclude all other rights and remedies of the said plaintiff as against the defendant as her employer, and the North Carolina Workmen's Compensation Act is here pleaded as a bar to the right to prosecute this action for that this Court does not have jurisdiction by reason of the relationship between plaintiff and defendant, and that exclusive jurisdiction of any rights of the plaintiff are in the Industrial Commission of the State of North Carolina.

"3. That the plaintiff, Patricia Morse, as employee, has made claim for compensation pursuant to the North Carolina Workmen's Compensation Act, and this defendant has admitted the employer-employee relationship and that her injury was caused by an accident arising out of the employment."

The cases were, by consent, consolidated for hearing without a jury on the pleas in bar before Judge W. K. McLean. Judge McLean heard the evidence, including the entire record of the previous court actions filed in 1966 and the record of Patricia Morse's claim previously filed with the North Carolina Industrial Commission. Other evidence heard will be considered in the opinion.

Judge McLean, after hearing all the evidence, entered judgment in which he concluded that Patricia Morse was an independent contractor and that jurisdiction of the subject matter was in Henderson County Superior Court, and thereupon overruled defendant's pleas in bar. Defendant appealed to the North Carolina Court of Appeals,

where the action of the trial court was affirmed. Defendant appealed and also filed petition with this Court for certiorari to the North Carolina Court of Appeals to review its decision pursuant to G.S. 7A-31(c)(1)(2) and (3). The petition was allowed by order dated 22 January 1970.

Uzzell and DuMont by Harry DuMont, and Francis M. Coiner for plaintiffs-appellees.

Landon Roberts, Ralph H. Ramsey, Jr., Ramsey, Hill & Smart for defendant-appellant.

BRANCH, J.

The question here presented for decision is: Did the Court of Appeals err in affirming the trial judge's action in overruling defendant's pleas in bar and allowing plaintiff's motion to strike defendant's entire First Further Answer and Defense?

Defendant first contends that when plaintiff Patricia Morse filed her claim with the Industrial Commission and the defendant thereafter admitted liability, the North Carolina Industrial Commission was invested with exclusive jurisdiction. In support of this position defendant cites and relies upon G.S. 97-9 and G.S. 97-10.1. We quote both sections:

> "§ 97-9. Employer to secure payment of compensation. — Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified."

> "§ 97-10.1. Other rights and remedies against employer excluded. — If the employee and the employer *are subject to* and have accepted and complied with the provisions of this article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death." (Emphasis added)

[1-3] The General Court of Justice consists of an appellate division, a Superior Court division, and a District Court division. The

Superior Court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute. Article IV, Section 2, North Carolina Constitution; G.S. 7A-240, G.S. 7A-242; *Bryant v. Dougherty,* 267 N.C. 545, 148 S.E. 2d 548. By statute the Superior Court is divested of original jurisdiction of all actions which come within the provisions of the Workmen's Compensation Act. *Neal v. Clary,* 259 N.C. 163, 130 S.E. 2d 39; *Thomason v. Cab Co.,* 235 N.C. 602, 70 S.E. 2d 706; *Hedgepeth v. Casualty Co.,* 209 N.C. 45, 182 S.E. 704. Conversely,

> "The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions and has a special or limited jurisdiction created by statute and confined to its terms. Its jurisdiction may not be enlarged or extended by act or consent of parties, nor may jurisdiction be conferred by agreement or waiver. *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673; *Reaves v. Mill Co.,* 216 N.C. 462, 5 S.E. 2d 305." *Letterlough v. Atkins,* 258 N.C. 166, 128 S.E. 2d 215.

In the case of *Hanks v. Utilities Commission,* 210 N.C. 312, 186 S.E. 252, the facts show that Curtis E. Hanks died by reason of injuries received while employed by Southern Public Utilities Company. His employer filed a report of the accident which resulted in Hanks' death with the Commission on its required forms in December 1929. Hanks' administrator filed an action in Superior Court of Wilkes County under provisions of the Federal Employers Liability Act. This action remained *in fieri* in Wilkes County Superior Court until 8 January 1935, when a voluntary nonsuit was taken. The first action taken before the North Carolina Industrial Commission by the Administrator of Hanks' estate was a formal petition for award and request for hearing on 23 March 1935 — more than five years after the date of death. The Workmen's Compensation Act at that time provided that right to compensation would be barred unless a claim was filed within one year of death. The defendant denied liability and contended that the plaintiff was barred because claim had not been filed within one year after the employee's death and because plaintiff had elected to proceed under the Federal Employer's Liability Act in Wilkes County Superior Court. The North Carolina Industrial Commission denied compensation and upon appeal the Superior Court overruled the Commission. This Court in reversing the action of the Superior Court stated:

> "The restriction upon proceeding in another forum is that a recovery in the one form of action bars recovery in the other. As

was said in *Phifer v. Berry,* 202 N.C. 388: 'He may recover by one of the alternate remedies, but not by both.'

. . . .

"The procedure upon the consideration and determination of a matter within the jurisdiction of the Industrial Commission, agreeable to the provisions of the act and the rules and regulations promulgated by the Commission, conforms as near as may be to the procedure in courts generally. By analogy, cases should be disposed of by some award, order, or judgment final in its effect, terminating the litigation. *Employers' Ins. Ass'n. v. Shilling,* 259 S.W., 236; *Todd v. Casualty Co.,* 18 S.W. (2d), 695. A final judgment is the conclusion of the law upon the established facts, pronounced by the court. *Lawrence v. Beck,* 185 N.C., 196; *Swain v. Bonner,* 189 N.C., 185.

"The record before us fails to show any final order or adjudication of any kind prior to the one appealed from.

"A claim for compensation lawfully constituted and pending before the Commission may not be dismissed without a hearing and without some proper form of final adjudication.

"No statute of limitations runs against a litigant while his case is pending in court."

See also *Pratt v. Upholstery Co.,* 252 N.C. 716, 115 S.E. 2d 27.

[4] The filing of plaintiff's claim with the Industrial Commission invoked its jurisdiction. When its jurisdiction is invoked, the Commission's first order of business is to determine if the claim is properly before it and then proceed according to law. *Letterlough v. Atkins, supra.*

[5] In the instant case there has been no recovery in either forum. The Industrial Commission has made no final order or adjudication of any kind. *A fortiori,* it has merely continued consideration of plaintiff's claim without taking any action to determine whether the parties are subject to the Workmen's Compensation Act. The only order determining any matter with finality is the one now before us from the Superior Court. Absent an unchallenged determination of jurisdiction coupled with action resulting in recovery by plaintiff, or a challenge to its jurisdiction resulting in a final appellate holding establishing the Commission's jurisdiction, plaintiff was not precluded from filing her action in Superior Court because she had previously filed claim with the Industrial Commission and defendant had thereafter admitted liability under the Workmen's Compensation Act.

[6] Consequently, Judge McLean, sitting without a jury, by consent of the parties, followed the proper *procedure* in determining the pleas in bar by hearing evidence offered by the parties, finding facts, reaching conclusions of law, and thereupon entering judgment. His determination of these particular pleas in bar necessarily exercised the inherent judicial power of the court to determine its jurisdiction. Manifestly, this determination of jurisdiction is subject to appellate review. *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E. 2d 806; *Jones v. Oil Co.*, 202 N.C. 328, 162 S.E. 741. By the judgment entered the trial judge overruled defendant's pleas in bar.

The findings of fact included the following:

"3. That the plaintiff, Patricia Morse, upon accepting employment pursuant to the written contract dated March 4, 1964, located and chose horses to be used by her as head of the saddle seat riding program at Camp Illahee, Inc., which was owned and operated by the defendant.

"4. That the plaintiff, Patricia Morse, was engaged during the 1964 camp season as head of the saddle seat program, and as such, had the independent use of her skill, knowledge and training in the execution of said program; was engaged as head of the saddle seat program because of her independent skill and occupation as a horseback riding instructor; that she was employed to perform said duties at the fixed price of $400.00 plus living expenses at the camp for the entire camp season; that said plaintiff in the performance of her duties had complete charge and control of said program, determining solely the type of instruction to be given and the times when such instruction was to be given, and was not subject to discharge for adopting one method of performing her duties rather than another; that said plaintiff was free to use such assistants in said program as she deemed proper, and had full control and the right to control such assistants; that said plaintiff in fact had full responsibility and control, including the right to control the saddle seat riding program at the defendant's camp during the 1964 camp season, more particularly, from June 25, 1964, up to and including August 15, 1964, the date of the occurrence giving rise to this action."

"9. That on the aforesaid occasion and prior thereto on August 15, 1964, the plaintiff, Patricia Morse, was not performing any of the duties for which she had been employed, nor had said plaintiff at any time been instructed not to use the aforesaid shed."

Based on these findings of fact, Judge McLean, *inter alia,* concluded as a matter of law:

> "That this Court has jurisdiction of the parties and the subject matter of these actions."
>
> "That the plaintiff, Patricia Morse, during the 1964 camp season and up to and including August 15, 1964, was not an employee of the defendant, but was an independent contractor."

In the landmark case of *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137, the Court enumerated elements ear-marking a contract as creating the relationship of employer and independent contractor as follows:

> "The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time."

Considering the relationship of employer-employee and employer-independent contractor in the case of *Scott v. Lumber Co.,* 232 N.C. 162, 59 S.E. 2d 425, the Court said:

> ". . . The test to be applied in determining whether the relationship of the parties under a contract for the performance of work is that of employer and employee, or that of employer and independent contractor is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right of control, it is immaterial whether he actually exercises it."

[7] We recognize the often-repeated rule that findings of fact by a trial judge are conclusive when supported by competent evidence, even when there is conflict in the evidence, but an exception to a finding of fact not supported by competent evidence must be sustained. *Horton v. Redevelopment Commission,* 264 N.C. 1, 140 S.E. 2d 728; *Insurance Co. v. Lambeth,* 250 N.C. 1, 108 S.E. 2d 36.

[8] The question crucial to decision in this case is whether the trial court correctly concluded that "The plaintiff, Patricia Morse,

during the 1964 camp season and up to and including August 15, 1964, was not an employee of the defendant, but was an independent contractor." If this conclusion was correctly reached, then defendant's pleas in bar were correctly overruled because the statute expressly provides that the Workmen's Compensation Act only applies where the employer-employee relationship exists. G.S. 97-2; *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E. 2d 240 (1966); *Hayes v. Elon College, supra.*

We must, therefore review the record to determine if the record evidence supports the findings of fact upon which this conclusion was based.

A portion of the evidence pertinent to decision in this case is summarized in part and quoted in part, as follows:

Plaintiff Patricia Morse, then age 20, sustained an injury on the premises of defendant on 15 August 1964; she had entered into a written contract (which has not been made a part of the record) to work as a counselor and head of the "saddle seat program" during the summer of 1964 for a salary of "$400 and something" plus board, lodging and laundry. Plaintiff, Patricia Morse, testified:

> "In 1964, at Camp Illahee, I was termed a senior counselor and head of the saddle seat riding department.
>
> . . . .
>
> "After the first week of camp, we were allowed one day a week, until the last week of camp and we were not allowed to leave.
>
> "When I was allowed one day a week after the first week of camp, I signed out when I took my time off, and I was then free to come either to my home or anywhere I wanted to go.
>
> ". . . As head of the saddle seat riding department, I instructed my little girls in the riding of horses. That program started at 6:30 A.M., and then we broke for breakfast, of course, and then we resumed again at 9 o'clock, from 9 until 11, classes and from 3 to 5 we had classes.
>
> "My routine and schedule began at 6:30 each morning. We had classes from 6:30 to 7:30. Your next class started at 9 — it had been a long time and I don't remember what time we had breakfast, but between 7:30 and 9 o'clock you had breakfast. During that period of time, I had the duty to sit at one of the tables with the little campers, which I rotated probably weekly. At each meal, whether breakfast, lunch or dinner, I sat at the

table with the campers, unless I had a day off. When I had a break for lunch, I came back and sat at the table and supervised the noon meals for the campers. I had classes in the afternoon and then I had dinner or the supper meal, at which time I sat at the table with the campers and supervised their meals.

"After supper at night, the activities varied. I was there approximately half an hour after dinner and went until about 8:30. Sometimes I assisted in their preparation and making sure the planned activities in the evening went along. Most of the time, we had people that planned the activities for us and we just enjoyed them. I went with my campers to enjoy the activities in the evening.

"Taps blew at 9 o'clock and I was to have the children in bed by a quarter of 9. Sometimes it was my responsibility to see that my children were in bed by 9 o'clock.

. . . .

". . . In 1964, as head of the saddle seat program, it was my duty to find horses, and I chose those horses. I determined which ones were to be rented or hired or used. During the year 1964, I set up the program for the saddle seat division."

The record further shows that there were more than five persons employed by defendant and that defendant listed Patricia Morse as an employee for Federal Insurance Contribution Act (F.I.C.A.) and for state and federal income tax purposes; that the F.I.C.A. taxes were paid by defendant for Patricia Morse for the year 1964. On 15 August 1964 no saddle seat riding was scheduled. On that day Patricia Morse and the other counselors were instructed by defendant to go down and move their personal automobiles so that the campers' parents could park their automobiles in that space. Although Patricia did not have a personal car on the premises, she accompanied the other counselors and, when the automobiles were moved, she and two other counselors went into a pump house on the premises to get out of the rain and to smoke a cigarette. After smoking a cigarette, plaintiff started out of the pump house to return to her cabin and her raincoat caught in the pump gears, causing her to react so as to receive serious injuries.

[8] A careful review of the record, including the evidence, findings of fact and conclusions of law, and an application of the legal principles hereinbefore set forth, clearly establish that plaintiff Patricia Morse did not possess the independence and other characteristics necessary to constitute her an independent contractor. Rather, a re-

view of the record evidence, which was substantially uncontroverted, compels a conclusion of law that, at the time she was injured the relation of employer-employee existed between defendant and Patricia Morse.

We note here, parenthetically, that defendant admitted liability under the Workmen's Compensation Act to the Industrial Commission and orally affirmed this admission upon argument in this Court.

The record evidence does not support the trial judge's findings upon which he based his conclusions of law that Patricia Morse was an independent contractor and that the Superior Court had jurisdiction of the subject matter.

Decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. WILLIAM NORMAN BARROW

No. 3

(Filed 11 March 1970)

1. Criminal Law § 98; Trial § 5— sequestration of witnesses — discretionary with court

It is the general rule in this State, in both civil and criminal cases, to separate witnesses and send them out of the hearing of the Court when requested, but this practice is discretionary with the trial judge and may not be claimed as a matter of right.

2. Criminal Law § 98— motion to sequester — review

A judge's refusal to sequester the State's witnesses is not reviewable unless an abuse of discretion is shown.

3. Criminal Law § 43; Homicide § 20— photograph of the deceased — admissibility

In a prosecution for homicide, the trial court properly admitted the photograph used by a State's witness to illustrate his testimony relating to the position and appearance of the deceased's body.

4. Criminal Law § 43— gruesome photographs — admissibility

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.

5. Criminal Law §§ 75, 86, 89— impeachment of defendant — use of statement not previously admitted in evidence — harmless error

In a homicide prosecution in which the State offered eyewitness testi-

mony that the defendant shot the deceased three times and the defendant on direct examination denied any recollection that he shot the deceased more than once, the defendant was not prejudiced by the solicitor's attempt to cross examine him with regard to his purported in-custody statement, not previously introduced, that he had shot the deceased three times, where the trial court, upon defendant's objection, struck all reference to the purported statement and instructed the jury not to consider it.

6. Criminal Law § 169— questions of solicitor — objection — prejudice

Where the court sustains objection to questions asked by the solicitor, no prejudice results.

7. Criminal Law § 169— striking of evidence — effect on jury

When all evidence of a particular character is stricken and the jury instructed not to consider it, any prejudice is ordinarily cured, unless the evidence stricken was so highly prejudicial that its effect cannot be erased from the minds of the jurors.

8. Criminal Law § 169— admission of technically incompetent evidence — harmless error

The admission of evidence, even though technically incompetent, will not be held prejudicial unless it is made to appear that defendant was prejudiced thereby and that a different result would have likely ensued had the evidence been excluded.

9. Criminal Law § 117— instructions — scrutiny of defendant's testimony

The trial court may properly instruct the jury to scrutinize carefully the testimony of defendant and to take into consideration the interest which he has in the verdict, but that if after such scrutiny the jury finds he was telling the truth, to give his testimony the same weight and credibility as that of any disinterested witness.

10. Homicide § 24— instructions — presumptions arising from intentional use of deadly weapon — proof of mitigation or excuse

In a second-degree murder prosecution, the trial court properly instructed the jury that if they found from the evidence and beyond a reasonable doubt that the defendant killed the deceased with a deadly weapon, then the presumptions arise that the killing was unlawful and that it was done with malice, thereby constituting murder in the second degree unless the defendant proved to the satisfaction of the jury the facts which would justify his act or mitigate it to manslaughter.

APPEAL by defendant from decision of the Court of Appeals upholding judgment of *Beal, S.J.*, at the 2 June 1969 Regular Schedule "D" Session of MECKLENBURG Superior Court.

Criminal action upon a bill of indictment charging defendant with the murder of John Smith on 8 May 1969. The solicitor sought only a verdict of guilty of murder in the second degree or manslaughter, as the evidence might disclose.

The State's evidence tends to show that defendant and others lived in a two-story rooming house at 204 North McDowell Street in the City of Charlotte. The deceased, John Smith, lived next door. On 8 May 1969 about 7:30 p.m. defendant and John Smith were sitting on the front porch of the rooming house drinking spiked Kool-Aid from the same jar and talking. After consuming the contents of that jar, defendant mixed Kool-Aid with grain alcohol in another jar and the two men continued to drink. There was no quarrel, disturbance or confusion between them. They were just sitting there talking and drinking when defendant arose, entered the rooming house, went upstairs to his room, obtained a single-barreled shotgun, returned downstairs, exited through a side door, went to the front of the house and advanced to a point within a few feet of John Smith who was still in a chair on the porch. Then, taking his time, defendant aimed the gun at John Smith and shot him. Smith arose from his chair, tried to enter the front door but was unable to get it open, and fell to the floor. Defendant then reloaded his gun, walked upon the porch to a point closer to Smith, and shot him again. Defendant then went around the house, re-entered at the side door, went upstairs, and returned immediately to the front porch where he shot John Smith a third time as he lay on the floor in the doorway. Smith died where he lay as a result of the gunshot wounds. No knife, gun or other weapon of any kind was found on or about his person.

As a witness in his own behalf, defendant testified that John Smith had never been to the rooming house before this day; that he was sitting on the porch drinking Kool-Aid mixed with grain alcohol when John Smith came up, asked for a drink and was given one. Defendant testified that Smith then wanted to borrow some money and, upon refusal, said "I'll take my knife and cut off your head if you don't give it to me." Smith then pulled his knife, according to defendant, threatened defendant with it and stated he would cut off defendant's head if he didn't let him have the money. Smith was called away to answer a telephone but said he would be back. He returned within five minutes, took a chair on the porch beside defendant and asked for more of the spiked Kool-Aid. Defendant refused to give him another drink whereupon Smith again threatened him about the money. Defendant then arose, went upstairs and got the gun, and came back "to scare him off the porch." When defendant came around to the front yard with the gun, John Smith jumped out of his chair and "went for his pocket." He started his hand in his pocket but "never got nothing out of his pocket. That is when I shot him. I was standing about four feet from the first step when I shot

him. John Smith was standing up by the chair, that white chair . . . on the right hand side of the porch. He didn't say anything to me. . . . I never had any fusses or fights with him before." Defendant further testified that he remembered shooting Smith one time on the front porch but did not remember shooting him a second or third time.

The jury returned a verdict of guilty of murder in the second degree and the court imposed a prison sentence of thirty years. Defendant appealed to the Court of Appeals where the judgment was upheld, Brock, J., dissenting. See 6 N.C. App. 475, 170 S.E. 2d 563. Defendant, pursuant to G.S. 7A-30(2), appealed as of right to the Supreme Court assigning errors noted in the opinion.

Weinstein, Waggoner, Sturges & Odom, by T. LaFontine Odom and Wallace C. Tyser, Jr., Attorneys for defendant appellant.

Robert Morgan, Attorney General, by James F. Bullock, Deputy Attorney General, and (Mrs.) Christine Y. Denson, Staff Attorney, for the State.

HUSKINS, J.

At the commencement of the trial defendant moved to sequester the State's witnesses and assigns as error the denial of his motion.

[1, 2] It is the general rule in North Carolina, in both civil and criminal cases, to separate witnesses and send them out of the hearing of the court when requested. But this is discretionary with the trial judge and may not be claimed as a matter of right. Stansbury, N. C. Evidence § 20 (2d ed. 1963); *State v. Manuel,* 64 N.C. 601 (1870); *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670; *State v. Love,* 269 N.C. 691, 153 S.E. 2d 381. "A judge's refusal to sequester the State's witnesses is not reviewable unless an abuse of discretion is shown." *State v. Clayton,* 272 N.C. 377, 158 S.E. 2d 557. Accord, *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506, cert. den. 384 U.S. 1020, 16 L. ed 2d 1044, 86 S. Ct. 1936; 2 Strong, N. C. Index 2d, Criminal Law § 98 (1967). This is in accord with the great majority of jurisdictions. "Reasons for the majority view are the rule that trials should be open to the public, the fact that witnesses have an interest in the course of the litigation, and the danger that the rule might be used to unnecessarily delay and obstruct trials. It has been said that the discretion to exclude witnesses is a sound judicial discretion, and that courts should not arbitrarily refuse to enforce the rule, nor should litigants or lawyers be permitted to require it arbitrarily." 53 Am.

Jur., Trial § 31 (1945). The record discloses no reason for sequestration of the witnesses, and no abuse of discretion has been shown. This assignment of error has no merit and is overruled.

[3] Defendant's second assignment of error is to the admission for illustrative purposes of a photograph showing the body of deceased as it lay in the doorway of the rooming house.

[3, 4] We note that inaccuracy of the photograph in any particular is not claimed. It was used to illustrate the testimony of the witness Walter Smith with respect to the position of the body, and the blood surrounding it, as it lay face down in the doorway after having been shot the third time. It was relevant and material and therefore competent for that purpose. "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." Stansbury, N. C. Evidence § 34 (2d ed. 1963); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824. The holdings of this Court in that respect are in accord with authorities from other jurisdictions. See Annotation, Evidence — Photograph of Corpse, 73 A.L.R. 2d 769. Defendant's second assignment of error is overruled.

An examination of the record is necessary to bring defendant's next assignment of error into proper focus.

[5] During the presentation of the State's case, no evidence was elicited from Detective Fesperman concerning a statement made by defendant following his arrest. Although Fesperman testified with respect to his investigation of the crime, the State's case was developed largely by the testimony of two eyewitnesses. Then defendant, testifying in his own behalf, stated that he went upstairs, got the gun, came back down and went around the house into the front yard; that he shot the deceased when he "jumped out of the chair and went for his pocket." On cross examination, without objection, defendant stated that he talked to Mr. Fesperman about the case and "signed a written statement, but it wasn't too many words. I suppose I told Mr. Fesperman that I got three shells, one of which I put in the chamber of the shotgun and the other two I put in my pockets. . . . The first time I shot the man, he was on the porch and I was on the walkway at the steps." Defendant denied all recollection of shooting the deceased more than once. Thereupon the following cross examination took place:

> "Q. But when you (the defendant) talked with Mr. Fesperman at 9:30 that night, which was within a hundred and

twenty minutes after it happened, did you or did you not tell him that after you shot him the first time I reloaded my gun, went on the porch, and shot him while he was lying down in the front door?

MR. ODOM: Objection. It appears the Solicitor is reading from a statement and trying to get in the back door what he couldn't get in the front door.

THE COURT: Objection overruled."

DEFENDANT'S EXCEPTION #10 (R p 33)

"Q. When you (the defendant) talked with Mr. Fesperman at the police station at 9:30 on the night of May 8, 1969, you did tell him that you shot the man the third time, didn't you?

A. I don't remember whether I did or not.

Q. Well, let me show you this paperwriting and ask you whether or not it refreshes your recollection?

A. I know I—

MR. ODOM: I'm going to object to the paperwriting, your Honor, and move to strike.

THE COURT: Well, objection sustained.

MR. SCHWARTZ: Your Honor, we want to show if he made any prior inconsistent statements about this.

THE COURT: He said he didn't remember.

MR. SCHWARTZ: Well, I would like to see if I could refresh his recollection.

THE COURT: I'll let you ask him if it refreshes his recollection.

MR. SCHWARTZ: Yes, sir.

Q. (BY MR. SCHWARTZ) This statement here with your signature on it at the bottom, do these last few lines on this statement refresh your recollection about it, starting right here. I then, and from there on.

MR. ODOM: I object again to the reference to the statement used by the Solicitor.

THE COURT: Overruled.

MR. ODOM: Exception.

A. These phrases here was supposed to be made what first happened.

THE COURT: Objection sustained.

Q. (BY MR. SCHWARTZ) Well, did you tell Mr. Fesperman then that —

THE COURT: Wait just a minute. Now, members of the jury, you will not consider any statements that the defendant has made about the paperwriting, whether it refreshes his memory or whether it doesn't.

Q. (BY MR. SCHWARTZ) Well, what did you tell Mr. Fesperman the night that this happened at the police station, Mr. Barrow?

A. He told me that I didn't have to make any statements if I didn't want to, you know. I remember his telling me that. And he asked me some details on it, and I told him a few things. He asked me if I could think of any more to tell and I said no.

Q. What were those few things that you told him?

A. I told him when he first came up there —

THE COURT: Objection. The Court on its own motion sustains the objection and orders it stricken from the record, anything about that examination as to what's on that paper. Ladies and gentlemen of the jury, you will not consider any of the examination at all about what's on that paper."

DEFENDANT'S EXCEPTION #11 (R pp 34, 35)

Defendant contends the court erred in allowing the solicitor, over objection, to cross examine him regarding an incriminating statement he allegedly made to Detective Fesperman while in custody without previously having determined on voir dire that he had been warned of his constitutional rights and had voluntarily, knowingly and intelligently waived them, relying on *Miranda v. Arizona,* 384 U.S. 436, 16 L. ed 2d 694, 86 S. Ct. 1602 (1966); *Jackson v. Denno,* 378 U.S. 368, 12 L. ed 2d 908, 84 S. Ct. 1774 (1964); and *State v. Edwards,* 274 N.C. 431, 163 S.E. 2d 767 (1968).

[6] We decline to pass upon the constitutional question posed by this assignment. The court finally sustained defendant's objection, ordered all testimony with reference to defendant's alleged statement stricken from the record, and instructed the jury not to consider "any of the examination at all about what's on that paper." Our decisions hold that where the court sustains objection to questions asked by the solicitor, no prejudice results. *State v. Butler,* 269 N.C. 483, 153

S.E. 2d 70. Ordinarily, merely asking the question will not be held prejudicial. *State v. Williams,* 255 N.C. 82, 120 S.E. 2d 442; *State v. Hoover,* 252 N.C. 133, 113 S.E. 2d 281. Compare *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762.

[7, 8] Furthermore, when all evidence of a particular character is stricken and the jury instructed not to consider it, any prejudice is ordinarily cured, *State v. Burton,* 256 N.C. 464, 124 S.E. 2d 108; *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193; *State v. Perry,* 226 N.C. 530, 39 S.E. 2d 460, unless the evidence stricken was so highly prejudicial that its effect cannot be erased from the minds of the jurors — in which event error in its admission is not cured by its withdrawal and instructions not to consider. *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169; *State v. Frizzelle,* 254 N.C. 457, 119 S.E. 2d 176; *State v. Aldridge,* 254 N.C. 297, 118 S.E. 2d 766; *State v. Choate,* 228 N.C. 491, 46 S.E. 2d 476. The evidence stricken here was not highly prejudicial. In fact, it was not prejudicial at all. Two eyewitnesses had already testified that defendant shot deceased three times. Defendant himself had already testified on both direct and cross examination that he shot deceased once and didn't recall shooting a second or third time. The stricken evidence at most could only serve to impeach defendant's professed loss of memory about the second and third shots. This was relatively unimportant because there was abundant evidence to support the main contentions of the State. The admission of evidence, even though technically incompetent, will not be held prejudicial unless it is made to appear that defendant was prejudiced thereby and that a different result would have likely ensued had the evidence been excluded. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481; *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740; *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206; *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661; *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916; *State v. Bennett,* 237 N.C. 749, 76 S.E. 2d 42. "The burden is on defendant to show not only that there was error but also that the error affected the result adversely to him." *State v. Rowland, supra.* No such showing is made here; therefore, this assignment, based on Exceptions 10 and 11, is overruled.

[9] Defendant's fourth and fifth assignments relate to various errors allegedly committed in the charge. Referring to defendant's testimony, the court charged: "Members of the jury, when you come to consider his evidence, the Court instructs you that it is your duty to carefully consider and scrutinize his testimony, he having gone upon the witness stand and testified in his own behalf. So you, the

jury, ought to take into consideration the interest which the defendant, William Norman Barrow, has in the result of this action and in your verdict in the case. But the Court instructs you that the law requiring you to scrutinize his testimony does not require that you impeach such evidence or that you reject it, because if you find, after considering the testimony of the defendant in this case, that he has told you the truth, then you will give the same weight and credibility to his testimony as you would to any unbiased or disinterested witness. . . ." Defendant says this charge focused attention upon his veracity and was prejudicial.

The challenged instruction finds approval in the decisions of this Court. *State v. Turner,* 253 N.C. 37, 116 S.E. 2d 194; *State v. Worrell,* 232 N.C. 493, 61 S.E. 2d 254; *State v. Parsons,* 231 N.C. 599, 58 S.E. 2d 114; *State v. Hightower,* 226 N.C. 62, 36 S.E. 2d 649; *State v. Redfern,* 223 N.C. 561, 27 S.E. 2d 441; *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *State v. Holland,* 216 N.C. 610, 6 S.E. 2d 217; *State v. Davis,* 209 N.C. 242, 183 S.E. 420; *State v. Anderson,* 208 N.C. 771, 182 S.E. 643; *State v. Deal,* 207 N.C. 448, 177 S.E. 332.

[10] Defendant excepts to the following portion of the charge: "If you find from the evidence and beyond a reasonable doubt that the defendant William Barrow intentionally killed the deceased with a deadly weapon, and the Court instructs you that the shotgun described in evidence in this case is a deadly weapon, the law raises two presumptions against the defendant. First, that the killing is unlawful, and, second, that it was done with malice, and an unlawful killing with malice is murder in the second degree, and the defendant would be guilty of murder in the second degree unless he can satisfy you, the jury, of the truth or fact which justifies his act or mitigates it to manslaughter. The burden in that event would be on the defendant to establish such facts to the satisfaction of you, the jury; now, not beyond a reasonable doubt, nor by the greater weight of the evidence, but to the satisfaction of the jury, unless they arise out of the evidence against him; that is, if he would rebut the presumption arising from such showing, he must establish to the satisfaction of the jury the legal provocation which will take from the crime the element of malice and thus reduce it to manslaughter or which will excuse it altogether on the grounds of self-defense, and this, ladies and gentlemen, may arise out of the evidence offered against him." Defendant says this charge placed a burden of proof upon him which should legally be placed upon the State and was thus prejudicial.

When the State satisfies the jury from the evidence beyond a reasonable doubt that defendant intentionally shot the deceased and thereby proximately caused his death, the law raises two presumptions against him: First, that the killing was unlawful; and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305; *State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154; *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337; *State v. Johnson,* 261 N.C. 727, 136 S.E. 2d 84; *State v. Carter,* 254 N.C. 475, 119 S.E. 2d 461; *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Revis,* 253 N.C. 50, 116 S.E. 2d 171. "The law then casts upon the defendant the burden of showing to the satisfaction of the jury, if he can do so — not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury — from all the evidence, facts and circumstances, the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the ground of self-defense. . . . The legal provocation that will rob the crime of malice and thus reduce it to manslaughter, and self-defense, are affirmative pleas, with the burden of satisfaction cast upon the defendant." *State v. Todd, supra.* Thus the challenged instruction is supported by our decisions, and defendant's exception thereto is overruled. See *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322.

The remaining assignments relating to the charge are equally devoid of merit. The charge as a whole is free from prejudicial error.

The record discloses a senseless, unprovoked killing. There is little evidence to support a plea of self-defense. In fact, defendant's own testimony is sufficient to carry the case to the jury and support a conviction of murder in the second degree.

The decision of the Court of Appeals upholding the verdict and judgment is

Affirmed.

STATE OF NORTH CAROLINA v. LEONARD AUSTIN AND ROYCE STAMEY

No. 9

(Filed 11 March 1970)

1. Criminal Law § 66— pretrial lineup — in-court identification — new trial granted by Court of Appeals — voir dire hearing — remarks of trial court

Where defendants were granted a new trial by the Court of Appeals for error in the admission of robbery victim's in-court identification of defendants without a voir dire finding that his identification of them had an independent origin and did not result from an illegal pretrial lineup, the trial court did not err in stating, in the presence of the witness but in the absence of the jury, that a voir dire hearing would be conducted in compliance with the decision of the Court of Appeals, and in reading in the presence of the witness an excerpt from the decision of the Court of Appeals that "It may well be that . . . the identity of both defendants was based on factors complete and independent of the line-up identity," defendant's contention that the witness' voir dire testimony was influenced by the court's statements being mere speculation.

2. Constitutional Law § 32; Criminal Law § 66— pretrial lineup — right to counsel

Defendant had no constitutional right to the presence of counsel at a lineup conducted in May 1967, since the rules established by *U. S. v. Wade*, 388 U.S. 218, and *Gilbert v. California*, 388 U.S. 263, affect only cases involving lineups for identification purposes conducted after June 12, 1967.

3. Constitutional Law § 30; Criminal Law § 66— pretrial lineup — due process — totality of circumstances — suggestive procedures

Principles of Due Process with respect to lineups, guaranteed by the Fourteenth Amendment, were not offended where there is nothing in the record to indicate that the lineup was conducted in such fashion as to offend fundamental standards of decency, fairness and justice, and the total circumstances surrounding the lineup do not reveal procedures unnecessarily suggestive and conducive to irreparable mistaken identification.

4. Criminal Law § 66— pretrial lineup — in-court identification — independent origin — sufficiency of State's evidence

In this armed robbery prosecution, the State's evidence on voir dire was clear and convincing that the robbery victim's in-court identification of defendant was based upon his observation of defendant at the time of the robbery and was in no way related to a pretrial lineup, where the evidence discloses that the victim observed defendant from 8 to 10 minutes during the robbery, that defendant was undisguised and the victim had full opportunity to form a mental picture of his facial features and identifying characteristics, that defendant fits the description the victim gave officers following the robbery, that the victim identified defendant the first and every time he saw him, that he identified defendant by a photograph that favors him very closely, and that the witness viewed the lineup for only a few seconds.

5. Robbery § 4— armed robbery — sufficiency of evidence

In this armed robbery prosecution, the State's evidence, including the robbery victim's identification of defendant as one of the perpetrators of the robbery, was sufficient to withstand defendant's motion for nonsuit and carry the case to the jury.

APPEAL by defendant Leonard Austin from decision of the Court of Appeals upholding judgment of *Copeland, S.J.*, at the May 1969 Session, BURKE Superior Court.

Defendants were charged in separate bills with the armed robbery of M. A. Brinkley on 25 February 1967. They were first tried and convicted at the March 1968 Session, Burke Superior Court. A new trial was awarded by the Court of Appeals (3 N.C. App. 200, 164 S.E. 2d 547) for error in admission of Brinkley's in-court identification of defendants without a voir dire finding that his identification of them had an independent origin and did not result from a pretrial lineup at which defendants were not represented by counsel and at a time when their right to counsel had not been waived.

At the second trial from which this appeal is taken a voir dire was conducted in the absence of the jury. M. A. Brinkley testified, in summary, that at approximately 8:15 a.m. on the morning of 25 February 1967 a tall man entered his store on West Main Street in Valdese and asked for a load of insulation. When he turned to pick up the insulation, the man put a gun in his ribs and said, "Do as I say, and I won't kill you." Brinkley replied, "You couldn't mean that could you? You have been a customer of mine, you have been in this store." The man said, "No, I have never been in your store before." He had on dark glasses but Brinkley could see the expression change in his face, "looked like it took him by surprise when I said that." At that point a short man entered the store. He was bareheaded, wore a red jacket, and had a gun in his right hand and a roll of masking tape in the other. He came across the counter and placed the gun at Brinkley's head. The tall man caught Brinkley by the shoulder and directed him to the rear of the building. He opened the door leading to the basement and ordered Brinkley down the stairs. At the foot of the stairs the robbers taped his hands behind him and tied his feet to the banister post. All this time, perhaps five minutes, they were around and in front of Brinkley and he had a good view of them. "There was no question in my mind as to a mental picture of the two. I observed them perhaps 8 to 10 minutes from the time they came in and had the conversation with me, and took me downstairs, until they went upstairs." Neither had any disguise over his face. The taller one had on sunglasses and was wear-

ing a dark hat, a tie and a trench coat. When they finished tying Brinkley, the tall one said to the short one, "get his billfold." The short one pulled a billfold containing $191.00 in cash from Brinkley's pocket and handed it to the tall one.

Brinkley further testified that the robbers went upstairs and he heard their footsteps leading to the office and heard the squeaky door open as they entered it. Then he heard the front door open and someone enter the store. Shortly thereafter he heard someone leave by the back door. Officers were called by the customer who had entered and sensed that something was wrong; Brinkley was found and released; and a check of his safe revealed approximately $140.00 missing in addition to the $191.00 taken with his wallet.

On cross examination, Brinkley stated that an SBI agent brought him five to ten photographs about two weeks after the robbery. From these pictures he picked out the tall robber, identified as Stamey. About ten days later the SBI agent brought him more pictures, and from those he picked both of the robbers, later identified by him as defendants Stamey and Austin. In May, 1967 following their arrest, Brinkley observed defendants in a police lineup at the Burke County Sheriff's Department and recognized both of them. There were seven people in the lineup. "I did not point them out to anybody and there were no words exchanged in the lineup. . . . I had already made up my mind as to the looks of them from the pictures. The whole time I had a mental picture of the two because they were with me some 10 or 15 minutes in tying me up. In the lineup I should say about half of them were short and half of them were tall, but I don't recall how they were dressed. I only looked at their faces, because I have a mental picture of their faces and not how they were dressed. The expressions on their face has stuck with me all this time. . . ."

On further cross examination by Austin's counsel, Mr. Brinkley stated that he picked Stamey's picture from both the first and second group of pictures. He stated further that the solicitor "did not discuss that he was going to have to establish my identification of these defendants without regard to the lineup. I haven't discussed the lineup with anybody. All I knew was what I read in the papers from the Appeals Court."

Royce Stamey's father testified on the voir dire as a witness for his son. He stated that his son had accompanied him to Mr. Brinkley's store on an average of three or four times a year until three or four years prior to the robbery and that Mr. Brinkley knew his son. "For some 10 years, I stopped at Mr. Brinkley's store about 2 or

3 times a year when my son was with me, and Mr. Brinkley was there every time I was in there. . . . My son was in prison occasionally but I don't have a record of how long."

Fred Goins, a witness for defendant Stamey, testified on voir dire that he was in Brinkley's store with Royce Stamey several times between 1953 and 1957; that Stamey bought a .410 shotgun from Mr. Brinkley on one of those occasions.

Defendant Austin offered no evidence on voir dire.

Upon the foregoing evidence the court found that identification of defendants by the prosecuting witness was based entirely on his recognition — his mental picture — of them at the time they robbed him and did not originate with the lineup; the lineup had nothing to do with it.

The jury was thereupon recalled to the jury box and on direct examination Mr. Brinkley testified substantially in accord with his testimony on voir dire. The witness then pointed out Royce Stamey as the tall man and Leonard Austin as the short man who had robbed him on 25 February 1967.

On cross examination by Austin's counsel he stated that he was given fifteen to twenty pictures and instructed to look them over. "I didn't know any of the names, but I recognized one of the faces . . . as being the taller of the two that came in the store and held the gun on me. I don't think he had a picture of Austin. . . . I picked out a picture and I said 'The shorter one looks similar to this one.' . . . He brought some more pictures, and . . . I picked out the taller of the two. . . . I said 'This picture looks like the second fellow, the shorter one. . . . I don't believe it is him . . . it favors him very closely.' . . . I did not pick Leonard Austin out by the pictures, but I picked out someone that looked like him, and I said that one looks like the person."

On further cross examination by Stamey's counsel, Brinkley said: "I picked out the picture that resembled Austin to give them a clue as to his description."

Stamey offered no evidence. Austin offered only the testimony of Aline Marchetti — the customer who entered the store while the robbery was in progress and Mr. Brinkley was tied up in the basement. She described the robbers as "the tall one" and "the shorter one." She said the tall one stated that "Mr. Brinkley has stepped out on a coffee break." Then both men walked casually to the rear of the store and left by the back door. At that moment she realized some-

thing was wrong and went next door to get help. She was unable to identify the robbers because she saw them only "for a moment."

The jury found both defendants guilty of armed robbery and each was sentenced to prison for a term of twenty to thirty years. The judgment was upheld by the Court of Appeals, 6 N.C. App. 517, 170 S.E. 2d 497, and defendant Austin appealed to this Court assigning errors noted in the opinion.

Ted S. Douglas, Attorney for defendant appellant.

Robert Morgan, Attorney General; Bernard A. Harrell, Assistant Attorney General.

HUSKINS, J.

Appellant brings forward the following assignments, to wit: (1) The court erred in reading to the prosecuting witness prior to his examination on voir dire an excerpt from the decision of the Court of Appeals relative to the lineup; (2) the court erred in permitting the prosecuting witness to make an in-court identification of defendant Austin because it was based on an illegal lineup identification when defendant had not waived and was not represented by counsel; and (3) the court erred in failing to grant Austin's motion for judgment of nonsuit. These assignments will be considered in the order named.

[1] Preceding the voir dire, the trial judge dictated the following statement into the record in the absence of the jury but in the presence of the prosecuting witness: "Let the record show at this time by and with the agreement of counsel for both defendants and the solicitor for the State, upon the swearing of the witness M. A. Brinkley, it is agreed that a Voir Dire hearing would be conducted by the Court in compliance with mandate of the Court of Appeals language. It may well be that the witnesses in court, the identity of both defendants was based on factors complete and independent of the line-up identity. So at this time the Court will be conducting this hearing for the purpose indicated in the opinion of the Court of Appeals in the absence of the jury." (The language referred to appears in 3 N.C. App. 200 at 203, as follows: "It may well be that the witness's in-court identification of both defendants was based on factors completely independent of the lineup identification.")

Defendant Austin assigns this as error, suggests that it amounted to an expression of opinion on the part of the judge, and argues that it in effect told the witness Brinkley the significance of the pretrial lineup and influenced him to attach only minor importance to it. Defendant's argument is not persuasive. The opinion of the Court of

Appeals is not a secret document the contents and significance of which are reserved only for the eyes of defendant and his counsel. No reason occurs to us, and none has been cited, why the victim should not be apprised of the purpose of the voir dire examination and the significance of the lineup. Defendant and his counsel were cognizant of these matters. Why should the same knowledge be kept from the witness? Is it suggested that only the ignorant swear truthfully and that those who know the purpose and significance of the questions propounded are more apt to commit perjury than those who do not? If this be a valid premise, then knowledge is a vice and ignorance a virtue. But be that as it may, the statement of the court was hardly sufficient to apprise the witness of anything. It was entirely harmless. This assignment is mere speculation, supported only by surmise and conjecture. It is without merit and is overruled.

With respect to the lineup, the following language from *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345, is appropriate:

> "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."

[2, 3] The lineup in this case was conducted in May 1967. Hence the rules fashioned by *Wade* and *Gilbert* do not apply, and the appellant here had no constitutional right to the presence of counsel at the lineup. *Stovall v. Denno, supra.* Furthermore, there is nothing in this record to indicate, and defendant does not contend, that the lineup was conducted in such fashion as to offend fundamental standards of decency, fairness and justice. His only complaint is the absence of counsel. Nor do the total circumstances surrounding the lineup reveal procedures unnecessarily suggestive and conducive to irreparable mistaken identification. Thus the principles of Due

Process with respect to lineups, guaranteed by the Fourteenth Amendment, have not been offended. *Rochin v. California,* 342 U.S. 165, 96 L. ed 183, 72 S. Ct. 205, 25 A.L.R. 2d 1396; *Foster v. California,* 394 U.S. 440, 22 L. ed 2d 402, 89 S. Ct. 1127; *State v. Rogers, supra; State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593.

[4] Even if *Wade* and *Gilbert* applied in this case, the evidence supports the findings of the trial judge on voir dire that identification of the defendants by the prosecuting witness was based entirely on his mental picture of them at the time of the robbery and was in no way related to the lineup. This evidence discloses that the prosecuting witness had observed both defendants from eight to ten minutes during the robbery; that defendant Austin was undisguised and the victim had full opportunity to form a mental picture of his facial features and identifying characteristics; that Austin's actual description fits the description Brinkley gave the officers following the robbery; that Brinkley identified both defendants the first time and every time he saw them; and that he identified Austin by a photograph "that favors him very closely." It is quite apparent from Brinkley's testimony on voir dire, and before the jury as well, that he had in his mind a fixed image of these defendants and had formed it from observations at the time of the robbery. "The expressions on their face has stuck with me all this time. . . . I did not pick Leonard Austin out by the pictures, but I picked out someone that looked like him . . . to give them a clue as to his description. . . . I picked him out on the basis of my mental picture." Furthermore, according to the record, the witness viewed the lineup for only a few seconds. Its imprint upon Brinkley's mind, therefore, must have been minimal and served only to verify the mental picture formed at the time of the robbery. In our view, the State's evidence is clear and convincing that Brinkley's in-court identification was based upon observation of defendants at the time of the robbery and not on observations at the time of the lineup. Compare *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353, and *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225.

In light of these principles, it follows that the victim's in-court identification of appellant was properly admitted. His assignment of error based on its admission has no merit and is therefore overruled.

[5] There was ample evidence to withstand the motion for nonsuit and carry the case to the jury. Appellant's third assignment is overruled.

The decision of the Court of Appeals upholding the judgment is Affirmed.

ROLAND J. BROWN, ADMINISTRATOR OF THE ESTATE OF OSSIE D. BROWN, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY

— AND —

WILLIAM E. PHILLIPS, SR., ADMINISTRATOR OF THE ESTATE OF WILLIAM E. PHILLIPS, JR., DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY

No. 25

(Filed 11 March 1970)

1. Railroads § 6— railroad's duty to give warning at obstructed crossing

A railroad is under a duty to give timely warning when its train approaches a visually obstructed and much traveled crossing.

2. Railroads § 6; Evidence § 17— crossing accident — evidence that locomotive failed to give signal

Plaintiffs' evidence that none of the survivors of a crossing accident heard a bell, horn, or whistle prior to the collision between defendant's locomotive and the truck in which the survivors were riding as passengers, and that a nearby householder heard the collision and then a long whistle but had heard no signal from the train prior to the collision, *held* sufficient to justify a jury finding that defendant failed to give any warning as its locomotive approached the crossing.

3. Railroads § 5— crossing accident — negligence of driver — knowledge of obstruction

Evidence that the driver of a truck drove toward a railroad crossing at an undiminished speed of 30 to 35 mph despite her knowledge that the crossing was visually obstructed, *held* sufficient to establish the negligence of the driver.

4. Railroads § 7— crossing accident — death of passengers — imputation of driver's negligence

Under the facts of this wrongful death action resulting from a collision between defendant's locomotive and the truck in which plaintiff's intestates were passengers, the negligence of the truck driver in approaching the crossing at an undiminished speed of 30 to 35 mph despite her knowledge that the view of the crossing was visually obstructed, *held* not imputable to the intestates.

5. Railroads § 6— railroad crossing — duty of railroad to warn motorist

Ordinary human experience demonstrates that a train crew should reasonably foresee that the driver of an automobile nearing a railroad crossing may be unaware of the train's approach and drive upon the track unless he receives timely warning that the train is coming — inattention of the motorist being more likely if the crossing is obstructed, little used by the railroad, and much used by the public; the railroad's failure to protect the traveling public against this risk is negligence.

6. Negligence § 10— foreseeable intervening forces — effect on original risk

Foreseeable intervening forces are within the scope of the original risk,

and hence of defendant's negligence; intervening causes which fall fairly in this category will not supersede the defendant's responsibility.

7. Railroads §§ 5, 7— crossing accident — death of truck passengers — concurring negligence of driver and railroad — nonsuit

In an action for wrongful death resulting from a collision between defendant's locomotive and the truck in which plaintiffs' intestates were riding as passengers, plaintiffs' evidence that the defendant's locomotive approached the crossing without giving any warning or signal and that the driver of the truck, with full knowledge that her view of the crossing was obstructed, drove toward the crossing at an undiminished speed of 30 to 35 mph, *held* sufficient to support a jury finding that defendant's negligence concurred with that of the truck driver in proximately causing the deaths of the intestates; and the defendant's motion for nonsuit was improperly granted.

MOORE, J., did not participate in the consideration or decision of this case.

ON certiorari to review the decision of the Court of Appeals reported in 4 N.C. App. 169, 166 S.E. 2d 535, which affirmed the judgment of nonsuit entered by *Godwin, S.J.*, in the Superior Court of LEE, docketed and argued in the Supreme Court as Case No. 54 at the Fall Term 1969.

These two actions for wrongful death, which were consolidated for trial, result from a collision between defendant's train and the truck in which plaintiffs' intestates, Ossie D. Brown and William E. Phillips, Jr., were passengers.

Plaintiffs' evidence tended to show: On 12 November 1966 at 10:30 p.m., Mrs. Jean Phillips was driving her husband's pickup truck westerly on Rose Street in the town of Sanford. Ossie Brown, the mother of the driver, was seated beside her in the cab. Mrs. Phillips' husband, her brother, Gordon Brown, and her 12-year-old son, William E. Phillips, Jr., were seated in the open bed of the truck. Rose Street is a four-lane highway, "a major thoroughfare" forty-eight feet wide, which runs generally east and west. Two lines of defendant's railroad tracks, running approximately north and south, intersect Rose Street at right angles twenty-eight feet west of the west edge of Chatham Street. Chatham, a two-lane street twenty feet wide, intersects Rose Street from the north to form a "T" intersection. There are no obstructions between Chatham Street and the railroad tracks. However, an oil company's tanks and warehouse, located in the northeast corner of the Rose-Chatham intersection, obstruct the view to the north. A motorist traveling west on Rose Street cannot see a train approaching from the north until he enters the intersection. The speed limit for this area is 35 MPH.

Mrs. Phillips entered Rose Street three blocks east of the railroad crossing. She knew the location of the crossing but had never seen a train on it. Traveling at 30-35 MPH in the northernmost lane of Rose Street, she approached the crossing without slowing down. When she entered the intersection she looked to the right. She saw a swirling light bearing down from the north when she was between Chatham Street and the railroad. At that point she was "probably twenty feet" from the train. Knowing that she was too close to stop, she "swerved to the left and speeded up, trying to get across before the train hit." The engine hit the truck broadside on the right. In the collision Mrs. Brown and William E. Phillips, Jr., were killed. None of the survivors heard a bell, horn, or whistle before the impact. Mr. Phillips heard the roar of the diesel engine when the truck swerved, about two seconds before the crash. He was thrown about sixty feet and, as he was "sailing through the air," he heard a whistle blowing. A householder, living forty yards from the Rose-Chatham intersection, heard the collision and immediately thereafter, a long whistle. Prior to the impact he had heard no signal from the train.

The transcript does not reveal the frequency with which trains traversed the Rose Street crossing. However, upon the argument before us, counsel stated that two trains (one each way) used the crossing daily.

At the conclusion of plaintiffs' evidence, the court allowed defendant's motion for nonsuit, and plaintiffs appealed.

Pittman, Staton & Betts for plaintiff appellants.

Henry & Henry and Cameron, Harrington & Love for defendant appellee.

SHARP, J.

[1-3] Defendant Railroad was under a duty to give timely warning when its train approached the visually obstructed and much traveled Rose Street crossing. *Cox v. Gallamore,* 267 N.C. 537, 148 S.E. 2d 616; *Jarrett v. R. R.,* 254 N.C. 493, 119 S.E. 2d 383; *High v. R. R.,* 248 N.C. 414; 103 S.E. 2d 498; *Summerlin v. R. R.,* 238 N.C. 438, 78 S.E. 2d 162; 6 Strong, N. C. Index *Railroads* § 6 (2d ed. 1968). Assuming the truth of plaintiffs' evidence, as we must in passing upon a motion for nonsuit, it would justify a finding by the jury that defendant failed to give any warning as its locomotive approached the crossing. *Kinlaw v. R. R.,* 269 N.C. 110, 152 S.E. 2d 329. Plaintiffs' evidence establishes the negligence of Mrs. Phillips. With full knowledge of the obstructed crossing, she drove toward it

at an undiminished speed of 30-35 MPH. *Carter v. R. R.*, 256 N.C. 545, 124 S.E. 2d 561; *Summerlin v. R. R., supra.*

[4] On this evidence the negligence of the driver cannot be imputed to plaintiffs' intestates, and they were guilty of no contributory negligence. *Harper v. R. R.*, 211 N.C. 398, 190 S.E. 750; *Johnson v. R. R.*, 205 N.C. 127, 170 S.E. 120; 6 Strong, N. C. Index *Railroads* § 7 (2d ed. 1968). Therefore, unless Mrs. Phillips' negligence relieves defendant Railroad from liability, the judgments of nonsuit were erroneously entered. Defendant contends that even if plaintiffs' evidence shows it to have been "in some respect negligent," it also shows the death of plaintiffs' intestates to have been "independently and proximately produced by the wrongful act, neglect or default of a responsible third person, to-wit: Mrs. Phillips, the operator of the pickup truck." In support of this proposition, defendant relies, *inter alia,* upon *Jones v. R. R.*, 235 N.C. 640, 70 S.E. 2d 669; *Hinnant v. R. R.*, 202 N.C. 489, 163 S.E. 555, and — most heavily — upon *Jeffries v. Powell and Branch v. Powell,* 221 N.C. 415, 20 S.E. 2d 561.

Jeffries v. Powell and Branch v. Powell, supra, were suits against a railroad by the driver of an automobile and the administrator of his deceased passenger. The driver was injured and the passenger killed when a train struck the vehicle at a grade crossing. Plaintiffs' evidence tended to show that the "whistle didn't blow and the bell didn't ring." In affirming judgments of nonsuit, Winborne, J. (later C.J.), said: "[I]t is clear from the evidence that the negligence of Branch (the driver) was such as to insulate the negligence of defendants, and that his negligence was the sole proximate cause of the collision between his automobile and the train of defendants in which Jeffries lost his life." In concluding the opinion he quoted from *Chinnis v. R. R.*, 219 N.C. 528, 531, 14 S.E. 2d 500, 502: "Conceding that there was evidence of failure on the part of defendant to sound whistle or bell to give warning of the approach of the train to the crossing, it is clear that the active negligence of the driver of the automobile, subsequently operating, was the real efficient cause of the injury to plaintiff's intestate. . . . The negligence of the driver of the automobile was patent. It intervened between the failure of the defendant to give warning of the approach of the train to the crossing and the injury to plaintiff's intestate, and it began to operate subsequent to any act of negligence on the part of defendant, and continued to operate to the instant of injury."

Plaintiffs in the instant case, contending that intestates' deaths were proximately caused by the joint and concurring negligence of defendant Railroad and the driver of the truck, rely, *inter alia,* upon

Cox v. Gallamore, 267 N.C. 537, 148 S.E. 2d 616; *Henderson v. Powell and Rattley v. Powell,* 221 N.C. 239, 19 S.E. 2d 876; *Harper v. R. R.,* 211 N.C. 398, 190 S.E. 750; *Johnson v. R. R.,* 205 N.C. 127, 170 S.E. 120.

In *Henderson* and *Rattley, supra,* two passengers were injured, one fatally, when McCrimmon, the operator of the automobile in which they were riding, drove upon a blind crossing over a much used public street. There was no watchman or automatic signaling device to give warning of an approaching train. The driver testified that he stopped his car, looked and listened. Then, seeing nothing and hearing no whistle, bell, or signal, he drove upon the tracks and was struck by a speeding train. The trial judge nonsuited the plaintiffs, who appealed. In overruling the nonsuit and disposing of defendant's contention that "the intervening negligence" of the driver of the car "insulated" the defendant's negligence and became the "sole proximate cause," Seawell, J., speaking for the Court, reasoned: "It took the combined activities of the railroad company and McCrimmon to bring their respective vehicles into the collision. . . . The formula proposed by defendants would exonerate both of them with equal impartiality." The duties of the railroad and those using the crossing "are reciprocal, interrelated, and immediate; and, whatever the previous history of neglect, are concurrently in force and effect as soon as the zone of danger is created by simultaneous approach to the intersection." No negligence is "insulated" so long as it plays a substantial and proximate part in the injury. The legal effect of the active negligence of two independent agencies, simultaneously occurring, and inflicting injury upon a third person hinges upon the question of foreseeability. The test is whether the intervening act and the resultant injury is one that the original actor could have reasonably foreseen and expected. The negligence of McCrimmon was not "of such an extraordinary character as to be beyond the limits of foreseeability."

As opinion writers have frequently noted, cases involving grade-crossing accidents are myriad, and "no good can be obtained from attempting to analyze the close distinctions drawn in the decisions of these cases for each case must . . . be governed by the controlling facts there appearing." *Faircloth v. R. R.,* 247 N.C. 190, 193, 100 S.E. 2d 328, 331, and *Hampton v. Hawkins,* 219 N.C. 205, 209, 13 S.E. 2d 227, 229. Gilliam, District Judge, put it succinctly: "Any effort to reconcile the North Carolina law on the subject of insulating negligence seems futile." *Cronenberg v. United States,* 123 F. Supp. 693, 699.

Prosser, in his treatise on *Torts* § 51 (3d ed. 1964) analyzes the problems of intervening causes with his usual clarity. Except when quoted, we summarize pertinent portions of his discussion:

The question is not one of actual causation because the problem never arises until causation is established. The query is "whether the defendant is to be held liable for an injury to which he has in fact made a substantial contribution, when it is brought about by a later cause of independent origin. . . . The older cases tend to ask the question, why should the defendant be held liable for harm brought about by something for which he is not responsible? The later ones tended to ask instead, why should he be relieved of liability for something that he has caused, along with other causes?" Since an infinite number and variety of causes may intervent after the defendant's negligence is an accomplished fact, "out of sheer necessity and in default of anything better," the courts have had "to fall back upon the scope of the original foreseeable risk which he has created." They say, therefore, that the defendant is to be held liable only if the intervening cause is foreseeable. "If the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant had reason to anticipate under the particular circumstances, he may be negligent among other reasons because he failed to guard against it; or he may be negligent only for that reason." If it be determined "that the defendant's duty requires him to anticipate the intervening misconduct, and guard against it, it follows that it cannot supersede his liability."

There are many situations in which the reasonably prudent man is expected to anticipate and guard against the conduct of others. Prosser, *supra,* § 33. "[H]e is required to realize that there will be a certain amount of negligence in the world. In general, where the risk is relatively slight, he is free to proceed upon the assumption that other people will exercise proper care. . . . But when the risk becomes a serious one, either because the threatened harm is great, or because there is an especial likelihood that it will occur, reasonable care may demand precautions against 'that occasional negligence which is one of the ordinary incidents of human life and therefore to be anticipated.' 'It is not due care to depend upon the exercise of care by another when such reliance is accompanied by obvious danger.' Thus an automobile driver may not proceed blindly across a railway track, upon the assumption that any approaching train will sound bell and whistle. . . ." Prosser, *supra* at p. 174. Conversely, even though the train crew knows that a motorist approaching a railroad crossing is charged with the duty of keeping a

vigilant lookout for an approaching train, it likewise has the duty to keep a lookout for the motorist and to give a timely warning of the train's approach. *Johnson v. R. R.*, 255 N.C. 386, 121 S.E. 2d 580.

[5, 6] We think "ordinary human experience" demonstrates that a train crew should reasonably foresee that the driver of an automobile nearing a railroad crossing may be unaware of the train's approach and drive upon the track unless he receives timely warning that the train is coming. Inattention on the part of the operator of a motor vehicle is all the more likely if the crossing is obstructed, little used by the railroad and much used by the public. A railroad's failure to protect the traveling public against that very risk is negligence. "Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence. The courts are quite generally agreed that intervening causes which fall fairly in this category will not supersede the defendant's responsibility." Prosser, *supra*, § 51, p. 312. This is the rationale of *Henderson* and *Rattley, supra*, and of *Cox v. Gallamore, supra*.

[7] At this stage of the proceedings, only plaintiffs' evidence has been heard. We express no opinion as to its veracity or the inferences which arise from it. We merely hold that plaintiffs' evidence was sufficient to support a finding that defendant failed to signal the approach of its train to the crossing and that its negligence concurred with that of Mrs. Phillips in proximately causing the deaths of plaintiffs' intestates. The judgment of nonsuit is

Reversed.

MOORE, J., did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. LEROY MITCHELL

No. 16

(Filed 11 March 1970)

1. Criminal Law §§ 146, 174— constitutional questions — appeal of right — preserving question for review

While an appeal lies of right to the Supreme Court from any decision of the Court of Appeals in a case which directly involves a substantial question arising under the Constitution of the United States or the Constitution of this State, in order to exercise this right, the appellant must follow appropriate procedures for raising and for preserving for review such constitutional question.

2. Criminal Law § 169— admission of incompetent evidence — failure to object

Nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered, even though appellant asserts the evidence was obtained in violation of his rights under the Constitution of the United States or under the Constitution of this State.

3. Criminal Law §§ 146, 174— consideration of constitutional questions by Supreme Court — necessity for raising question in trial court and Court of Appeals

The Supreme Court will not pass upon the merits of a litigant's contention that his constitutional right has been violated by a ruling or order of a lower court unless, at the time the alleged violation of the right occurred or was threatened by a proposed procedure, ruling or offer of evidence, or at the earliest opportunity thereafter, the litigant made an appropriate objection, exception or motion and thereafter preserved the constitutional question at each level of appellate review by an appropriate assignment of error and by argument in his brief.

4. Criminal Law §§ 146, 174— failure to raise search and seizure question below — defendant's status as tenant not known by defense counsel

Assertion by defendant for the first time in his notice of appeal to the Supreme Court that he was a tenant of the room wherein he lay asleep and drunk when a ring was taken from his finger by a police officer, and that the constitutional question which he now attempts to raise with reference to the taking of the ring was not raised in the Court of Appeals because defendant's status as a tenant was only recently communicated to defendant's attorney, if true, does not exempt defendant from the rule that constitutional questions not properly raised in the trial court and the Court of Appeals will not be considered by the Supreme Court.

5. Criminal Law §§ 146, 174— failure to raise properly any constitutional question — dismissal of appeal

Appeal is dismissed for failure of defendant to raise by appropriate and available procedures any substantial constitutional question for consideration of the Supreme Court, where defendant's notice of appeal and brief present only questions as to the constitutionality of the admission of a ring taken from defendant by police officers while defendant was asleep and drunk and the admission of testimony concerning defendant's statements and actions while in the company of two police officers in a police car, but the record shows that, in the trial court, defendant did not object to any testimony of any witness concerning the entry of police officers into the room where defendant was found, the taking of the ring from his finger, the identification of the ring, or any statement or action of the defendant while in the presence of police officers, the record shows no exception to any ruling of the trial court with reference to these matters, and upon appeal to the Court of Appeals, no ruling of the trial court relating to any of these matters was assigned as error.

APPEAL by defendant from the decision of the Court of Appeals, reported in 7 N.C. App. 49.

The defendant was convicted of common law robbery and sentenced to imprisonment for a term of six to ten years at the 19 May 1969 Criminal Session of New Hanover Superior Court upon an indictment, proper in form. The Court of Appeals affirmed.

The evidence for the State consisted of the testimony of the alleged victim of the robbery (Bradley) and two police officers (Hanes and Genes). It was ample to support the verdict. The defendant did not testify but offered one witness, whose testimony tended to establish an alibi.

Without objection, Bradley testified on direct examination: Entering the gate to his rooming house about 2:00 a.m., he was seized by the defendant, with whom he was acquainted, and four other men, beaten and robbed of his wedding ring and money. The following afternoon he saw the defendant on the street in the vicinity. The defendant was wearing Bradley's ring and refused to surrender it. Bradley then went to the police and returned to the vicinity with Officer Hanes. The defendant was in bed with Bradley's ring on his finger. The State's Exhibit (not shown in the record to have been actually introduced in evidence) is Bradley's ring.

On cross examination, without objection, Bradley testified: He took Officer Hanes where the defendant was. The defendant was lying across a bed in a drunken sleep from which Officer Hanes was unable to arouse him. Officer Hanes took Bradley's ring off the defendant's finger. Leaving the defendant there, Bradley and Officer Hanes returned to the police station. Thereafter, Bradley, accompanied by Officer Genes, returned in a police car to the house where Bradley and Officer Hanes had found the defendant on the bed. This time, the defendant was out on the sidewalk. He walked up to the police car, got in without being told to do so and entered into a conversation with Bradley about the ring and pocketbook. Upon Bradley's statement that the defendant must have taken his ring and pocketbook, the defendant started to leave the police car. Officer Genes then told the defendant he was under arrest. Thereupon, the defendant ran away.

Officer Hanes testified, over objection, to statements made to him by Bradley. The court instructed the jury that this testimony was admitted for the sole purpose of "corroborating the witness" if the jury found it did so "corroborate the witness."

Without objection, Officer Hanes testified: He took Bradley to

the house in which they found the defendant and knocked. A woman came to the door and told him he might enter to see the defendant, directing him to the room where the defendant was. Going to that room, Officer Hanes observed the defendant lying face down across the bed in a drunken sleep from which Officer Hanes could not arouse him. Officer Hanes removed the ring, identified by Bradley, from the defendant's finger, returned with Bradley to the police station and turned the ring over to Officer Genes.

Officer Genes testified, over objection, to statements made to him by Bradley. The court instructed the jury that this testimony was admitted for the sole purpose of "corroborating the witness" if the jury found it did "corroborate the witness."

Without objection, Officer Genes testified that he and Bradley went to the house where the defendant had been observed across the bed. After a conversation with Bradley on the sidewalk, the defendant came over to the patrol car, got into the front seat and asked Officer Genes to "tell this man [Bradley] I ain't got no ring of his." The defendant and Bradley then engaged in an argument and the defendant jumped out of the car. Officer Genes then told him, "Leroy, I'm going to have to place you under arrest." The defendant ran away. That night Officer Genes "took a warrant out for him." The State's Exhibit #1 (not shown in the record to have been actually introduced in evidence) is the ring which Bradley said belonged to him and which was delivered to Officer Genes by Officer Hanes.

Upon his appeal to the Court of Appeals, the defendant made only four assignments of error. These were: (1) The admission of the testimony of Officer Hanes as to the statements made to him by Bradley; (2) the admission of the testimony of Officer Genes as to statements made to him by Bradley; (3) a portion of the court's review of the testimony in the charge to the jury; and (4) the failure of the court to state the evidence sufficiently and to give equal stress to the contentions of the parties.

In his brief to the Court of Appeals, the defendant made the following further contentions: (1) At the time of his arrest, he was not advised of his right to remain silent and his right to have counsel appointed; and (2) he was searched and evidence was taken from him without a search warrant. These actions were asserted to have been "in violation of his constitutional rights" but the brief contained no other statement in support of these contentions, save a bare citation of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1062, 16 L. Ed. 2d 694.

The notice of appeal from the Court of Appeals states as the only grounds for appeal: (1) "The appellant's room * * * where he was residing as a tenant, was entered without his permission and without a valid search warrant by a police officer * * * [who] took from the person of the appellant who was asleep and intoxicated a ring * * * and that the fruits of this search were introduced into evidence at the appellant's subsequent trial" in violation of his rights under Amendment IV to the Constitution of the United States; and (2) appellant's rights under Amendments V and VI to the Constitution of the United States were violated in that the investigation of the alleged robbery having reached the accusatory stage, the police officer, knowing the appellant to be highly intoxicated, and without warning him of his right to remain silent and of his right to have the assistance of counsel, and without warning him that anything he said might be used against him, "allowed the prosecuting witness to interrogate and question the appellant, the fruits of which were introduced into evidence against the appellant at his subsequent trial."

The notice of appeal states that the first of these constitutional questions "was not raised in the Court of Appeals due to the fact that appellant's status as a tenant was only recently communicated to appellant's attorney," and the second constitutional question "was not raised in the Court of Appeals."

Nothing in the record suggests that the defendant was a tenant of the house or of the room where he lay drunk and asleep when the ring was taken from his finger by Officer Hanes.

Attorney General Morgan and Roy A. Giles, Jr., Staff Attorney, for the State.

Murchison, Fox & Newton for defendant.

LAKE, J.

[1] G.S. 7A-30 provides that, subject to an exception not here material, an appeal lies of right to this Court from any decision of the Court of Appeals in a case which directly involves a substantial question arising under the Constitution of the United States or the Constitution of this State. In order to exercise this right, however, the appellant must follow appropriate procedures for raising and for preserving for review such constitutional question.

In *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376, the defendant was indicted for murder. Over his objection, the trial court admitted

in evidence a vodka bottle, found by police officers in a bedroom of his house, and testimony concerning its discovery. On appeal to the Court of Appeals, this was assigned as error but this assignment was not discussed in the appellant's brief filed in the Court of Appeals and no reason or argument was cited in support of it. The Court of Appeals did not discuss this assignment of error in its opinion, apparently treating it as abandoned by the appellant. Upon appeal to this Court, the appellant asserted that the admission of the evidence violated his constitutional rights because it was the tainted fruit of an illegal search. Speaking through Huskins, J., we said at pp. 309-310:

> "Now in this Court for the first time in the appellate division, defendant seeks to inject the constitutionality of the search of the bedroom * * *. This he cannot do. The Supreme Court reviews the decision of the Court of Appeals for errors of law allegedly committed by it and properly brought forward for consideration.
>
> "* * * 'Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Jones,* 242 N.C. 563, 564, 89 S.E. 2d 129. This is in accord with the decisions of the Supreme Court of the United States. *Edelman v. California,* 344 U.S. 357, 358 [97 L. ed. 387, 73 S. Ct. 293].' *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1. Thus, the new question is not properly before us because it was not raised and passed upon in the Court of Appeals."

The record in the present case shows that, in the trial court, the defendant did not object to any testimony of any witness concerning either the entry of Officer Hanes and Bradley into the room where the defendant was found, the taking of the ring from his finger, the identification of the State's Exhibit #1 as the ring so taken, or any statement or action of the defendant while in the presence of Officer Genes and Bradley. The record shows no exception to any ruling of the trial court with reference to any of these matters. Upon the appeal to the Court of appeals, no ruling of the trial court relating to any of these matters was assigned as error.

[2] It is elementary that, "nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered." *State v. Williams,* 274 N.C. 328, 334, 163 S.E. 2d 353; *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341; *State v. Camp,* 266 N.C. 626, 146 S.E. 2d 643; *Lambros v. Zrakas,* 234 N.C. 287, 66 S.E. 2d 895; *State v.*

Fuqua, 234 N.C. 168, 66 S.E. 2d 667; *State v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598; Stansbury, North Carolina Evidence, 2d Ed., § 27; Wigmore on Evidence, 3rd Ed., § 18. An assertion in this Court by the appellant that evidence, to the introduction of which he interposed no objection, was obtained in violation of his rights under the Constitution of the United States, or under the Constitution of this State, does not prevent the operation of this rule.

[3] This Court will not pass upon the merits of a litigant's contention that his constitutional right has been violated by a ruling or order of a lower court, unless, at the time the alleged violation of such right occurred or was threatened by a proposed procedure, ruling or offer of evidence, or at the earliest opportunity thereafter, the litigant made an appropriate objection, exception or motion and thereafter preserved the constitutional question at each level of appellate review by an appropriate assignment of error and by argument in his brief. *State v. Colson, supra; State v. Grundler and State v. Jelly,* 251 N.C. 177, 111 S.E. 2d 1; *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129. As Stone, C.J., speaking for the Supreme Court of the United States, said in *Yakus v. United States,* 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834, "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

[4] In his notice of appeal to this Court, the defendant asserts, for the first time, that he was a tenant of the room wherein he lay when the ring was taken from his finger by Officer Hanes, and that the constitutional question, which he now attempts to raise with reference to such taking of the ring, "was not raised in the Court of Appeals due to the fact that appellant's status as a tenant was only recently communicated to appellant's attorney." If true, this does not exempt him from the operation of the above mentioned rule. Nothing in the record supports his contention that he was occupying the room as a tenant. If he was, that fact was within his knowledge at the time the evidence in question was introduced.

The defendant does not even suggest any reason for his failure to raise, either in the trial court or in the Court of Appeals, any question as to the admissibility of testimony concerning his statements and actions while in the police car in the company of Officer Genes and Bradley.

[5] We, therefore, do not reach and do not pass upon any constitutional question as to the admissibility of any of the evidence of which the defendant complains in his notice of appeal and in his

brief filed in this Court. The appeal is dismissed for the failure of the defendant to raise by appropriate and available procedures any substantial constitutional question for the consideration of this Court.

Appeal dismissed.

KENNEDY W. WARD v. I. L. CLAYTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA

No. 22

(Filed 11 March 1970)

Taxation § 28— income tax — fire loss deduction — computation of loss

Taxpayer's loss of timber by fire is an "other disposition of property" within the meaning of the statute providing a method for the ascertainment of gain or loss, and therefore the income tax deduction allowable under G.S. 105-147 for such casualty loss may not exceed the taxpayer's cost basis of the property so destroyed. G.S. 105-144.

MOORE, J., did not participate in the consideration or decision of this case.

ON *certiorari* to the Court of Appeals to review its decision reported in 5 N.C. App. 53, which affirmed a judgment in favor of defendant entered by *Cohoon, J.*, at September 30, 1968 Session of CRAVEN Superior Court, docketed and argued as No. 35 at Fall Term 1969.

Plaintiff-taxpayer paid under protest additional income taxes and interest assessed by defendant for the year 1963 and instituted this action to recover the amount so paid.

Upon waiver of jury trial, as then provided in G.S. 1-184 *et seq.*, Judge Cohoon set forth separately his findings of fact and conclusions of law and entered judgment.

The findings of fact and conclusions of law are accurately set forth in the statement of facts preceding the opinion of Morris, J., for the Court of Appeals.

Plaintiff's only assignment of error is stated as follows: "That the Court erred in signing and entering Judgment for the Defendant . . . with particular reference to paragraphs 3, 4, 5 and 6 of the conclusions of law."

This Court allowed *certiorari* upon plaintiff's application therefor.

A. D. Ward for plaintiff appellant and plaintiff appellant in personam.

Attorney General Morgan and Assistant Attorney General Banks for defendant appellee Commissioner of Revenue.

BOBBITT, C.J.

The sole question is whether, in computing the taxpaper's net income for 1963, the deduction allowable under G.S. 105-147 for a loss of property by fire is to be ascertained as provided in G.S. 105-144.

The statutory provisions applicable to the determination of the taxpayer's net income for 1963 are the following:

G.S. 105-144, in pertinent part, provides: "(a) . . . in ascertaining the gain or loss from the sale or other disposition of property: (1) For property acquired after January 1, 1921, and before July 1, 1963, the basis shall be *the cost* thereof; . . . ." (Our italics.)

G.S. 105-147, in pertinent part, provides: "In computing net income there shall be allowed as deductions the following items. . . . (9) Losses of such nature as designated below: a. . . . b. Losses of property not connected with a trade or business sustained in the income year if arising from fire, storm, shipwreck or other casualties or theft to the extent such losses are not compensated for by insurance or otherwise. . . ."

The taxpayer failed to show a cost basis for his loss, and frankly asserts the destroyed property (timber which grew after he purchased the land) was acquired without cost to him. He contends the words "other disposition" in G.S. 105-144 refer *solely* to an *intentional* disposition which results in a gain or a loss. He seeks to establish as a deductible loss the fair market price or value of the timber as of the date it was destroyed by fire.

The Commissioner contends the words "other disposition" refer to any disposition, intentional or involuntary (including a casualty loss), which results in a taxable gain or deductible loss. He contends the amount of the deductible loss allowable under G.S. 105-147 as the result of fire cannot exceed the cost to the taxpayer of the property so destroyed. In short, he contends the loss of the taxpayer's timber by fire consisted of an unrealized gain rather than an out-of-pocket loss.

Affirming the Court of Appeals, we hold that the method for as-

certaining the amount of a loss prescribed in G.S. 105-144 is applicable whenever property is disposed of by sale, casualty or otherwise, in such manner as to result in a taxable gain or a deductible loss.

The Revenue Act of 1923, Chapter 4, Public Laws of 1923 contains (Section 300 *et seq.*) the first comprehensive North Carolina Income Tax Statute.

Section 300 provided: "The words 'net income' mean the gross income of a taxpayer less the deductions allowed by this act." (Now G.S. 105-140 so provides.)

Section 303, in pertinent part, provided: "For the purpose of ascertaining the gain or loss from the sale *or other disposition* of property, real, personal or mixed, the basis shall be, in the case of property acquired before January first, one thousand nine hundred and twenty-one, the fair market price or the value of such property as of that date, and in all other cases, *the cost thereof:* . . ." (Our italics.)

Section 306, in pertinent part, provided: "In computing net incomes there shall be allowed as deductions: . . . . 6. Losses sustained during the taxable year of property used in trade or business or of property not connected with trade or business, if arising from fire, storms, shipwrecks or other casualties or theft and if not compensated for by insurance or otherwise."

By the enactment of Section 4, Chapter 708, Session Laws of 1945, the General Assembly amended the Revenue Act of 1939 (Chapter 158 of the Public Laws of 1939) so as to substitute these words, which now appear in G.S. 105-147, "to the extent such losses are not compensated for by insurance or otherwise," for the words, "if not compensated for by insurance or otherwise." With this modification, the pertinent provisions of G.S. 105-144 and G.S. 105-147 are re-enactments of the provisions originally enacted as Sections 303 and 306 of the Revenue Act of 1923.

Having been enacted as portions of the Revenue Act of 1923, Sections 303 and 306 are to be considered as interrelated portions of a single complete statute. *State v. Barksdale,* 181 N.C. 621, 625, 107 S.E. 505, 507; *In re Hickerson,* 235 N.C. 716, 721, 71 S.E. 2d 129, 132; *Fishing Pier v. Carolina Beach,* 274 N.C. 362, 370, 163 S.E. 2d 363, 369. Section 306 (G.S. 105-147) enumerates the items, including casualty losses, which are deductible, but prescribes no method for ascertaining the amount of such casualty loss. Section 303 (G.S. 105-144) prescribes the method for ascertaining the amount of a loss resulting "from the sale or other disposition of property." Noth-

ing indicates the General Assembly intended a taxpayer's deductible loss by fire or other casualty to be treated differently from a loss resulting from a sale.

Prior to the enactment of the North Carolina Revenue Act of 1923, the federal income tax statutes had referred to gain or loss "from the sale or other disposition" of property.

The Revenue Act of 1916, 39 Stat. 756 *et seq.*, in Section 2(c), provided that the amount of "the gain derived from the sale or other disposition of property" acquired before March 1, 1913, was determinable on the basis of "the fair market price or value" of such property as of March 1, 1913. Section 5 provided that, in computing a citizen's net income, allowable deductions included the following: "Fourth. Losses actually sustained during the year, incurred in his business or trade, or arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise: *Provided,* That for the purpose of ascertaining the loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such loss sustained; . . . ."

The Revenue Act of 1918, 40 Stat. 1057 *et seq.*, in Section 202(a), provided that, as to property acquired before March 1, 1913, the gain derived or loss sustained "from the sale or other disposition" thereof was determinable on the basis of the fair market price or value of such property as of that date; but that, as to property acquired on or after March 1, 1913, the gain derived or loss sustained "from the sale or other disposition" thereof was determinable (with exceptions not material to the factual situation under consideration) on the basis of "the cost thereof." Section 214(a), in pertinent part, provided: "That in computing net income there shall be allowed as deductions: . . . . (6) Losses sustained during the taxable year of property not connected with the trade or business . . . if arising from fires, storms, shipwreck, or other casualty, or from theft, and if not compensated by insurance or otherwise; . . . ."

The Revenue Act of 1921, 42 Stat. 227 *et seq.*, in Section 202(a) provided that, as to property acquired after February 28, 1913, the gain derived or loss sustained "from a sale or other disposition of property" was determinable (with exceptions not material to the factual situation under consideration) on the basis of "the cost of such property." Subject to exceptions not material to the factual situation under consideration, Section 202(b) provided that the gain derived

or loss sustained "from a sale or other disposition of property" was determinable on the same basis, namely, "the cost of such property." Section 214(a), in pertinent part, provided: "That in computing net income there shall be allowed as deductions: . . . . (6) Losses sustained during the taxable year of property not connected with the trade or business . . . if arising from fires, storms, shipwreck, or other casualty, or from theft, and if not compensated for by insurance or otherwise . . . In case of losses arising from destruction of or damage to property where the property so destroyed or damaged was acquired before March 1, 1913, the deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913; . . . ."

Beginning with the Revenue Act of 1924, 43 Stat. 253 *et seq.*, Sections 202(a), 204(a), 204(b) and 214(a)(6), the section of the federal statutes which allows a deduction for a loss by casualty, *e.g.*, by fire, of property not connected with a trade or business, provides by cross-reference that the amount of such loss is determinable by the method prescribed in a designated separate section. This separate section provides that the amount of "the gain or loss from the sale or other disposition of property" is determinable on the basis of "the cost of such property." The federal statutory provisions now in effect are codified as 26 U.S.C.A. §§ 165, 1011 and 1012. *Harper v. United States,* 274 F. Supp. 809 (D.C. S.C. 1967), affirmed *Harper v. United States,* 396 F. 2d 223 (4 Cir. 1968).

Hubinger v. Commissioner of Internal Revenue, 36 F. 2d 724 (2 Cir. 1929), involved the determination of the Federal Income Tax for 1920 of a taxpayer who suffered a (partial) fire loss. The taxpayer's claim was rejected on the ground there had been "no proof of a loss" within the meaning of the Revenue Act of 1918. The decision treats a loss by fire as an "other disposition" of property within the meaning of Section 202(a) of the Revenue Act of 1918. The opinion of Circuit Judge Augustus N. Hand quoted and emphasized a Treasury Department Regulation issued pursuant to the Revenue Act of 1918 which contained the following provision: "When the loss is claimed through the destruction of property by fire, flood or other casualty, the amount deductible will be the difference between the cost of the property or its fair market value as of March 1, 1913, if acquired before that date, and the salvage value thereof, after deducting from such cost or such value as of March 1, 1913, the amount, if any, which has been or should have been set aside and deducted in the current year and previous years from the gross income on account of depreciation and which has not been paid out

in making good the depreciation sustained. But the loss should be reduced by the amount of any insurance or other compensation received. . . ." In accord with this Treasury Department Regulation, issued pursuant to and interpretative of the Revenue Act of 1918, the federal statutes, as indicated above, provide that the amount of a deductible loss from a casualty such as a fire is determinable on the basis of the reasonable market price or value of the property when such casualty occurs but not in excess of the cost to the taxpayer of the destroyed property.

Plaintiff attempts to distinguish *Pioneer Cooperage Co. v. Commissioner of Int. Rev.*, 53 F. 2d 43 (8 Cir. 1931), cited and discussed in the opinion of the Court of Appeals, by calling attention to this statement in the opinion: "Petitioner (taxpayer) has abandoned in this court the theory that the value when destroyed should be adopted as the basis for determining its loss." The property having been acquired by the taxpayer prior to March 1, 1913, the Revenue Act of 1918 expressly provided that the fair market price or value of the property as of March 1, 1913, was the basis for ascertaining the gain derived or loss sustained "from the sale or other disposition" of such property. With reference to property acquired on or after March 1, 1913, "the cost thereof" was the basis for ascertaining the gain derived of loss sustained "from the sale or other disposition" of such property. The primary significance of *Pioneering Cooperage Co. v. Commissioner of Int. Rev., supra,* is the holding that, in a factual situation similar to that now under consideration, the method prescribed for ascertaining the loss sustained "from the sale or other disposition" of property applies to an involuntary disposition by casualty as well as to a voluntary disposition by sale.

Although it seemed appropriate to set forth the provisions of successive State and Federal income tax statutes, we deem it unnecessary to discuss further the questions involved in the taxpayer's appeal. Suffice to say, we approve the comprehensive opinion of Morris, J., for the Court of Appeals. The opinion is supported by the authorities cited and well and accurately disposes of the questions raised by the taxpayer's appeal. As stated therein, the income tax statutes deal with realized gains and realized losses. Having failed to show a cost basis for his loss, plaintiff's claim was properly denied.

Affirmed.

MOORE, J., did not participate in the consideration or decision of this case.

MRS. RUBY W. PETTY, WIDOW, EDGAR PETTY, DECEASED, EMPLOYEE v. ASSOCIATED TRANSPORT, INC., SELF-INSURER

No. 20

(Filed 15 April 1970)

1. Master and Servant §§ 47, 58— interpretation of G.S. 97-12 — suicide by employee — objective of Compensation Act

An interpretation of G.S. 97-12 as prohibiting compensation to the dependents of an employee who intentionally killed himself is not compatible with the objective of the Workmen's Compensation Act, which is to provide for the injured workman, or his dependents in the event of his death, at the cost of the industry which he was serving.

2. Master and Servant § 47— construction of Compensation Act

Benefits under the Workmen's Compensation Act should not be denied by a technical, narrow and strict construction.

3. Master and Servant § 58— workmen's compensation — suicide resulting from compensable accident — intervening act

When suicide is the end result of an injury sustained in a compensable accident, it is an intervening act but not an intervening cause.

4. Master and Servant § 58— workmen's compensation — suicide resulting from compensable accident

An employee who becomes mentally deranged and deprived of normal judgment as the result of a compensable accident and commits suicide in consequence thereof does not act wilfully within the meaning of G.S. 97-12, and his death is compensable under the Compensation Act.

5. Master and Servant § 97— workmen's compensation — hearing by Commission under misapprehension of the law — remand for necessary finding of fact

Where a claim for compensation for the death of an employee who committed suicide while totally disabled from a compensable accident was heard and reviewed in the Industrial Commission under the misapprehension that G.S. 97-12 prohibited compensation for the death of an employee who intentionally took his own life, even though his death was directly attributable to the injuries he received in the accident, the cause must be returned to the Industrial Commission for a specific finding whether the employee's suicide was attributable to an abnormal mental condition resulting from the compensable accident, no finding with respect thereto having been made.

6. Master and Servant § 85— workmen's compensation — rehearing by Industrial Commission

The Industrial Commission, in a proper case, may grant a rehearing and hear additional evidence.

7. Master and Servant § 93— workmen's compensation — rulings upon objections to evidence — answers "for the record"

Ordinarily, when objection is made to a question propounded to a witness in a workmen's compensation hearing, the proper procedure is for

the commissioner to require counsel to state the grounds of objection and then to make his ruling; when a ruling is deferred and the witness is allowed to answer "for the record," the ruling should be entered in the transcript before the hearing commissioner makes his award.

8. Master and Servant § 93— workmen's compensation — suicide — causal relation to accident — hypothetical questions — expert testimony

In this proceeding upon a claim for compensation for the death of an employee who committed suicide while totally disabled from a compensable accident, doctor's answers "for the record" to hypothetical questions seeking to establish a direct causal relation between the employee's accident and suicide were competent.

MOORE, J., did not participate in the consideration or decision of this case.

ON certiorari to review the decision of the Court of Appeals reported in 4 N.C. App. 361, 167 S.E. 2d 38, docketed and argued in the Supreme Court as Case No. 20 at the Fall Term 1969.

Plaintiff, the widow and sole dependent of Edgar Petty (Petty), instituted this proceeding before the North Carolina Industrial Commission to recover death benefits under G.S. 97-38. On 13 February 1966 Petty (57) was working for defendant, a self-insurer, as an over-the-road truck driver. On that day he was injured on the highway in Maryland in an accident arising out of and in the course of his employment. On 8 July 1966 he committed suicide. Plaintiff contends that the suicidal act was causally related to the accident and that she is therefore entitled to compensation.

The first hearing in this case was held by Commissioner William F. Marshall, Jr., on 3 April 1967. The second was conducted on 1 April 1968 by Deputy Commissioner Robert F. Thomas. The only evidence adduced by defendant was the medical reports of the surgeon who treated Petty in Maryland. The testimony of plaintiff's witnesses tended to show the following facts:

Plaintiff's co-driver, J. W. Walker, was driving the truck when a two-pound hunk of concrete hurtled from an overhead bridge into the bunk where Petty was resting. Walker stopped the truck and observed that Petty was bloody and unconscious, "the rock laying up beside his head." He "waived down traffic to get some help," and in about 30 minutes an ambulance took Petty to Prince George General Hospital at Cheverly, Maryland, where he was treated by Dr. Dunn Kavanaugh.

The rock had fractured Petty's right cheek and shattered his jawbone. There were three complete fractures of the mandible and "a

fracture of the remaining portion of the alveolus on the right maxilla, which contained two molar teeth." Dr. Kavanaugh attempted to reduce the fracture by drilling holes in the bones and wiring them together. He also placed wires around the teeth and applied arch bars to the upper and lower arches with wire around each of the solid teeth.

On 22 February 1966, after nine days in the Maryland hospital, Petty was permitted to return to North Carolina for follow-up care. His personal physician, Dr. Matthews of Burlington, saw him on 24 February 1966 and immediately referred him to Dr. Erle E. Peacock, Jr., of North Carolina Memorial Hospital at Chapel Hill. Dr. Peacock examined Petty on 1 March 1966 and found "an unstable nonunion of a fracture of the symphysis of the mandible." Dr. Peacock attempted to stabilize the jaw without surgery by driving Kirschner wires across the fragments. However, this procedure was unsuccessful. On 11 April 1966, he operated and found the cause of the instability to be "a large butterfly fragment" and two lateral fragments which were barely touching each other. He drilled opposing holes on each side of the loose fragments and in the lateral processes, and wired them together tightly. Arch bars were placed on both dental arches by fastening them to the teeth with steel wires. The wires were removed on 17 April 1966, and Petty was discharged from North Carolina Memorial Hospital.

As long as Petty's jaws were wired he could not talk normally, and he could take nourishment only through a quill. Between the date of the accident and his death he lost forty pounds. All the while his jawbone was wired (32 days) he suffered pain from muscular spasms in his face, neck, and jaw. One of his multiple discomforts was that he could not complete a yawn. After the wires were removed, he complained of "a novocain numbness" of the lower lip and jaw. This, the doctor told him, "might last for several years or it could go away." Dr. Peacock's operation corrected the nonunion of the bone fragments and the instability of the jaw. However, Petty's appearance was not the same as it had been before the accident. His teeth did not meet right; his jaw jutted; and his eyes were "not right." He continued to have trouble talking, and he could not open his mouth normally. His teeth were still braced, and within 2-3 days after his return from Chapel Hill the braces set up muscular spasms which seemed to him to be pulling his teeth apart where they were wired. He became apprehensive that damage was being done to the bone. Five or six of his teeth were loose. He had no bite, and he could not chew even soft food. During the last two weeks of his life, Petty had no appetite and could not sleep.

Prior to 13 February 1966, according to Petty's neighbors, associates, and family, he was a happy, healthy, well-adjusted man, who enjoyed fishing, fish frys, cook-outs, and keeping his yard. He was friendly, poised, and assured, a devoted husband and father, and a loving grandparent. His minister characterized him as "a wonderful person." Petty's home in Elon College was paid for; "he had money in the bank" and no debts. On 28 February 1966 he became eligible for retirement at $250.00 a month for life. Before the accident Petty had manifested no symptoms of mental illness. After the accident, however, his personality changed; "he was never himself thereafter."

Early in March, after Dr. Peacock started treating him, Petty became upset because he felt that Dr. Peacock was too busy to take a personal interest in his case. However, he "calmed down" when Dr. Matthews told him that Dr. Peacock was "the best qualified man in the whole area" to treat his injury. Later Petty said he was glad he had not changed doctors. Dr. Peacock told Petty that he was unduly concerned about himself, and his wife and daughter felt that this was "the kind of talk" he needed to hear. After the first of March, Petty was definitely anxious, nervous, and showed signs of depression. His family noted that his thinking and comprehension "was slowed." He did not always understand what was said to him, and he was forgetful. He was concerned only with his physical feelings, and he did not want his grandchildren around for fear they would hurt him. His eyes did not seem to focus, and at times he would stare vacantly. It was Dr. Matthews' opinion that Petty's accident would have had an emotional effect on anybody.

Petty dreaded the operation on April 11th, his second, and there was a marked change in his condition thereafter. His depression and nervousness worsened. He would pace the floor of his room and the hospital corridor or stare out of his window and cry. He continued to do this after he came home from the hospital on April 17th.

Sometime in May, Petty apparently realized that he was mentally ill. He told his minister, Mr. Ben Cox, that he knew something was wrong with him; that he had feelings of hostility toward total strangers; that while sitting on a bench in the city park, he had wanted to throw something at a child who rode by on a bicycle. Mr. Cox had advised him to go to the mental-health clinic.

The last of May, Petty went to the office of his sister-in-law, Mrs. Webster, a nurse with the Alamance County Health Department, and told her that he constantly had "feelings of confusion in his head," a "feeling of pressure and blurred vision," and "a feeling of something closing in on him." He told her he was thinking of killing his

wife and her mother. When she asked him if he had told his wife about these feelings he wept and said she was "dearest of all to him," and he could not discuss the situation with her lest she become afraid of him. As he talked, his eyes did not focus. He told Mrs. Webster he wanted help; that he had talked to Mr. Cox; and that he was willing to consult a psychiatrist. At his request she went to the Petty home that night to help him tell his wife of these "strange feelings" and of his fear that he might harm her, her mother, and the colored maid. Mrs. Petty assured him that she had no fear he would ever harm her and that they would seek help immediately.

The next morning Petty and his wife went to see Dr. Matthews. Petty was reluctant to disclose the details of his feelings to the doctor but managed to tell him that he had the urge to harm the occupants of his house and that this frightened him. It was obvious to Dr. Matthews that Petty's reasoning power was disturbed, and he arranged for Petty to see Dr. Fox at the mental clinic that afternoon.

Dr. Fox saw Petty on June 2nd and 9th. Dr. W. D. Clarkson, the director of the mental-health clinic, saw him on June 22nd. Dr. Clarkson thought Petty was "repressing," for he could get very little out of him. The doctor was concerned for him and troubled by "what he didn't say." He told Petty to return on June 29th with his wife.

Petty did not tell his wife Dr. Clarkson wanted to see her. On June 29th Petty cancelled his appointment and went to Durham to see his mother-in-law. After learning of Petty's urge to do harm, his wife had sent her there to stay with another daughter. When he arrived about 10:30 a.m. his face was red and his eyes wild. He told his mother-in-law that he had started to Butner but decided to come by and tell her he was going to kill his wife and himself, that he was in a fog and could not get out. She talked with him until 2:30 when he appeared to be quiet and said he wanted to go back home. She immediately telephoned her daughter and informed her of Petty's agitated state.

Despite the urge to harm his wife, Petty was always kind to her. At no time after his accident did he ever speak crossly to her or manifest irritability toward her. Nor did he ever complain about the liquid diet which she prepared for him.

On 8 July 1966 Dr. Cadell, a dentist, was scheduled to begin procedures calculated to correct Petty's dental problems. Petty had told his wife that he did not believe he would ever have the nerve "to go through with that dental work." On the afternoon of July 7th,

the day before his first scheduled appointment with the dentist, Petty went to the home of a policeman, a friend to whom he had loaned his pistol, and repossessed the weapon. On the following morning, after his wife went to work, a neighbor saw him take a bag from his car into the house. When Mrs. Petty came in from work that afternoon she found his body on the floor of his bedroom. He had shot himself with the pistol he had procured the day before.

As a result of the accident on 3 February 1966, Petty was completely and totally disabled until his death on 8 July 1966. However, Dr. Matthews thought he would have sufficiently recovered from his injury to have returned to work within 30 days had the dental work proceeded according to plan.

In Dr. Clarkson's opinion, the injury which Petty received in Maryland on 13 February 1966 could have contributed to the mental condition he observed on 22 June 1966. At that time Petty was anxious, severely depressed, and paced the floor. Dr. Clarkson described his condition as an "agitated depression" or "involutional psychotic depression." Such depression in a man of Petty's age, he said, indicated a "high likelihood of suicide," and "he would assume that his death on July 8 was related to his depression." It was also Dr. Clarkson's opinion that if Petty suffered great pain it could have contributed to an emotional condition such as depression, particularly if the pain was chronic, and he saw no end or solution to it. Dr. Clarkson also said that if Petty was unconscious after the accident — as Walker testified — the assumption is that he had suffered a concussion of the brain, and the presence of some brain injury could not be ruled out. However, he found in the hospital records "no gross evidence" of brain damage.

On 15 May 1968, Commissioner Marshall filed his opinion and award. *Inter alia* he found:

"(6) . . . All evdientiary medical records and all medical evidence points to the fact that plaintiff (*sic*) did not suffer any brain injury in the accident; that the deceased employee knew the nature and extent of his surroundings and that the depression experienced was the normal reaction to the nature and length of time of recovery for the accident and subsequent operation, . . . (7) that there is no causal relationship between the self-inflicted injuries resulting in death on July 7, 1966 (*sic*), and the industrial injury sustained on February 13, 1966." His conclusion of law was that "[t]here is no causal relationship shown connecting the admitted industrial accident of February 13, 1966, and the self-inflicted injuries resulting in

death on July 7, 1966." He denied plaintiff's claim for death benefits, and she appealed to the full Commission.

Upon appeal the full Commission concluded that Commissioner Marshall had reached the correct result but for the wrong reason; that the decision should rest on "G. S. 97-12 concerning the willful intention of the employee to kill himself, rather than upon the basis of causal relationship." It struck out Finding of Fact No. 7 and substituted therefor the following: "7. The deceased employee shot himself to death with his own pistol . . . deceased having obtained such pistol (on the preceding day) from a policeman to whom he had loaned it. . . . The death of deceased employee was occasioned by his willful and premeditated intention to kill himself." Upon this finding it substituted for Marshall's conclusion of law the following: "The death of the deceased employee was occasioned by the willful and premeditated intention of the employee to kill himself. The plaintiff is therefore not entitled to compensation. G. S. 97-12; cf. *Painter v. Mead,* 258 N.C. 741."

From the award of the full Commission, plaintiff appealed to the Court of Appeals, which found "No error." We allowed certiorari.

John H. Vernon and W. R. Dalton, Jr., for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill by Luke Wright and Edward L. Murrelle for defendant appellee.

SHARP, J.

The opinion and award of the full Commission, which struck Commissioner Marshall's finding that there was no causal relation between Petty's suicide and the accident on 13 February 1966, discloses: (1) As to the facts, the Commission was convinced that Petty intentionally took his own life, but that his death was directly attributable to the injuries he received in the accident. (2) As to the law, upon these facts, the Commission thought G. S. 97-12 denied to plaintiff any compensation for Petty's death.

G. S. 97-12, in pertinent part, provides: "No compensation shall be payable if the injury or death was occasioned by the . . . willful intention of the employee to injure or kill himself or another." Plaintiff's assignments of error raise this question: Does an employee who intentionally takes his own life because of a mental derangement produced by a compensable injury act *willfully* within the meaning of G.S. 97-12?

Prior to *Painter v. Mead Corporation,* 258 N.C. 741, 129 S.E. 2d

482 (1963), this Court had not passed upon a claim for compensation for the death of an employee who committed suicide while totally disabled from a compensable accident. In that case, the deceased employee suffered a blow to his head in an accident arising out of and in the course of his employment. Headaches of increasing intensity followed, and twenty days later a cranial operation was performed to relieve pressure on the brain. Thereafter he was never himself; he was the victim of headaches, sleeplessness, emotional instability, and periods of blankness. On the morning of 2 September 1960, after a sleepless night, Painter hung himself. A psychiatrist testified that, in his opinion, Painter was so depressed, upset, and bereaved of judgment as a result of his head injury that he would be considered insane; in committing suicide he was dominated by a disturbance of mind directly caused by the injury and its consequences; and, "in that sense," his act was involuntary. The hearing commissioner found the following facts, which the full Commission adopted:

"That the accidental injury of deceased employee, Tolvin Edgar Painter, on July 21, 1960, caused the deceased to become insane and mentally deranged to such an extent that he had an uncontrollable and irresistible impulse to such an extent that he become delirious and frenzied without rational knowledge of the physical consequences of his act, without conscious volition to produce death on September 2, 1960."

In using the foregoing words to express its finding in *Painter's* case, the Commission was obviously paraphrasing the *"Sponatski* rule," formulated in 1915 by the Supreme Judicial Court of Massachusetts in *In Re Sponatski,* 220 Mass. 526, 108 N.E. 466. In that case the court said that under the Workmen's Compensation Act the right of dependents of a mentally disturbed employee to recover compensation for his death by suicide was determined by the following rule:

". . . [W]here there follows as the direct result of a physical injury an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy 'without conscious volition to produce death, having knowledge of the physical consequences of the act,' then there is a direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary willful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act even though choice is dominated and ruled

by a disordered mind, then there is a new and independent agency which breaks the chain of causation arising from the injury." *Id.* at 530, 108 N.E. at 468. (In 1958 Massachusetts rejected the *Sponatski* rule by legislation. Mass. Gen. Laws Ann. Ch. 152, § 26(A), (1958).)

Thereafter, for many years, the majority of American courts deciding the question here presented followed the *Sponatski* rule, or at least gave it lip service. *Painter v. Mead Corporation, supra* at 747; 1A Larson's Workmen's Compensation Laws § 36.20 (1967); Annot., Suicide as Compensable Under Workmen's Compensation Acts, 15 A.L.R. 3d 616; Comment, 31 U. of Cinn. L. Rev. 187.

In effect that rule incorporates the M'Naghten test for criminal responsibility. Under M'Naghten, if the accused should be in such a state of mental derangement as not to know the nature and quality of the act he was doing, or, if he did know it, as not to know he was doing wrong, the law does not hold him accountable for his acts, for guilt arises from volition and not from a diseased mind. *State v. Spence,* 271 N.C. 23, 38-39, 155 S.E. 2d 802, 814. Also it should be noted that the *Sponatski* rule was predicated upon the tort concept of an independent intervening cause. It eliminates the accident as the proximate cause of death if the employee had sufficient mental capacity to know the purpose and effect of his suicidal act notwithstanding he was dominated by a disordered mind directly caused by the injury and its consequences.

At the time we decided *Painter,* the *Sponatski* rule was still the majority rule. However, in writing the Court's opinion, which affirmed an award to Painter's dependents, Higgins, J., noted: (1) *Sponatski's* is a harsh rule which has been widely criticized as "an application of the test of criminal responsibility not justified in workmen's compensation cases" and as confusing "an intervening *act* with an intervening *cause";* and (2) a growing minority of jurisdictions in this country are holding that the death of an employee is compensable if a work-connected injury causes insanity which in turn induces suicide. In *Painter* it was carefully pointed out that in affirming the Commission's award, we were not to be understood "as fixing as our standard the rigid rule of the *Sponatski* case"; we merely held that the evidence met *Sponatski* requirements, the most stringent of all tests, and that further discussion was therefore unnecessary. *See* Case Law Comment, 42 N. C. L. Rev. 611.

[1, 2] Despite our intimation in *Painter,* however, the Commission cited that case in support of its conclusion that G. S. 97-12 prohibited compensation to the dependents of an employee who intentionally killed himself. We do not think such an interpretation is

compatible with the objective of the Workmen's Compensation Act, which is to provide for the injured workman, or his dependents in the event of his death, at the cost of the industry which he was serving. To this end, the rule is that benefits under the Act "should not be denied by a technical, narrow, and strict construction." *Hollman v. City of Raleigh,* 273 N.C. 240, 252, 159 S.E. 2d 874, 882. *Accord, Cates v. Construction Co.,* 267 N.C. 560, 148 S.E. 2d 604; *Hartley v. Prison Department,* 258 N.C. 287, 128 S.E. 2d 598; *see* Comment in 45 Iowa Law Rev. 669 (1960).

[3] To say, as a matter of law, that one who intentionally takes his own life acts willfully is to ignore "the role which pain or despair may play in breaking down a rational, mental process. *Harper v. Industrial Commission,* 24 Ill. 2d 103, 107, 180 N.E. 2d 480, 482. Annot., 15 A. L. R. 3d 616, 622. "If the sole motivation controlling the will of the employee when he knowingly decides to kill himself is the pain and despair caused by the injury, and if the will itself is deranged and disordered by these consequences of the injury, then it seems wrong to say that this exercise of will is 'independent,' or that it breaks the chain of causation. Rather, it seems to be in the direct line of causation." 1A Larson's Workmen's Compensation Law § 36.30 (1967); Annot., 15 A. L. R. 3d 616, 622. As Fowler, J., pointed out in his dissent in *Barber v. Industrial Commission,* 241 Wis. 462, 6 N.W. 2d 199 (1942) (a decision which applied *Sponatski*), when suicide is the "end result" of an injury sustained in a compensable accident, it is "an intervening act but not an intervening cause. An intervening cause is one occurring entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is a cause of that result."

In 1949 the Supreme Court of Florida adopted the chain-of-causation test. *Whitehead v. Keene Roofing Co.,* 43 So. 2d 464 (Fla. 1949). *See* Comment in 16 Vanderbilt L. Rev. 275 (1960). *Whitehead* involved facts and a statute practically identical with those we now consider. Whitehead, an employee, sustained serious injuries in a compensable accident. Three months thereafter he committed suicide by swallowing poison. He knew the consequences of his act, but at the time he was suffering from a mental disturbance directly attributable to the injuries he received in the accident. The Florida Act provided: "No compensation shall be payable if the injury was occasioned primarily . . . by the willful intention of the employee to injure or kill himself." In reversing the Circuit Court's judgment denying death benefits to Whitehead's dependents, the Florida Supreme Court said:

"From the evidence, there can be no doubt that the death of the deceased was directly attributable to the injuries he sustained in the fall from the roof. . . .

"[W]e are not persuaded that the fact that a workman knew that he was inflicting upon himself a mortal wound will, in all cases, amount to a 'willful intention' to kill himself, within the meaning of the statute. We believe that in those cases where the injuries suffered by the deceased result in his becoming devoid of normal judgment and dominated by a disturbance of mind directly caused by his injury and its consequences, his suicide cannot be considered 'willful' within the meaning and intent of the Act. . . .

"While it may be an independent intervening cause in some cases, it is certainly not so in those cases where the incontrovertible evidence shows that, without the injury, there would have been no suicide. . . ." *Id.* at 465.

Other jurisdictions having statutes which prohibit compensation for willfully inflicted injuries and death have followed the "realistic and reasonable view" of the Florida Court in *Whitehead, supra.*

In *Burnight v. Industrial Acc. Com.*, 181 Cal. App. 2d 816, 821, 5 Cal. Rptr. 786, 790, Bray, P.J., said: "[S]uicide cannot be intentionally self-inflicted if, in spite of his act being one of conscious volition, the suicide, because of mental condition resulting from the injury, is unable to control the impulse to kill himself. . . ."

Twenty-six years after the decision in *Barber, supra,* the dissent of Fowler, J., became the law in Wisconsin. In *Brenne v. Department of Industry, Labor & Hum. Rel.*, 38 Wis. 2d 84, 156 N.W. 2d 497, a lineman received a severe electrical shock in the course of his employment and suffered multiple burns to various parts of his body. Thereafter he committed suicide. The hearing examiner, relying upon *Barber* and the Wisconsin Act allowing recovery only "where the injury is not intentionally self-inflicted," denied plaintiff's claim for direct benefits. In remanding the case to the Department for reconsideration and further hearing, the Supreme Court of Wisconsin (citing *Whitehead v. Keene Roofing Co., supra*), said: "The burden of proof is on the claimant to establish by substantial evidence that the 'chain-of-causation' exists. The claimant does this by showing that the industrial injury caused the suicide. . . .

". . . The act of suicide cannot then be said to be willful or intentional within the meaning of the statute since its causation ultimately relates back to the original injury, rather than existing as an independent and intervening cause." *Accord, Graver Tank &*

Mfg. Co. v. Industrial Comm., 97 Ariz. 256, 399 P. 2d 664 (1965). *Terminal Shipping Co. v. Traynor*, 243 F. Supp. 915 (1965). *See* Annot., 15 A. L. R. 3d 616, 631-637 (1965) and 29 N. A. C. C. A. Law Journal 212, 216-219 (1963), where the cases adopting the chain-of-causation test are collected. Another perceptive argument for the rejection of the *Sponatski* rule and the adoption of the chain-of-causation test appears in the following comment in 45 Iowa L. Rev. 669 (1960):

"In spite of the fact that the majority rule (*Sponatski*) is a departure from the conventional rules of causation, the plain wording of the wilful self-injury statutes appears at first glance to be a convincing argument for the rule's adoption. It might seem that the lack of conscious volition which is the basis of that rule is quite in accord with these statutory limitations. An examination of the purpose to be served by these statutes, however, would indicate that their application is inappropriate in cases of this type. As has been pointed out the law of workmen's compensation does not, at the time of the initial injury, employ the common-law concepts of legal cause in determining liability. Work-connection rather than fault underlies recovery. This absence of the traditional safeguards of the common law may necessitate these statutory safeguards when the level of inquiry is the primary source of injury. Certainly, however, there is no reason for these statutes to be applied in determining the range of compensable consequences stemming *from* the initial injury. Here the employer and his insurer are protected by the common-law concepts of causation which will prevent recovery for additional self-injury which is not connected with the employment. Using the statute to deny compensation for suicides arising out of the employment is anomalous because to do so produces a narrower basis for recovery under the remedial workmen's compensation acts than would have been possible under common-law tort doctrine." *Id.* at 675-676.

[4] We conclude that the chain-of-causation test effectuates the purpose and intent of the Workmen's Compensation Act. We hold, therefore, that an employee who becomes mentally deranged and deprived of normal judgment as the result of a compensable accident and commits suicide in consequence does not act wilfully within the meaning of G. S. 97-12.

The evidence in this case tends to show that Petty's death was directly attributable to the accident on 13 February 1966, in that the agitated depression resulting from the accident caused his suicide. This, it seems, the full Commission recognized when it struck Commissioner Marshall's finding that there was no causal relation be-

tween the accident and death. The Commission's belief that, because Petty planned his own destruction causation was immaterial, no doubt explains its failure to make a specific finding with reference to causation.

The transcript does not support Commissioner Marshall's findings (contained in No. 6) that "*all* evidentiary medical records and *all* medical evidence points to the fact that plaintiff (sic) did not suffer any brain injury in the accident . . . and that the depression experienced was the normal reaction to the nature and length of time of recovery for the accident and subsequent operation . . ." (Italics ours.) The record contains evidence to the contrary. Although we do not regard the finding that Petty did not suffer any physical injury to his brain as being determinative of whether his agitated depression was related to his injuries, there is evidence that he was unconscious after the accident and that he had a concussion of the brain. The commissioner's finding that Petty's depression was "the natural reaction" to his injury and subsequent operations ignores certain statements in the testimony of each of the three doctors.

[5, 6] It is clear that this proceeding has been heard and reviewed upon a misapprehension of the applicable principle of law. The opinion and award of the Commission is vacated and the cause is remanded to the Court of Appeals with directions that it be returned to the Industrial Commission, the only tribunal which can find the facts, for a specific finding whether Petty's suicide was attributable to an abnormal mental condition resulting from his accident on 13 February 1966. "[W]here facts are found or where the Commission fails to find facts under a misapprehension of law, the court will, when the ends of justice require, remand the cause so that the evidence may be considered in its true legal light." *Bailey v. Department of Mental Health*, 272 N.C. 680, 684, 159 S.E. 2d 28, 31. "Furthermore, the Industrial Commission, *in a proper case*, may grant a rehearing and hear additional evidence." *Id.* at 686, 159 S.E. 2d at 32.

[7] In view of the manner in which objections to Dr. Clarkson's testimony were handled at the second hearing, it would seem that, upon the request of either party, the Commission should reopen the case to permit his re-examination. We note, however, that on the first hearing Dr. Clarkson gave evidence similar to much of that sought to be adduced by the hypothetical question. When defendant objected to questions propounded by plaintiff's counsel to Dr. Clarkson, the hearing commissioner deferred his ruling and instructed the doctor to answer "for the record." The deferred rulings, however,

were never entered in the record. Obviously this *modus operandi* is unsatisfactory. Ordinarily, the proper procedure is for the commissioner to require counsel to state the grounds of objection and then to make his ruling. If there is a valid objection to the form of the question, counsel can rephrase it; if the objection is made on other grounds, the Commission and opposing counsel are alerted to the legal principle invoked and can appraise it. In any event, when a ruling is deferred it should be entered in the transcript before the hearing commissioner makes his award. Only in this way can the parties, the full Commission, and the court (if there is an appeal) intelligently review the decision. Apparently the full Commission failed to enter rulings on the evidence because of its interpretation of G. S. 97-12.

In justice to the hearing commissioner we are compelled to say that he probably felt driven to the procedure he adopted by the hypothetical question which plaintiff's counsel propounded. Seemingly it was articulated on the spur of the moment and, like Topsy, it just grew. Its form changed as the objections and pages multiplied and confusion became worse confounded.

[8] All the testimony of the lay witnesses tended to establish a direct causal relation between Petty's accident and suicide. The purpose of the hypothetical question was to establish this relationship by expert testimony also. By and large, the doctor's "answers for the record" were competent, and the testimony could be properly elicited.

Reversed and remanded.

MOORE, J., did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. CURTIS HENDERSON AND MOSES PRICE, JR.

No. 21

(Filed 15 April 1970)

1. Homicide § 21— murder in perpetration of attempted armed robbery — sufficiency of evidence

In this prosecution for first degree murder committed in the perpetration of an attempted armed robbery, the State's evidence, including an in-court identification of defendants as the perpetrators of the robbery and

murder and testimony that a witness overheard defendants planning the robbery, *is held* sufficient for the jury, the apparent contradictions in the testimony and the equivocation of some of the witnesses bearing upon the weight of the evidence or its credibility and not upon its competency, and the jury being the trier of the facts.

2. Criminal Law § 50; Evidence § 42— testimony that statement was forthright, complete and articulate — shorthand statement of fact

Testimony by the solicitor of a municipal-county court that in a conference with the State's principal witness immediately prior to a preliminary hearing held in that court, the witness was reluctant to talk, and that "suddenly the boy began to talk and he was very forthright and complete and gave an articulate statement" may well be considered a shorthand statement of fact, and its admission was not prejudicial error.

3. Criminal Law § 132— motion to set aside verdict as contrary to weight of evidence

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial judge.

4. Criminal Law § 166— abandonment of assignments of error

Assignments of error not supported by reason or authority in defendant's brief will be deemed abandoned. Supreme Court Rule No. 28.

5. Criminal Law § 163— assignments of error to charge — failure to indicate particular error asserted

Assignments of error which quote excerpts from the charge and assert the court erred in so charging the jury, but which fail to indicate in what particular any of the quoted excerpts is erroneous, do not comply with the requirement of Supreme Court Rule 19(3) that the asserted error be clearly presented without the necessity of going beyond the assignment itself to learn what the question is.

6. Criminal Law §§ 112, 168— instructions — "if you find from the evidence" — beyond a reasonable doubt

The trial court did not commit prejudicial error in using in one portion of the charge the words "if you find from the evidence" instead of "if you find from the evidence beyond a reasonable doubt," where in other portions of the charge the court fully and correctly instructed the jury that the burden was on the State to satisfy the jury beyond a reasonable doubt as to the guilt of defendant before such verdict could be returned.

7. Criminal Law §§ 9, 163; Homicide § 25— instructions — homicide committed during robbery — conspiracy to rob

In this consolidated trial of two defendants for a homicide committed in the perpetration of an attempted armed robbery, trial court's instruction to the effect that if the attempted robbery and murder were committed pursuant to a conspiracy to rob, each conspirator would be responsible for the acts of the other on the occasion the crime was committed, but in the absence of such conspiracy, each would be guilty only if he individually was engaged in the perpetration of the attempted robbery and fired the fatal shots, was not unclear and ambiguous, and was favorable

to defendants, since each would be responsible for the acts of the other if both were present, aiding and abetting each other in the perpetration of the attempted robbery, even though there were no previously formed conspiracy.

8. Criminal Law § 168— instructions — State's rebuttal evidence — harmless error

In this prosecution for first degree murder, defendants were not prejudiced by an instruction that the State offered rebuttal evidence "in substance opposed to the testimony of" the State's principal witness "to explain away some of the discrepancies between the testimony of certain officers" presented by the State and that of an officer who testified for defendant, although the instruction was somewhat confusing in that the rebuttal evidence obviously was not offered in opposition to the State's principal witness, but only to explain discrepancies in the testimony of the officers.

9. Criminal Law § 163— exception to charge embracing number of propositions

An exception to a portion of the charge embracing a number of propositions is insufficient if any of the propositions are correct.

10. Criminal Law § 163— exception to excerpt from charge — challenge to omission

An exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case.

11. Criminal Law §§ 118, 168— instructions — contentions of State — discrepancies and conflicts in evidence

In this prosecution for first degree murder, defendants were not prejudiced by the court's frequent references to the discrepancies and conflicts in the evidence while reviewing the contentions of the State, where the court's references thereto tended to emphasize rather than minimize the significance of the discrepancies and conflicts, and it is clear from the evidence and charge that the respective contentions of the State and of defendants with reference to these discrepancies and conflicts were well understood by the jury.

12. Criminal Law §§ 118, 168— instructions — review of State's contentions — statement that witness "put it very accurately" — harmless error

In this prosecution for first degree murder, defendants were not prejudiced when the court, while reviewing the contentions of the State, expressed the view that he thought a State's witness had "put it very accurately" that there was a marked reluctance on the part of the State's principal witness to be the only eyewitness against one of the defendants, where all the evidence tended to show that at the beginning of a conference preceding defendants' preliminary hearing, the State's principal witness was reluctant to talk, and the State's evidence was that this reluctance was based on his belief that he was to be the only witness against one defendant and that this reluctance ceased when he learned that other witnesses were to testify against such defendant.

13. Criminal Law § 126— polling the jury — failure of record to show each juror assented to verdict — certificate of clerk of court

Defendant's contention that the Supreme Court should order a new trial *ex mero motu* because the record on appeal does not show affirmatively that, when the jury was polled, each and every juror assented to the verdict, *is held* without merit, the Court having obtained a certificate from the clerk of superior court to the effect that subsequent to the announcement of the verdict, each juror, upon being polled by the clerk as to each defendant, replied that his verdict was guilty of murder in the first degree with recommendation that the punishment be imprisonment for life.

MOORE, J., did not participate in the consideration or decision of this case.

APPEAL by defendants under G.S. 7A-27(a) from *Mintz, J.*, January 1969 Criminal Session of LENOIR Superior Court, docketed and argued as No. 21 at Fall Term 1969.

At December 1968 Session, the grand jury of Lenoir County returned a bill of indictment charging that defendants on October 5, 1968, murdered Woodrow Stanley.

Evidence was offered by the State and by each defendant.

Uncontradicted evidence offered by the State tended to establish that Woodrow Stanley (Stanley) was shot and fatally injured on Saturday, October 5, 1968, shortly before 11:00 p.m., in the parking area portion of the premises of Stanley's Supermarket (Supermarket), under the circumstances narrated below.

The Supermarket property is located in Kinston, N. C., at the southwest corner of the intersection of Washington Street and Clay Street, and is designated 811 East Washington Street. It fronts eighty-one feet on the south side of Washington Street and extends one hundred and sixty-two feet along the west side of Clay Street. The store building is in the northeast portion of the lot, thirty feet south from the Washington Street curb and seven feet west from the Clay Street curb. The building has a frontage of twenty-three feet and extends south at that width sixty feet. An open space in the shape of the letter "L" extends (1) south from Washington Street and west of the building to a fence along the back property line, and thence (2) east between the back of the building and the fence to Clay Street. In the portion which extends (at the width of fifty-one feet) south from Washington Street, there are eleven parking spaces along the west property line. These spaces point diagonally towards the west side of the building. Near the back property line of this portion are four parking spaces with lines pointed towards Washington Street. There are no parking spaces in the area extending from the rear of the building a distance of seventy-two feet to the

fence. This area provides access to and from Clay Street. Stanley's station wagon was parked in the second parking space from Washington Street and was backed towards the west property line. The front was headed diagonally towards the west side of the building. The car of Venters, an employee, was parked, headed towards the back fence, in one of the four parking spaces at the rear of the parking area.

The Supermarket was closed to the public about 10:45 p.m. Stanley, the owner-operator, and his employees were making preparations to leave. Upon locking and leaving the store, Stanley and two of his employees, Phillip Rhugaber (Rhugaber) and Stanley Lee (Lee), went to Stanley's station wagon; and the four other employees, James Robert Williams (Williams), Johnnie Ray Miller (Miller), James Lacewell (Lacewell) and Harry Venters (Venters) went to the Venters car.

Lee and Rhugaber got in the Stanley station wagon, Lee on the front seat and Rhugaber on the back seat. Stanley got in the driver's seat. Before he could close the door two colored men came running towards the station wagon and asked for change for a dollar. One of them stopped at the door beside Stanley, on the driver's side, and the other went to the back of the station wagon. After Stanley stated he had left all the money in the store, he was told: "This is a stickup, Woodrow, give me the money. . . . I know you have got it because I saw you put it in a bag, give it to me." A first shot was fired. When Lee started to get out, the man who fired the shot said: "If you open that door I will kill you." Lee was "scared to death" and "just froze." Again the man asked for the money. Stanley was sitting in the car with the door open. A second shot was fired. When this occurred, Stanley reached over and got a bag of groceries, threw it out and said, "There is your money, go home." Stanley grabbed the wheel, blew the horn and tried to get out of the car. He finally "made it outside," still blowing the horn. A third shot was fired. Thereupon, Stanley "turned the wheel aloose and fell." Just before he fell, the man who fired the shots grabbed Stanley's billfold from his pocket and ran. Both men ran from the back of the station wagon towards the back of the parking area, across the area in back of the store building and towards Clay Street. Lee got out of the station wagon and hollered to Venters: "They shot Mr. Stanley." In running from the station wagon, the two men involved in the holdup passed the parked car of Venters.

Lee testified to the facts narrated in the preceding paragraph. He testified also that the man who did the shooting was "standing

up all the time"; that all shots were fired by the man on the driver's side; and that he could not see the face of either of the men.

Rhugaber did not testify. Lee and Rhugaber told an investigating officer that night (October 5-6, 1968) that they could not identify either of the men.

Unconscious, Stanley was taken by ambulance to the hospital and died en route or shortly after arrival. An autopsy disclosed that three bullets had penetrated his body. Death was caused by a bullet that had penetrated his left chest, left lung and heart.

Williams, aged 17, and Miller, aged 18, two of the four Stanley employees who went to the Venters car, testified as witnesses for the State. Lacewell and Venters did not testify.

Portions of the testimony of Williams and of Miller as to what happened after they reached the Venters car, exclusive of testimony bearing upon the identification of defendants, are narrated below.

According to Williams: He and Miller got in the back seat of the Venters car and Lacewell got in the front seat. Venters, outside the car, hollered, "Somebody shot Mr. Stanley." Thereupon, the occupants of the car jumped out and all ran towards the station wagon. When they got "some distance" from it, they heard *somebody* say, "Stop, or I'll shoot," and all "turned around and went back the other way." Williams (but none of the other three) got back in the Venters car. From the back seat of the Venters car, looking through the back glass, Williams saw "tussling" on the driver's side (far side from Williams) of the station wagon. On the passenger's side, towards the back, he "saw a guy peeping into a bag." When the tussling ceased, a guy, who came from the driver's side of the station wagon, ran by the Venters car and said, "Don't move or I'll shoot you." The man was about fifteen feet from Williams. Venters was "out there" when the man passed and made that statement. A few seconds later the man with the bag ran from the passenger's side of the station wagon. He fell before he reached Clay Street, dropped something from the bag he was carrying, picked it up, put it back in the bag and started running again. When he fell, Williams got out of the Venters car and attempted to overtake the man with the bag by cutting him off as he ran down Clay Street. However, Williams ran into the fence that extended along the rear of the parking lot. The man who came from the driver's side of the station wagon was the first to run by the Venters car. He had a pistol in his hand. After Stanley was put in the ambulance, Williams went to the station wagon, found Stanley's money (over $2,000.00) in a bag, and gave the money to one of the officers.

According to Miller: When Venters said, "Somebody is shooting Mr. Stanley," those in the Venters car hopped out and started towards the station wagon. A man standing behind the station wagon on the passenger's side was looking into a bag. Miller went approximately eighteen steps towards the station wagon. When he was about ten steps from the station wagon, the man said: "Halt, or I'll shoot." Lacewell said, "Come on Johnnie," and when Miller looked up Lacewell "was across the fence." Miller heard one shot before he got out of the Venters car. He saw the man who had the bag fall, get up and pick up some packages. There was another man on the far side of the station wagon. He (Miller) could hear him but did not see him.

The parking areas of the Supermarket premises were well lighted by mercury lights when the events relating to the attempted robbery and the murder occurred.

Evidence offered by the State, which was *contradicted* by the personal testimony of each defendant and by evidence offered in their behalf, included the following:

Williams testified that defendant Henderson was the man who came from the driver's side of the station wagon and, with pistol in hand, said, "Don't move or I'll shoot you," as he passed by the Venters car; and that defendant Price was the man on the passenger's side of the station wagon who looked into the bag and fell on the parking lot while running towards Clay Street.

Miller testified defendant Price was the man on the passenger's side of the station who looked into the bag, the man who said, "Halt, or I'll shoot," when Miller and others first approached the station wagon, and the man who fell on the parking lot while running towards Clay Street. (Note: Miller did not testify as to the identity of the man on the far (driver's) side of the Station wagon or as to what that man may have said or done.)

Johnnie Thomas, aged 22, testified that, in September, 1968, at "Miss Annie's house" on Washington Street, he overheard the following conversation between defendant Price and defendant Henderson, *viz.*: "Moses told Curtis he was getting hungry and Curtis said 'What do you expect me to do about it?' Moses said that he had to have some money and he was going to get some money because he was broke. Moses Price. Curtis didn't say anything. After awhile Curtis Henderson said 'I need some money, I'm going back to Boston.' Then Moses said 'I know Mr. Stanley and he has got some loot on him. I believe I'll hit him but I have got to find a way to do it.' Curtis said 'I used to have a credit account there at the store

but I'm with you.' Moses said 'Let's do it tonight,' but Henderson said not tonight he had some business to attend to."

Evidence for the State tended to show Thomas had made a statement to this effect to an officer on or about October 14, 1968, when in jail on a forgery charge; and that Thomas had pleaded guilty to forgery at October 1968 Session of Lenoir Superior Court and received a probationary sentence.

Separate warrants, each based on an affidavit of Carl Long, were issued October 24, 1968. Each charged the accused with the murder of Stanley on October 5, 1968.

The evidence most favorable to the State tended to show that Price was arrested first; that he was arrested by Detective Long; that Private Detective Whaley and Deputy Sheriff Eubanks were present; that, upon arrival at the courthouse, Detective Long went off with other officers; that Price, in the company of Whaley and Eubanks, got to the top of the steps of the courthouse and was coming into the two swinging glass doors when he (Price) fell down on his knees, hanging to the door, and said, "Oh, God, why did I do it?" and broke down and began crying in the presence of these officers. (Note: Detective Long, a witness for defendant, testified that he was with Whaley, Eubanks and Price when they entered the courthouse; that Price "was crying, saying he didn't do anything, and he couldn't hardly walk"; that he saw Price, crying, go down on his knees, but that he didn't hear him say, "Why did I do it? Oh, my Lord, why did I do it?")

The evidence most favorable to the State tended to show the warrant for the arrest of defendant Henderson was served on him at his father-in-law's home on Lincoln Street; that the officers present included Private Detective Whaley, Deputy Sheriffs Eubanks, Ipock, and Brake, and Detective Long; that when Henderson saw them drive up he came out and asked them what they wanted him for; that, although he was denied permission to do so, he forced his way until he got back into the house; that after the warrant had been read to him, Henderson said, "Shoot me, I'd rather be dead, shoot me," and "ran down the street hollering"; and that he had run approximately four blocks when he was stopped on Lincoln Street by Detective Long. (Note: Detective Long, a witness for defendant, testified the officers went first to Henderson's home; that he was not at his home but was at his mother's house; that they talked with him and placed him under arrest and the warrant was read to him; that Henderson stated he wanted to say something to his wife and that he (Detective Long) let him; that Henderson came back out

of the door and said, "he had nothing to hide and he jumped up and said you might as well kill me, I haven't done anything, and he took off running and left everybody"; and that when he (Detective Long) apprehended him, Henderson stated "that he didn't know why he run, he just panicked and ran, that he hadn't done anything.")

The evidence, reduced to narrative form and single spaced, occupies one hundred and thirty pages of the mimeographed record. Other features of the evidence will be referred to in the opinion.

As to each defendant, the jury returned a verdict of "Guilty of murder in the first degree with recommendation of life imprisonment"; and, as to each defendant, the court pronounced a judgment which imposed a sentence of life imprisonment.

Each defendant gave notice of appeal. An order was entered that each be represented on appeal by his trial counsel and that Lenoir County pay all costs necessary to perfect the appeal.

Attorney General Morgan, Deputy Attorney General Moody and Staff Attorney Mitchell for the State.

Beech & Pollock, by D. D. Pollock, for defendant appellant Henderson.

Brock & Gerrans, by C. E. Gerrans, for defendant appellant Price.

BOBBITT, C.J.

Although they present their fourteen assignments of error in a joint statement, each defendant filed a separate brief.

[1] Assignments of Error Nos. 2 and 4 are based on defendants' exceptions to the denial of their motions under G.S. 15-173 for judgments as in case of nonsuit.

In the consideration of these assignments, we apply the well-established and oft-stated rules summarized in 2 Strong's North Carolina Index 2d, Criminal Law § 104, as follows: "On motion to nonsuit, 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. Contradictions and discrepancies, even in the state's evidence, are for the jury to resolve, and do not warrant nonsuit. Only the evidence favorable to the state will be considered, and defendant's evidence relating to matters of defense, or defendant's evidence in conflict with that of the state, will not be considered."

The *credibility* of the State's crucial evidence, particularly the testimony of Williams, Miller and Thomas, was sharply challenged by cross-examination and by defendants' testimony and by evidence offered in their behalf.

Williams, who identified both Price and Henderson in his testimony at trial, did not know either defendant *by name* on the night of the attempted robbery and the murder of Stanley. Miller, who identified Price in his testimony at trial, did not know him *by name* on the night of the attempted robbery and the murder of Stanley.

As witnesses for the State, various officers, namely, a Kinston Police Officer (Loftin), two Kinston Detectives (Brooks and Gay), a Private Detective (Whaley) and an SBI Agent (Campbell), testified to statements made by Williams in response to their inquiries. Portions of this testimony tended to corroborate Williams' testimony at trial. Other portions thereof tended to show discrepancies and conflicts between Williams' testimony at trial and statements previously made by him. Conflicts between the testimony of certain of the State's witnesses and the testimony of Detective Long, a witness for Henderson, are noted in our preliminary statement. The testimony of Thomas was contradicted by each defendant in his personal testimony and also by the testimony of Mrs. Annie Belle Shaw ("Miss Annie"). Testimony of Thomas, under cross-examination, tended to show Thomas' prior criminal record; that he had "pulled five years" in prison and in addition had "pulled some time just around the city jail"; and that he was in custody for forgery when he told the officers of overhearing the conversation at "Miss Annie's house" and under a probationary sentence for forgery when he testified for the State against defendants. Too, each defendant offered alibi evidence. This evidence tended to show the defendants were not together on the night of October 5th and that each was at a location in Kinston other than the premises of the Supermarket.

This statement from the opinion of Stacy, C.J., in *State v. Satterfield*, 207 N.C. 118, 176 S.E. 466, is applicable: "Counsel for the defendant assailed the State's case with force and vigor, pointing out the apparent contradictions in the testimony and the equivocation of some of the witnesses, but these were matters bearing upon the weight of the evidence or its credibility, and not upon its competency. The jurors alone are the triers of the facts."

Considered in the light of applicable legal principles, the evidence was sufficient to require submission to the jury and to support the verdict. Hence, the assignments of error with reference to nonsuit are without merit.

Assignment of Error No. 1 contains nothing of sufficient significance to require discussion and is overruled.

[2] A preliminary hearing was conducted November 1, 1968, in the Municipal-County Recorder's Court. The solicitor of that court, P. H. Crawford, Jr., as a rebuttal witness for the State, testified to his conversation with Williams, in the presence of several law enforcement officers, in the judge's office adjoining the courtroom, preparatory to the hearing. A portion of his testimony is the subject of Assignment of Error No. 3.

Mr. Crawford testified in part as follows: "At the beginning of my conference with him he indicated a very pronounced reluctance to talk, he replied to questions in monosyllables and I had difficulty in bringing him out. I insisted to him that what I wanted him to tell me was exactly what he knew about the facts and what happened, and one or two of those present made similar statements to him about telling me what happened, to tell the truth. One of those present, I think it was Mr. Whaley, made the statement to him — if there are not the words it is the substance; he said 'Tell it to Mr. Crawford just like you told it to me.' (And almost suddenly the boy began to talk and he was very forthright and complete — Objection overruled — and gave an articulate statement.) DEFENDANTS' EXCEPTION NO. 3. Yes, sir, immediately after my conference with him he testified at the hearing."

Although the words "Objection overruled" appear in the record as indicated, the record does not show the question to which the objection was addressed. Nor does the record show that defendants made a motion to strike any particular portion of Mr. Crawford's testimony.

In their briefs, defendants call attention to "DEFENDANTS' EXCEPTION NO. 3," on which they base Assignment of Error No. 3. Their only point seems to be that Crawford was testifying to an opinion or conclusion as distinguished from facts. We perceive no error prejudicial to defendants. Crawford's testimony that Williams was reluctant to talk when the conference began and later talked freely constituted what may well be considered a shorthand statement of fact. Stansbury, N. C. Evidence, Second Edition, § 125. If deemed desirable, counsel for defendants could have explored in depth exactly what Williams said at various stages of this conference.

[3] Assignment of Error No. 14 asserts "the court erred in overruling the defendants' motions to set aside the verdict for that the

evidence was overwhelmingly against the verdict, for errors made during the trial, and for arrest of judgment." No ground for the arrest of judgment is suggested other than defendants' contentions that the verdicts were contrary to the weight of the evidence. Since this was a matter for determination by the trial judge in the exercise of his discretion, this assignment is deemed formal.

[4] In his brief, Henderson expressly abandons Assignments of Error Nos. 6 and 7. Since Price's brief states no reason and cites no authority in support thereof, these assignments will be taken as abandoned by him. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810; *Freeman v. City of Charlotte,* 273 N.C. 113, 116, 159 S.E. 2d 327, 329.

[5] Assignments of Error Nos. 5-13, inclusive, quote excerpts from the charge and assert the court erred in so charging the jury. In these assignments, defendants do not indicate in what particular any of the quoted excerpts is erroneous. They ignore the requirement of Rule 19(3), Rules of Practice in the Supreme Court, 254 N.C. 783, 797, as interpreted in numerous decisions of this Court, that "always the very error relied upon shall be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is." *State v. Mills,* 244 N.C. 487, 94 S.E. 2d 324.

The excerpt on which Assignment of Error No. 5 is based is the only portion of the charge assigned as error which relates to an instruction with reference to a legal principle. Other portions of the charge assigned as error involve either the court's review of evidence or statement of contentions.

[6] With reference to Assignment of Error No. 5, Price contends that the court used the words, "if you find from the evidence," instead of the words, "if you find from the evidence beyond a reasonable doubt." In other portions of the charge, the court fully and correctly instructed the jury that the burden was on the State to satisfy the jury beyond a reasonable doubt as to the guilt of the defendants or either of them before such verdict(s) could be returned. The contention advanced by Price is without merit.

[7] Henderson's contention with reference to Assignment of Error No. 5 is that the instruction given in the quoted excerpt was "unclear and ambiguous." This contention is without merit. The clear import of the instruction is that if the attempted robbery and the murder were committed pursuant to a conspiracy to rob, each conspirator would be responsible for the acts of the other on the occasion the

crime was committed; but, in the absence of such conspiracy, each would be guilty only if he individually was engaged in the perpetration of the attempted robbery and fired the fatal shots. The instructions were favorable to defendants. It is noteworthy that the court failed to instruct the jury as to the legal principle that each would be responsible for the acts of the other if both were present, aiding and abetting each other in the perpetration of the attempted robbery, even if there were no evidence of a previously formed conspiracy. Too, the charge was quite favorable to defendants in that, notwithstanding all the evidence tended to show a murder committed in the perpetration of an attempted robbery, the court instructed the jury it would be permissible for them to return a verdict of guilty of murder in the second degree as to either or both of the defendants.

The excerpt from the charge on which Assignment of Error No. 8 is based consists of a brief summary by the court of the testimony of (State's witness) Loftin. We find no significant conflict between the court's summary and Loftin's testimony. This assignment is without merit.

[8] The excerpt from the charge on which Assignment of Error No. 9 is based is in these words: "The State offered a number of rebuttal witnesses — I am not going to recount their testimony, or attempt to recapitulate it here — you heard it this morning, and it was offered in substance opposed to the testimony of James Robert Williams to explain away some of the discrepancies between the testimony of certain officers, Eubanks, Whaley and others, and Officer Carl Long. I assume that was the purpose of the offer. That was all given today and you will recall it."

Obviously, the rebuttal evidence was not offered "in substance opposed to the testimony of James Robert Williams," the State's principal witness, but was offered in an attempt "to explain away some of the discrepancies" between the testimony of Officer Eubanks, Whaley and others, on the one hand, and the testimony of Officer Long, on the other hand. Although this portion of the charge as reported seems somewhat confusing, we find nothing therein which may be considered prejudicial to defendants.

[9] The remaining excerpts from the charge, on which Assignments of Error Nos. 10, 11, 12 and 13 are based, consist of the court's review of certain of the *contentions* of the State. The excerpts on which Assignments of Error Nos. 10 and 11 are based are lengthy and involve multiple and diverse matters. Apparently, defendants were inadvertent to the rule that "an exception to a portion of a

charge embracing a number of propositions is insufficient if any of the propositions are correct." *Powell v. Daniel,* 236 N.C. 489, 493, 73 S.E. 2d 143, 146, and cases cited. The excerpt on which Assignment of Error No. 12 is based is worded as follows: "The State says and contends that even the discrepancies between the testimony of Officer Carl Long and some of the other officers *are not as pronounced as they appear* when they are examined in the light of the whole case, and consider that the memory of people who are active in law enforcement work is, like others, it is not perfect; they may not remember exactly what happened at a given session at a given time." (Our italics.) This sufficiently illustrates the type of statement of contention which defendants assert constitutes prejudicial error.

[10, 11] The discrepancies and conflicts in the evidence were obvious. Defendants did not except to the failure of the court to charge the jury in respect of any matter. "It is elemental that an exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case." *Peek v. Trust Co.,* 242 N.C. 1, 16, 86 S.E. 2d 745, 757. Be that as it may, it would seem the court's frequent references to the discrepancies and conflicts in the evidence tended to emphasize rather that to minimize the significance thereof. Careful readings of the evidence and of the charge make it clear that the respective contentions of the State and of defendants with reference to these discrepancies and conflicts were well understood by the jury. These assignments fail to disclose prejudicial error and are overruled.

[12] In the lengthy excerpt on which Assignment of Error No. 11 is based, the court, while reciting contentions of the State, said: ". . . and there is evidence here that he (James Robert Williams) did have some reluctance — it was recited by Mr. Crawford, who I thought put it very accurately, that there was a marked reluctance on his part to be the only eyewitness to talk about Henderson." Conceding the court should not have expressed the view that he thought (State's witness) Crawford had "put it very accurately," all the evidence tended to show that, at the beginning of the conference preceding the preliminary hearing, Williams was in fact reluctant to talk. Indeed, (defense witness) Long testified that Williams stated "he was not going in there and testify about Curtis Henderson because he could not positively identify him." According to the State's evidence, the initial reluctance of Williams to testify against Henderson was based on his belief that he was to be the only witness against Henderson and that this reluctance ceased when he learned that other witnesses were to testify against Henderson.

Assignment of Error No. 11 fails to disclose prejudicial error and is overruled.

While, as indicated, the assignments of error, except those relating to nonsuit, do not comply with our rules, we have elected to consider all of them and all contentions made with reference thereto in the briefs. After reading and re-reading the evidence and the charge, we find no error deemed prejudicial to the defendants or either of them. The real issues in dispute were factual in nature. They were resolved adversely to defendants by the jury.

[13] The record shows the following:

"THE JURORS, BEING CALLED BY NAME AND BEING INDIVIDUALLY POLLED BY THE CLERK OF SUPERIOR COURT, RENDERED THE FOLLOWING VERDICTS:

"AS TO THE DEFENDANT, MOSES PRICE, JR.:

"VERDICT: 'Guilty of murder in the first degree with recommendation of life imprisonment.'

"AS TO THE DEFENDANT, CURTIS HENDERSON:

"VERDICT: 'Guilty of murder in the first degree with recommendation of life imprisonment.'

"Upon the bringing in of the verdict as to the defendant, Moses Price, Jr., said defendant, through counsel, requested that the jury be polled.

"THE CLERK OF SUPERIOR COURT POLLED THE JURY.

"Upon the bringing in of the verdict as to the defendant, Curtis Henderson, said defendant, through counsel, requested that the jury be polled.

"THE CLERK OF SUPERIOR COURT POLLED THE JURY."

In their briefs, each defendant asserts that, although there is no exception or assignment of error in respect of the polling of the jury, the record does not disclose affirmatively that each and every juror assented to the verdict. They contend the Court should order a new trial *ex mero motu* on authority of *State v. Dow,* 246 N.C. 644, 99 S.E. 2d 860. The contention is without merit.

In *State v. Dow, supra,* the record showed that the jurors were polled in open court and that the responses of *all* the jurors were not in accord with the verdict as announced by the foreman of the jury. Here, defendants' counsel did not include in the record what occurred when the jury was polled. In view of the contention made in their briefs, we have obtained a certificate from the Clerk of the

Superior Court of Lenoir County to the effect that, subsequent to the announcement of the verdict, each juror, upon being polled by the clerk as to each defendant, replied that his verdict was guilty of murder in the first degree with recommendation that the punishment be imprisonment for life.

Finding no prejudicial error in the trial, the verdict and judgment will not be disturbed.

No error.

MOORE, J., did not participate in the consideration or decision of this case.

ROBERT M. OLIVE, SR., INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF RUTH SEDBERRY OLIVE, DECEASED v. GEORGE BIGGS; CHRISTINE BIGGS; RUTH OLIVE NEITMAN; CLARENCE SEDBERRY OLIVE; JEAN McKAY OLIVE TOLAR, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ROBERT M. OLIVE, JR., DECEASED; ANN M. OLIVE; CARRIE BLACKMAN SIMMONS; MYRA OLIVE; LOWNEY OLIVE; IULA OLIVE AND ROBERT M. OLIVE, III; TERRY DEE OLIVE; HUNTER OLIVE; THERESA OLIVE; WINSTON OLIVE; CARLA NEITMAN; ROBIN NEITMAN; RENEE NEITMAN; DEBRA NEITMAN; KAY OLIVE AND NANCY OLIVE, MINORS

No. 31

(Filed 15 April 1970)

1. Wills § 1— joint will — definition

A joint will is in effect the separate will of each person signing it as testator.

2. Wills § 8— joint will — revocation

Nothing else appearing, either signer of a joint will may revoke it, in any manner permitted by statute, during the life of all of the persons signing it as testators.

3. Wills § 8— joint will — revocation by surviving signer

Nothing else appearing, though one of the signers of a joint will has died and the document has been probated as his or her will, the surviving signer may revoke it and, in that event, it cannot be probated as the will of such survivor.

4. Wills § 8— revocation of joint will — contract not to revoke — breach — rights of devisees

Even where there is a contract between the testators not to revoke the joint will, the better view is that the revocation by the survivor is ef-

fective to prevent the probate of the instrument as the will of the survivor, leaving the disappointed legatees or devisees under the joint will to their rights, if any, for breach of the contract as beneficiaries thereof.

5. Wills § 8— joint will of spouses — revocation by surviving spouse

A joint will executed by the husband and wife is revocable by the surviving husband and does not impair his right to convey properties owned by him, notwithstanding the will was also executed by the deceased wife and has been probated as her will.

6. Wills § 34; Husband and Wife § 17— wife's will — effect on property owned by the entireties

A wife's will cannot devise to the husband property which at the time of her death was already owned by the husband alone or was owned by the husband and wife as tenants by the entireties, nor could her will, nothing else appearing, limit the husband's right to convey such properties after her death.

7. Husband and Wife §§ 15, 17— estate by entireties — incidents — effect of deceased spouse's will

Land owned by a husband and wife as tenants by the entireties is not owned by them in shares, but by the two considered as a separate legal being; consequently, no interest in such property passes under the will of the first to die.

8. Wills § 30; Husband and Wife § 17— construction of joint will — disposition of entireties property — assumptions

In an action to construe a joint will executed by a husband and wife with the assistance of an attorney, it is reasonable to assume that the husband and wife were aware that property owned by them by the entireties would pass to the surviving spouse by virtue of survivorship and not under the will; and consequently it is reasonable to assume that they did not intend the provisions of the will relating to entireties property to be given effect as parts of the will of the first to die, but intended these provisions to become effective only as parts of the will of the survivor.

9. Wills § 64— devise of property belonging to beneficiary — beneficiary put to election

Where the devisor purports to devise property which belongs to the beneficiary, giving it to another, and also devises property of his own to the beneficiary, such beneficiary must make a choice between retaining his own property, which has been given to another, or taking the property which has been given him under the terms of the will.

10. Wills § 64— election — intent of testator

The doctrine of election does not apply unless the intent of the testator to put the beneficiary to an election clearly appears from the terms of the will.

11. Wills § 64— construction of joint will executed by husband and wife — doctrine of election

In a husband's action seeking construction of a joint will executed by

himself and his wife, now deceased, the doctrine of election *is held* inapplicable, and consequently the husband's acceptance of the devise to him under the wife's will did not deprive him of title to or of the right to convey land which, at the time of the wife's death, was owned by him alone or was owned by them as tenants by the entireties.

12. Wills § 28— joint will executed by spouses — death of wife — construction of will

A joint will executed by a husband and wife must be construed as if it were the will of the deceased wife alone to determine what title the husband took thereunder to those properties which the wife alone owned at the time of her death.

13. Wills § 28— term "in fee simple" — construction

The technical term "in fee simple" is to be given its technical meaning in the absence of a clear expression of a contrary intention in the will itself.

14. Wills § 73— action to construe joint will of spouses — devise to surviving spouse — disposition to children

In an action by a husband seeking construction of a will executed jointly by himself and his wife, now deceased, wherein Item Two of the will devised and bequeathed "all of his or her property, unconditionally and in fee simple, to the survivor, in the event that one of us survives the other," and Items Three through Twelve attempted to devise certain of the wife's properties to their children either outright or "upon the death of the survivor" or "at the time of our death," it is apparent that the wife intended that, if her husband survived her, all of her property was to pass to him in fee simple, and at his death was to pass to the children as specified in the remaining Items; consequently, the will *is held* a devise to the husband in fee simple of all the wife's property, with no limitation upon his right to convey the same.

15. Wills § 28— construction of a will — intent of testator

The cardinal principle in the construction of a will is to give effect to the intent of the testator as it appears from the language used in the instrument itself, insofar as that can be done within the limits of the statutes or by decisions of the court.

16. Wills § 28— intent of testator — determined from entire instrument

The intent of the testator is determined from the entire instrument so as to harmonize, if possible, provisions which would otherwise be inconsistent.

17. Frauds, Statute of § 7; Wills § 2— contract not to revoke joint will — sufficient memorandum

A joint will executed by a husband and wife may itself be a sufficient memorandum of a contract between the two that the survivor will not revoke the document as his or her own will.

18. Wills § 2— contract to make joint will — breach — equitable relief

Where a husband and wife enter into a contract to make a joint will

or separate wills, whereby each devises his or her property to the survivor of them and the survivor devises his or her property to others, according to a specified plan of distribution, and one spouse dies without revoking his will, the survivor, accepting the benefits of the will, is bound by the contract; his subsequent revocation of the will is a breach of such contract for which a court of equity will fasten a trust, in favor of the beneficiaries named in the will, upon the properties which the survivor so contracted to devise.

19. Wills § 2— contract to make joint will — sufficiency of terms

Language in a joint will executed by a husband and wife, that they, "in consideration of each making this our Last Will and Testament, do hereby make, publish and declare this instrument to be jointly as well as severally our Last Will and Testament," *held* sufficient, in conjunction with the reciprocal devises and bequests, to show the existence of a contract between the husband and wife to execute the joint will.

20. Wills §§ 2, 73— action to construe joint will — evidence of the contract to make the will — harmless error

In an action by a husband seeking construction of a joint will executed between himself and his deceased wife, a purported beneficiary under the wife's will was not prejudiced by the testimony of the attorney who prepared the will that he knew of no agreement between the spouses, other than what was in the will, with respect to the execution of the joint will, where the will itself contained clear evidence of the agreement.

21. Husband and Wife § 4— contract to make a will — acknowledgment by wife

A contract between husband and wife prescribing the testamentary disposition of their properties is not binding upon the wife unless the contract is acknowledged by her in conformity with G.S. 52-6(a).

22. Wills § 2— contract to make will — void promise on one side — subsequent performance of promise

When the wife is not bound by a contract executed between herself and her husband for the testamentary disposition of their properties, neither is the husband bound; but when the wife dies, leaving a will in accordance with the contract, the husband thereby becomes bound by his contract to make the agreed testamentary disposition of his own property.

23. Contracts §§ 4, 21— void promise — subsequent performance — consideration

While a promise void for incapacity of the promisor will not support a counter-promise, if the void promise is actually performed, the performance may become sufficient consideration to support the counter-promise.

24. Wills § 2— contract for testamentary disposition of property — construction

Each contract for the testamentary disposition of property must be construed to determine the intent of the parties thereto with reference to the right of the owner of the property to make an *inter vivos* conveyance.

25. Wills §§ 2, 68— contract between spouses to make joint will — construction — rights of surviving spouse

Where husband and wife, pursuant to a contract, executed a joint will providing for the testamentary disposition of their properties, and the wife thereafter dies without revoking her will, the husband may not make a testamentary disposition of any property contrary to the contract, or revoke the joint will as his will, or make an *inter vivos* conveyance or transfer of any property which will prevent a court of equity from subjecting the property, so transferred in breach of the contract, to the rights of the beneficiaries thereof prior to the acquisition of such property by a bona fide purchaser for value.

26. Wills §§ 2, 73— contract between spouses to make joint will — construction — right of surviving spouse to make inter vivos conveyance

In a joint will executed by a husband and wife pursuant to a contract, the will devised to a named devisee the house and furnishings at 209C Olive Court "if, at the time of our death we still own the house and property on East Mountain Drive; but if, at the time of our death we do not own the said property on East Mountain Drive" then the house and furnishings at 209C Olive Court shall vest in another name devisee. *Held:* The will clearly contemplated that the property on East Mountain Drive might not be owned by the surviving testator at his death, and the surviving testator therefore had the power to make an *inter vivos* conveyance of the property during his lifetime.

HIGGINS, J., dissenting.

BOBBITT, C.J., joins in dissenting opinion.

ON certiorari to the Court of Appeals to review its decision reported in 6 N.C. App. 265, 170 S.E. 2d 181.

On 25 February 1965, Dr. Robert M. Olive and Ruth Sedberry Olive, his wife, jointly executed a document which has been admitted to probate in Cumberland County as her will. At her death, on 29 September 1965, she was the sole owner in fee simple of certain real property, he was the sole owner in fee simple of other real property and they owned still other real property in fee simple as tenants by the entireties.

Dr. Olive is the executor of his wife's estate and a devisee under the will. He instituted this action for a declaratory judgment construing the will so as to determine: (1) What interest he takes under the will in the properties owned by Mrs. Olive at the time of her death; (2) whether he may take such interest in those properties under the will and also take in fee simple the properties held by him and his wife as tenants by the entireties; (3) whether, if he be not the unconditional owner in fee simple of the properties owned at her death by Mrs. Olive, he may, by a sale thereof, revoke the will as to him; (4) whether, if he be the owner in fee simple of all the properties owned at the time of Mrs. Olive's death by her only, by him

only and by them as tenants by the entireties, he may revoke the will as to himself and convey a good and marketable title thereto; and (5) whether he is barred by the doctrine of election from taking under the will and making a disposition of the properties other than that specified in the will.

The provisions of the will pertinent to the determination of these questions are:

> "We, Robert M. Olive, Sr., and Ruth Sedberry Olive, husband and wife, * * * in consideration of each making this OUR LAST WILL AND TESTAMENT, do hereby MAKE, PUBLISH and DECLARE this instrument to be jointly as well as severally OUR LAST WILL AND TESTAMENT.
>
> * * *
>
> TWO:
>
> "We, and each of us, devise and bequeath all of his or her property, unconditionally and in fee simple, to the survivor, in the event that one of us survives the other.
>
> THREE:
>
> "Upon the death of the survivor, *or in the event that our death is simultaneous,* we do hereby give and devise our home place, at No. 126 Dobbin Avenue, in the City of Fayetteville, to our sons ROBERT M. OLIVE, JR., and CLARENCE S. OLIVE, and our daughter, RUTH OLIVE NEITMAN. [Emphasis other than capitalization added.]
>
> FOUR:
>
> "We give and devise, in fee simple, to our son, ROBERT M. OLIVE, JR., the white brick and weatherboard constructed house at No. 209 A DeVane Street, in the City of Fayetteville, including the household and kitchen furniture therein.
>
> FIVE:
>
> "We give, devise and bequeath, in fee simple, subject to the conditions hereinafter set out, to our daughter, RUTH O. NEITMAN, our following described property:
>
> "1. The two store [sic] brick dwelling at No. 209 DeVane Street, * * *
>
> "2. The brick dwelling and the furniture and furnishings therein, at 209 B on Olive Court * * *

"3. The brick dwelling, and the furniture and furnishings therein, at 209 C on Olive Court * * * *if, at the time of our death we still own the house and property on East Mountain Drive, but if, at the time of our death we do not own the said property on East Mountain Drive*, then the brick dwelling, and the furniture and furnishings therein, at 209 C on Olive Court, shall vest in ROBERT M. OLIVE, JR., as set out in Article SIX of this will. [Emphasis other than capitalization added.]

"4. The house and lot on Grove Street, the two houses and lots on Bell Street, and one vacant lot on New York Street, all in the City of Fayetteville.

"All of the foregoing described property is devised and bequeathed to our daughter, RUTH O. NEITMAN, subject to the condition and provision that no part thereof may be sold or mortgaged without the consent, in writing, of ALEXANDER E. COOK and LACY S. COLLIER, Fayetteville, North Carolina, or the survivor.

"In the event, however, that either ALEXANDER E. COOK or LACY S. COLLIER *be not living at the time of the death of the survivor of us*, * * * we hereby appoint JAMES R. NANCE of Fayetteville, North Carolina, in the place of that one, to serve in this capacity. [Emphasis other than capitalization added.]

SIX:

"We give, devise and bequeath to our son, ROBERT M. OLIVE, JR., our country place located on East Mountain Drive in Pearce's Mill Township, about six miles south of Fayetteville, * * *

"In the event, however, that *at the time of our death* we do not own said property, then we give and devise to our son, ROBERT M. OLIVE, JR., the brick building at 209 C on Olive Court leading from DeVane Street eastwardly, in the City of Fayetteville. [Emphasis other than capitalization added.]

SEVEN:

"We give and devise and bequeath to our son, CLARENCE S. OLIVE, the brick dwelling house, and the furniture and furnishings therein, at No. 209 D Olive Court in the City of Fayetteville.

* * *

TWELVE:

"All the rest and residue of our estate, meaning thereby all of our property of any sort, kind and description, both real and personal, * * * we will, devise and bequeath, *after the death of the survivor,* to our three children, ROBERT M. OLIVE, JR., CLARENCE S. OLIVE and RUTH O. NEITMAN, share and share alike. [Emphasis other than capitalization added.]

THIRTEEN:

"We, and each of us, do hereby appoint the survivor of the two as executor or executrix of this OUR LAST WILL AND TESTAMENT; however, *after the death of the survivor* of the two, we and each of us do hereby constitute and appoint ALEXANDER E. COOK and LACY S. COLLIER as Executors of this, OUR LAST WILL AND TESTAMENT, * * * [Emphasis other than capitalization added.]

"IN THE EVENT, HOWEVER, that either ALEXANDER E. COOK or LACY S. COLLIER be not living *at the time of the death of the survivor of us,* * * * we hereby appoint JAMES R. NANCE of Fayetteville, as co-Executor, to act in conjunction with the remaining one, with all the duties, power and authority herein given to the originally named Executors. [Emphasis other than capitalization added.]

The defendants, with the exception of George Biggs and Christine Biggs, are all who claim as legatees or devisees under the will, the minors among them being represented by duly appointed guardians ad litem. The defendants Biggs contracted with the plaintiff, after the death of Ruth Sedberry Olive, to purchase from him the land described in Item Six of the will, part of which was the sole property of Ruth Sedberry Olive at her death and part of which was then owned by Ruth Sedberry Olive and Dr. Olive as tenants by the entireties, but have refused to do so because of doubt as to his ability to convey a good title in fee simple thereto.

The defendant Jean McKay Olive Tolar is the widow and devisee of all the property of Robert M. Olive, Jr., who died testate after the death of Ruth Sedberry Olive. She filed answer alleging that the plaintiff contracted with Ruth Sedberry Olive to make a joint, mutual, reciprocal will which would control the disposition of all property owned by them individually and as tenants by the entireties, that they did execute such will and the plaintiff is estopped to deny its validity. She prays that the action be dismissed and, if

not, that she be adjudged the beneficiary of all bequests and devises made to Robert M. Olive, Jr., by the joint will.

Evidence for the plaintiff included his inventory and annual account as executor of the estate of Ruth Sedberry Olive, and the testimony of Alexander Cook, the attorney who drafted the will. Over objection, he testified that he had no knowledge of any agreement, apart from what appears upon the will itself, between Dr. Olive and Ruth Sedberry Olive respecting the execution of the will or of any agreement, apart from the will, between them to the effect that it could not be changed by either without the consent of the other.

The defendants' evidence consisted of the testimony to the effect that rent collected since the death of Mrs. Olive from tenants of the property on Grove Street, referred to in Item Five of the will, of which Mrs. Olive was the sole owner at her death, was paid over to and deposited in the bank account of Dr. Olive whose bills have been paid from that account. Such rent has been reported for income tax purposes as his income.

The superior court entered judgment containing the following findings of fact, conclusions of law and adjudications:

FINDINGS OF FACT

* * *

"3. That Ruth Sedberry Olive and Robert M. Olive, Sr., executed jointly on February 25, 1965, a Last Will and Testament of said date, a true copy of which is appended to a complaint as Exhibit 'A'; that said will was admitted to probate in common form in the Office of the Clerk of Cumberland County, North Carolina, as the Last Will and Testament of Ruth Sedberry Olive and that Letters Testamentary qualifying and appointing the plaintiff as executor were issued on October 20th, 1965, and that such letters are still in effect; that no final accounting has been filed in said estate.

* * *

"10. That there was no contract, apart from the joint will of February 25th, 1965, which was executed by the plaintiff and his decedent wife, Ruth Sedberry Olive, respecting the execution of the aforesaid joint will, nor any contract between such parties that the aforesaid joint will of February 25th, 1965, could not be changed by one without the consent of the other, or any such contract that the aforesaid joint will of February

25th, 1965, was to be the only will of the plaintiff and his decedent wife, Ruth Sedberry Olive.

"11. That the plaintiff has received the rents from the properties of his decedent wife at 803 Grove Street and 732 Bell Street, Fayetteville, North Carolina, approximately $1,800.00 since the death of Ruth Sedberry Olive, and has received the sums called for by Exhibit 'D'; * * * that the estate of Ruth Sedberry Olive is indebted to the plaintiff in the sum of $3,881.41; that all such rents and funds were deposited to the plaintiff's bank account from which his personal expenses were paid, but the plaintiff had other sources of income adequate to maintain him properly and maintains a balance in his account in excess of any sums received from such rents and from the defendants, Biggs.

* * *

CONCLUSIONS OF LAW

"1. That the joint will of February 25th, 1965, executed by the plaintiff and his decedent wife, Ruth Sedberry Olive, does not contain nor comprise a contract between the parties to enter into such joint will nor does same constitute or comprise an agreement between the plaintiff and his decedent wife that said joint will would remain in effect until the death of the survivor.

"2. That the plaintiff, Robert M. Olive, Sr., acquired a fee simple absolute estate in all the properties of his decedent wife, Ruth Sedberry Olive, under the joint will of February 25th, 1965.

* * *

"4. That the properties owned by plaintiff and his decedent wife, Ruth Sedberry Olive, in an estate by the entireties as set out in the complaint were acquired by plaintiff by virtue of his survivorship and not under the joint will of February 25th, 1965.

"5. That the plaintiff has not accepted benefits under the joint will of February 25th, 1965, in any manner which would estop him from denying any contract between himself and his decedent wife or which would estop him from revoking said will or otherwise dealing freely with the properties of her estate.

"It is therefore, ORDERED, ADJUDGED, DECREED AND DECLARED:

"(1) That the plaintiff acquired a fee simple absolute title to the properties of his decedent wife, Ruth Sedberry Olive, under the joint will of February 25th, 1965.

"(2) That there was no contract between the plaintiff and his decedent wife, Ruth Sedberry Olive, to enter into the joint will of February 25th, 1965, nor does said will constitute a contract between plaintiff and his said wife, Ruth Sedberry Olive, requiring that said joint will remain in effect as the will of the survivor at the time of his death.

"(3) That the plaintiff is under no disability to convey title to the property described in Exhibit 'D' to the defendants, Biggs, by reason of the execution and existence of said joint will of February 25th, 1965."

The defendant Jean McKay Olive Tolar appealed to the Court of Appeals assigning as error the admission, over objection, of the testimony of Alexander Cook as to his lack of knowledge of any contract, apart from the will itself, between the plaintiff and Ruth Sedberry Olive concerning the execution of a joint will or change therein by one without the consent of the other, the making of Finding of Fact No. 10 and Conclusions of Law 1, 2, 4 and 5 and the entry of the judgment.

The Court of Appeals found no prejudicial error and affirmed the judgment of the superior court.

McCoy, Weaver, Wiggins, Cleveland & Raper for plaintiff appellee.

Quillin, Russ, Worth & McLeod for defendant appellant.

LAKE, J.

The document before us for construction is what is called a joint will. *Ginn v. Edmundson*, 173 N.C. 85, 91 S.E. 696; Atkinson on Wills, 2d ed., § 49; 57 Am. Jur., Wills, § 681. In order to determine its effect upon the present right of the surviving husband to convey an unencumbered fee simple estate in (a) land owned by the wife alone at the time of her death, (b) land then owned by them as tenants by the entireties, and (c) land owned, at the time of the wife's death, by the husband alone, we must determine first the effect of the document as a will and second its effect, if any, as a contract.

[1] What is called a joint will, is, in effect, the separate will of each person signing it as testator. *Walston v. College*, 258 N.C. 130, 128 S.E. 2d 134; *In Re Davis' Will*, 120 N.C. 9, 26 S.E. 636; 57 Am. Jur., Wills, §§ 688, 735; Annot., 169 A.L.R. 9, 12. It is as if each of them had simultaneously executed separate, identical wills. Thus,

though the document is not executed by one of the signers in the manner prescribed by the statute for the execution of wills, it may nevertheless be properly probated as the will of the other. *In Re Cole's Will,* 171 N.C. 74, 87 S.E. 962. Though revoked by one of the signers, it may continue in effect and be properly probated as the will of the other. *In Re Will of Watson,* 213 N.C. 309, 195 S.E. 772.

[2, 3] Nothing else appearing, either signer of a joint will may revoke it, in any manner permitted by statute, during the life of all of the persons signing as testators. *In Re Davis' Will, supra.* Upon the death of one of the persons so signing, without a valid revocation of the document by that person, it will be probated and given effect as his or her will. *In Re Davis' Will, supra; In Re Will of Watson, supra.* Thereafter, upon the death of another person so signing the document, without a revocation of it by him or her, it will then be probated and given effect as the will of that person. *In Re Davis' Will, supra;* 57 Am. Jur., Wills, § 682. Nothing else appearing, though one of the signers has died and the document has been probated as his or her will, the surviving signer may revoke it and, in that event, it cannot be probated as the will of such survivor. *Ginn v. Edmundson, supra; In Re Davis' Will, supra.* That is, the mere execution of a joint will does not establish the existence of a contract by the signers thereof so to dispose of their property. *Ginn v. Edmundson, supra; In Re Davis' Will, supra;* Atkinson on Wills, 2d ed., § 49; 57 Am. Jur., Wills, § 729. The intervening death of one of the signers, followed by the probate of the document as the will of such signer, nothing else appearing, does not impair the right of the survivor to convey property belonging to him at the time of such conveyance. *Ginn v. Edmundson, supra.*

[4] Even where there is a contract between the testators not to revoke the joint will, the better view is that the revocation by the survivor is effective to prevent the probate of the instrument as the will of the survivor, leaving the disappointed legatees or devisees under the joint will to their rights, if any, for breach of the contract as beneficiaries thereof. *Allen v. Bromberg,* 147 Ala. 317, 44 So. 771; *Stewart v. Todd,* 190 Iowa 283, 173 N.W. 619, 20 A.L.R. 1272; *Rastetter v. Hoenninger,* 214 N.Y. 66, 108 N.E. 210; *Williams v. Williams,* 123 Va. 643, 96 S.E. 749; *Doyle v. Fischer,* 183 Wis. 599, 198 N.W. 763, 33 A.L.R. 733; Annot., 169 A.L.R. 9, 24, 47; 57 Am. Jur., Wills, § 690; Atkinson on Wills, 2d ed., § 49. Thus, in *Stone v. Hoskins* (1905), P. 194 (Probate Division, England), it was held that a later will, executed by the survivor in violation of his contract not to revoke the joint will, must be admitted to probate since, not-

withstanding such contract, a will is always revocable, but a court of equity may impose a trust upon the devisee under the later will in favor of the beneficiary of such contract.

[5] We shall consider below the effect of the document before us as a contract between Dr. and Mrs. Olive. Considered only as the will of Dr. Olive, it is revocable by him and does not impair his right to convey properties now owned by him, notwithstanding the fact that it was also executed by Mrs. Olive and has been probated as her will.

[6, 7] We turn now to the effect of this document as the will of Mrs. Olive. Obviously, the will of Mrs. Olive could not and did not devise to Dr. Olive property which, at the time of her death, was already owned by him alone or was owned by them as tenants by the entireties, nor could her will, nothing else appearing, limit his right to convey such properties after her death. Land owned by a husband and wife as tenants by the entireties is not owned by them in shares, but by the two considered as a separate legal being. *Isaacs v. Clayton, Comr. of Revenue,* 270 N.C. 424, 154 S.E. 2d 532. Consequently, nothing else appearing, no interest in such property passes under the will of the first to die. *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598. As Stacy, J., later C.J., said for the Court, in *Davis v. Bass,* 188 N.C. 200, 204, 124 S.E. 566, "Upon the death of one, either the husband or the wife, the whole estate belongs to the other by right of purchase under the original grant or devise and by virtue of survivorship — and not otherwise — because he or she was seized of the whole from the beginning, and the one who died had no estate which was descendible or devisable."

[8] The record shows that in the preparation of this document Dr. and Mrs. Olive had the assistance of an attorney. It is reasonable to assume that when they executed it they were aware of this attribute of a tenancy by the entireties and, consequently, to assume, in the complete absence of any indication to the contrary, that they did not intend the provisions thereof relating to property owned by them as tenants by the entireties to be given effect as parts of the will of the first to die, but intended these provisions to become effective only as parts of the will of the survivor. It is equally reasonable to assume that neither of them intended the provisions of the document relating to the properties owned by the other alone to take effect, except as parts of the will of the owner thereof at the time of such owner's death. Therefore, considering the document as the will of Mrs. Olive, it does not show an attempt by her to devise property owned by her husband alone, or property owned by her and her hus-

band as tenants by the entireties, unless she should survive her husband and thus be the owner of those properties at the time of her own death.

[9] As Denny, J., later C.J., said for the Court, in *Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183, "[W]here the devisor purports to devise property which belongs to the beneficiary, giving it to another, and also devises property of his own to the beneficiary, such beneficiary must make a choice between retaining his own property, which has been given to another, or take the property which has been given him under the terms of the will."

[10] This doctrine of election does not apply, however, unless the intent of the testator to put the beneficiary to an election clearly appears from the terms of the will. *Burch v. Sutton,* 266 N.C. 333, 145 S.E. 2d 849; *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29. For example, the doctrine of election does not come into play where it appears that the testator was under the mistaken belief that he or she had the right to devise the property of the person alleged to be under the duty to make the election. *Breece v. Breece,* 270 N.C. 605, 155 S.E. 2d 65; *Burch v. Sutton, supra.*

In *Walston v. College, supra,* the testator was under the mistaken belief that he and his wife held title to land as tenants in common, whereas they actually held it as tenants by the entireties. He and his wife made a joint will purporting to devise this land to the survivor for life and then to Atlantic Christian College. The court found there was no evidence of a contract between them so to do. The will also bequeathed to the wife, absolutely, the personal property of the husband. Upon the death of the husband, the surviving wife brought an action to quiet title to the land. The court held that the wife was not put to an election since it could not be inferred that the husband intended to devise or bequeath anything to her "in lieu of her legal interest as a tenant by the entireties in the land involved."

We think it quite clear that the document before us shows upon its face that Mrs. Olive (and similarly, Dr. Olive) intended that thereby, if she died first, all the property of which she was the sole owner would pass to Dr. Olive as a devise from her and all of the property held by them as tenants by the entireties would pass to him by operation of law so that he would then be the owner of the whole, together with the lands of which he was already the sole owner. Conversely, it was her intent and expectation that, if he died first, she would be the sole owner of the whole of the three types of properties. In that event, and only in that event, she intended that

the provisions in Items Three through Twelve, relating to the land owned by him alone or to the land owned by them as tenants by the entireties, would be given effect as parts of her will. This is not the intent which calls into play the doctrine of election; namely, the intent by her will to devise his property and, in lieu thereof, devise hers to him.

[11] Thus, the doctrine of election has no application to the present case. Consequently, the document before us, considered only as the will of Mrs. Olive, and Dr. Olive's acceptance of the devise to him thereby, do not deprive Dr. Olive of title to or of the right to convey land which, at the time of Mrs. Olive's death, was owned by *him alone or* was owned by them as tenants by the entireties.

[12] The document before us devises to Dr. Olive certain properties which Mrs. Olive alone owned at her death. Though it is joint in form, it must be construed as if it were the will of Mrs. Olive alone to determine what title Dr. Olive took thereunder to those properties. 57 Am. Jur., Wills, § 736.

[13] Item Two of the will is a clear and express devise of all of the property of Mrs. Olive to Dr. Olive "unconditionally and in fee simple," he having survived her. If the will had stopped with that provision, no question of construction would arise since the technical term "in fee simple" is to be given its technical meaning in the absence of a clear expression of a contrary intention in the will itself. *Ray v. Ray,* 270 N.C. 715, 155 S.E. 2d 185; *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151. Furthermore, G.S. 31-38 provides: "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

[14] The Court of Appeals was of the opinion that the dominant purpose of the testator was, first, to provide for the survivor and, second, to provide for the disposition of the properties of both husband and wife if they should die simultaneously. To avoid inconsistency with Item Two, the Court of Appeals construed Items Three through Twelve as limited to the unlikely situation of the simultaneous deaths of Dr. and Mrs. Olive. In our opinion, this construction of such remaining portions of the will is unduly limited and does not reflect the intent of the testatrix as it appears from the entire will.

It is to be observed that in Item Three the attempted devise to the children of the testatrix is to take effect "upon the death of the

survivor, or in the event that our death is simultaneous." This language does not appear in the remaining items, though in Items Five and Six there are provisions as to conditions which may exist "at the time of our death" and "at the time of the death of the survivor of us," and the residuary clause in Item Twelve is a devise and bequest to the children of the testatrix "after the death of the survivor." Likewise, in Item Thirteen there is provision for the appointment of a substitute executor "after the death of the survivor."

[15, 16] As the Court of Appeals observed, the cardinal principle in the construction of a will is to give effect to the intent of the testator as it appears from the language used in the instrument itself, insofar as that can be done within the limits of rules of law fixed by statute or by the decisions of this Court. *Raines v. Osborne,* 184 N.C. 599, 114 S.E. 849. The intent of the testator is to be determined from the entire instrument so as to harmonize, if possible, provisions which would otherwise be inconsistent. *Clark v. Connor,* 253 N.C. 515, 117 S.E. 2d 465; *Andrews v. Andrews,* 253 N.C. 139, 116 S.E. 2d 436; *Gatling v. Gatling,* 239 N.C. 215, 79 S.E. 2d 466.

[14] Considering this will in its entirety, we think it apparent that the testatrix was not solely, or even primarily, concerned with the possibility of the simultaneous deaths of her husband and herself in making the provisions for her children. Nor did she intend, in our opinion, by Items Four and Five, to devise the properties there described to a designated child at the expense of her general devise in Item Two of all her property in fee simple to her husband if he survived her. We think it apparent that the intent of the testatrix was that if her husband survived, as he has done, all of her property was to pass to him "unconditionally and in fee simple," but at his death was to pass to the children as specified in Items Three through Twelve of the will, subject to the possibility of a conveyance by him of the property on East Mountain Drive hereinafter noted. Items Five and Six of the will expressly recognize the possibility that the property on East Mountain Drive might not be owned "at the time of our death." We think it unduly restrictive to limit the words "our death" to the simultaneous deaths of the testatrix and her husband. Construing the term "our death" in the light of the circumstances surrounding the execution of this document (see *Trust Co. v. Dodson,* 260 N.C. 22, 33, 131 S.E. 2d 875), we are of the opinion that it means "the death of the survivor," which is the language used in Item Three. Consequently, we hold that the proper construction of the will of Mrs. Olive is a devise "unconditionally and in fee simple"

of all of her property to her husband, followed by a direction as to the disposition to be made of the properties at his death.

In *Barco v. Owens,* 212 N.C. 30, 32, 192 S.E. 862, Stacy, C.J., speaking for the Court, said:

> "The general rule is, that where real estate is devised in fee, or personalty bequeathed unconditionally, a subsequent clause in the will expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit it to a life estate. * * * Conditions subsequent, in the absence of compelling language to the contrary, are usually construed against divestment. * * * The absolute devise is permitted to stand, while the subsequent clause is generally regarded as precatory only."

This general rule of testamentary construction was applied to give to the devisee an unrestricted fee simple estate in *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368; *Peyton v. Smith,* 213 N.C. 155, 195 S.E. 379; and *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892. While it is a rule which will yield to "compelling language" showing a contrary paramount intent of the testator, we find no such clear evidence of a contrary intention in this instrument. On the contrary, the document, considered in its entirety, as well as the clear, unequivocal language of Item Two, shows that Mrs. Olive's paramount purpose was to provide for Dr. Olive if he survived her. We, therefore, hold that the document, considered only as the will of Mrs. Olive, devises to Dr. Olive a fee simple estate in the land owned by the testatrix at her death and imposes no limitation upon his right to convey the same.

[17] There remains for determination the question of whether the document is also a sufficient memorandum of a contract between the husband and wife that the survivor will not revoke the document as his or her own will. "It is * * * well settled that where a husband and wife make an agreement for the disposition of their respective estates, in a particular manner, and execute either a joint will or separate wills providing for the disposition of their estates in accordance with the agreement, such agreement may be upheld by specific performance." *Godwin v. Trust Co.,* 259 N.C. 520, 529, 131 S.E. 2d 456. Such joint will may, itself, be a sufficient memorandum of such contract to satisfy the Statute of Frauds. *Godwin v. Trust Co., supra.*

[18] The great weight of authority is to the effect that where a husband and wife enter into a contract, otherwise valid, to make, and do make, a joint will or separate wills, whereby each devises his

or her property to the survivor of them and the survivor devises his or her property to others, according to a specified plan of distribution, and one spouse dies without revoking his or her will, the survivor, accepting the benefits of the will of the deceased spouse, is bound by the contract. His or her subsequent revocation of the will is a breach of such contract for which a court of equity will give relief in a suit by those who would have been the beneficiaries of such will had the survivor not revoked it. In such event, equity will fasten a trust upon the properties which the survivor so contracted to devise, which trust is enforceable against a subsequent taker of the property other than a bona fide purchaser for value without notice. See: *Dufour v. Pereira,* 1 Dick. 419, 21 English Rep. 332; *Allen v. Bromberg, supra; In Re Johnson's Estate,* 389 Ill. 425, 59 N.E. 2d 825; *Curry v. Cotton,* 356 Ill. 538, 191 N.E. 307; *Stewart v. Todd, supra; Rastetter v. Hoenninger, supra; Stevens v. Myers,* 91 Ore. 114, 117 P. 37, 2 A.L.R. 1155; *Nye v. Bradford,* 144 Tex. 618, 193 S.W. 2d 165, 169 A.L.R. 1; *Wilson v. Starbuck,* 116 W. Va. 554, 182 S.E. 539, 102 A.L.R. 485; *Allen v. Ross,* 199 Wis. 162, 225 N.W. 831, 64 A.L.R. 180; *Doyle v. Fischer, supra; Annot.,* 169 A.L.R. 9, 57-58, 61; 57 Am. Jur., Wills, §§ 717, 718, 721.

[19, 20] In the present case, the joint will declares, "We, Robert M. Olive, Sr., and Ruth Sedberry Olive, * * * *in consideration of each making this our Last Will and Testament,* do hereby make, publish and declare this instrument to be jointly as well as severally our Last Will and Testament." (Emphasis added.) This is contractual language. It is sufficient, in conjunction with the reciprocal devises and bequests, to show the existence of a contract between the husband and wife, pursuant to which the joint will was executed by them. The testimony of the attorney who drafted the document was simply that he knew of no agreement between Dr. and Mrs. Olive with respect to the execution of the will, or the right of the parties thereafter to change the will, "other than what is contained in this will." We need not determine whether the admission of this evidence, over objection, was error, as the appellant contends, for the reason that it was not prejudicial to the appellant. There is nothing in the record to suggest any agreement between Dr. and Mrs. Olive "other than what is contained in this will." Since, in our view, the will contains within itself clear evidence of such agreement, which is not contradicted, the admission of this testimony was not prejudicial to the appellant.

G.S. 52-6(a) provides:

> "No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real

estate of the wife * * * unless such contract * * * is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land."

[21-23] The document before us was not acknowledged in conformity with this statute. This does not affect its validity as the will of Mrs. Olive but, by the terms of the statute, it could not have validity as a contract affecting or changing her real estate. A contract by which one binds himself to make a specified testamentary disposition of his real property is a contract affecting that property. Consequently, a contract between husband and wife prescribing the testamentary disposition of their properties is not binding upon the wife unless the procedure prescribed by G.S. 52-6 is followed. During the life of the wife, such a contract, not acknowledged as prescribed by this statute, is not binding upon the husband since, as to him, there is a failure of consideration. When, however, the wife dies, leaving the will for which her husband bargained with her, the contract is thereafter binding upon him. In 1 Williston on Contracts, 3rd ed., § 106, it is said: "[W]hile a promise void for incapacity of the promisor will not support a counter-promise, if the void promise is actually performed, the performance may become sufficient consideration to support the counter-promise. And other instances may be found where a bilateral agreement originally unenforceable gives rise, when performed on one side, to a binding unilateral contract."

In *Godwin v. Trust Co., supra,* such a contract, not acknowledged by the wife as required by G.S. 52-12, now G.S. 52-6, was held to have been incorporated by reference into the separate, simultaneous wills of the husband and wife. The wife died leaving her will in effect. The husband then made another will and died. In an action brought to compel distribution according to the former will, which he had made pursuant to the contract, this Court held that the husband was bound by the contract and the defendant, taking under the subsequent will made by the husband in breach of the contract, took the property, subject to the rights of the beneficiary in the former will. The *Godwin* case did not hold that, by virtue of the doctrine of incorporation by reference, the contract of the wife to make a specified testamentary disposition of her property was binding upon her notwithstanding G.S. 52-6, nor did it hold that, though the requirements of the statute have not been met, the executory contract of the wife to make such will is consideration for the promise of the husband, so as to make the contract binding upon him during her lifetime. Those questions were not before the Court in the *Godwin* case and they are not before us in the present case. We hold, how-

ever, that the wife having died, leaving a will in accordance with the contract, the husband is bound by his contract to make the agreed testamentary disposition of his own property.

It is necessary, however, to determine what the contract was. As noted above, the document, in Items Five and Six, clearly contemplates the possibility that the property on East Mountain Drive, which is the subject of the contract by Dr. Olive to sell and convey to the defendants Biggs, might not be owned by the surviving testator at death; that is, it might be transferred by an *inter vivos* conveyance.

[24] In Sparks, Contracts to Make Wills, p. 53, it is said that where the contract is for a devise of specific real estate, as distinguished from all or a fractional part of the promisor's estate, any subsequent conveyance, other than to a bona fide purchaser, is ineffective as against the beneficiary of the contract. In our opinion, this statement is too sweeping in its extent. Each such contract must be construed to determine the intent of the parties thereto with reference to the right of the owner of the property to make an *inter vivos* conveyance. See Annot., 108 A.L.R. 867, 868-9.

[25, 26] We find in the document before us a clear indication that Dr. and Mrs. Olive intended the survivor to have full power to sell and convey the land on East Mountain Drive, referred to in Items Five and Six. We find, however, nothing therein to indicate an intent that the survivor might make an *inter vivos* sale or conveyance of other properties specifically mentioned. As to the effect of such contract upon the right of the survivor to make an *inter vivos* transfer or conveyance of residuary property and as to the effect of a contract to devise or bequeath all or a fractional part of one's estate upon his right of *inter vivos* conveyance, see: *Sample v. Butler University,* 211 Ind. 122, 4 N.E. 2d 545, 5 N.E. 2d 888, 108 A.L.R. 857; 57 Am. Jur., Wills, § 710; Atkinson on Wills, 2d ed., § 49.

We hold, therefore, that Dr. Olive is bound by the contract shown in the document before us. His right to sell and convey the property on East Mountain Drive, referred to in Items Five and Six, is not restricted by the contract. He may not, however, make a testamentary disposition of any property contrary to this contract, or revoke the joint will as his will, or make an *inter vivos* conveyance or transfer of any other property specifically dealt with in this document which will prevent a court of equity from subjecting the property, so transferred in breach of the contract, to the rights of the beneficiaries thereof prior to the acquisition of such property by a bona fide purchaser for value.

The superior court was in error in concluding and adjudging that the joint will does not constitute a contract between the plaintiff and his wife requiring such will to remain in effect as the will of the plaintiff.

This matter is remanded to the Court of Appeals for the entry of a judgment further remanding it to the superior court for the entry by it of a judgment in conformity with this opinion.

Error and remanded.

HIGGINS, J., dissenting:

A study of the will involved in this proceeding convinces me that all issues were correctly resolved by the trial judge and by the Court of Appeals. I must dissent from any decision or opinion to the contrary.

Item Two of the will furnishes a key to the intent of the testators. "*We, and each of us,* devise and bequeath all of his or her property, unconditionally and in fee simple, to the survivor, *in the event that one of us survives the other.*" (Emphasis added) Necessarily, there must be a survivor in order for Item Two to become controlling. Item Two, in the absence of simultaneous death, leaves to the survivor a full, absolute and final disposition of all the other's property. However, had there been no survivor, that is, a simultaneous death, Item Two would be inapplicable and the subsequent items would control. Actually there was a survivor and in my judgment the subsequent dispositive items of the will are inapplicable. It seems clear that Item Two was intended to govern in case there was a survivor, and that the subsequent items were intended to control in case of simultaneous death, but not otherwise. This construction is borne out by the will, which admittedly is not free from some ambiguities.

Item Two begins "We and each of us devise and bequeath all of his or her property, unconditionally and in fee simple, to the survivor . . ." and when properly construed is the separate will of each maker of his property to the other, if there is a survivor. If there is no survivor, that is in case of simultaneous death, there is no one to take under Item Two, and there being no taker, the rules of intestacy would dispose of the property of each. In order to obviate this situation, the subsequent items of the will were intended to take over in such contingency, that is, no survivor. While Item Two begins "We and each of us," all subsequent items begin "We". The words "each of us" in Item Two indicate that Item Two is the sep-

arate will of each, but in the subsequent items the beginning is "We devise and bequeath", which shows the joint will of both. This indicates to me that Items Three through Twelve, inclusive, were only intended to apply in case of simultaneous death, when neither could take under Item Two.

The rules of interpretation applicable here are stated in a number of our cases. In *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298, this Court held: "The discovery of the intent of the testator as expressed in his will is the dominant and controlling objective of testamentary construction, for the intent of the testator, as so expressed, is his will." (Citing authority) "And greater regard is to be given to the dominant purpose of the testator than to the use of any particular words." (Citing authority)

In *Worsley v. Worsley,* 260 N.C. 259, 132 S.E. 2d 579, the Court said: "The general rule is, that where real estate is devised in fee, or personalty bequeathed unconditionally, a subsequent clause in the will expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit it to a life estate. . . . In construing a will every word and clause will be given effect if possible, and apparent conflicts reconciled, and irreconcilable repugnancies resolved by giving effect to the general prevailing purpose of testator." (Citing authority)

Under these rules, notwithstanding inconsistencies, it is my conclusion that the intent of Dr. Olive and his wife was to give to the survivor all the other's property "unconditionally and in fee simple". But if neither survived the other, then Items Three through Twelve, inclusive, were intended as their joint will and disposed of all property owned by both. I vote to affirm the decision of the Court of Appeals.

BOBBITT, C.J., joins in dissenting opinion.

STATE OF NORTH CAROLINA v. EDWARD GRADY MACON, JR.

No. 35

(Filed 15 April 1970)

1. Constitutional Law § 30; Criminal Law §§ 101, 130— right to impartial jury — deputy sheriffs as witnesses and court officers

In this homicide prosecution, defendant's constitutional right to a fair trial by an impartial jury, as guaranteed by the Sixth and Fourteenth Amendments, was not violated when two deputy sheriffs who were wit-

nesses for the State and testified against defendant were allowed to act as court officers or bailiffs during the trial, where the jury was not sequestered, the deputies were not in the presence of the jurors outside the courtroom, had no communication at any time with them, had no custodial authority over them, and the only service of the bailiffs to the jurors was in opening the door to send them out or call them in, defendant having failed to show circumstances affording any reasonable ground upon which to attack the fairness of the trial or the integrity of the verdict.

2. Criminal Law §§ 101, 130— State's witness — disqualification to act as custodian or officer in charge of jury

A State's witness is disqualified to act as "custodian" or "officer in charge" of the jury in a criminal case.

3. Criminal Law § 42; Constitutional Law § 31— pretrial examination of State's exhibits — G.S. 15-155.4

An accused is entitled to the benefits of G.S. 15-155.4, relating to a court order for pretrial examination of State exhibits, when either he or his counsel (1) has made written request to the State's counsel that the State produce for defendant's inspection, examination, copying and testing sufficiently in advance of the trial to permit him to prepare his defense (2) a specifically identified exhibit to be used in the trial of the case, and (3) said request has been denied or gone unanswered for more than 15 days.

4. Criminal Law § 80; Constitutional Law § 31— denial of pretrial examination of SBI agent's interrogation notes

In this homicide prosecution, the court did not err in the denial of defendant's motion under G.S. 15-155.4 that the State's counsel be required to permit defense counsel to examine the typewritten transcript of notes made by an SBI agent during interrogation of defendant, where no written request was made to the State's counsel and no refusal or neglect was shown as required by the statute, and the notes were not an exhibit to be used at the trial, no prejudice having resulted to defendant in any event since defense counsel examined the notes at the trial and cross-examined the SBI agent at great length concerning them.

LAKE, J., did not participate in the consideration or decision of this case.

APPEAL by defendant to review decision of the Court of Appeals upholding judgment of *McKinnon, J.*, 1 July 1968 Session, WAKE Superior Court. The appeal was docketed in the Supreme Court as Case No. 59 and argued at the Fall Term 1969. Thereafter, we allowed certiorari with respect to other than constitutional questions, and the case was reargued at the Spring Term 1970.

Defendant was tried on a bill of indictment charging him with the murder of Jane Ellen Smith on 31 July 1967. The solicitor sought a verdict of guilty of murder in the second degree or manslaughter as the evidence might disclose.

The State's evidence tended to show that Jane Ellen Smith was a married woman living with her husband at Route 3, Apex, North Carolina. On Monday, 31 July 1967, she left home around 7:15 p.m. in her husband's 1956 Ford, ostensibly going to the drug store. She was wearing a blouse, shorts and leather-strap sandals. She had a high school class ring with her initials in the band on her finger and a Miss America Bulova wristwatch on her arm. When she failed to return home that night, her husband and sister informed a deputy sheriff at Apex that she was missing and furnished a description of what she was wearing when she left home.

On 10 March 1968 a skeleton was found near the Oscar Jones Pond one mile east of N. C. Highway 55, two miles north of Holly Springs, and approximately five miles southwest of Apex. The bones of the skeleton appeared to have been gnawed upon, were widely scattered, and some were missing altogether. The skull, the larger bones, and many of the smaller bones were recovered. The undergarments, the blouse, the shorts, the sandals, the ring, and the wristwatch — all of which were worn by Jane Ellen Smith when she left home on the evening of 31 July 1967 — were found at the site of the skeleton.

In the opinion of an expert pathologist, the skull was that of an adult female human being. The skull had a hole on both the left and the right side. The hole on the left was smaller. The hole on the right had the appearance of having been blown outward by a force moving from left to right and exiting on the right side. This type of perforation was compatible with that caused by a bullet. Injury to the brain by such perforation would likely cause death. Small metallic fragments removed from inside the skull were, on analysis, found to be lead and copper.

Defendant had known Jane Ellen Smith prior to 31 July 1967. He had been seen driving along the highway in front of her house and looking toward it. He had been observed on two occasions when he stopped in front of her house to pick her up. Her fourteen-year-old daughter had accompanied her on several occasions when she drove to meet defendant elsewhere — twice when they met in the woods on the road leading from Highway 55 to the Oscar Jones Pond. During the late afternoon of 31 July 1967, defendant was seen passing Jane Ellen Smith's house and looking toward it.

Prior to 7 October 1967 defendant owned a .38 caliber Charter Arms pistol, serial number 5744, which he swapped on that date for a .38 caliber Smith and Wesson, Model 10.

The State's evidence further tended to show that on 16 March 1968 defendant told Robert D. Emerson, Special Agent of the State Bureau of Investigation, that he formerly resided in Apex and during the summer of 1967 was associating with Jane Ellen Smith and had sexual relations with her on at least one occasion; that he met her one night during the summer of 1967 on Highway 64 near Apex; that she parked her car, got into his 1955 Chevrolet, and he drove down Highway 55 south of Apex and parked off the highway; that they drank some beer and got into an argument but no blows were passed; that he shot Jane Ellen Smith with a .38 caliber revolver and left the body in a wooded area off Highway 55, leaving her personal effects with the body; that he drove to Fuquay and then returned to Wake Forest where he was staying; that he did not see why he had to suffer for the death of Jane Ellen Smith; that she was a slut and led him on and that she was not worth a tinker's damn; that to the best of his knowledge the .38 caliber Charter Arms pistol, serial number 5744, was the weapon he used to shoot Jane Ellen Smith.

The defendant offered evidence which tended to show that he is forty-nine years of age, married, and has four children. He lived in Apex and was employed by the Durham and Southern Railroad until 15 November 1966. He first met Jane Ellen Smith when he talked with her about the crossing over the Durham and Southern tracks between her house and the paved road. Thereafter, he went with her three times — the last time on 24 July 1967 when she flagged him down at the intersection of Highways 1 and 64 south of Raleigh. He took her to get some beer and then drove down Highway 55 south of Apex to a spot opposite the Gas Pipeline Terminal where they parked and drank the beer. Then they continued on down Highway 55 to Fuquay-Varina. On arrival there she wanted more beer which he refused to provide. She got out of the car to walk on into town and he continued on down Highway 55. He had not seen Jane Ellen Smith since that time.

On 30 and 31 July 1967 (Sunday and Monday) defendant was staying in Wake Forest with his sister, mother, and grandmother. He was working for the Seaboard Railway out of Henderson. When he got off work at 4 p.m. on 31 July 1967 he went straight to Wake Forest, rested awhile, ate supper, watched television, and went to bed for the night. He was not in the vicinity of Apex or Holly Springs on that date and had never told anyone differently. He did not tell the officers that he shot Jane Ellen Smith. He bore her no ill will and had no desire to have her out of the way.

The jury convicted defendant of murder in the second degree, and a prison sentence of twenty to thirty years was imposed by the court. Defendant appealed to the Court of Appeals where his conviction was upheld, 6 N.C. App. 245, 170 S.E. 2d 144. Defendant appealed as of right on the constitutional question noted in the opinion, and we thereafter allowed certiorari.

Hatch, Little, Bunn, Jones & Liggett by E. Richard Jones, Jr., and William P. Few, Attorneys for defendant appellant.

Robert Morgan, Attorney General, by Millard R. Rich, Jr., Assistant Attorney General, for the State.

HUSKINS, J.

[1] The only constitutional question preserved and presented here for review is whether or not the trial court erred in allowing Deputy Sheriff Connie Holmes and Deputy Sheriff W. L. Pritchett, over objection, to act as court officers or bailiffs during the trial of this case in spite of the fact that both officers were witnesses and testified against the defendant. Defendant contends this amounted to a denial of Due Process under the Fourteenth Amendment and was a violation of his Sixth Amendment right to be tried "by an impartial jury of the state and district wherein the crime shall have been committed." We first examine decisions of this Court on the question presented.

In *State v. Hart,* 226 N.C. 200, 37 S.E. 2d 487 (1946), a deputy sheriff who was sworn and served as "officer of the jury" was also a witness for the State in the trial of the case. The extent of his exposure to the jury is not revealed by the record. Held: "The decisions by the various courts have not been in accord, but we are now of the opinion that the weight of authority is to the effect that an officer is not necessarily disqualified from acting as custodian of a jury in a criminal case because he happens to be a witness in the case. It is our opinion, and we so hold, that actual prejudice must be shown before the result of the trial can be, as a matter of right, disturbed. . . . [T]he findings of the trial judge upon the evidence and facts are conclusive and not reviewable."

In *State v. Taylor,* 226 N.C. 286, 37 S.E. 2d 901, an automobile which was then parked behind the courthouse was an exhibit material to the State's case. During the trial the car was offered in evidence, and the jury was permitted to retire to the courtyard in the custody of a deputy sheriff to view the vehicle. The deputy designated to conduct the jury to the courthouse lawn was a witness for the

in charge of the jury and, in a constitutional sense, amounts to a denial of due process.

In the *Turner* case defendant was charged with murder in the perpetration of a robbery. Members of the jury were sequestered in accordance with Louisiana law and "placed in charge of the sheriff." The jurors "were continuously in the company of deputy sheriffs . . . during the three days that the trial lasted. The deputies drove the jurors to a restaurant for each meal, and to their lodgings each night. The deputies ate with them, conversed with them, and did errands for them." Two of these deputies were the State's principal witnesses. One described in detail an investigation he had made at the scene of the murder. He further testified that the two of them later took Turner into custody, and that Turner led them to a place in the woods where a cartridge clip from the murder weapon was recovered. The second deputy corroborated this testimony and told of certain damaging admissions made by Turner at the time of his apprehension. This witness further described the circumstances under which Turner made a written confession — later offered in evidence.

Defendant moved for a mistrial when the deputies testified and for a new trial after the jury returned a guilty verdict. The motions were denied and Turner was sentenced to death. The Supreme Court of Louisiana affirmed on the ground that there was no showing of prejudice. 244 La. 447, 152 So. 2d 555. On certiorari, the Supreme Court of the United States reversed. It was held: (1) The constitutional right to jury trial guarantees a fair trial by an impartial jury, and failure to accord an accused a fair hearing violates even the minimal standards of due process (*In Re Oliver*, 333 U.S. 257, 92 L. ed 682, 68 S. Ct. 499; *Tumey v. Ohio*, 273 U.S. 510, 71 L. ed 749, 47 S. Ct. 437); (2) a verdict must be based upon the evidence developed at the trial, and the evidence must come from the witness stand "where there is full judicial protection of the defendant's right of confrontation, of cross examination, and of counsel"; (3) even assuming the deputies never discussed the case directly with any member of the jury, "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution"; and (4) this kind of association between jurors and key prosecution witnesses undermines the basic guarantees of trial by jury; moreover, the prejudice is potentially greater when the witnesses are officers "in charge of the jury" because such association fosters the confidence of jurors in witnesses who are also their *official guardians* during the trial.

State. There was no suggestion of any misconduct on the part of the jury or the officer, but defendant insisted that the occurrence was highly prejudicial to him. Held: "The practice of putting the jury in the custody of an officer who has actively investigated the evidence or has become a witness for the State is not to be approved. While, in the absence of evidence of some fact or circumstance tending to show misconduct on the part of the officer or the jury, we hesitate to make it alone the grounds for a new trial, we do stress the need for trial judges to be extremely careful to avoid such incidents. . . . [T]hese occurrences always, as here, tend to bring the trial into disrepute and produce suspicion and criticism to which good men should not be subjected."

In *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190, defendant's motion for a mistrial and for a new trial was based upon a conversation between the bailiff and the jury foreman. During jury deliberations the bailiff opened the door to the jury room in response to a knock on the door and the following conversation, as related by the bailiff, took place: "The foreman asked me if he could ask me a question. I told him I could not answer a question. He says 'We wanted to know how quick a parole was possible.' I says 'It has nothing to do with the evidence.' And I reported it to the judge." Nothing else was said. While disapproving the conduct of the bailiff in assuming the role of the judge, the Court said: "The great weight of authority sustains the rule that '. . . a verdict will not be disturbed because of a conversation between a juror and a stranger when it does not appear that such conversation was prompted by a party, or that any injustice was done to the person complaining, and he is not shown to have been prejudiced thereby, and this is true of applications for a new trial by the accused in a criminal case as well as of applications made in civil actions. . . . [A]nd if a trial is really fair and proper, it should not be set aside because of mere suspicion or appearance of irregularity which is shown to have done no actual injury. . . . The matter is one resting largely within the discretion of the trial judge.' 39 Am. Jur., New Trial, § 101." See *Stone v. Baking Co.,* 257 N.C. 103, 125 S.E. 2d 363, where this statement of the rule is quoted with approval. See also Annotation: Prejudicial Effect, in Criminal Case, of Communication Between Court Officials or Attendants and Jurors, 41 A.L.R. 2d 227.

Conceding that prior holdings of this Court do not support his position, defendant contends that *Turner v. Louisiana,* 379 U.S. 466, 13 L. ed 2d 424, 85 S. Ct. 546 (1965), has invalidated those decisions and obviated the necessity for a showing of prejudice. Defendant argues that prejudice is inherent where a State's witness is placed

We are in full accord with the sound principles of constitutional law enunciated in the *Turner* case. The facts in the case before us, however, do not invoke their application. In *Turner* the jury was sequestered — not so here. There, the deputies involved were "in actual charge of the jury." Here, they were only court officers or bailiffs. There, the deputies were in continuous and intimate association with the jurors, eating with them, conversing with them, and doing errands for them throughout a three-day trial. Here, the deputies were not in the presence of the jurors outside the courtroom, had no communication at any time with them, and had no custodial authority over them. The exposure of the jury to these bailiffs was brief, incidental, and without legal significance. Hence, defendant not only fails to show *actual prejudice* — he fails to show circumstances affording any reasonable ground upon which to attack the fairness of the trial or the integrity of the verdict. The only service of the bailiffs to the jurors was in "opening the door to send them out or call them in as occasion required." We hold on the facts in this record that defendant received a fair trial in a fair tribunal in keeping with basic requirements of Due Process. There is nothing to support the contention that his constitutional rights under the Sixth and Fourteenth Amendments have been violated.

[2] Since the State's witnesses here had no custodial authority over the jury, *Turner* does not apply. Even so, trial judges should not overlook the significance of that decision. Simply stated, it holds that a State's witness is disqualified to act as *custodian* or *officer in charge* of the jury in a criminal case. We said as much in *State v. Taylor, supra.* Under such circumstances prejudice is conclusively presumed.

[4] Appellant's next assignment worthy of note is based on denial of his written motion, filed 25 June 1968, that the "prosecuting officials" be required to permit defense counsel to inspect and examine the "typewritten transcript of notes made by SBI Agent Emerson during the interrogation of defendant on March 16, 1968."

The motion is grounded upon G.S. 15-155.4, relating to pretrial examination of witnesses and exhibits of the State, which provides in pertinent part as follows:

> "In all criminal cases before the superior court, the superior court judge . . . shall for good cause shown, direct the solicitor or other counsel for the State to produce for inspection, examination, copying and testing by the accused or his counsel any specifically identified exhibits to be used in the trial of the case sufficiently in advance of the trial to permit the accused

to prepare his defense. . . . Prior to issuance of any order for the inspecting, examining, copying or testing of any exhibit . . . under this section the accused or his counsel shall have made a written request to the solicitor or other counsel for the State for such inspection, examination, copying or testing of one or more specifically identified exhibits . . . and have had such request denied by the solicitor or other counsel for the State or have had such request remain unanswered for a period of more than 15 days."

[3] Under this section, an accused is entitled to the benefits provided therein when either he or his counsel (1) has made written request to the State's counsel that the State produce for defendant's inspection, examination, copying and testing sufficiently in advance of the trial to permit him to prepare his defense (2) a specifically identified exhibit to be used in the trial of the case, and (3) said request has been denied or gone unanswered for more than fifteen days.

[4] The statute contemplates request and denial (or neglect equivalent to denial) "prior to the issuance of any order" for such inspection. These requirements were not met. No written request was made to the State's counsel and no refusal or neglect to furnish is shown. Furthermore, the notes made by Agent Emerson during his interrogation of defendant were not an exhibit to be used at the trial. Finally, the record shows that defense counsel examined the notes at the trial and cross-examined Agent Emerson at great length concerning them. We hold that defendant's motion was properly denied and that, in all events, no prejudice resulted.

Defendant's other assignments of error have been carefully examined but merit no discussion. They are adequately treated in the opinion of Parker, J., for the Court of Appeals, and further discussion here would serve no useful purpose. In the final analysis, defendant's guilt or innocence was a question of fact for the jury. It accepted the State's version, and no error of law requiring a new trial has been made to appear. The decision of the Court of Appeals upholding the verdict and judgment is therefore

Affirmed.

LAKE, J., did not participate in the consideration or decision of this case.

HARWELL ENTERPRISES, INC. v. GARY L. HEIM, INDIVIDUALLY, AND GARY L. HEIM AND DWIGHT BALLARD, TRADING AS METRO SCREEN ENGRAVING COMPANY

No. 11

(Filed 15 April 1970)

1. Appeal and Error § 55— review of a demurrer

In passing upon a demurrer the Supreme Court must accept as true the facts alleged.

2. Contracts § 7; Master and Servant § 11— covenant not to engage in competition — action for breach — sufficiency of complaint

The complaint of plaintiff corporation states a cause of action against its former employee and a codefendant for their violation of a covenant by the employee not to engage in silk screen processing or in any other business competitive with plaintiff in the United States for a period of two years, where there are allegations (1) that plaintiff is engaged in silk screen processing throughout the United States, (2) that the contract of employment included the employee's covenant not to engage in competition, (3) that during the course of his employment the employee acquired knowledge of plaintiff's trade and technical processes, customer lists, and price information, (4) that the codefendant knew of the covenant and conspired with the employee to violate its terms, and (5) that the defendants are now actively engaged in silk screen processing in a municipality in this state and are actively soliciting such business from plaintiff's customers.

3. Contracts § 7— covenant against competition in the U. S. for two years — validity

A restrictive covenant in an employment contract that the employee will not engage in silk screen processing or in any other business competitive with the employer in the United States for a period of two years after termination of his employment, *held* valid and enforceable.

4. Contracts § 7— covenants against competition — enforceability

Covenants not to engage in competitive businesses will be enforced if they are no broader than reasonably necessary for the protection of the employer's business and do not impose undue hardship on the employee, due regard being given the interests of the public.

5. Contracts § 7; Conspiracy § 1— conspiracy to violate covenant against competition — liability of co-conspirator

Where a person knowingly enters into a conspiracy with an employee to violate the employee's covenant not to engage in a competitive employment or business, the person is jointly liable with the employee for the breach.

ON *certiorari* to the Court of Appeals to review its decision reported in 6 N.C. App. 548, 170 S.E. 2d 540.

Plaintiff, Harwell Enterprises, Inc., of Gastonia, North Carolina,

brought this action against Gary Heim (Heim), individually, and Gary Heim and Dwight Ballard (Ballard), trading as Metro Screen Engraving Company of Gastonia, North Carolina, to restrain the operation of defendants' company and to recover money damages.

The complaint alleges: Plaintiff company is a North Carolina corporation with its principal offices in Gastonia, North Carolina, engaged in "various business endeavors including all phases of silk screen processing, plastics, importing and various other ventures throughout the United States." On 27 September 1967, plaintiff employed Heim under a written contract of employment executed by him and described as an "Employee Patent and Trade Secret Agreement," containing in part the following provisions:

> "Harwell Enterprises, Inc., is engaged in various business endeavors including all phases of silk screen processing, plastics, importing and various other ventures which will materialize during the time of my employment with HARWELL ENTERPRISES, INC. The nature of these operations or businesses will depend upon constant engineering, research, development, manufacturing, and processes which are of a secret and confidential nature necessary to maintain its business, and in order to continue as a company in these fields.
>
> "THEREFORE, in consideration of the above and in consideration of employment or continued employment with Harwell Enterprises, Inc., and the payment of wages during employment, it is understood and agreed as follows:
>
> * * *
>
> "6. I further agree that I will not, after the termination of my employment with Harwell Enterprises, Inc., for any cause whatsoever, engage either directly or indirectly on my own behalf, or on behalf of any other person, persons, firm, partnership, company, or corporation in the business of silk screen processing or any other business providing products and services similar in nature to those of Harwell Enterprises, Inc., or in any competitive business in the United States for a period of two (2) years from the date of the termination of my employment."

Plaintiff further alleges: Heim voluntarily left its employ on 11 February 1968, and in violation of the provisions of his contract, entered into the silk screen processing business with Ballard, a former employee of the plaintiff; during the course of his employment with the plaintiff, Heim acquired knowledge of valuable trade

and technical processes, customer lists, price information, and research and development data and is using this knowledge in violation of his contract; Ballard knew of the employment contract with Heim and conspired with him to violate its terms; and defendants are presently engaged in the operation of the silk screen processing business, are actively soliciting such business from plaintiff's customers, and are supplying silk screen processing equipment and materials to concerns in Gastonia, North Carolina, and Clover, South Carolina, customers of plaintiff during Heim's employment.

Plaintiff prays that the defendants be restrained from engaging in the business of silk screen processing or any other business providing products and services similar to those of the plaintiff for a period of two years beginning 11 February 1968, and that the plaintiff recover damages for the breach of the contract.

Both defendants demurred for failure of the complaint to allege facts sufficient to state a cause of action and for misjoinder of causes of action and parties. Heim also demurred for the reason the employment contract was unreasonable in its provisions, and therefore void.

At the 22 September 1969 Session of Gaston Superior Court, Heim's demurrer was sustained on the ground that "the complaint states a defective cause of action in that the contract sued upon is void and unenforceable because it purports to prevent the defendant from working in 'any competitive business in the United States.'" The demurrer of Ballard was overruled, and plaintiff and Ballard appealed to the Court of Appeals.

The Court of Appeals affirmed the judgment sustaining Heim's demurrer and dismissed Ballard's appeal.

Plaintiff's petition for *certiorari* was allowed on 6 January 1970.

The issuance of a restraining order is no longer involved since the two-year period prohibited in the contract has expired. Only the right of the plaintiff to seek damages for breach of contract remains to be decided.

Whitener & Mitchem by Basil L. Whitener and Anne M. Lamm for plaintiff appellant.

Horace M. DuBose, III, for defendant appellee Heim.

Hollowell, Stott & Hollowell by Grady B. Stott for defendant appellee Ballard.

MOORE, J.

[1, 2] In passing upon the demurrer this Court must accept as true the facts alleged. Hence, for the present hearing these facts are deemed established: (1) Plaintiff is engaged in various business endeavors including all phases of silk screen processing, plastics, importing and various other ventures throughout the United States; (2) the parties entered into a written contract which provided, *inter alia*, that Heim would not engage in any business competitive with the plaintiff in the United States for a period of two years after termination of his employment with the plaintiff; (3) Heim voluntarily left the employment of plaintiff on 11 February 1968; (4) in violation of the terms of the agreement Heim entered into the silk screen processing business with Ballard, also a former employee of the plaintiff; (5) Heim acquired valuable trade and technical processes, customer lists, price information, and research and development data while employed by plaintiff; (6) Ballard knew of the contract between Heim and the plaintiff and conspired with Heim to violate it; and (7) defendants are presently engaged in the silk screen processing business, are actually soliciting business from plaintiff's customers, and are now supplying named concerns in North and South Carolina which were customers of plaintiff during Heim's employment.

[3] Under the facts as alleged, Heim's conduct violated the terms of the restrictive covenant. The question for decision is whether the restrictive covenant is valid and enforceable. The defendants say its territorial scope (United States) is too large, and the business sought to be protected (any competitive business) is too broad; hence, it is void and unenforceable. We hold otherwise. The general rule for the interpretation of such covenant is well stated by Stacy, C.J., in *Beam v. Rutledge*, 217 N.C. 670, 9 S.E. 2d 476:

> "The test to be applied in determining the reasonableness of a restrictive covenant is to consider whether the restraint affords only a fair protection to the interest of the party in whose favor it is given, and is not so broad as to interfere with the rights of the public." [Citing authority.] The question is one of reasonableness — reasonableness in reference to the interests of the parties concerned and reasonableness in reference to the interests of the public. [Citing authority.] Such a covenant is not unlawful if the restriction is no more than necessary to afford fair protection to the covenantee and is not injurious to the interests of the public."

[4, 5] Such covenants will be enforced if they are no broader than

reasonably necessary for the protection of the employer's business and do not impose undue hardship on the employee, due regard being given the interests of the public. *Asheville Associates v. Miller and Asheville Associates v. Berman,* 255 N.C. 400, 121 S.E. 2d 593. If the covenant in this case is enforceable as to Heim, and Ballard knowingly entered into a conspiracy with Heim to violate it, he would be jointly liable with Heim for the breach. *Sineath v. Katzis,* 218 N.C. 740, 12 S.E. 2d 671.

Defendants rely upon *Comfort Spring Corp. v. Burroughs,* 217 N.C. 658, 9 S.E. 2d 473, to support their contention that the covenant in the present contract including "all the United States" is void in North Carolina because the territory covered is unreasonable. In that case the restrictive clause which was held void referred to a particular company, the Spring Products Corporation of New York City, or its successor, and provided:

> ". . . [I]t is understood and agreed that for the period of five years immediately following the termination of this contract by either party for or without cause, the party of the second part shall not, directly or indirectly, enter into the employ of such corporation, or its successor, or represent same within the entire United States; and the said party of the second part agrees that for said period of five years and in the United States he will not represent or enter the employ of the said Spring Products Corporation in any manner whatsoever."

In passing upon the validity of this covenant, this Court said:

> "It should first be observed that the only breach of the restrictive covenant alleged is that the defendant has accepted employment from the Spring Products Corporation and is calling upon the customers of the plaintiff. There is no allegation nor evidence as to the territory in which the defendant is calling upon the plaintiff's customers. . . . In truth, there is no allegation nor evidence as to over what territory the plaintiff's business extends. Therefore we are called upon to decide simply the question as to whether the covenant that the defendant would not accept employment as a salesman or otherwise from the Spring Products Corporation anywhere in the United States is unreasonable and oppressive, and in restraint of trade."

[2] *Comfort Spring Corp.* is factually distinguishable from the instant case. In that case there was neither allegation nor evidence as to the territory over which the plaintiff's business extended or as to the territory in which the defendant was calling upon the plaintiff's customers. There was neither allegation nor evidence on which the

Court could properly determine whether the restrictive covenant in question was reasonably necessary for the protection of the plaintiff's business. In the absence of such allegations or proof, the Court properly held the restriction "within the entire United States" was unnecessary for the protection of the plaintiff. In the present case, however, the plaintiff has specifically alleged that its business activities extend throughout the United States; that the defendants are actively engaged in soliciting business from the plaintiff's customers, among them being Wix Corporation, Gastonia, North Carolina; Charleston Rubber Company, Clover, South Carolina; Uniroyal Corporation, Gastonia, North Carolina; Homelite Corporation, Gastonia, North Carolina, and others; and that they are actually supplying silk screen processing equipment and material to said customers and various other customers of the plaintiff, and are using valuable trade and technical information concerning the plaintiff's business such as lists of plaintiff's customers, prices charged for services and equipment, the method in which plaintiff's business was conducted, manufacturing processes, and research and development information acquired by defendant Heim while employed by the plaintiff. Such conduct by Heim is exactly what the restrictive covenant sought to prevent and is contrary to the rule as approved in *Asheville v. Miller and Asheville v. Berman, supra,* stated as follows:

> "The general rule with respect to enforceable restrictions is stated in 9 A.L.R. 1468: 'It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons and customers of his former employer, and thereby gain an unfair advantage, equity will interpose in behalf of the employer and restrain the breach . . . providing the covenant does not offend against the rule that as to time . . . or as to the territory it embraces it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer.' "

Because of the increased technical and scientific knowledge used in business today, the emphasis placed upon research and development, the new products and techniques constantly being developed, the nation-wide activities (even world-wide in some instances) of many business enterprises, and the resulting competition on a very

broad front, the need for such restrictive covenants to protect the interests of the employer becomes increasingly important. If during the time of employment new products are developed and new activities are undertaken, reason would require their protection as well as those in existence at the date of the contract, and to a company actually engaged in nation-wide activities, nation-wide protection would appear to be reasonable and proper. For as 5 Williston on Contracts § 1639 (Rev. ed., 1937) states:

> ". . . The decisions in the United States now follow the English test, whether the promised restraint is reasonably necessary for the protection of the employer's business, or of the business transferred. The old view that any restraint of trade covering the entire state or nation is invalid has almost disappeared, at least where the restraint is limited in time. . . ."

In the present case the defendants do not contend that the time limit of two years is excessive, and the allegations of the complaint as to business activities throughout the United States support the reasonableness of the restriction imposed as to the territory covered.

Courts throughout the United States have held contracts almost identical to the one here involved to be valid and enforceable. *Irvington Varnish & Insulator Co. v. Van Norde,* 138 N.J.Eq. 99, 46 A. 2d 201; *Eastman Kodak Co. v. Powers Film Products,* 189 App. Div. 556, 179 N.Y.S. 325, appeal denied 190 App. Div. 970, 179 N.Y.S. 919; *Eagle Pencil Co. v. Jannsen,* 135 Misc. 534, 238 N.Y.S. 49; *O & W Thum Co. v. Tloczynski,* 114 Mich. 149, 72 N.W. 140; Annot., 43 A.L.R. 2d 94, 275.

Upon the allegations of the complaint, which the proof may or may not sustain, the court should have overruled both demurrers and permitted the defendants to answer and proceed to trial of the case on its merits.

For the reasons stated, the decision of the Court of Appeals affirming the trial court's action in sustaining the demurrer of Heim is reversed. The decision of the Court of Appeals dismissing the appeal of Ballard is affirmed.

As to Heim, Reversed.

As to Ballard, Affirmed.

STATE OF NORTH CAROLINA v. CHARLIE McPHERSON, ROBERT LEE JONES AND RONALD MICHAEL HARRIS

No. 33

(Filed 15 April 1970)

1. Criminal Law § 66— submission of photographs of 7 or 8 persons to robbery victim

There is nothing unlawful or inherently wrong in the police submitting to an armed robbery victim photographs of seven or eight persons who fit generally the victim's description of the robbers for possible identification by the victim of his assailants.

2. Criminal Law § 66— in-court identification — pretrial photographic identification — accidental pretrial confrontation at police station

In this armed robbery prosecution, the *voir dire* evidence was sufficient to support the trial court's findings of fact and conclusions of law that the victim's in-court identification of defendants were based on his actual observations of defendants prior to and during the robbery, and were neither tainted by the display of seven or eight photographs to the victim by police, from which he identified two of the defendants, nor by an unarranged and accidental confrontation between the victim and the third defendant at the police station.

3. Criminal Law § 66— in-court identification — suggestive pretrial photographic identification

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

4. Criminal Law §§ 99, 170— colloquy between court and counsel — prejudice to defendants

Although neither counsel nor the court acted with proper dignity or restraint at times during the trial, defendants were not prejudiced by remarks made by the court in the presence of the jury during exchanges with defense counsel.

5. Criminal Law § 169— exclusion of testimony — refusal to allow answer to be placed in record

Where the trial court had sustained an objection by the State to defense counsel's question to armed robbery victim as to why he was carrying $3.00 worth of change at the time of the robbery, the trial court did not err in denying the request of defense counsel to permit the answer of the witness to be inserted in the trial record, where cross-examination of the robbery victim had gone far afield and had consumed an unreasonable amount of time in view of the simplicity of the matters at issue, and both the question and answer were immaterial.

6. Criminal Law § 88— limits of cross-examination — discretion of court

The limits of legitimate cross-examination are largely within the discre-

tion of the trial judge, and his ruling thereon will not be held error in the absence of showing that the verdict was improperly influenced thereby.

APPEAL by defendants from the decision of the North Carolina Court of Appeals (7 N.C. App. 160) finding no error in the trial before *Bowman, S.J.*, at the June 9, 1969 Session, DURHAM Superior Court.

The defendants, Charlie McPherson, Robert Lee Jones and Ronald Michael Harris, were indicted, tried, convicted and given prison sentences in the Superior Court of Durham County for the armed robbery of Alvin Fisher. The defendants appealed to the North Carolina Court of Appeals, alleging their in-court identifications by Fisher, the victim of the robbery, resulted from the suggestions and activities of the police, in violation of their constitutional rights to a fair trial. Specifically, the defendants McPherson and Jones contend their in-court identifications were influenced by the use of their photographs which were selected and shown to Fisher by the police department of Durham. Harris contends his in-court identification was influenced to his prejudice by his pre-trial identification while he was being interviewed in jail by a member of the Durham Police Department. At the beginning of the trial in the Superior Court, the defendants moved to suppress Fisher's evidence of identification.

The court, in the absence of the jury, heard evidence, found facts, and therefrom concluded that their identifications were based on Fisher's actual observation of the defendants prior to and during the robbery. The in-court identifications were neither tainted by any improper display of photographs of McPherson and Jones, nor by Fisher's having seen Harris at the time he was being interviewed in police headquarters by Officer Leathers. The evidence, findings and conclusions on the voir dire hearing are fully set out on Pages 16-28 of the trial record filed in the Court of Appeals.

The State's evidence before the jury was positive and unequivocal that the three defendants forcibly assaulted the prosecuting witness Fisher, and at the point of a pistol, took from him three $1 bills and $3.00 in change. The defendants did not testify, and did not offer evidence.

During the trial, the defendants took exception to the judge's comments to defense counsel upon the ground they constituted the expression of an opinion adverse to the defendants. They also excepted to the court's refusal to permit counsel for defendant Harris

to insert in the record Fisher's answer to this question: "What you doing carrying three dollars worth of change around?"

After argument and the court's charge, the jury returned a verdict finding all defendants guilty as charged. From sentences of imprisonment, the defendants appealed.

Robert Morgan, Attorney General; Andrew A. Vanore, Jr., Assistant Attorney General, for the State.

C. C. Malone, Jr., for the defendant Charlie McPherson.

W. G. Pearson, II, for the defendant Robert Lee Jones.

Blackwell M. Brogden, for the defendant Ronald Michael Harris.

HIGGINS, J.

The defendants argue here they are entitled to have the decision of the Court of Appeals reversed and a new trial awarded because of three alleged prejudicial errors committed during the trial: (1) The failure of the trial judge to sustain objection to the evidence of Alvin Fisher identifying them as the three men who robbed him on the night of April 4, 1969; (2) The prejudicial remarks made by the judge in the presence of the jury; and (3) The refusal of the judge to permit counsel for the defendants to insert in the record the answer to a question which the court, on State's objection, had ruled incompetent.

At the trial, the defendants moved to suppress the in-court identifications of the defendants by the witness Fisher. The court excused the jury and conducted a voir dire hearing to determine the question raised by the defendants' motion.

The evidence before the trial judge on the voir dire examination was not in conflict. The victim, Fisher, and the investigating officer, Cameron, were the only witnesses who gave testimony. In substance, their evidence disclosed that three men, in their late teens, robbed Alvin Fisher by the threatened use of a pistol, taking from him three $1 bills and $3.00 in change. Prior to and during the robbery, Fisher had opportunity, under good lights, to observe his assailants. Immediately after the robbery, he notified the police, giving detailed descriptions of the three men who robbed him.

The day following the robbery, Officer Cameron went to Fisher's home, displayed to him 7 or 8 double photographs (front and side views) and asked whether Fisher recognized any of them. Fisher at once identified the photographs of McPherson and Jones as two of

the men who robbed him. He so informed Officer Cameron. Fisher did not find any photograph of the third robber. The photograph of the defendant Harris was not among those exhibited by Officer Cameron. When Fisher was asked on cross-examination whether his identification was based on his having seen McPherson and Jones at the time of the robbery, or from the pictures, he answered, "Seeing them and the pictures".

On Monday following the hold up, Fisher went to police headquarters for a conference with Officer Cameron, who was investigating the robbery. As Fisher passed one of the interrogation rooms, he happened to observe Officer Leathers in conference with the defendant Harris, whom he recognized immediately as the one who held the gun during the robbery. He immediately so informed Officer Cameron. Fisher identified Harris on first sight. The evidence disclosed that his opportunity to observe Harris in police headquarters was unarranged and was coincidental. Officer Leathers was investigating another case. Officer Cameron was investigating the Fisher robbery. Neither suspected that Harris was implicated in Fisher's case, and neither had anything to do with the confrontation between Harris and Fisher.

[1] Fisher, who had never seen his assailants prior to the robbery, and Officer Cameron, who had only Fisher's description to guide him in the selection of the 7 or 8 photographs for Fisher's examination, were following the customary investigative procedure where the participants were unknown to the victim or to the police. The officer, on the basis of the descriptions given to him by the victim, selected 7 or 8 photographs, presumably of persons who, to some extent, answered the descriptions. There is nothing unlawful or inherently wrong in submitting photographs under such circumstances. It is worthy of note that in the probing cross examinations of Fisher and Cameron, defense counsel ascertained that Cameron had with him in court the pictures which he displayed to Fisher and from which Fisher made the identifications. These pictures were kept from the jury by the action of the defendants. Although they had been identified, they were excluded on the defendants' objection.

The involvement of Harris in Fisher's case may be the key to what McPherson meant by his remark to Fisher at the beginning of the robbery, "You are next".

[2] The court found as a fact, and concluded as a matter of law, that Fisher's in-court identifications of the defendants were neither tainted by the display of the photographs of McPherson and Jones, nor by the accidental confrontation between Fisher and Harris. The

evidence and findings dispose of the defendants' first assignment of error. *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681; *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353, *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344.

[3] The exhibitions of the photographs and the ruling that the in-court identifications were proper are also supported by federal decisions. *Simmons, et als v. United States,* 390 U.S. 377; *Stovall v. Denno,* 388 U.S. 293; *Gilbert v. California,* 388 U.S. 263; *United States v. Wade,* 388 U.S. 218. In *Simmons,* the Supreme Court of the United States said:

> "Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . ."

After all, the dominant function of the criminal law is to protect society from criminals rather than to protect criminals from punishment.

[4] The defendants contend they are entitled to a new trial on account of the court's prejudicial remarks made in the presence of the jury. The exchanges between the court and defense counsel are set out in the opinion of the Court of Appeals. At times, neither counsel nor the court acted with proper dignity and restraint during the trial. However, we see nothing in the discussion or exchanges that would prejudice the jury in favor of or against either party. *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769; *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9; *State v. Jones,* 181 N.C. 546, 106 S.E. 817.

[5, 6] Following the lengthy cross examination of Fisher by counsel for both McPherson and Jones, counsel for Harris re-surveyed

the entire field. At the end of the cross examination, counsel for Harris asked this question: "What you doing carrying three dollars worth of change around?" The court sustained the objection and the motion for a new trial based thereon was overruled. The court denied the request of counsel to permit the answer of the witness to be inserted in the trial record. Ordinarily, this Court does not approve the refusal of the trial court to permit counsel to insert in the record the answer to a question to which objection has been sustained. However, in this instance a number of things are obvious. The cross-examinations had gone far afield and had consumed an unreasonable amount of time in view of the simplicity of the matters at issue. These cross-examinations produced nothing of value to the defense. Three dollars in change in the pocket of Fisher, who was on his way to the store, neither impeached his testimony nor justified the defendants in taking it from him at the point of a pistol. Both the question and the answer were immaterial. "The limits of legitimate cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby." *State v. Edwards,* 228 N.C. 153, 44 S.E. 2d 725. The exclusion of the answer under the circumstances here disclosed was not error.

After careful review, we conclude the decision of the North Carolina Court of Appeals finding no error in the trial is amply sustained by legal authority. The decision is

Affirmed.

WILSON COUNTY BOARD OF EDUCATION v. BESSIE H. LAMM, WIDOW; VIRGINIA LAMM HAYES AND HUSBAND, J. F. HAYES; JACK F. HAYES, A MINOR; TEMPIE ANN HAYES, A MINOR; JACK THOMAS HAYES, A MINOR; THE FREE WILL BAPTIST CHILDREN'S HOME, INC.; AND ALL PERSONS NOT IN BEING WHO MAY BY ANY CONTINGENCY OWN OR ACQUIRE ANY INTEREST IN THE LANDS CONSTITUTING THE SUBJECT MATTER OF THIS ACTION BY REASON OF THE LAST WILL AND TESTAMENT OF GROVER T. LAMM, DECEASED

No. 30

(Filed 15 April 1970)

1. Adverse Possession § 1— open and notorious possession

A plaintiff can acquire title by adverse possession only if the possession is open, notorious, and adverse.

2. Adverse Possession § 2— permissive use — disclaimer by user — notice to owner

If a plaintiff enters into possession with the permission of the owner,

such possession is not adverse unless and until the plaintiff disclaims such arrangement and makes the owner aware of such disclaimer, or disclaims the arrangement in such manner as to put the owner on notice that the plaintiff is no longer using the land by permission but is claiming it as absolute owner.

3. Adverse Possession § 24; Evidence §§ 35, 36— action to quiet title to school property — admissions by school board — competency

In an action by a county board of education to quiet title to property used as a school site since 1923, the board claiming title by adverse possession, defendants' evidence of statements made by a member of the board, while presiding over the meeting to select a site, that the owner was "giving the site for as long as it was a school" and "that's as long as we want it," *is held* admissible, since the statements were competent as an admission of the board and as a declaration accompanying the act of taking possession of the property.

4. Adverse Possession § 24; Evidence § 34— quieting title to school property — owner's declarations against interest — self-serving declaration

In an action by a board of education to quiet title to school property, defendants' evidence that, prior to the time school buildings were constructed on the property, the owner in fee of the property, now deceased, had stated that he was allowing the board of education to use the property as long as it was needed for school purposes and that the property would go back to him or his estate when the school use was discontinued, *held* admissible as a declaration against interest by the owner; but the owner's statement to the same effect years after the school buildings had been constructed was a self-serving declaration and should have been excluded, although its admission was not prejudicial in this case.

5. Evidence § 34— declarations against interest

Declarations against interest are admissible when (1) the declarant is dead, (2) the declaration is against a known proprietary interest, (3) the declarant has competent knowledge of the fact declared, and (4) the declarant has no probable motive to falsify the fact declared.

6. Appeal and Error § 48— harmless error in admission of evidence

Not every erroneous ruling on the admissibility of evidence will result in a new trial; the burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby.

7. Appeal and Error § 48— admission of incompetent evidence — harmless error

The admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative.

8. Evidence § 34— offer to compromise or settle claim — admissibility

Ordinarily, evidence of an offer to compromise or settle a disputed claim will not be admitted.

9. Evidence § 34— what constitutes a compromise

An offer to compromise necessarily implies an existing dispute, a claim to be adjusted, or a controversy to be settled.

10. Evidence § 34— action to quiet title — evidence not amounting to an offer to compromise — harmless error

In an action by a board of education to quiet title to property used as a school site since 1923, the board was not prejudiced by testimony of its former superintendent that upon his discovery in 1947 that the board did not have title to the property he discussed with the owner's widow the possibility of securing fee title to the property, since the testimony did not amount to evidence of an offer to compromise.

LAKE, J., dissents.

ON *certiorari* to the Court of Appeals to review its decision reported in 6 N.C. App. 656, 171 S.E. 2d 48, upholding the judgment of *Bone, J.*, at the March 1969 Civil Session, WILSON Superior Court.

Plaintiff brought this action against the devisees of Grover T. Lamm, deceased, to quiet title to a tract of land in Wilson County which has been used by the plaintiff as a school site since 1923. The complaint alleges: Prior to 1922 Grover T. Lamm was the owner in fee of the land in question; in 1922 he put the plaintiff into possession as owner, and the plaintiff has been in open, notorious, adverse, and continued possession of said land under known and visible lines and boundaries, as owner, for more than forty-three years. Plaintiff prays that it be declared the owner in fee of this land free of all claims of the defendants. The defendants deny that Grover T. Lamm put the plaintiff into possession as owner and alleged plaintiff was put into possession under an agreement with Lamm which permitted plaintiff to use said land so long as it was used for school purposes, and provided that when it ceased to be so used the land would revert to Lamm or his heirs.

Plaintiff offered evidence which tended to show: In August, 1922 the plaintiff let a contract for the construction of a school building, a pump house, and teacherage on the lot in question. The buildings were completed and first used in the fall of 1923, and since that time have been continuously used by the plaintiff for school purposes and have been maintained like all other school buildings belonging to the plaintiff, except in recent years the teacherage has been rented to private individuals not connected with the school. The rent for the teacherage has been paid to the plaintiff.

The defendants over plaintiff's objection offered testimony which tended to show that Grover T. Lamm made oral statements to the effect that he gave the plaintiff permission to use the land in contro-

versy so long as it was used as a school site, and when it ceased to be so used it would go back to him or his estate. Such statements were made both before and after the plaintiff occupied the premises. This testimony will be discussed more fully in the opinion.

Issues were submitted to and answered by the jury as follows:

"1. Is the plaintiff the fee simple owner of the lands described in the Complaint as amended?

"ANSWER: No.

"2. If so, does the claim of the defendants constitute a cloud on the plaintiff's title?

"ANSWER: ....."

Judgment was entered on the verdict in favor of the defendants, and plaintiff appealed to the Court of Appeals which found no error. We allowed *certiorari* on 3 February 1970.

Connor, Lee, Connor & Reece by Cyrus F. Lee and David M. Connor for plaintiff appellant.

Lucas, Rand, Rose, Meyer & Jones by David S. Orcutt and Louis B. Meyer for defendant appellees.

MOORE, J.

Plaintiff claims title by adverse possession for more than twenty years (G.S. 1-40). Defendants admit plaintiff's possession but contend that it was not adverse but was a permissive possession which was to cease when the property was no longer used for school purposes.

[1] The trial judge correctly charged the jury that plaintiff could acquire title by adverse possession only if the possession was open, notorious, and adverse. In *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347, adverse possession is defined as follows:

". . . 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 un-

equivocal indication to all persons that he is exercising thereon the dominion of owner."

Accord: *State v. Brooks,* 275 N.C. 175, 166 S.E. 2d 70.

[2] The trial court further correctly charged the jury if the plaintiff entered into possession with the permission of the owner such possession would not be adverse unless and until the plaintiff disclaimed such arrangement and made the owner aware of such disclaimer or disclaimed the arrangement in such manner as to put the owner on notice that the plaintiff was no longer using the land by permission but was claiming it as absolute owner. *Morehead v. Harris,* 262 N.C. 330, 137 S.E. 2d 174; *Graves v. Causey,* 170 N.C. 175, 83 S.E. 1030.

Plaintiff challenges certain testimony offered by the defendants and admitted over the objections of the plaintiff.

[3] J. Walter Harrison, witness for defendants, testified that about 1919 he attended a meeting presided over by E. J. Barnes and held at Lamm's Store for the purpose of selecting a site for a new school. Over plaintiff's objection, Harrison was permitted to testify as follows:

"Q. Did Mr. Barnes indicate at that meeting the selection of the site for Lamm's School?

"A. Yes.

"Q. And did he make any statement with regard to how the land for Lamm's School site was obtained?

"A. Yes sir.

"Q. What statement did he make?

"A. That question was raised several times. When they were asking about where the site was going to be, he showed it to them. It was right there in sight of the store, right in sight of where the school is now. And he told them that Mr. Lamm was giving the site for as long as it was a school. He said, 'After all, that's as long as we want it. What do we want with it if we don't have any school here?' "

Plaintiff contends the admission of this testimony was error. We think not. Barnes was a member of the Board of Education and was present and presiding over a meeting called to select a school site. As such he was speaking for the Board. His statement under such circumstances was competent as an admission of the Board. *Stone v. Guion,* 222 N.C. 548, 23 S.E. 2d 907; *McRainy v. Clark,* 4 N.C.

698; Stansbury, N. C. Evidence § 167 (2d ed. 1963). This statement by Barnes would also be competent as accompanying or characterizing the act of taking possession of the property. Stansbury, N. C. Evidence § 159 (2d ed. 1963). This assignment of error is overruled.

[4, 5] Plaintiff also contends the testimony of the defense witnesses Simpson and Peele was incompetent. These witnesses testified that prior to the time the school buildings were constructed they heard Grover Lamm make statements to the effect that he was allowing plaintiff to use the property so long as it was needed for school purposes, and then it was to return to him or his estate. At that time Lamm was the undisputed owner in fee but by these statements he conceded plaintiff had the right to go on the land, construct school buildings, and use the land for school purposes as long as it desired. This placed a definite limitation on his title and was clearly a declaration against his interest. 5 Wigmore, Evidence § 1458 (3rd ed. 1940); Stansbury, N. C. Evidence § 147 (2d ed. 1963). Declarations against interest are held admissible in North Carolina when (1) the declarant is dead, (2) the declaration is against a known proprietary interest, (3) the declarant has competent knowledge of the fact declared, and (4) declarant has no probable motive to falsify the fact declared. *Carr v. Bizzell,* 192 N.C. 212, 134 S.E. 462; *Roe v. Journegan,* 175 N.C. 261, 95 S.E. 495; Stansbury, N. C. Evidence § 147 (2d ed. 1963). Lamm died in 1952. As the record owner in possession of the property, he had competent knowledge concerning the use of the land, and since by his statements he was placing a limitation on his title, he at that time had no real motive to falsify the nature of this arrangement with the plaintiff. This testimony was properly admitted.

[4] Plaintiff next assigns as error the admission of testimony by defense witnesses Moore and Jones relating to statements made by Lamm years after the plaintiff had constructed the buildings and had taken possession of the property in question. Statements made by Lamm at that time concerning his purported agreement with the plaintiff would be self-serving and should have been excluded. *Gouldin v. Insurance Co.,* 248 N.C. 161, 102 S.E. 2d 846; *Williams v. Young,* 227 N.C. 472, 42 S.E. 2d 592; Stansbury, N. C. Evidence § 140 (2d ed. 1963).

[6, 7] Not every erroneous ruling on the admissibility of evidence, however, will result in a new trial. The burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby.

Hunt v. Wooten, 238 N.C. 42, 76 S.E. 2d 326; Stansbury, N. C. Evidence § 9 (2d ed. 1963). The admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative. *Bullin v. Moore,* 256 N.C. 82, 122 S.E. 2d 765; *Town of Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366; *Carpenter, Solicitor v. Boyles,* 213 N.C. 432, 196 S.E. 850. The testimony of defense witnesses Harrison, Simpson and Peele concerning the same or similar statements made by Lamm was properly admitted. We therefore hold that the admission of similar testimony from the witnesses Moore and Jones was not such error as to require a new trial.

[8-10] Plaintiff also assigns as error the testimony of H. D. Browning, Superintendent of Schools and Secretary of the Board from 1945 to 1967, who testified that in 1947 he first discovered that the plaintiff had no deed for the property in question. Over plaintiff's objection he was allowed to testify:

"In 1961 or thereabouts I paid a visit to Mrs. Bessie Lamm at her home at Lamm's Crossroads.

"Q. And did you at that time offer to purchase the Lamm's School site from Mrs. Bessie Lamm and Virginia Lamm Hayes?

"A. Well I don't know if it would be an offer to purchase. I called on Mrs. Lamm to discuss with her, as I remember it, the possibility of securing a fee title to the Lamm's School site. And in the conversation, I think I told Mrs. Lamm that I wasn't speaking for the Board but I was thinking it would be only fair to reimburse the family for about the same cost as the Board paid for the Sims and New Hope schools at the time they were purchased. It was all about the same time."

Plaintiff contends this testimony constituted an offer to compromise and as such should have been excluded. Ordinarily, evidence of an offer to compromise or settle a disputed claim will not be admitted. *Stein v. Levins,* 205 N.C. 302, 171 S.E. 96; Annot., 15 A.L.R. 3d 13 (1967). But an offer to compromise necessarily implies an existing dispute, a claim to be adjusted, or a controversy to be settled. Such was not the case here. When Browning called on Mrs. Lamm, plaintiff had been in possession of the land in question for more than twenty years, and the defendants were not then seeking to disturb that possession. There was no dispute between the parties at that time. Even had there been a dispute, Browning's statement was too vague and too indefinite to constitute an offer. At most he was

simply exploring possibilities. As stated in *Lumber Co. v. Cedar Works,* 168 N.C. 344, 84 S.E. 523, 1917B Ann. Cas. 992:

> ". . . A party is not bound to admit, and does not necessarily admit, title in another because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. To hold otherwise would compel him to litigate adverse claims, or, by buying one, forego any right to claim the benefit of the statute of limitations as to all others. The acts and declarations of the possessor may, doubtless, be given in evidence with a view of showing the character of his claim, but whether the possession is adverse or not is a question for the jury to determine upon all the evidence."

This assignment of error is overruled.

Other assignments of error made by the plaintiff have been carefully considered but as they were adequately treated in the opinion of Britt, J., of the Court of Appeals, no further discussion is deemed necessary. The plaintiff simply failed to establish title by adverse possession, and no error of law requiring a new trial has been made to appear. The decision of the Court of Appeals is therefore

Affirmed.

LAKE, J., dissents.

SPOONER'S CREEK LAND CORPORATION v. ROMA STYRON AND WIFE, CATHERINE STYRON

No. 29

(Filed 15 April 1970)

1. Controversy Without Action § 1; Rules of Civil Procedure § 85— effect of new Code of Civil Procedure

Since the effective date of the new Code of Civil Procedure, 1 January 1970, there can be no further proceedings under the remedy known as "controversy without action."

2. Statutes § 1— effect of unconditional repeal of statute

When statutes providing a particular remedy are unconditionally repealed the remedy is gone.

3. Controversy Without Action § 2; Rules of Civil Procedure § 85— abatement of proceeding on effective date of new Code of Civil Procedure

Where a controversy without action was submitted to the trial court upon an agreed statement of facts under [former] G.S. Ch. 1, Art. 25, the Court of Appeals correctly reversed judgment for plaintiff entered by the superior court and held that all persons having an interest in the controversy were necessary parties, and the statutes under which the proceeding was brought were thereafter unconditionally repealed, effective 1 January 1970, by the new Code of Civil Procedure, the proceedings abated on 1 January 1970 when repeal of the statutes under which it was brought became effective; if plaintiff desires to pursue the matter further, action must be brought under the new statutes with additional necessary parties defendant.

ON certiorari to the Court of Appeals to review its decision reversing judgment of *Cowper, J.*, at the 10 April 1969 Session, CARTERET Superior Court.

Plaintiff and defendants submitted a controversy without action to the trial court upon an agreed statement of facts under the provisions of Chapter 1, Article 25, of the General Statutes of North Carolina seeking a determination of the rights of the parties under a written contract to buy and sell real property.

The trial court concluded as a matter of law that plaintiff was entitled to specific performance of the contract and entered judgment accordingly. Defendants appealed to the Court of Appeals, and that court, in an opinion by Vaughn, J., with Brock, J., concurring and Britt, J., dissenting, reversed the judgment of the trial court for reasons noted in the opinion. 7 N.C. App. 25, 171 S.E. 2d 215. We allowed certiorari.

Nelson W. Taylor, Attorney for plaintiff appellant.

Boshamer and Graham by Otho L. Graham, Attorneys for defendant appellees.

PER CURIAM:

[1, 2] The decision of the Court of Appeals reversing the judgment of the superior court and holding that all persons having an interest in the controversy are necessary parties is correct. Since the decision of that Court, however, the statutes under which this proceeding was brought have been unconditionally repealed, effective 1 January 1970, by enactment of the new Code of Civil Procedure. See Session Laws 1967, Chapter 954, and Session Laws 1969, Chapter 803. Therefore, there can be no further proceedings under the remedy

known as "controversy without action." When statutes providing a particular remedy are unconditionally repealed the remedy is gone.

If plaintiff desires to pursue the matter further, action must be brought under the new statutes with additional necessary parties defendant as pointed out by the Court of Appeals.

[3] This proceeding, having abated on 1 January 1970 when repeal of the statutes under which it was brought became effective, is remanded to the Court of Appeals where it will be certified to the Superior Court of Carteret County for judgment of dismissal.

Remanded.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BURK v. INSURANCE CO.

No. 26 PC.

Case below: 7 N.C. App. 209.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 8 April 1970.

IN RE FARR

No. 31 PC.

Case below: 7 N.C. App. 250.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 8 April 1970.

INSURANCE CO. v. HAYES

No. 23 PC.

Case below: 7 N.C. App. 294.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 8 April 1970.

INSURANCE CO. v. HYLTON

No. 22 PC.

Case below: 7 N.C. App. 244.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 15 April 1970.

MICROFILM CORP. v. TURNER

No. 29 PC.

Case below: 7 N.C. App. 258.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 8 April 1970.

SHORE v. SHORE

No. 19 PC.

Case below: 7 N.C. App. 197.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 8 April 1970.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. ASHFORD

No. 35 PC.

Case below: 7 N.C. App. 320.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 8 April 1970.

STATE v. BLIZZARD

No. 40 PC.

Case below: 7 N.C. App. 395.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 April 1970.

STATE v. CAUDLE

No. 42.

Case below: 7 N.C. App. 276.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 17 March 1970.

STATE v. JACKSON

No. 34 PC.

Case below: 7 N.C. App. 386.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 8 April 1970.

STITH v. PERDUE

No. 30 PC.

Case below: 7 N.C. App. 314.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 8 April 1970.

TUTTLE v. BECK

No. 32 PC.

Case below: 7 N.C. App. 337.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 15 April 1970.

STATE OF NORTH CAROLINA v. MARVIN RAY SPARROW, KATHERINE TAFT SPARROW, AND BRITTON OXIDINE, JR.

No. 15

(Filed 13 May 1970)

1. Courts § 7— guilty plea in district court — appeal — trial de novo in superior court

Upon appeal from the district court, a defendant is entitled to a trial *de novo* in the superior court even though he pleaded guilty in the district court.

2. Courts § 7— appeal from district court to superior court

When an appeal of right is taken to the superior court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial, the judgment appealed from being completely annulled and not thereafter available for any purpose.

3. Criminal Law § 138— appeal from district court to superior court — increased sentence

Upon appeal from the district court for a trial *de novo* in the superior court, imposition of a more severe sentence by the superior court judge than that imposed by the district court judge does not violate defendant's right to due process or rights secured by the Sixth Amendment to the U. S. Constitution.

4. Infants § 7— contributing to delinquency of minor — constitutionality of statute

The statute, [former] G.S. 110-39, now G.S. 14-316.1, making it a misdemeanor to contribute to the delinquency of a minor is not unconstitutional for vagueness.

5. Indictment and Warrant § 9— indictment for statutory offense — sufficiency

Ordinarily, an indictment for a statutory offense is sufficient if the offense is charged in the words of the statute.

6. Indictment and Warrant § 9— charge of crime

An indictment must allege all the essential elements of the offense with sufficient certainty so as to (1) identify the offense, (2) protect the accused from being twice put in jeopardy for the same offense, (3) enable the accused to prepare for trial, and (4) support judgment upon conviction or plea.

7. Infants § 7— contributing to delinquency of minor — sufficiency of warrant

Warrant is sufficient to charge defendant with a violation of [former] G.S. 110-39, now G.S. 14-316.1, where it alleges that defendant contributed to the delinquency of a named fourteen year old female in violation of G.S. 110-39 by harboring and providing lodging for said minor and wilfully concealing her from officers knowing they had petitions for her arrest for delinquency, runaway and truancy.

8. Infants § 7— contributing to delinquency of minor — necessity for prior adjudication of delinquency

It is not necessary that a minor be convicted of the charges contained in a juvenile petition before a person may be prosecuted under G.S. 110-39 for contributing to the delinquency of the minor. G.S. 110-39(b).

9. Criminal Law § 98— sequestration of witnesses — discretion of court

Although it is the general rule in this State in both civil and criminal cases to separate witnesses and send them out of hearing of the court when requested, this is discretionary with the trial judge and may not be claimed as a matter of right.

10. Criminal Law § 98— denial of motion to sequester witnesses

In this prosecution for contributing to the delinquency of a minor and for interfering with an officer in the performance of his duties, the trial judge did not abuse his discretion in the denial of defendants' motion to sequester the State's witnesses, the record having disclosed no reason for sequestration of the witnesses.

11. Arrest and Bail § 5— entry of private home without invitation or permission — necessity for demand and refusal of entry

Absent special or emergency circumstances, a police officer may not lawfully enter a private home without invitation or permission to make an arrest or otherwise seize a person unless he first gives notice of his authority and purpose and makes a demand for and is refused entry.

12. Arrest and Bail § 6— resisting arrest — illegal entry by officers

One who resists an illegal entry into a private home is not resisting an officer in the discharge of his duties.

13. Arrest and Bail § 5— right to break into house to arrest felon — necessity for demand and denial of entry

Even where there is reasonable ground to believe that a person guilty of a felony is concealed in a house, there exists no right under G.S. 15-44, in the absence of special and emergency circumstances, to break into the house and arrest the person unless and until admittance has been demanded and denied.

14. Arrest and Bail § 6— obstructing a police officer — instructions — lawful or unlawful entry by officer — rights of defendants

In this prosecution for obstructing a police officer in the performance of his duties when the officer attempted to serve a juvenile arrest order on a minor who was in a house rented by defendants, the trial court erred in failing to instruct the jury with regard to the rights of defendants if the jury should find that entry by the officers into the house was illegal, where the evidence for the State and for defendants was conflicting as to whether the officers lawfully entered the house, the State's evidence tending to show that entry was made after the officers knocked on the front door and received an invitation to come in, and defendants' evidence tending to show that the officers entered from the front and back of the house without knocking, declaring their identity, authority and mission, and without receiving an invitation to come in.

15. Arrest and Bail § 6— obstructing police officer named in indictment — instructions — obstructing a different officer

Where defendant was charged with obstructing a named police officer while the officer was attempting to serve a juvenile petition, the trial court erred in instructing the jury that it could return a verdict of guilty if it found from the evidence beyond a reasonable doubt that defendant obstructed another officer while he was attempting to serve the juvenile petition.

16. Arrest and Bail § 6— obstructing officer in arrest of juvenile — action after juvenile was in custody — variance between warrant and proof

In this prosecution under a warrant charging that defendant obstructed a police officer in the performance of his duties by kicking the officer while he attempted to arrest a minor under a juvenile petition, there was a material variance between the warrant and the proof where all the evidence tended to show that when defendant kicked the officer, the officer had already served the juvenile process on the minor and had her in his custody, that another officer had arrested defendant's husband for interfering with the first officer, and that defendant's action was caused by resentment because of her husband's arrest.

17. Arrest and Bail § 6; Infants § 7— obstructing a police officer— contributing to delinquency of minor — sufficiency of evidence

The trial court properly denied motion of one defendant for nonsuit of a charge of obstructing a police officer in the performance of his duties and motion of a second defendant for nonsuit of a charge of contributing to the delinquency of a minor.

18. Criminal Law § 102— argument of solicitor — part of trial

The argument of the solicitor is part of the trial and not part of the record.

19. Criminal Law § 170— argument of solicitor — action by trial court — harmless error

Ordinarily, improper argument of counsel is cured by the court's action promptly sustaining an objection thereto and cautioning the jury not to consider it.

20. Criminal Law §§ 102, 154— record on appeal — argument of solicitor

It is not required that the argument of counsel be recorded and included in the record on appeal.

21. Criminal Law §§ 102, 165, 170— refusal of motion to have solicitor's jury argument recorded

In this prosecution for contributing to the delinquency of a minor and for interfering with a police officer in the performance of his duties, the trial court did not err in refusing to have the solicitor's argument to the jury recorded, defendants having neither alleged nor shown that any part of the solicitor's argument was improper or prejudicial.

LAKE, J., concurring in result as to Katherine Sparrow.

BOBBITT, C.J., dissenting as to Oxidine.

SHARP, J., joins in dissenting opinion.

APPEAL by defendants under G.S. 7A-30(1) from decision of the Court of Appeals reported in 7 N.C. App. 107, 171 S.E. 2d 321.

On 7 May 1969 Marvin Ray Sparrow (Marvin) was tried and convicted in Mecklenburg District Court upon two warrants charging him with the following offenses: (1) Contributing to the delinquency of Karen Torpey, a minor, in violation of G.S. 110-39 (now G.S. 14-316.1), and (2) resisting, delaying and obstructing a public officer in the discharge of his duties in violation of G.S. 14-223. The cases were consolidated for judgment, and Marvin was sentenced to six months in jail, suspended for five years on condition he be of good behavior and pay a $50 fine and $15 costs.

On 7 May 1969 Katherine Taft Sparrow (Katherine) was tried and convicted in Mecklenburg District Court upon three warrants charging her with the following offenses: (1) Contributing to the delinquency of Karen Torpey, a minor, in violation of G.S. 110-39, (2) resisting, delaying and obstructing a public officer in the discharge of his duties, and (3) assaulting an officer. On the charges contained in (1) and (2), consolidated for judgment, she was sentenced to six months in jail, suspended for five years on condition she be of good behavior. On the charge of assaulting an officer she was sentenced to thirty days in Mecklenburg County jail.

On 7 May 1969 Britton Oxidine, Jr., was tried and convicted in Mecklenburg District Court upon a warrant charging him with contributing to the delinquency of Karen Torpey, a minor, in violation of G.S. 110-39. He was sentenced to a term of six months in the Mecklenburg County jail.

Defendants appealed to Mecklenburg Superior Court from the judgments pronounced. There the cases were consolidated and tried *de novo* before Mintz, J., and a jury, at the 12 May 1969 Schedule "A" Regular Session.

The State's evidence tends to show that about five weeks prior to their arrest on 5 May 1969, Marvin (age 23) and his wife Katherine (age 21) rented a large two-story house in the city of Charlotte. Twenty to twenty-five people of both sexes lived in the house with them, some on a permanent basis and others temporarily. The rules of the house required permanent residents to contribute to the

payment of rent, purchase of food, and to take part in housekeeping duties. House furnishings included kitchen appliances and one table but consisted primarily of two beds and mattresses sufficient to provide pads for about twenty-five people. It was necessary for a visitor to be at least sixteen years of age and have permission from at least five permanent residents in order to stay overnight. Persons under sixteen years of age, however, had been allowed on occasions to spend the night there.

The State's evidence further shows that on Thursday morning, 1 May 1969, Karen Torpey, a fifteen-year-old girl, went to the Sparrow house without her mother's knowledge or permission. She remained there throughout the day and slept that night in an upstairs room with other persons. She spent Friday night of the same week in the social room of a dormitory in Chapel Hill with a group including Oxidine. They returned to Charlotte Saturday morning, and that night Karen and Oxidine shared a bedroom at the home of one of his relatives. They returned to the Sparrow house on Sunday but went back to his relative's home for several hours between 3 a.m. and 6 a.m. on Monday.

When Karen failed to return from school at the regular time on Thursday afternoon, her mother began an unsuccessful search for her. On the following day, which was Friday, May 2, the mother reported her daughter missing to the Charlotte police and visited the Sparrow house twice searching for her. She talked with defendant Oxidine on both occasions and informed him her daughter was only fifteen years of age. Oxidine told her Karen had been there but fled through the back door when she saw her mother approaching. Karen later testified that she was hiding in an upstairs closet during one of her mother's visits to the Sparrow house.

Clyde White, a State's witness, testified that he saw Karen at the Sparrow house on a mattress with Oxidine in an upstairs room on Sunday evening at which time she offered him beer which she was drinking; that in the early hours of Monday morning while police officers were on the premises looking for Karen, she and Oxidine left the house and Oxidine asked him to let him know when the officers left; that Karen and Oxidine returned when the officers had gone, and shortly thereafter he, White, called the police and informed them Karen was in the house.

On Monday morning, 5 May 1969, Karen's mother filed a petition in the district court in which she alleged that her daughter was uncontrollable, absent from home without permission, and requested the court to assume custody. District Judge Beacham signed a ju-

venile custody endorsement and, armed with this document, Officer Maness of the Charlotte Police Department went to the Sparrow house to serve the document on Karen and take her into custody. He was unable to find her but later, as a result of a telephone call, returned to the Sparrow house accompanied by Lieutenant Hall, Sergeant Griffin, Officer Williams, two uniformed officers, and Clyde White. Officers Hall, Griffin, and Maness went to the front door and the other officers went to the back door. Officer Maness testified that as he knocked on the front door he could see the other officers, who had entered through the back door, already inside the house; however, Lieutenant Hall indicated that he did not see the other officers inside until after he had gained entrance. In response to Officer Maness's knock on the front door, someone inside said "come in." Officers Maness and Hall entered the front door, identified themselves to Marvin Sparrow, and advised him they had court orders to pick up Karen Torpey. Maness began reading the court order aloud, but the entry of the officers created such upheaval among the occupants of the house that he was unable to finish. When Officer Maness asked Karen to come with him, she attempted to run out the front door. Officer Maness caught her around the waist, whereupon Karen bit him on the hand and Marvin jumped on the officer's back. When Lieutenant Hall took hold of Marvin and told him he was under arrest, Katherine attempted to free her husband and kicked Lieutenant Hall. She was then arrested for obstructing and assaulting an officer. Oxidine was also arrested at the scene and charged with contributing to the delinquency of a minor. Throughout this entire confrontation there was pushing and shoving by many, if not all, of the twenty-five people gathered in the "living" room.

Evidence for the defendants tends to show that Lieutenant Hall and Officer Maness entered the front door of the Sparrow house without knocking and without an invitation, and that the other officers entered through the back door before Hall and Maness had gained entrance at the front.

At the close of all the evidence Judge Mintz dismissed as of nonsuit the charge of assault on an officer against Katherine Sparrow. The jury returned a verdict of guilty against all defendants on the remaining charges.

Marvin Ray Sparrow received concurrent sentences as follows: (1) Fifteen to eighteen months in prison for contributing to the delinquency of a minor, and (2) eight to twelve months for obstructing a public officer in the discharge of his duties.

Katherine Taft Sparrow received concurrent sentences as follows:

(1) Nine months for contributing to the delinquency of a minor, and (2) six months for obstructing a public officer in the discharge of his duties.

Britton Oxidine, Jr., was sentenced to prison for a term of eighteen to twenty-one months.

Defendants appealed to the Court of Appeals. That court reversed the convictions of Marvin Ray Sparrow and Katherine Taft Sparrow on the charges of contributing to the delinquency of a minor but upheld the conviction and sentence of each of them on the charge of obstructing a public officer in the discharge of his duties. The conviction and sentence of Britton Oxidine, Jr., on the charge of contributing to the delinquency of a minor was also upheld.

Defendants appealed to this Court under the provisions of G.S. 7A-30(1) assigning numerous errors.

Attorney General Robert Morgan and Staff Attorney Burley B. Mitchell, Jr., for the State.

Casey & Daly by George S. Daly, Jr., and Chambers, Stein, Ferguson & Lanning by Adam Stein for defendant appellants.

Of Counsel: Taft, Stettinius & Hollister, Cincinnati, Ohio, by Thomas Allman for defendant appellants.

MOORE, J.

[3] Each defendant received a greater sentence in the Superior Court than had been imposed by the district court. Appellants contend that this increase in sentence denied them due process of law and violated rights secured to them by the Sixth Amendment to the United States Constitution. "Until recently, it was the general rule that a trial de novo meant a sentence de novo." *State v. Stafford,* 274 N.C. 519, 531, 164 S.E. 2d 371, 379. Defendants insist that the rule stated in *Stafford,* and supported by voluminous authority, was overruled by the decision in *North Carolina v. Pearce,* 395 U.S. 711, 89 S. Ct. 2072, 23 L. ed 2d 656 (1969).

In *Pearce,* defendant was convicted at the May Term 1961 of Durham Superior Court of assault with intent to commit rape and sentenced to prison for a term of twelve to fifteen years. In 1965 he initiated a post conviction hearing which resulted in a reversal of his conviction by this Court for the wrongful admission of an involuntary confession. *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918. He was retried before another Superior Court judge and jury, and again convicted. The trial judge at the second trial imposed a sen-

tence of eight years in prison which, when added to the time already served, amounted to a longer prison sentence than the 12-year minimum originally imposed. The second conviction and sentence were upheld by this Court, 268 N.C. 707, 151 S.E. 2d 571. Pearce then instituted habeas corpus proceedings in the United States District Court for the Eastern District of North Carolina. That court held the more severe sentence unconstitutional and void and ordered his release upon failure of the State court to resentence him within sixty days. This order was affirmed by the Fourth Circuit Court of Appeals. (397 F. 2d 253). The United States Supreme Court granted *certiorari* and in affirming the lower court stated:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

We hold that *Pearce* is factually distinguishable from the instant case and has no application here. The following language from *State v. Morris,* 275 N.C. 50, 61, 165 S.E. 2d 245, 252, is in point:

> "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)."

[1, 2] In *Pearce,* the superior court had original jurisdiction. Here, its jurisdiction is derivative. In *Pearce,* the same court that imposed

the first sentence imposed the second. Not so here. In *Pearce,* the first conviction was voided on constitutional grounds. Here, defendants simply appealed as a matter of right from an inferior trial court to a superior trial court where they were tried *de novo* pursuant to G.S. 7A-288 (now G.S. 7A-290) and G.S. 15-177.1. In *Pearce,* appellant was required to attack the validity of his conviction and sentence in the trial court and seek reversal for constitutional errors committed there. Here, an appeal entitled these defendants to a trial *de novo* in the Superior Court as a matter of right. This is true even when an accused pleads guilty in the inferior court. *State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384; *State v. Meadows,* 234 N.C. 657, 68 S.E. 2d 406. When an appeal of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose. *State v. Goff,* 205 N.C. 545, 172 S.E. 407; *State v. Meadows, supra; Spriggs v. North Carolina,* 243 F. Supp. 57 (M.D.N.C. 1965); *Doss v. North Carolina,* 252 F. Supp. 298 (M.D.N.C. 1966). In *Pearce* the defendant was given a new trial on his appeal from an incorrect ruling which was adverse to him. The court's error necessitated the appeal. Under those facts the imposition of additional punishment would in effect have penalized him for asking the court to correct its error. This distinction is emphasized in *Lemieux v. Robbins,* 414 F. 2d 353 (1st Cir. 1969), cert. den. 397 U.S. 1017, 90 S. Ct. 1247, 25 L. ed. 2d 432, which approves the North Carolina rule. In that case the defendant on an appeal from the district court to the Superior Court in the State of Maine, as in North Carolina, was entitled to a trial *de novo.* On his conviction in the Superior Court he was given a greater sentence than that imposed in the district court. The Circuit Court of Appeals for the First Circuit said:

> ". . . Nor, unlike the situation in Pearce, need he demonstrate error, constitutional or other, in a first trial to secure a second trial, which very proof of error gives the state the opportunity to increase the punishment. Such is indeed a one way street. Here we deal with a two way street. Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to 'appeal' not only gives him a new trial but vacates the judgment and removes the entire case to the Superior Court. The state is willing to accept this in the long-run interest of reducing the load on the Superior Court. The defendant need not accept it at all."

It is our view, and we so hold, the decision in *Pearce* is not fashioned to apply to judgments pronounced on appeal from inferior tribunals.

The composition and operation of the Superior Court and the district court emphasize the validity of these distinctions between *Pearce* and the case before us. A district court makes no transcript of the evidence in the trial of a criminal case. It is therefore impossible for a Superior Court judge, upon appeal from a district court, to know what evidence and what facts affected the imposition of sentence in the court below. Furthermore, in a criminal trial before a jury in Superior Court more evidence is ordinarily presented and a more extensive cross-examination is conducted. Thus the facts are more fully developed. The Superior Court judge is generally a lawyer with extensive trial experience and with a deep understanding with respect to proper punishment. It is essential to the proper administration of justice that he use his own independent judgment, based upon the facts as they appear in the trial before him, in imposing punishment; otherwise, trial in the Superior Court becomes a travesty upon justice and a waste of time.

[3] To hold that upon appeal the Superior Court judge may decrease the sentence imposed below but is precluded from increasing it would necessarily destroy the district court system of this State. With all to gain and nothing to lose, defendants would swamp the Superior Court with appeals in every case and render trials in the district court a vain and worthless exercise. On the other hand, it could tempt district court judges to impose maximum sentences which likewise would prompt every defendant to give automatic notice of appeal. Inasmuch as the trial in the Superior Court is without regard to the proceedings in the district court, the judge of the Superior Court is necessarily required to enter his own independent judgment. His sentence may be lighter or heavier than that imposed by the inferior court, provided, of course, it does not exceed the maximum punishment which the inferior court could have imposed. Such is the rule in North Carolina. *State v. Meadows, supra* (234 N.C. 657, 68 S.E. 2d 406). There is no sensible alternative and, in our opinion, there is nothing in *Pearce* which requires us to hold otherwise. It should also be noted that *Pearce* was decided 23 June 1969, and the sentences in the present case were imposed on 29 May 1969. This assignment of error is overruled.

[4] Defendant Oxidine was convicted of contributing to the delinquency of a minor. He contends the statute under which he was charged is "so sweeping and vague" as to deny him due process guaranteed by the Fourteenth Amendment. The challenged statute

is G.S. 110-39 (now G.S. 14-316.1 by virtue of Session Laws 1969, Chapter 911, Section 4), which provides in pertinent part that any person "who knowingly or willfully is responsible for, or who encourages, aids, causes, or connives at, or who knowingly or willfully does any act to produce, promote, or contribute to, any condition of delinquency or neglect of [a] child shall be guilty of a misdemeanor."

There is nothing so sweeping and vague about this statute as to confuse men of common intelligence. The words used in G.S. 110-39 are ordinary words in common usage, and adequate warning is provided those inclined to violate them. Simply stated, any person who knowingly does any act to produce, promote or contribute to any condition of delinquency of a child is in violation of the statute.

Huskins, J., speaking for the Court in *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879, concerning Chapter 110, Article 2 of the General Statutes, which delineates the practices and procedures to be followed in juvenile cases and includes G.S. 110-39, stated:

> "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."

We think Oxidine could comprehend without difficulty what conduct is prohibited by the statute he challenges for vagueness. Judges and juries have been able to interpret and apply our juvenile statutes uniformly in numerous cases including *In re Burrus, supra; State v. Wiggins,* 272 N.C. 147, 158 S.E. 2d 37, cert. den. 390 U.S. 1028, 88 S. Ct. 1418, 20 L. ed 2d 285; *Winner v. Brice,* 212 N.C. 294, 193 S.E. 400; *In re Coston,* 187 N.C. 509, 122 S.E. 183; *In re Hamilton,* 182 N.C. 44, 108 S.E. 385; *State v. Coble,* 181 N.C. 554, 107 S.E. 132; *State v. Burnett,* 179 N.C. 735, 102 S.E. 711. Furthermore, North Carolina follows 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. This assignment of error is overruled.

[5-8] Defendant Oxidine further contends that conceding the constitutionality of G.S. 110-39 the warrant in this case failed to charge a violation of this statute. The warrant in pertinent part reads as follows: "[I]n the county named above and on or about the 4 day of May, 1969, the defendant named above did unlawfully, wilfully, contribute to the delinquency of Karen Torpey, white female, age 14, in violation of G.S. 110-39 of North Carolina by harboring and providing lodging for Karen Torpey and wilfully concealing said minor from officers knowing they had petitions for said Karen Torpey for delinquency, runaway and truancy." G.S. 15-153 provides that every criminal proceeding by warrant is sufficient for all intents and purposes if it expresses the charge against the defendant in plain, intelligible, and explicit manner. Since the enactment of this statute, it has been liberally construed. *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917. Ordinarily, an indictment for a statutory offense is sufficient if the offense is charged in the words of the statute. *State v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149. In the case of *State v. Greer, supra,* Parker, J. (later C.J.), speaking for the Court, outlined the requirement for a valid indictment and stated the necessity for a lucid and accurate allegation of all the essential elements of the offense as follows:

> ". . . (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883."

The *Greer* case was quoted with approval in *State v. Hord,* 264 N.C. 149, 141 S.E. 2d 241. The warrant for Oxidine in this case followed the wording of the statute, cited the statute by number, and made it more definite and explicit by adding the words: "[H]arboring and providing lodging for Karen Torpey and wilfully concealing said minor from officers knowing they had petitions for said Karen Torpey for delinquency, runaway and truancy." This wording is sufficient to put Oxidine on notice that Karen had been charged in a juvenile

petition with delinquency, runaway, and truancy, and that he was charged with contributing to such condition. It was not necessary that Karen be convicted of these charges contained in the petition before proceeding against the defendant under G.S. 110-39, since G.S. 110-39(b) specifically provides that it is not necessary "that there shall have been a prior adjudication of delinquency or neglect of the child to proceed under this statute." Thus, Oxidine was on notice that Karen Torpey was only 15 years of age, had run away from home, and was charged with being a truant and a delinquent, and that he was charged with contributing to such condition by concealing her from her mother and from the officers, by sharing a bedroom with her, and by other acts on his part. It would tax credulity to believe that this defendant, a man 23 years of age, failed to understand that his conduct was unlawful and was contributing to Karen's delinquency knowing as he did that the officers were looking for her to bring her under the protection of the juvenile authorities and to return her to her mother. While the allegations in the warrant could have been more precise, they are sufficient to identify the offense with which the defendant is charged, to protect him from double jeopardy, to enable him to prepare for trial, and to allow the court upon conviction to pronounce sentence. *State v. Greer, supra; State v. Hord, supra.* This assignment of error is overruled.

[9, 10] Defendants urge that the trial court erred in summarily denying their motion to sequester the State's witnesses. It is the general rule in North Carolina in both civil and criminal cases to separate witnesses and send them out of hearing of the court when requested, but this is discretionary with the trial judge and may not 2d 381; *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670; *State v.* be claimed as a matter of right. *State v. Love,* 269 N.C. 691, 153 S.E. *Manuel,* 64 N.C. 601; Stansbury, N. C. Evidence § 20 (2d Ed. 1963). A judge's refusal to sequester the State's witnesses is not reviewable unless an abuse of discretion is shown. *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512; *State v. Clayton,* 272 N.C. 377, 158 S.E. 2d 557. The record discloses no reason for sequestration of the witnesses, and no abuse of discretion has been shown. This assignment of error has no merit and is overruled.

[14] Defendants' next assignment of error is that the entry into the Sparrow house was illegal and as a consequence they had the right to resist unlawful conduct of an officer; that is, an attempted illegal arrest. The juvenile order for the arrest of Karen seems valid on its face, and if the entry and presence of officers in the Sparrow home were legal, the arrest of Karen under this warrant would constitute conduct of the officers in performance of their duty, and in-

terference would be a violation of G.S. 14-223. Marvin's and Katherine's right to interfere depends upon whether the officers were in the Sparrow home pursuant to a legal entry. Decisions of this Court recognize the right to resist illegal conduct of an officer. *State v. Curtis,* 2 N.C. 471; *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100; *State v. McGowan,* 243 N.C. 431, 90 S.E. 2d 703.

[11-13] Ordinarily, a police officer, absent invitation or permission, may not enter a private home to make an arrest or otherwise seize a person unless he first gives notice of his authority and purpose and makes a demand for and is refused entry. Without special or emergency circumstances, an entry by an officer which does not comply with these requirements is illegal. Officers have no duty to make an illegal entry into a person's home. Hence, one who resists an illegal entry is not resisting an officer in the discharge of the duties of his office. *State v. Cesero,* 146 Conn. 375, 151 A. 2d 338 (1959); *King v. State,* 246 Miss. 86, 149 So. 2d 482 (1963); *People v. Young,* 100 Ill. App. 2d 20, 241 N.E. 2d 587 (1968). These views are in accordance with the ancient rules of the common law and are predicated on the constitutional principle that a person's home is his castle. Semayne's Case, 77 Eng. Rep. 194, 195, 11 English Ruling Cases 628, 631 (1604); Cooley, Constitutional Limitations 364 (6th Ed. 1890); *State v. Covington,* 273 N.C. 690, 698, 161 S.E. 2d 140, 146; *State v. Mooring,* 115 N.C. 709, 20 S.E. 182. In North Carolina, under G.S. 15-44, even where there is reasonable ground to believe that a person guilty of a felony is concealed in a house, there exists no right, in the absence of special and emergency circumstances, to break into the house and arrest the person unless and until admittance has been demanded and denied. *State v. Covington, supra.* In *Covington* the opinion states: "With five armed officers present, Covington's opportunity for escape was minimal . . . . Compliance with this requirement [demanding admittance] serves to identify the official status of those seeking admittance. The requirement is for the protection of the officers as well as for the protection of the occupant and the recognition of his constitutional rights."

In the present case, the State's evidence discloses that five other police officers accompanied Officer Maness when he went to the Sparrow residence to arrest Karen. Three officers (Maness, Hall, and Griffin), in plain clothes, approached the front door; and three unidentified officers (two in uniform) went to the back door. Karen's opportunity for escape "was minimal," and there was no evidence of any special or emergency circumstances justifying the waiver of legal requirements to gain entrance.

[14] The crucial question then is whether the officers entered the Sparrow home legally. If, as Maness testified, entry was made after the officers knocked on the front door and received an invitation to come in, their entry and presence were legal. If, as the evidence for the Sparrows tended to show, the officers entered, both from the front and from the back, without knocking, without declaring their identity, authority and mission, and without receiving an invitation to come in, their entry and presence were illegal.

The court's instructions did not submit this factual controversy for determination by the jury. There were no instructions bearing upon the rights of the Sparrows if the entry by the officers was illegal. In charging the jury in respect to Marvin's case, the court gave this mandate:

> "[I]f the State has satisfied you . . . beyond a reasonable doubt that on or about the 5th day of May, 1969 . . . the defendant Marvin Ray Sparrow did resist, delay or obstruct an officer, to wit, Mr. Maness, D. M. Maness, in the performance of a duty, that he, Mr. Maness, or Officer Maness, was on a duty, that is, a police duty, and that that duty constituted the service of a process on Karen Torpey, and that he was obstructed or delayed or resisted from carrying out this duty by the defendant Marvin Ray Sparrow, then it would be your duty to find Marvin Ray Sparrow guilty on this charge of resisting, as it's been characterized, interfering with an officer in the performance of his duty."

Thus, the court's instructions ignored the crucial question, whether the entry by the officers was legal or illegal. The jury should have been instructed as to the rights of Marvin if the entry was illegal. Error in this respect was prejudicial and sufficient to entitle Marvin to a new trial.

[15] Error also appears as to Katherine. She was tried on a warrant which charged that she "did unlawfully, wilfully, resist, delay and obstruct a public officer, to wit: *Lt. J. R. Hall,* an officer of the Charlotte Police Department youth bureau, while he, the said Lt. J. R. Hall, was attempting to discharge and was discharging a duty of his office, to wit: Serving a petition on a minor, by kicking him from behind as he attempted to arrest a juvenile on the petition, in violation of North Carolina G.S. 14-223 of North Carolina." (Emphasis ours.)

The judge instructed the jury to return a verdict of guilty if they found from the evidence beyond a reasonable doubt that Katherine on 5 May 1969 did "delay and obstruct *Mr. Maness* of the Char-

lotte Police Department while he was attempting to discharge a duty, that is the service of a process on Karen Torpey." (Emphasis ours.) This was obviously error as Katherine was charged with interfering with Lieutenant J. R. Hall and not Mr. Maness.

[16] However, there is a more serious defect as to Katherine; that is, a material variance between the allegation in the warrant and the proof. All the evidence tends to show that Officer Maness had served the juvenile process on Karen and had her in his custody and that Officer Hall had arrested Marvin for resisting Officer Maness. It was then that Katherine kicked Officer Hall. Her action apparently was caused by resentment because of her husband's arrest, not to prevent Hall from arresting Karen as charged in the warrant since Karen had already been arrested and was in the custody of Officer Maness. Because of this fatal variance between the allegation and proof, Katherine's motion for judgment as in case of nonsuit should have been allowed. *State v. Overman,* 257 N.C. 464, 468, 125 S.E. 2d 920, 924; 2 Strong's N. C. Index 2d, Criminal Law § 107.

[17] Marvin and Oxidine assign as error the trial court's refusal to grant their motions for judgment as of nonsuit. The State's evidence tended to show all the elements of the crimes charged, and the denial of these motions was correct. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. Beaver,* 266 N.C. 115, 145 S.E. 2d 330; *State v. Mullinax,* 263 N.C. 512, 139 S.E. 2d 639.

[18-21] The defendants also assign as error the refusal of the trial court to have the solicitor's argument recorded, contending that such refusal violated their rights of appeal. The argument of the solicitor is part of the trial and not part of the record. It was defendant's duty to object to any part of the argument deemed improper so as to secure a ruling from the court then and there. The record does not show any objections to the remarks of the solicitor or that any exceptions were taken to any rulings of the court on such objections. Ordinarily, improper argument of counsel is held cured by the court's action promptly sustaining the objection to the argument and cautioning the jury not to consider it. 7 Strong's N. C. Index 2d, Trial, § 11, p. 274. The Supreme Court of North Carolina has in the interest of justice set stringent requirements for the record on appeal. These rules do not include the requirement that the argument of counsel be recorded and included in the record on appeal. 1 Strong's N. C. Index 2d, Appeal and Error, §§ 40, 41, 42. Since the appellants have neither alleged nor shown that any part of the solicitor's argument was improper or prejudicial, this assignment of error is without merit.

Other assignments of error have been carefully considered but, in view of the conclusions reached, deserve no further discussion.

For the reasons stated above, we hold as to Katherine Sparrow, the judgment of the Court of Appeals is reversed; as to Marvin Sparrow, we find error and remand for a new trial; and as to Britton Oxidine, the decision of the Court of Appeals upholding the judgment of the trial court is affirmed.

As to Katherine Sparrow: Reversed.

As to Marvin Sparrow: New trial.

As to Britton Oxidine: Affirmed.

LAKE, J., concurring in result as to Katherine Sparrow.

Katherine Sparrow was charged with: (1) Unlawfully and wilfully resisting, delaying and obstructing "Lt. J. R. Hall, an officer of the Charlotte Police Department youth bureau, while he * * * was attempting to discharge a duty of his office, to-wit: Serving a petition on a minor, by kicking him from behind as he attempted to arrest a juvenile on the petition;" and (2) "assault on Lt. J. R. Hall * * * by striking the said Lt. J. R. Hall, with her feet as she kicked him from behind."

The superior court dismissed the second charge. The effect is an adjudication that she did not commit the assault which is the basis of the first charge — resisting, obstructing and delaying the officer. Since the second charge has been so adjudicated, it necessarily follows that the motion for nonsuit on the charge of resisting, obstructing and delaying the officer should have been granted. Consequently, I concur in this result.

I cannot, however, concur in the reasoning by which the majority has reached this result and which, I fear, will rise up to haunt us in other cases of resistance to police officers. The majority says the nonsuit should have been granted because at the time Katherine Sparrow kicked Lt. Hall, Karen had already been arrested and was in the custody of Officer Maness.

The evidence for the State is that Karen Torpey, the child whom the process directed the officers to take into custody, attempted to dart past the officers and run out of the front door of the Sparrow house. Officer Maness grabbed her by the arm. She then bit him. As he was in process of gaining control over the child and of removing her from the house, Marvin Ray Sparrow sprang upon Officer Maness' back, obviously to prevent him from taking Karen from the house.

As they struggled, Lt. Hall laid hold upon Marvin Ray Sparrow and told him he was under arrest. When he did so, Katherine Sparrow kicked Lt. Hall.

If we disregard the trial judge's adjudication that Katherine Sparrow did not assault Lt. Hall, we have here, in my opinion, a clear-cut case of resisting and obstructing the officer in the discharge of his duty to serve the petition upon Karen Torpey. Obviously, Lt. Hall and Officer Maness were collaborating. I cannot agree with the suggestion that simply because a police officer has a grasp upon a person, for whose arrest he has a valid process, and has told such person he or she is under arrest, the arrest is so far complete that, while the officer is struggling to subdue the prisoner and remove him or her from the scene of arrest, another person may strike the officer, in the course of the general melee, without being guilty of resisting and obstructing a police officer in the discharge of his duty in violation of G.S. 14-223.

I concur in the majority opinion as to the defendants Oxidine and Marvin Ray Sparrow.

BOBBITT, C.J., dissenting as to Oxidine.

The warrant charges that Oxidine wilfully contributed to the delinquency of Karen by harboring and providing lodging for her and wilfully concealing her from officers when he knew that "they (the officers) had petitions for said Karen Torpey for delinquency, runaway and truancy." The warrant does not charge that Karen was delinquent in any respect. The only accusation is that officers had petitions which charged her with "delinquency, runaway and truancy."

It is unnecessary, as expressly provided in Subsection (b) of G.S. 110-39, "that there shall have been a prior adjudication of delinquency or neglect of the child in order to proceed under this statute." This simply means that an adjudication of delinquency *in an independent proceeding for that purpose* is not a prerequisite to a prosecution under the statute.

In my opinion, in a prosecution under G.S. 110-39, it is incumbent upon the State *to allege* and *to prove* that the named child is a delinquent in respect of some particular condition of delinquency and that the accused wilfully contributed to the child's delinquency in that respect.

Applying these well-established legal principles, the warrant does not sufficiently charge a violation of G.S. 110-39. Hence, this Court, *ex mero motu*, should arrest the judgment. *State v. Walker*, 249 N.C.

35, 38, 105 S.E. 2d 101, 104. The arrest of judgment on the ground the warrant is fatally defective would not bar further prosecution on a valid warrant. *State v. Sossamon,* 259 N.C. 374, 130 S.E. 2d 638.

While I would base decision on the insufficiency of the warrant, the following should be noted.

The only reference to the verdict in the record is the recital in the judgment that defendant had been "found guilty of the offense of Cont/Del/Minor which is a violation of N.C. G.S. 110-39 and of the grade of Misdemeanor . . ." Assuming the verdict was returned by the jury as stated in the quoted recital, the significance thereof must be determined by reference to the allegations, the facts in evidence, and the instructions of the court. *State v. Thompson,* 257 N.C. 452, 457, 126 S.E. 2d 58, 61. "(T)he verdict should be taken in connection with the issue being tried, the evidence, and the charge of the court." *Davis v. State,* 273 N.C. 533, 539, 160 S.E. 2d 697, 702.

In charging the jury, the court's final instruction (mandate) was as follows: "Now, when you come to consider the case of Britton Oxidine, Jr., if the State has satisfied you and satisfied you beyond a reasonable doubt that on or about May 4, 1969, that Karen Torpey was a delinquent minor; that is, under the age of sixteen, *as 'delinquency' and 'minor' have been explained to you,* and that on or about that date he aided, encouraged or contributed in harboring or concealing her and that harboring or concealment amounted to a furtherance of her delinquency, if the State has so satisfied you of these elements then it would be your duty to find him guilty." (My italics.)

Earlier in the charge the court had defined "delinquency" in the following three sentences: "'Delinquency' means failure, omission, violation of duty, or it may be the state or condition of one who has failed to perform his duty. A delinquent child is an infant of not more than specified age who has violated the law or who is incorrigible. 'Incorrigible' with respect to juvenile offenders means unmanageable by parents or guardians."

Under the foregoing circumstances, the meaning and significance of the verdict are at best imprecise.

I do not defend or condone the activities or conduct of Oxidine as disclosed by the record before us. Nor do I suggest that the evidence is insufficient to have supported a verdict of guilty in an error-free trial on a sufficient warrant. However, I regard firm adherence to sound legal principles as to criminal pleading of greater importance than the effect this decision will have upon Oxidine.

SHARP, J., joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RICHARD DEWAYNE McCLOUD

No. 32

(Filed 13 May 1970)

1. Criminal Law § 75— objection to confession — necessity for voir dire

Upon defendant's objection to testimony concerning his alleged confession, the trial court must conduct a voir dire in the absence of the jury to determine the voluntariness of the confession.

2. Arrest and Bail § 3— arrest without warrant

An arrest without warrant, except as authorized by statute, is illegal.

3. Criminal Law § 84— evidence unlawfully seized — admissibility

Evidence seized from a defendant by unlawful search in violation of his Fourth Amendment rights is excluded from evidence in a criminal trial.

4. Searches and Seizures § 1— search without warrant — justification — burden of proof

One who seeks to justify a warrantless search has the burden of showing that the exigencies of the situation made search without a warrant imperative.

5. Arrest and Bail § 3— arrest without warrant — presence of officer

An arrest for a misdemeanor cannot be made without a warrant unless the misdemeanor is committed in the presence of the officer.

6. Arrest and Bail § 3; Searches and Seizures § 1; Criminal Law § 84— arrest without warrant — occupying motel room for immoral purpose — seizure of coins

Defendant's overnight occupancy of a motel room with his girl friend did not justify police officer's uninvited entry into the room to arrest the defendant without a warrant on a charge that the offense of occupying a motel room for immoral purposes had been committed in the presence of the officer; consequently, the arrest of defendant and the seizure of coins from the motel room were unlawful.

7. Criminal Law § 75— confession following illegal arrest — admissibility

A confession following an illegal arrest is not *ipso facto* involuntary and inadmissible, but the circumstances surrounding such an arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible.

8. Criminal Law § 76— admission of confession — effect of subsequent evidence

A ruling correctly admitting a confession in evidence should not be disturbed by evidence subsequently admitted on the trial unless (1) it is shown that the evidence could not have been offered on *voir dire* and (2) the subsequently admitted evidence compellingly and conclusively demonstrates that the confession was involuntary.

9. Criminal Law §§ 76, 175— voluntariness of confession — scope of appellate review

The Supreme Court must consider the entire record to determine whether a confession was in fact voluntary.

10. Criminal Law § 75— voluntariness of confession

Voluntariness remains the test of the admissibility of a confession.

11. Criminal Law § 75— confession triggered by illegally seized evidence — admissibility

Defendant's argument that his confession to police officers was involuntary in that the confession was triggered by the identification of stolen coins that had been illegally seized from defendant's motel room, the identification being made by the owner of the coins in the presence of defendant and the police officers, *held* without merit.

12. Searches and Seizures § 1— search of motor vehicle — prerequisites

Search of a motor vehicle made in connection with a lawful arrest for a traffic violation is lawful when it is a contemporaneous search for the purpose of finding property, the possession of which is a crime; such search must be based on a belief reasonably arising from the circumstances that the motor vehicle contained the contraband or other property lawfully subject to seizure.

13. Searches and Seizures § 1— seizure without warrant — contraband — burglary tools

Seizure of contraband, such as burglary tools, does not require a warrant when its presence is fully disclosed without necessity of search.

14. Searches and Seizures § 1; Criminal Law § 84— search of car without warrant — seizure of burglary tools

The warrantless seizure of burglary tools and other articles from the car in which defendant was riding as a passenger was lawful, and these tools and articles were properly admitted in the trial of defendant for possession of burglary tools, where (1) the driver had been stopped and placed under arrest for running a red light, (2) the arresting officer observed the burglary tools lying on the floorboard of the car and charged the driver with possession thereof, and (3) the other articles were thereafter discovered in the glove compartment.

15. Arrest and Bail § 3; Constitutional Law § 30— arrest without warrant — the magistrate

The fact that defendant was not immediately taken before a magistrate following his arrest on a Friday but instead was served with warrants for all charges against him except for a safecracking charge, and that the defendant was served with the safecracking warrant on Monday, *held* not to affect the validity of his trial. G.S. 15-46, G.S. 15-47.

16. Arrest and Bail § 9— purpose of bail

The purpose of bail is to assure the presence of the defendant at trial.

17. Arrest and Bail § 9— amount of bail — prejudice

Defendant who was placed under $25,000 bond on a charge of possession of burglary tools and under $25,000 bond on the charge of breaking and entering, larceny, and receiving failed to show that he was prejudiced by the large amount of bail.

18. Burglary and Unlawful Breakings § 9— possession of burglary tools — burden of proof

In a prosecution for possession of burglary tools, the burden is on the State to show that the person charged had in his possession implements of housebreaking as defined by G.S. 14-55 and that such possession was without lawful excuse.

19. Burglary and Unlawful Breakings § 10— possession of burglary tools — burden of proof — instructions

In a prosecution for the possession of burglary tools, trial court committed prejudicial error in instructing the jury that defendant had the burden of proving lawful excuse.

SHARP, J., dissenting.

BOBBITT, C.J., joins in dissenting opinion.

APPEAL by defendant from decision of the Court of Appeals reported in 7 N.C. App. 132.

Defendant was tried upon bills of indictment charging him with (1) possession of burglary tools, (2) safecracking, and (3) breaking and entering, larceny and receiving stolen property. The cases were consolidated for trial and defendant entered pleas of not guilty to all charges.

On the morning of 28 March 1969, it was discovered that the Flordia Street Baptist Church, Inc., of Greensboro, had been entered, doors broken open, and a safe door torn open. Cash in an amount between $48.00 and $60.00 had been taken from the safe, including a roll of coins upon which was stamped "Florida Street Baptist Church." On the same morning, at about 3:25 o'clock, Officers Hightower and Cooper attempted to stop an automobile occupied by two men for a routine check, whereupon the automobile rapidly increased speed and ran a red light. The officers pursued the automobile, which suddenly decreased speed, and the man on the passenger side jumped out, dropping a bundle as he ran. Officer Hightower vainly attempted to catch the fleeing man (he was later unable to identify this person as being the defendant McCloud). Officer Hightower then returned to the place where the pursued automobile had stopped, and found the driver of the car, Jack Jordan, in the custody of Officer Cooper on a charge of running a red light. It was established that Jordan

was the owner of the automobile. Officer Hightower looked into the Jordan automobile and observed on the floorboard two metal flashlights, a metal pry bar, a .22 caliber pistol, a small crowbar, a 13-inch screwdriver, and a pair of brown cloth work gloves. He thereupon advised Jordan that he was under arrest for the possession of burglary tools and carrying a concealed weapon, in addition to the charge of running a red light. Officer Hightower then looked in the glove compartment of the automobile and found an envelope containing $47.60, including a roll of coins wrapped in a blue container bearing the stamp "Florida Street Baptist Church." The glove compartment also contained a punch, a chisel, and a partially filled bottle of vodka. Officer Hightower then went to the area where he saw the fleeing passenger drop a bundle and found a gray metal box containing two punches, a chisel, tin snips, a brace and bit, and other items.

At the trial the money and the tools found in Jordan's automobile and near the scene were offered in evidence.

On 28 March 1969, defendant was served with warrants charging possession of burglary tools, breaking and entering and larceny, and occupying a room for immoral purposes. The record is vague as to the amount of bond set for defendant at that time. However, the Statement of Case on Appeal shows that he was placed under bond of $25,000 for possession of burglary tools and bond of $25,000 on the charge of breaking and entering, larceny and receiving. The record is again vague as to the bond set by the District Court when defendant waived hearing. However, the only amount appearing in the record is $5,000.

The State offered Detective Eli Welch as a witness. He testified that he first saw defendant at the Holiday Inn South on the morning of 28 March 1969. During his examination by the Solicitor this witness was questioned about conversations with defendant. Upon defendant's objection and motion to suppress, the court conducted a *voir dire* hearing in the absence of the jury.

On *voir dire*, Officer Welch testified that he first saw defendant about 7:00 o'clock a.m. on Friday, 28 March 1969. Defendant had been arrested by Sgt. Whitesell and Officer Bostic for occupying a room for immoral purposes. The witness talked with defendant for about thirty minutes around 11 o'clock a.m., on the same day, in the interrogation room at police headquarters. At that time defendant was advised "of his rights" and was told that Jordan was under arrest on charges of breaking and entering and that the police were at that time getting warrants to serve on defendant for similar charges. Defendant denied that he had any part in any of these

offenses. Officer Welch next saw defendant in the interrogation room on Monday, 31 March 1969. Referring to that occasion, the witness testified:

> "The first thing I did was I advised him of his rights. I told him he didn't have to say anything. I told him anything he told us could be used against him in court. I told him if he couldn't afford an attorney the State would appoint him an attorney. I told him if he wanted one present at that time that would be arranged also. I told him any question I asked him he didn't have to answer if he didn't want to answer. I asked him if he understood his rights and he said he did."

On the same morning Jordan was brought into the room and he told defendant: "I told them the truth, you might as well tell them the truth." Later, defendant told the police officers that if Mr. Hill (a resident of Virginia who had lost certain coins as a result of his home being burglarized) could identify certain coins taken from his motel room by the officers at the time of his arrest, he would tell the officers anything they wanted to know. Mr. Hill was brought to the room and he identified the coins. Thereupon defendant stated that he and Jordan went to Florida Street Baptist Church and entered it through an unlocked window, broke in some doors inside the church, went into the safe and took approximately $50 from the safe. He stated that he was the person who jumped from Jordan's car and ran. On the next day defendant was taken to District Court of Guilford County for preliminary hearing on the felony charges, and at that time he waived preliminary hearing. The misdemeanor charge was nol prossed. Following the preliminary hearing, defendant, for the first time, told the officers that he wanted an attorney. On the same day, after the court found that defendant was an indigent person, Mr. Forrest E. Campbell of the Guilford Bar was appointed by the Court to represent defendant.

Officer Zimmerman also testified that defendant made inculpatory statements to him concerning the felony charges on the morning of 31 March 1969, after he had again advised him "of his rights." Officer Melton's testimony on *voir dire* tended to corroborate other officers. Defendant offered no evidence on *voir dire*. At the conclusion of the *voir dire* the court found:

> "The court finds as a fact that prior to making any statement involving these cases on trial the defendant was properly warned of his constitutional rights as required by the *Miranda* decision of the United States Supreme Court; and that he was advised that he did not have to make any statements concern-

ing the offenses charged against him; and that any statements made by him could be used against him in a court of law; that he had the right to have an attorney present if he so desired while being questioned; that if he did not have funds to employ an attorney one would be appointed for him, if he requested one; that he had the right to refuse to answer any questions asked him.

"Further, the court finds as a fact that the defendant freely understandingly and voluntarily made the various statements concerning the offenses charged against him after being properly warned of his constitutional rights.

"Further, the court finds as a fact that there was no duress, promise or hope of reward offered, or threats against the defendant to induce him to make any statements he made pursuant to interrogation by the officers."

The court denied defendant's motion and objection concerning the alleged confession, and the jury returned to the courtroom. Officers Welch, Melton and Zimmerman then testified before the jury as to the inculpatory statements made by defendant.

Defendant testified in his own behalf. He admitted occupying the motel room with his girl friend and stated that on the night he was arrested he, Jordan and two girls had gone to a wrestling match and returned to the motel at 10 or 11 o'clock p.m. He and his date went to one room, Jordan and his to another. Defendant stated that he and his girl friend watched television until they went to bed. He said: "And the next thing I know it was around 5:00 in the morning and I heard banging on the door." He opened the door and saw two policemen standing there.

Following are excerpts of defendant's further testimony:

"And one of them (the officers) went around in the room and started digging in my personal property back there. The other one was talking to me inside the door and he asked me when was the last time I seen Jordan. And I told him the night before when I left him at the door to the room. And the man said, 'I think you're lying,' and I chased them out and told them to get out of the house because they had no warrant. They went out and the car stayed there because I heard the motor running. They were gone about twenty minutes and come back and were beating on the door again, and this time they got another police officer with them. I believe it is Bostick . . . ."

"Mr. Bostick just shoved his way in the house and said, 'Get your shoes on; you're going to jail.' And I said, 'For what.' . . . and I said, 'Do you have a warrant to take me to jail.' I asked him if he had a warrant to search my property and he didn't nothing — he done it.

". . . Following my arrest they took me to jail from there at the motel. I hadn't been served with a warrant until after I got in jail.

. . . .

". . . Mr. Welch started to warn me of my rights, and he never got through it because we got in an argument, and he never finished warning me. I did not sign a confession to these crimes, and I didn't make none. . . . I never did make one."

On cross-examination defendant admitted that he had been convicted of burglary, possession of burglary tools, and vagrancy, and that he was under indictment in South Carolina for safecracking.

The jury returned a verdict of guilty on each of the charges. The trial judge imposed sentence of 10 years on the charge of possession of burglary tools, 10 years on the charge of breaking and entering, 10 years on the charge of larceny, and not less than 25 nor more than 40 years for safecracking, all sentences to run concurrently. Defendant appealed to the North Carolina Court of Appeals. The Court of Appeals found no error as to the charges of safecracking, breaking and entering and larceny, but ordered a new trial as to the charge of possession of burglary tools. Defendant appealed to this Court, pursuant to G.S. 7A-30(1).

Attorney General Morgan and Staff Attorney Denson for the State.

Forrest E. Campbell for defendant.

BRANCH, J.

Defendant assigns as error the admission of testimony by police officers concerning his alleged in-custody confession.

[1] Upon defendant's objection to the testimony concerning his alleged confession, the trial court properly followed the procedure approved by this Court and the United States Supreme Court. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *Jackson v. Denno,* 378 U.S. 368, 12 L. Ed. 2d 908. There was ample evidence to support the findings of fact, and the findings of fact, in turn, supported the conclusion (denominated a finding) that defendant "freely, understandingly and voluntarily" made the various statements. Defendant offered no

evidence on *voir dire* and the State offered no evidence on *voir dire* tending to establish an illegal arrest or an illegal search and seizure.

At the conclusion of the *voir dire* the trial judge correctly admitted the alleged confession into evidence before the jury. *State v. Barnes*, 264 N.C. 517, 142 S.E. 2d 344, and *State v. Gray, supra.* The State offered no evidence before the jury tending to establish an illegal arrest or an illegal search and seizure. However, defendant, testifying in his own behalf before the jury, gave evidence concerning his arrest and the seizure of certain coins from his motel room at the time of his arrest. Based upon this testimony, defendant now argues that his confession was involuntary because it was the product of an illegal arrest and an illegal search and seizure.

[2] An arrest without warrant, except as authorized by statute, is illegal. *State v. Mobley*, 240 N.C. 476, 83 S.E. 2d 100.

G.S. 15-41, in part, provides:

> (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, 4] Further, any evidence seized from a defendant by unlawful search in violation of his Fourth Amendment rights is excluded from evidence in a criminal trial. Such unlawful search is not made lawful because of resulting discoveries. *Weeks v. United States*, 232 U.S. 383, 58 L. Ed. 652; *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081. Fruits of such evidence are excluded as well. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L. Ed. 319. And one who seeks to justify a warrantless search has the burden of showing that the exigencies of the situation made search without a warrant imperative. *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 685; *United States v. Jeffers*, 342 U.S. 48, 96 L. Ed. 59; *McDonald v. United States*, 335 U.S. 451, 93 L. Ed. 153.

Our research reveals no North Carolina cases in point concerning arrests for minor immoral offenses in which the officers entered premises occupied by defendant to make an arrest without warrant, on the ground that the offense was committed in the presence of the officer. However, other jurisdictions have reached the conclusion, under circumstances similar to those here related, that the offense was not committed in the presence of the officer.

In the case of *Hart v. State*, 195 Ind. 384, 145 N.E. 492, which was a prosecution for shooting a police officer who was standing outside the defendant's room when other officers broke into his room

without a warrant and found a woman asleep in the defendant's bed, the Indiana Court reversed conviction for assault on the police officer on the basis that no misdemeanor was committed "in view of the police officers" and the officers therefore had no authority to break into and search private rooms without a warrant. Accord: *Adair v. Williams*, 24 Ariz. 422, 210 P. 853; *Goodwin v. Allen*, 83 Ga. App. 615, 64 S.E. 2d 212.

[5, 6] It would seem that unless the misdemeanor is committed in the presence of the officer in the sense that at the time of its commission through his sensory perception he might know that a misdemeanor is being committed in his presence or have reasonable ground to believe that a misdemeanor has been committed in his presence, that an arrest cannot be made without warrant. The record before us fails to show facts which would justify uninvited entry into defendant's room to make an arrest for a misdemeanor without a warrant, on the ground that the officer had reasonable ground to believe the person committed a misdemeanor in his presence. Defendant's arrest was illegal. Neither did the State justify the warrantless search by showing that the circumstances made search without a proper warrant imperative. Thus the coins taken from the motel room were unlawfully seized.

[7] The rule in North Carolina is that a confession following an illegal arrest is not *ipso facto* involuntary and inadmissible, but the circumstances surrounding such an arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53.

It has long been the rule in this jurisdiction that the admissibility of a confession is determined by the facts appearing in evidence when it is received or rejected, and not by facts appearing in evidence at a later stage in the trial. *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572. However, defendant points to the line of cases represented by *Blackburn v. Alabama*, 361 U.S. 199, 4 L. Ed. 2d 242, and *Davis v. North Carolina*, 384 U.S. 737, 16 L. Ed. 2d 895, as altering this rule.

In the case of *Davis v. North Carolina, supra*, the petitioner was a Negro of low mentality who was kept in a detention cell for sixteen days, where he spoke to no one but the police and was subjected to daily, intermittent interrogation. There was no evidence that he was advised of his "constitutional rights." A purported confession by petitioner was offered into evidence over petitioner's objection, and the court heard conflicting evidence on the issue and ruled the

confession to be voluntary and admissible. Holding the confession to be involuntary, the United States Supreme Court stated:

> "It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the *entire record* and make an independent determination of the ultimate issue of voluntariness. E. g., *Haynes v. Washington,* 373 U.S. 503, 515-516, 10 L ed 2d 513, 521, 522, 83 S Ct 1336 (1963); *Blackburn v. Alabama,* 361 U.S. 199, 205, 4 L Ed 2d 242, 247, 80 S Ct 274 (1960); *Ashcraft v. Tennessee,* 322 U.S. 143, 147-148, 88 L ed 1192, 1195, 1196, 64 S Ct 921 (1944). Wholly apart from the disputed facts, a statement of the case from facts established in the record, in our view, leads plainly to the conclusion that the confessions were the product of a will overborne." (Emphasis added)

In *Blackburn v. Alabama, supra,* petitioner was arrested on a charge of robbery during an unauthorized absence from a veterans' hospital where he had been classified as one hundred percent mentally incompetent. He had previously been discharged from the army because of permanent mental disability. He signed a confession written by a deputy sheriff after eight or nine hours of sustained interrogation. Shortly thereafter he was committed to a State hospital after a finding of insanity. However, four years later he was declared competent to stand trial. Upon his trial in an Alabama State Court, his confession was admitted into evidence over objection, after a *voir dire* hearing by the court. Important evidence concerning the involuntariness of the confession was not introduced until after admission of the confession into evidence, and defendant's counsel did not later request reconsideration of that ruling. Holding that the use of this confession violated defendant's constitutional rights, the United States Supreme Court said:

> "We take note also of respondent's argument that our decision must be predicated solely upon the evidence introduced by defendant before admission of the confession . . . It is quite true that Blackburn's counsel, so far as the record shows, made no request that the judge reconsider his ruling on the basis of this additional data.
>
> ". . . (W)e reject the notion that the scope of our review can be thus restricted. Where the involuntariness of a confession is *conclusively* demonstrated at any stage of a trial, the defendant is deprived of due process by entry of judgment of conviction without exclusion of the confession." (Emphasis added)

At this point we think it proper to consider and distinguish instant case from the case of *State v. Hall*, 264 N.C. 559, 142 S.E. 2d 177. In *Hall* the State offered in evidence articles obtained from defendant's home without a search warrant while the defendant was in jail. The search was made with consent of defendant's wife. Defendant was confronted with the articles and he thereupon admitted that he stole the property. The facts do not show whether a *voir dire* hearing was held to determine admissibility of the confession at the first trial. This Court, in holding that the property was unlawfully obtained and improperly admitted into evidence, said:

> ". . . However, the confession which led to its recovery was not made until the officers confronted the defendant in jail with the clock and radio which they had obtained as a result of a search which had violated his rights. At the next trial the court may determine whether the confession was actually free and voluntary or whether it was triggered by the use the officers made of the fruits of their illegal search to such an extent as to render it inadmissible in evidence."

State v. Hall, supra, differs from instant case in that a new trial was ordered because property obtained by illegal search was *introduced into evidence.* The dictum in *Hall* directed the trial court, at the next trial, to determine whether the confession was triggered by the use of the property unlawfully seized, without indicating whether a *voir dire* hearing had been conducted in the original trial. Here, the property taken by police officers was not offered in evidence. A *voir dire* hearing was held and at that time defendant chose not to give the court the benefit of his contentions as to an illegal arrest or an illegal search and seizure. When the trial judge held the *voir dire* hearing to determine the admissibility of the alleged confession, defendant could have, without injury to his cause, presented his contentions as to the effect of his arrest and the effect of the seizure of the coins from his motel room. It should be noted that defendant did not offer the evidence upon which he relies to invalidate the confession until the third day of the trial. The evidence was offered before the jury by defendant's own testimony. Had the court found that this later introduced evidence compelled a finding that the confession was involuntary, it would have been proper to have declared a mistrial. We do not intimate that procedural matters should take precedence over constitutional rights; neither can we lightly condone a procedure which, without good cause, obstructs and delays the administration of justice.

[8] We recognize that when a confession is correctly admitted and it is later conclusively demonstrated that defendant's confession was involuntary, the court should not allow judgment to be entered. *Blackburn v. Alabama, supra.* However, orderly administration of justice demands that this rule be carefully applied so that planned, piecemeal defenses do not destroy certainty of punishment by causing the criminal courts to deteriorate into an endless series of *voir dire* hearings and mistrials. We hold that a ruling correctly admitting a confession into evidence should not be disturbed unless (1) it be shown that the evidence could not have been offered on *voir dire,* and (2) unless the later introduced evidence compellingly and conclusively demonstrates it to be involuntary.

[9] The rationale of *Blackburn v. Alabama, supra,* and *Davis v. North Carolina, supra,* dictates that we consider the entire record to determine whether the confession was in fact voluntary.

[10, 11] Defendant's most compelling argument is that the use of the illegally seized coins triggered his confession. In considering this contention it must be borne in mind that voluntariness remains the test of admissibility of a confession, and the use of the illegally seized property is only one circumstance surrounding the in-custody statement to be considered in determining whether the statement is voluntary and admissible. *State v. Moore, supra.* In instant case, other circumstances to be weighed in determining the admissibility of the confession include the failure of the record to show that: (1) defendant was mentally defective, (2) there was sustained interrogation or promise of reward resulting in a confession, (3) there were threats or coercive acts by the police accompanying or following the arrest, (4) defendant was held incommunicado, or (5) officers failed to promptly and fully warn him of his constitutional rights.

Here, the record discloses a knowledgeable person, a veteran of many trials and encounters with the police, who "ordered" the police officers from his motel room when they entered and who, while in custody, engaged in an "argument" with a police officer to the extent that the officer was allegedly unable to complete warning defendant of his constitutional rights. In fact, by his own sworn testimony defendant never made the confession which he now attacks as being involuntary. Thus the record presents a picture which is a far cry from the circumstances in *Blackburn v. Alabama, supra,* where the defendant, who had been discharged from the Army because of permanent mental disability, confessed after being subjected to eight or nine hours of sustained interrogation, and is entirely different from the situation in *Davis v. North Carolina, supra,* where the defend-

ant, a person of low mentality, confessed after being confined in a detention cell for sixteen days, where he spoke to no one but the police, who interrogated him daily. We do not think the entire record conclusively demonstrates that the confession was the "fruit" of the illegally seized coins, or that the confession was the product of a "will overborne." The Court of Appeals correctly overruled this assignment of error.

Defendant assigns as error the admission into evidence of the tools and other exhibits taken from the Jordan automobile.

The admission of defendant's confession destroys his contention that the evidence does not connect him with the exhibits offered in evidence. Thus the basic question presented by this assignment of error is whether the tools and exhibits were obtained by an unlawful search and seizure.

[12] Search of a motor vehicle made in connection with a lawful arrest for a traffic violation is lawful when it is a contemporaneous search for the purpose of finding property, the possession of which is a crime, i.e., burglary tools. Such search must be based on a belief reasonably arising from the circumstances that the motor vehicle contained the contraband or other property lawfully subject to seizure. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *People v. Lopez,* 60 Cal. 2d 223, 384 P. 2d 16; *State v. Boykins,* 50 N.J. 73, 232 A. 2d 141; *Welch v. U. S.,* 361 F. 2d 214.

[13] Seizure of contraband, such as burglary tools, does not require a warrant when its presence is fully disclosed without necessity of search. *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394; *State v. Bell, supra; Goodwin v. U. S.,* 347 F. 2d 793; *U. S. v. Owens,* 346 F. 2d 329; *State v. Durham,* 367 S.W. 2d 619. See also 10 A.L.R. 3rd 314, for a full note and collection of cases concerning lawfulness of search of a motor vehicle following arrest for traffic violation.

[14] In the instant case the owner of the automobile was lawfully under arrest. The arrest was accompanied by the extraordinary behavior of the passenger fleeing upon approach of the officers. After the driver's arrest, the contraband articles were observed, without necessity of search, lying on the floorboard of the automobile. Upon observing these articles, defendant was further charged with unlawful possession of burglary tools. Thereupon the officers immediately conducted further search and found other articles in the glove compartment. The further search was clearly based upon a belief reasonably arising from the circumstances that the motor vehicle contained other property subject to lawful seizure.

We note that the Court of Appeals questions the standing of defendant to raise objection to the search of Jordan's automobile, on the basis that defendant had no property right in the place alleged to have been invaded. We agree with the Court of Appeals that it is not necessary to decide this question since the search without warrant was legal. However, it should be noted that the long-recognized property right concept in relation to search and seizure has been greatly eroded by recent Federal decisions. *Jones v. U. S.*, 362 U.S. 257, 4 L. Ed. 2d 697; *Katz v. U. S.*, 389 U.S. 347, 19 L. Ed. 2d 576; *Mancusi v. DeForte*, 392 U.S. 364, 20 L. Ed. 2d 1154; *Bumper v. State of North Carolina*, 391 U.S. 543, 20 L. Ed. 2d 797.

[15] Defendant next contends that the police officers failed to immediately take him before a magistrate and failed to allow him reasonable bail, thereby violating the provisions of G.S. 15-46, G.S. 15-47, Article I, §§ 14, 17 and 18 of the North Carolina Constitution.

G.S. 15-46 provides:

> "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

G.S. 15-47 provides:

> "Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this State, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied. Provided that in no event shall the prisoner be kept in custody for a longer period than twelve hours without a warrant."

The failure to observe the provisions of these statutes may well result in the violation of a person's constitutional rights. However, G.S. 15-46 and G.S. 15-47 do not prescribe mandatory procedures affecting the validity of a trial. *State v. Broome*, 269 N.C. 661, 153 S.E. 2d 384; *Carroll v. Turner*, 262 F. Supp. 486 (E.D.N.C. 1966).

It is true that defendant was not immediately carried before a magistrate. On the day of his arrest (Friday, 28 March 1969) defendant was informed of charges against him and warrants were served on him for all charges except for the charge of safecracking. On the following Monday he was informed of and served with warrant for the charge of safecracking. There is nothing in the record to indicate that defendant was not given the opportunity to communicate with counsel and friends immediately.

[16, 17] It is also true that bail was set in a large amount. The purpose of bail is to assure the presence of the defendant at trial. *Stack v. Boyle,* 342 U.S. 1, 96 L. Ed. 3. The record does not clearly reveal what facts might have influenced the amount of the bond. However, the record is certain that defendant made no motion to reduce bond or exercise his remedy of habeas corpus. Defendant did not contend or offer evidence to show that he was prejudiced because of delay in his preliminary hearing, by fixing of bail, or by failure of police officers to immediately take him before a magistrate. Nor does the record support his present contention that he was thereby deprived of his constitutional rights.

The Court of Appeals correctly held that the trial judge erred in charging:

> "Now, when a person is charged with possession of implements of housebreaking, the burden of proving lawful excuse is on the person so charged. That burden is discharged by the accused if he proves that the alleged implement of housebreaking, or capable of being used for that purpose, is a tool used by him in his trade or business."

[18, 19] In a prosecution for possession of burglary tools, the burden is on the State to show that the person charged had in his possession implements of housebreaking enumerated or coming within the meaning of G.S. 14-55, and that such possession was without lawful excuse. *State v. Godwin,* 269 N.C. 263, 152 S.E. 2d 152. The trial judge incorrectly placed this burden upon defendant.

Defendant's other assignments of error were correctly decided by the Court of Appeals and do not justify further discussion.

The judgment of the Court of Appeals affirming the cases for safecracking, breaking and entering and larceny, and ordering a new trial in the case for possession of burglary tools, is

Affirmed.

SHARP, J., dissenting:

The majority opinion makes it quite clear that defendant's arrest upon the charge of occupying a room for immoral purposes and the search of his motel room were illegal. During the unlawful search the officers found the coins which had been stolen in Virginia from the home of Mr. Hill. These coins were not offered in evidence. The record clearly shows, however, that defendant's confession was obtained by Mr. Hill's identification of his coins in defendant's presence.

Evidence obtained by unlawful search and seizure is not excluded because it is inherently unreliable but because its exclusion is deemed the most effective means of enforcing constitutional guarantees against unreasonable searches and seizures. *Jones v. United States,* 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725. Had the coins been offered in evidence they would have been excluded because illegally obtained. G.S. 15-27; G.S. 15-27.1; *State v. Mills,* 246 N.C. 237, 98 S.E. 2d 329; *Mapp v. Ohio,* 367 U.S. 643; 6 L. Ed. 2d 1081, 81 S. Ct. 1684. It follows, therefore, that a confession obtained by their use is equally inadmissible. To hold otherwise would emasculate the rule of exclusion. In *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182, 24 A.L.R. 1426, Mr. Justice Holmes, with reference to information obtained during an unlawful search, said: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

We hold that incriminating articles obtained in consequence of an illegally obtained confession are inadmissible in evidence. *State v. Mitchell,* 270 N.C. 753, 155 S.E. 2d 96. The reverse of the rule is equally true. *State v. Hall,* 264 N.C. 559, 142 S.E. 2d 177; *People v. Stoner,* 55 Cal. Rptr. 897, 422 P. 2d 585; *Commonwealth v. Spofford,* 343 Mass. 703, 180 N.E. 2d 673; *People v. Rodriguez,* 11 N.Y. 2d 279, 183 N.E. 2d 651. *See Wong Sun v. United States,* 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407.

In *People v. Rodriguez, supra,* defendant confessed after being confronted with articles obtained in an illegal search. In granting defendant a new trial because his motion to suppress the confession had been denied, the Court of Appeals of New York said: "[T]he exclusionary rule covers not only the evidence illegally obtained, but the product of the unlawful search as well. The underlying rationale is that government may not violate the constitutional guarantee (U. S. Const., 4th Amdt.) and 'use the fruits of such unlawful conduct to secure a conviction.' . . . And, obviously, it matters

not that these 'fruits' happen to be confessions rather than some other type of evidence." (Citations omitted.)

As the majority opinion points out, evidence "concerning the involuntariness of the confession" was not introduced until after the confession was admitted into evidence, and "defendant did not offer the evidence upon which he relies to invalidate the confession until the third day of the trial." The orderly administration of justice is not furthered by such procedure. Counsel for defendant was remiss in not offering upon the *voir dire* the evidence he offered on the third day of the trial. However, the original remissness was that of the State. Upon defendant's objection to the confession testimony the burden devolved upon the State to show, *inter alia,* that the search by which the officers obtained the coins which triggered the confession was legal. *Bumper v. North Carolina,* 391 U.S. 543, 20 L. Ed. 2d 797, 88 S. Ct. 1788; *State v. Little,* 270 N.C. 234, 154 S.E. 2d 61. This it could not do. Indeed, the State offered no evidence attempting to establish the legality of the search. In view of this omission, the judge committed error in admitting the evidence of defendant's confession.

It is no longer the rule that a confession is presumed to be voluntary and the burden is on a defendant to show the contrary. The burden of showing the voluntariness of a confession is now upon the State. *State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171; *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481; *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334; *State v. Ross,* 269 N.C. 739, 153 S.E. 2d 469. Now, in order to be admissible, a confession must be voluntary in two aspects: (1) It must be made of a defendant's own free will, without coercion induced by fear, threat of harm, promise of reward or leniency; and (2) it must not be influenced by methods which violate the constitutional rights of the accused. *See* 29 Am. Jur. 2d *Evidence* §§ 526, 542, 555, 557, where the cases are collected. Thus, a confession obtained in consequence of a violation of a defendant's constitutional rights is deemed involuntary.

It appears from the State's evidence that defendant's confession was obtained by the exhibition and identification of the coins which the officers had seized while unlawfully arresting him and unlawfully searching his motel room. His confession therefore cannot be held voluntary. In my view defendant is also entitled to a new trial on the charges of safecracking, breaking and entering, and larceny.

BOBBITT, C.J., joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. ALLEN SPENCER, ALVIN SPENCER, HENRY JOHNSON, JR., PRESTON SIMMONS, BENJAMIN PHELPS AND SAMUEL BRYANT

No. 46

(Filed 13 May 1970)

1. Jury § 7; Constitutional Law § 29— quashal of jury venire — opportunity to offer evidence

A contention by Negro defendants that the trial court violated their constitutional rights under the Fourteenth Amendment, U. S. Constitution, by denying their motion to quash the jury venire and by preventing them from making an evidentiary showing on the motion, *held* without merit, where the record affirmatively showed that (1) the trial court, at the time of the motion, offered to hear any evidence presented by defendants, but no evidence was presented; (2) the defendants had had a minimum of four months, prior to the trial and the making of the motion, in which to gather evidence in support of the motion; and (3) the jury venire consisted of 54 white persons and 20 Negroes.

2. Constitutional Law § 29— right to jury free from racial discrimination

If the conviction of a Negro is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded, the conviction cannot stand.

3. Jury § 7— quashal of jury venire — burden of proof — prima facie case

If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon defendant to establish it: but once a *prima facie* case of racial discrimination is established, the burden of going forward with rebuttal evidence is upon the State.

4. Jury § 7; Constitutional Law § 29— jury trial — demand for proportionate number of race

A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn.

5. Jury § 7— inquiry into racial discrimination — opportunity to offer evidence

A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged intentional exclusion of Negroes because of their race from serving on the grand or petit jury in his case.

6. Criminal Law § 138; Constitutional Law § 36— punishment — appeal from district to superior court — increased sentence

Where the defendants appealed to the superior court from a conviction and sentence in the district court, the imposition of a greater sentence in the superior court than the sentence imposed in the district court did not violate defendants' constitutional rights under the state and federal constitutions, since the trial *de novo* in the superior court is a new trial from

beginning to end on both the law and the facts. U. S. Constitution, Amendments VI and XIV; N. C. Constitution, Art. I, §§ 13 and 17.

7. Criminal Law § 18— conviction in district court — right of appeal to superior court

Defendants who are convicted in the district or other inferior court are entitled to a trial *de novo* in the superior court even though their trials in the inferior court were free from error. G.S. 7A-290, G.S. 15-177.1.

8. Highways and Cartways § 10— impeding traffic — what constitutes "standing on highway" — instructions

The conduct of defendants in walking back and forth across a public highway for five minutes and thereby causing vehicular traffic on the highway to come to a stop, *held* within the purview of the statute making it unlawful for any person wilfully to stand upon a highway and impede the regular flow of traffic; and the trial court correctly instructed the jury that if the defendants "walked, standing and walked on the highway and did so wilfully in such a manner as to impede the regular flow of traffic, that would constitute a violation of this statute even though they were not standing still." G.S. 20-174.1.

9. Statutes § 5— statutory construction — intent of legislature

In construing the language of a statute the courts are guided by the primary rule that the intent of the legislature controls.

10. Statutes § 5— statutory construction — purpose of the law

If a strict literal interpretation of a statute contravenes the manifest purpose of the legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded.

11. Statutes § 5— language of statute

Where possible, the language of a statute will be interpreted so as to avoid an absurd consequence.

12. Statutes § 10— construction of criminal statutes

Criminal statutes must be strictly construed, but this does not mean that a criminal statute should be construed stintingly or narrowly.

13. Highways and Cartways § 10; Criminal Law § 138— obstructing traffic — prosecution — punishment — mitigation of sentence pending appeal

In an obstructing traffic prosecution, the sentencing of one defendant to a nine-month jail term, and the sentencing of other defendants to a six-month jail term, were within the limits allowed by G.S. 20-174.1(b) at the time judgment was pronounced; but where, pending appeal of defendants, the legislature reduced the maximum term of imprisonment under the statute to six months, the defendant who received the nine-month sentence was entitled to the mitigation of his sentence to six months. Session Laws of 1969, Chapter 1012.

14. Criminal Law § 138— offense punishable in discretion of court — amount of punishment

An offense punishable by "fine or imprisonment, or both, in the discre-

tion of the court" is a general misdemeanor for which an offender may be imprisoned for two years in the discretion of the court.

APPEAL by defendants from decision of the Court of Appeals upholding judgment of *Fountain, J.*, at the 23 May 1969 Session of HYDE Superior Court.

Each defendant was charged in a warrant with willfully standing upon the traveled portion of a state highway in such a manner as to impede the regular flow of traffic, a violation of G.S. 20-174.1.

Defendants were initially tried in the District Court of Hyde County and found guilty. Henry Johnson, Jr., was sentenced to sixty days in jail, suspended, and said defendant placed on probation for eighteen months on condition that he pay a fine of $75.00 and the costs, be at his residence each evening by 11:30 p.m. unless otherwise permitted by his probation officer, and abide by the usual terms and conditions of probation. The other five defendants were given sixty days in jail, suspended, and each defendant placed on probation for eighteen months on condition that each defendant pay a fine of $50.00 and the costs, be at his residence each evening by 11:30 p.m. unless otherwise permitted by his probation officer, and abide by the usual terms and conditions of probation. From these judgments defendants appealed to the Superior Court of Hyde County where they were brought to trial at the 19 May 1969 Criminal Session. The cases were consolidated by consent for purpose of trial.

Before the call of the cases, defense counsel moved to quash the jury venire and indicated a desire "to make a showing on it." The court expressed its willingness to hear any evidence defendants wished to offer on the motion but refused to delay the trial. The only evidence offered in that respect was a showing that of the total jurors present on the regular jury panel and as supplemental jurors, fifty-four were white and twenty were Negro.

The State's evidence tends to show that on 11 November 1968 the defendants, with a crowd of approximately one hundred people, were walking in a westerly direction on U. S. Highway 264 approaching the courthouse in Swan Quarter, North Carolina. The crowd proceeded to the courthouse where it remained for more than an hour demonstrating, singing, chanting and shouting. The group then started back on U. S. 264. For the first few hundred yards the crowd was orderly. Then the defendants, with a few others, began marching back and forth across the highway chanting and hollering. "It was a continual thing after they started," and continued for over ten minutes before the arrests were made. Traffic was blocked from

both directions because defendants were in the roadway marching back and forth from side to side, "raising their knees up high and rearing back as they walked and they were singing, clapping and screaming." In this fashion these defendants, and about a dozen others not involved in this case, occupied the highway for about five minutes thus forcing vehicular traffic to stop. Defendants were admonished by highway patrolmen to clear the highway and permit traffic to resume its normal flow. They ignored the admonition and continued to chant and sing while the vehicles were stopped. Defendants were thereupon placed under arrest and brought to trial.

Defendants offered no evidence but moved for judgment of nonsuit at the close of the evidence for the State. This motion was denied and, after arguments of counsel and charge of the court, the case was submitted to the jury. Defendants were found guilty as charged and the presiding judge pronounced judgment as follows: Henry Johnson, Jr., was given an active sentence of nine months in the common jail of Hyde County. The other five defendants were each given an active sentence of six months in the common jail of Hyde County. All defendants appealed to the Court of Appeals where the sentences were upheld, 7 N.C. App. 282, 172 S.E. 2d 280. Defendants thereupon appealed to the Supreme Court of North Carolina assigning errors as noted in the opinion.

Chambers, Stein, Ferguson & Lanning, by James E. Ferguson, II, Attorneys for defendant appellants.

Robert Morgan, Attorney General, and Burley B. Mitchell, Jr., Staff Attorney, for the State.

HUSKINS, J.

[1] Prior to entering any plea the following colloquy occurred between defense counsel and the court:

"MR. FERGUSON: I want to make a motion to quash the jury venire and would like to make a showing on it.

THE COURT: If you want to offer evidence I will hear it now. I think you have had ample time.

MR. FERGUSON: I would like for the record to reflect that counsel requested an opportunity to make a showing.

THE COURT: Let the record show that and further show that the court is now willing to hear any evidence defendants wish to offer on that question and denies the motion for continuance or delay to gather evidence on the question.

MR. FERGUSON: Let the record show that the only evidence we have at this time is the makeup of the jury.

THE COURT: Let the record show that of those present on the regular jury panel and the supplemental jurors, upon a roll call the Clerk reports that 54 are white and 20 Negro."

Defendants contend the trial court violated their right to due process and equal protection under the Fourteenth Amendment by denying the motion to quash and "by refusing to allow defendants to make an evidentiary showing on their motion." All six defendants are members of the Negro race.

At the outset, it is noted that the motion to quash was made orally and no grounds for it were stated. The record is silent in that respect. A jury venire may be illegal for many reasons. We can only surmise that the motion itself suggested systematic exclusion of Negroes from the petit jury because of their race. Although appellate courts are not required to speculate in such fashion, we assume *arguendo* that the motion was intended to suggest that Negroes had been systematically excluded from the jury box in Hyde County because of their race. We examine this assignment of error on that assumption.

[2-5] Both state and federal courts have long approved the following propositions:

1. If the conviction of a Negro is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race, the conviction cannot stand. *State v. Ray*, 274 N.C. 556, 164 S.E. 2d 457; *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897; *State v. Brown*, 271 N.C. 250, 156 S.E. 2d 272; *State v. Lowry and State v. Mallory*, 263 N.C. 536, 139 S.E. 2d 870; *Whitus v. Georgia*, 385 U.S. 545, 17 L. ed 2d 599, 87 S. Ct. 643; *Arnold v. North Carolina*, 376 U.S. 773, 12 L. ed 2d 77, 84 S. Ct. 1032; *Eubanks v. Louisiana*, 356 U.S. 584, 2 L. ed 2d 991, 78 S. Ct. 970; *Reece v. Georgia*, 350 U.S. 85, 100 L. ed 77, 76 S. Ct. 167; *Shepherd v. Florida*, 341 U.S. 50, 95 L. ed 740, 71 S. Ct. 549; *Cassell v. Texas*, 339 U.S. 282, 94 L. ed 839, 70 S. Ct. 629.

2. If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it. *State v. Ray, supra; State v. Yoes*, 271 N.C. 616, 157 S.E. 2d 386; *State v. Brown, supra; Whitus v. Georgia, supra; Akins v. Texas*, 325 U.S. 398, 89 L. ed 1692, 65 S. Ct. 1276; *Fay v. New York*, 332 U.S. 261, 91 L. ed 2043, 67 S. Ct. 1613. But once he establishes a *prima facie* case of racial discrimination, the burden of going for-

ward with rebuttal evidence is upon the State. *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109; *State v. Ray, supra.*

3. A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn. *Swain v. Alabama,* 380 U.S. 202, 13 L. ed 2d 759, 85 S. Ct. 824; *State v. Wilson, supra; State v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229, reversed on other grounds, 376 U.S. 773, 12 L. ed 2d 77, 84 S. Ct. 1032.

4. A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged intentional exclusion of Negroes because of their race from serving on the grand or petit jury in his case. *State v. Wright, supra* (274 N.C. 380, 163 S.E. 2d 897); *State v. Belk,* 272 N.C. 517, 158 S.E. 2d 335; *State v. Inman,* 260 N.C. 311, 132 S.E. 2d 613; *State v. Covington,* 258 N.C. 495, 128 S.E. 2d 822; *State v. Perry,* 248 N.C. 334, 103 S.E. 2d 404; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513; *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294. "Whether a defendant has been given by the court a reasonable time and opportunity to investigate and produce evidence, if he can, of racial discrimination in the drawing and selection of a . . . jury panel must be determined from the facts in each particular case." *State v. Perry, supra.*

In *State v. Belk, supra* (272 N.C. 517, 158 S.E. 2d 335), defendant was initially denied but belatedly offered an opportunity by the trial judge to present evidence in support of a motion to quash on the ground that members of defendant's race were systematically excluded from the grand jury, but defendant declined to present evidence during the term in support of the motion. Held: No error. Defendant was offered an opportunity to avoid any disadvantage resulting from the initial denial. "From the record it appears doubtful that the motion was originally made in good faith, and it is quite obvious that the defendant seeks to rely upon technicalities that have no merit."

In *State v. Inman, supra* (260 N.C. 311, 132 S.E. 2d 613), defense counsel had been employed in the case for approximately four weeks when the case was called for trial. Before pleading, defendant moved to quash the indictments on the ground that Negroes had been systematically excluded from serving on the grand jury that returned the bills against him. The court summarily overruled the motion and defendant assigned this as error. Defense counsel then asked for sufficient time to substantiate his motion and this was denied. Held: Error in refusing to grant defendant sufficient time to offer evidence in support of his motion to quash the indictments on the ground

that members of his race, by reason of their race, were systematically excluded from serving on the grand jury that returned the indictments. "Whether defendant can establish the alleged racial discrimination or not, due process of law demands that he have his day in court on this matter, and such day he does not have unless he has a reasonable opportunity to produce his evidence, if he has any."

In *State v. Covington, supra* (258 N.C. 495, 128 S.E. 2d 822), defendant was charged in a warrant drawn and served on 9 March 1962 with a violation of law which was included in the bills of indictment. The case was set for trial at the May 1962 Criminal Session, Superior Court of Union County. Defendant, a Negro, prior to pleading, moved to quash the indictments on the ground that members of the Negro race had been systematically excluded because of their race from service upon the grand jury. In his written motion defendant further moved for a reasonable time to inquire into the facts and requested the court to issue process to require certain named officers of Union County to appear in court and testify with respect to the selection of grand juries for Union County and to bring with them all books, documents, and records pertinent to the inquiry. This motion was supported by an affidavit of defense counsel. The trial court denied the motion to quash and the motion for a reasonable time to inquire into the alleged facts with respect to jury selection. Held: Defendant was denied a reasonable opportunity to produce evidence, if any such evidence existed. "Whether he can establish his contention or not, he must have his day in court on his motion to quash the indictments."

In *State v. Perry, supra* (248 N.C. 334, 103 S.E. 2d 404), defendant, a Negro doctor, was arrested 13 October 1957 on a warrant charging him with performing an abortion. He was bound over to the Superior Court of Union County after a hearing on 18 October 1957. The superior court convened on 28 October 1957 for a two-weeks term. The trial judge denied a motion to remove and ordered a special venire from Anson County to appear on 30 October 1957. On 29 October, defendant moved for a continuance and, failing that, on 30 October moved to quash the indictment. In support of the motion to quash was an affidavit of counsel to the effect that "the grand jury which indicted the defendant was unlawfully constituted for that negroes solely because of their race have been systematically excluded from serving on grand juries of Union County for many years" and that opportunity was needed "to inquire into the matter of such exclusion, and to gather evidence to present to the court on the matter." The motions for continuance and to quash the indictment were denied. Held: "After a careful examination of all the

facts in the instant case, it is our opinion that the trial court denied the defendant a reasonable opportunity and time to investigate and produce evidence, if such exists, in respect to the allegations of racial discrimination as to the grand jury set forth in the motion to quash and in the supporting affidavit. . . ."

The facts in *Belk, Inman, Covington* and *Perry* are readily distinguishable from the facts in the case before us.

[1] The facts in this case reveal that defendants were arrested on 11 November 1968. Four of them were tried in the District Court of Hyde County on 2 January 1969 and the remaining two on 15 January 1969. Attorney James E. Ferguson, II, represented defendants in their district court trials and noted an appeal to superior court. The cases were called for trial in the Superior Court of Hyde County at the next ensuing term of that court which convened on 19 May 1969. Thus it affirmatively appears from the record that more than six months had elapsed from date of arrest and more than four months from date of appeal to the superior court for trial *de novo* before a jury. Defense counsel thus had a minimum of four months in which to make his investigation, gather evidence, and subpœna records and witnesses in support of his motion to quash. It is apparent, however, that he had done nothing regarding this motion up to the moment it was made — just moments before the cases were called for trial — since all he had to offer was the makeup of the venire. And a mere showing that there were twenty Negroes on this 74-man venire is insufficient proof of systematic exclusion under any intelligent standards. See Anno. — Jury Service-Discrimination, 1 A.L.R. 2d 1292 at 1314; *State v. Brown, supra* (271 N.C. 250, 156 S.E. 2d 272); *Swain v. Alabama, supra* (380 U.S. 202, 13 L. ed 2d 759, 85 S. Ct. 824). It suggests instead that there was indeed no factual basis whatever for the motion. It seems more likely that delay in the trial was counsel's primary objective.

Under the facts of this case, counsel had ample time (four to six months prior to the date of the trial) in which to make his investigation and produce evidence, if any such evidence existed. We hold that there has been no denial of Due Process and Equal Protection in violation of the Fourteenth Amendment. This assignment is therefore overruled.

[6] Each defendant received a greater sentence in the superior court than had been imposed by the district court. Defendants contend this increase in sentence violated rights secured to them by the Sixth and Fourteenth Amendments to the Constitution of the United

States and by Article I, Sections 13 and 17, of the Constitution of North Carolina.

Article III, Section 2, of the Federal Constitution provides that "[t]he trial of all crimes . . . shall be by jury. . . ." The Sixth Amendment thereto contains the requirement that the accused in all criminal prosecutions "shall enjoy the right to a . . . trial, by an impartial jury. . . ."

Like provision for trial by jury is found in Article I, Section 13, of the Constitution of North Carolina in these words: "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."

Infringement upon the constitutional right of these defendants to trial by jury is not apparent. Although initially tried in the district court before the judge without a jury, defendants had, and exercised, an absolute right to a jury trial *de novo* in the superior court pursuant to G.S. 7A-288 (now G.S. 7A-290) and G.S. 15-177.1. It is established law in North Carolina that trial *de novo* in the superior court is a new trial from beginning to end, on both law and facts, disregarding completely the plea, trial, verdict and judgment below; and the superior court judgment entered upon conviction there is wholly independent of any judgment which was entered in the inferior court. "The fact that a right of appeal was given where the defendant was convicted in the lower court without the intervention of a jury has generally been regarded as a sufficient reason, in support of the validity of such trials without a jury in the inferior tribunal, as by appealing the defendant secures his right to a jury trial, in the Superior Court, and therefore cannot justly complain that he has been deprived of his constitutional right." *State v. Pulliam,* 184 N.C. 681, 114 S.E. 394. Accord: *State v. Norman,* 237 N.C. 205, 74 S.E. 2d 602.

Conceding that they have statutory access to trial by jury in the superior court, defendants contend the exercise of that right is unduly restricted because they must run the risk of increased punishment in case the jury convicts them. This risk, they argue, is a deterrent which inhibits the free exercise of a constitutional right to trial by jury and is therefore violative of due process guaranteed by the Fourteenth Amendment and by Article I, Section 17, of the Constitution of North Carolina. Defendants insist that *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371, and similar holdings in this and other jurisdictions, have been overruled by *North Carolina v. Pearce,* 395 U.S. 711, 23 L. ed 2d 656, 89 S. Ct. 2072, and contend *Pearce* is con-

trolling on this point. We now examine the validity of this contention in light of *Pearce*.

In *Pearce*, defendant was convicted in the Superior Court of Durham County of an assault with intent to commit rape and sentenced by the trial judge to a term of 12-15 years. After serving several years of this term, Pearce initiated a post conviction proceeding in the superior court on the ground that an involuntary confession had been admitted into evidence against him. A post conviction review was held in May 1965 before a superior court judge who entered an order denying relief. This Court allowed certiorari to review that order and awarded a new trial upon the ground that the trial court committed error in admitting said confession over defendant's objection. *State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918. Pearce was retried before another superior court judge and jury and again convicted. The second trial judge imposed a sentence of eight years which, when added to the time already served, amounted to a longer sentence in the aggregate than the twelve-year minimum originally imposed. The second sentence was upheld by this Court, 268 N.C. 707, 151 S.E. 2d 571. Pearce then obtained a writ of habeas corpus from the United States District Court for the Eastern District of North Carolina. That court held the greater sentence unconstitutional and ordered his release upon failure of the State Court to resentence him within sixty days. The Fourth Circuit Court of Appeals affirmed, 397 F. 2d 253. The United States Supreme Court granted certiorari and laid down the rule that vindictiveness must not play a part in the sentence a defendant receives at a second trial following his successful attack upon his first conviction. "And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process . . . requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." The court then required that whenever a judge imposes a more severe sentence after the second trial, "the reasons for his doing so must affirmatively appear. . . . And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

Various aspects of the decision in *Pearce* have been criticized and commended in varying degrees by the academic community. See Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606 (1965); Note, In Van Alstyne's Wake: *North Carolina v. Pearce*, 31 U. Pitt. L. Rev. 101 (1969);

Note, Higher Punishment for a Successful Appellant on Retrial: Defining the Gantlet, 23 Sw. L.J. 933 (1969); Comment, Criminal Procedure — Constitutional Limitations on Imposition of More Severe Sentence after Conviction upon Retrial, 58 Ky. L.J. 380 (1969).

We think *Pearce* is factually distinguishable and has no application here. There are many valid distinctions between a *retrial in the same court after reversal* and trial *de novo* in a higher court upon appeal — especially when the right of appeal is absolute and unconditional. Here, no defect in the first trial *caused a retrial* in superior court. Rather, the trial there was *de novo* and a matter of absolute right.

[7] In *Pearce*, both sentences were imposed in the same court. To get a retrial, Pearce had to attack the validity of his first sentence and show a violation of his constitutional rights committed during the first trial. Here, defendants were entitled to a trial *de novo* in the superior court even though their trials in the inferior court were free from error. G.S. 7A-288 (now G.S. 7A-290) and G.S. 15-177.1. This is an unfettered statutory right. It therefore appears that when these defendants appealed to the superior court the slate was wiped clean and the cases stood for trial in the superior court as if there had been no previous trial in the district court. Hence, in the sound discretion of the superior court judge, his sentence may be lighter or heavier than that imposed in the district court. *State v. Morris*, 275 N.C. 50, 61, 165 S.E. 2d 245, 252. Other jurisdictions which have considered this question have reached the same conclusion. *Lemieux v. Robbins*, 414 F. 2d 353 (1st Cir. 1969), cert. den. 397 U.S. 1017, 90 S. Ct. 1247, 25 L. ed 2d 432, and in *People v. Olary*, 382 Mich. 559, 170 N.W. 2d 842. To hold otherwise, and say that upon appeal the superior court judge may decrease the sentence imposed below but is precluded from increasing it, would encourage appeal to the superior court in every case. Trial in the district court would be futile and the court itself an impediment to the administration of justice. In our view, we are dealing here with wholly new sentences rather than increases in old ones.

[6] We hold that the decision in *Pearce*, based on a different factual situation, was never intended to apply to judgments following trials *de novo* on appeal from inferior tribunals. The fact that defendants received a greater sentence in the superior court than they received in the district court is no violation of their constitutional 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 im-

posed does not exceed the statutory maximum. *State v. Tolley,* 271 N.C. 459, 156 S.E. 2d 858. *Pearce,* decided 23 June 1969, is not applicable. This assignment of error is overruled.

The statute under which these defendants are charged makes it unlawful for any person willfully to stand, sit or lie upon the highway or street in such a manner as to impede the regular flow of traffic. G.S. 20-174.1.

[8] The State's undisputed evidence discloses that defendants impeded the regular flow of traffic on U. S. Highway 264 for over five minutes by marching and strutting back and forth across the highway, "raising their knees up high and rearing back as they walked." As a result, all vehicular traffic came to a stop. That the act was willful is perfectly apparent. Defendants contend, however, that the statute does not prohibit *walking* on the highway so as to impede the regular flow of traffic and challenge the following instruction to the jury by the trial judge: "If the defendants were on the highway and standing, whether they were standing still or walking is of no consequence. If they walked, standing and walked on the highway and did so willfully in such a manner as to impede the regular flow of traffic, that would constitute a violation of this statute even though they were not standing still. . . . So the question is whether the defendants, or either of them, stood by walking on Highway 264 in such a manner as to impede the regular flow of traffic, that is, to cause it to stop or to detour or to restrain the normal flow of traffic, or the regular flow of traffic, and, if so, did they do it willfully."

At issue then is whether the word "stand" as used in the statute means "standing still" as defendants insist or embraces the act of walking as contended by the State.

[9-11] In construing the language of a statute we are guided by the primary rule that the intent of the legislature controls. "In the interpretation of statutes, the legislative will is the all important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. The legislative intent has been designated the vital part, heart, soul, and essence of the law, and the guiding star in the interpretation thereof." 50 Am. Jur., Statutes § 223. A construction which will operate to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language. *Ballard v. Charlotte,* 235 N.C. 484, 70 S.E. 2d 575. If a strict literal interpretation of a statute contravenes the manifest purpose of the legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded. *State v. Barksdale,* 181 N.C. 621, 107

S.E. 505; *Duncan v. Carpenter,* 233 N.C. 422, 64 S.E. 2d 410. And, where possible, "the language of a statute will be interpreted so as to avoid an absurd consequence. *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797; *State v. Scales,* 172 N.C. 915, 90 S.E. 439." *Hobbs v. Moore County,* 267 N.C. 665, 671, 149 S.E. 2d 1, 5. Furthermore, words and phrases of a statute "must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." 7 Strong's N. C. Index 2d, Statutes § 5; *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2; *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505.

[12] Of course criminal statutes must be strictly construed. *State v. Ross,* 272 N.C. 67, 157 S.E. 2d 712; *State v. Brown,* 264 N.C. 191, 141 S.E. 2d 311. But this does not mean that a criminal statute should be construed stintingly or narrowly. It means that the scope of a penal statute may not be extended by implication beyond the meaning of its language so as to include offenses not clearly described. *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329; *State v. Whitehurst,* 212 N.C. 300, 193 S.E. 657, 113 A.L.R. 740. Even so, an interpretation which leads to a strained construction or to a ridiculous result is not required and will not be adopted. *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596. "While a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. And the rule that statutes will be construed to effectuate the legislative intent applies also to criminal statutes." 7 Strong's N. C. Index 2d, Statutes § 10; *State v. Brown,* 221 N.C. 301, 20 S.E. 2d 286; *State v. Hatcher,* 210 N.C. 55, 185 S.E. 435; *State v. Humphries,* 210 N.C. 406, 186 S.E. 473.

When G.S. 20-174.1 is subjected to these rules of construction, it is quite clear that the legislature intended to make it unlawful for any person to impede the regular flow of traffic upon the streets and highways of the State by willfully placing his body thereon in either a standing, lying or sitting position. A person may stand and walk, stand and strut, stand and run, or stand still. All these acts are condemned by the statute when done willfully in such manner as to impede the regular flow of traffic upon a public street or highway. The strained construction of this statute urged by defendants would lead to a ridiculous result and would completely disregard the evil which it is intended to suppress. The interpretation we adopt accords with reason and common sense and effectuates the legislative intent to prohibit and punish those who willfully place themselves upon the

streets and highways of the State in such manner as to impede the regular flow of traffic.

[9] We hold that the challenged portion of the charge to the jury correctly applied the law to the facts and that the motion for nonsuit was properly overruled. These assignments of error have no merit.

[13] Finally, defendants contend that their sentences exceed the statutory maximum for the offense charged. They argue that the punishment for a violation of G.S. 20-174.1 is controlled by G.S. 20-176(b) as interpreted and applied in *State v. Massey,* 265 N.C. 579, 144 S.E. 2d 649. This requires an analysis of pertinent statutes and cases.

G.S. 20-176(b) limits the punishment that may be imposed for violating any of the various sections of Article 3 of Chapter 20 of the General Statutes (which includes G.S. 20-174.1) to a $100.00 fine, or sixty days in jail, or both "[u]nless *another penalty is in this article* or *by the laws of this State provided.* . . ." (Emphasis added) This statute was enacted by Session Laws 1937, Chapter 407, Section 137.

In 1965 the Legislature enacted G.S. 20-174.1 under which defendants are charged. Subsection (a) provides: "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." Subsection (b) thereof prescribes the punishment for a violation of Subsection (a) in these words: "Any person convicted of violating this section shall be punished by fine or imprisonment, or both in the discretion of the court." This language in itself is "another penalty" and, being a part of Article 3, the punishment ceiling imposed by G.S. 20-176(b) does not apply. Had the Legislature intended G.S. 20-176(b) to govern the punishment for this offense, it would have been entirely unnecessary to enact Subsection (b). A violation of Subsection (a) is a misdemeanor and, absent Subsection (b), there would be no penalty prescribed in Article 3 for such violation. Furthermore, there would be no other penalty provided "in the laws of this State" because G.S. 14-3 is inapplicable to motor vehicle misdemeanors contained in Article 3 of Chapter 20 of the General Statutes. *State v. Massey, supra* (265 N.C. 579, 144 S.E. 2d 649). Hence, if Subsection (b) had not been enacted, the punishment prescribed by G.S. 20-176(b) would govern. But this is not the case. The Legislature provided "another penalty" by enacting Subsection (b). Since no maximum punishment is fixed by this subsection, we must look elsewhere to discover the maximum penalty authorized by use of the words "fine or imprisonment, or both in the discretion of the court."

[14] G.S. 20-179 provides that one who drives a motor vehicle upon the public highways of the State while under the influence of intoxicants 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." This language establishes a minimum, but with respect to maximum punishment the language is identical to that used in G.S. 20-174.1(b), i.e., "fine or imprisonment or both in the discretion of the court." This Court has twice held that a sentence of eighteen months was within the limits authorized by G.S. 20-179 and that an offense punishable *by fine or imprisonment, or both, in the discretion of the court* is a general misdemeanor for which an offender may be imprisoned for two years in the discretion of the court. *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245; *State v. Lee*, 247 N.C. 230, 100 S.E. 2d 372. We adhere to that interpretation and hold, consonant with the legislative intent, that the offense condemned by G.S. 20-174.1, at the time these offenses were committed, was a general misdemeanor for which an offender could have been imprisoned for as much as two years in the discretion of the court. The sentences imposed are within the limits allowed by law at the time the offenses were committed and at the time the judgments were pronounced.

[13] We note, however, that while this appeal was pending the Legislature amended G.S. 20-174.1(b) to read as follows: "Any person convicted of violating this section shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court." (S.L. 1969, c. 1012) Since this amendment reduced the maximum punishment for violation of G.S. 20-174.1(a) while this appeal was pending, the change inures to the benefit of defendant Henry Johnson, Jr., who was given an active sentence of nine months by the trial judge. "A judgment is not final as long as the case is pending on appeal." *State v. Pardon*, 272 N.C. 72, 75, 157 S.E. 2d 698, 701, and authorities there cited. The judgment as to defendant Henry Johnson, Jr., is therefore modified so as to reduce his sentence from nine months to six months in the common jail of Hyde County.

As thus modified the result reached by the Court of Appeals is affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. ABRAM C. CAUDLE, III

No. 42

(Filed 13 May 1970)

1. Criminal Law § 143— suspended sentence — right of defendant to rely on conditions of suspension

Where a sentence in a criminal case is suspended upon certain valid conditions expressed in the sentence imposed, the defendant has a right to rely upon such conditions, and so long as he complies therewith the sentence should stand.

2. Criminal Law § 143— consent to suspension of sentence — attack on validity of activation of suspended sentence

A defendant who expressly or impliedly consents to the suspension upon specified conditions of an otherwise valid sentence to imprisonment may not thereafter attack the validity of an order putting such sentence into effect, entered after due notice and hearing, except (1) on the ground that there is no evidence to support a finding of a breach of the conditions of suspension, or (2) on the ground that the condition which he has broken is invalid because it is unreasonable or is imposed for an unreasonable length of time.

3. Criminal Law § 143— consent to suspension of sentence — attack on reasonableness of breached condition

Defendant's consent to the suspension of a prison sentence does not preclude him from contesting the reasonableness of the condition which he has broken when such breach is made the ground for putting the prison sentence into effect. Statements to the contrary in *State v. Collins*, 247 N.C. 248, and *State v. Henderson*, 207 N.C. 258, are disapproved.

4. Criminal Law § 143— suspended sentence — condition which violates defendant's constitutional right

A condition which is a violation of the defendant's constitutional right, and, therefore, beyond the power of the court to impose, is *per se* unreasonable and subject to attack by the defendant upon the State's subsequent motion to put the sentence into effect for violation of that condition.

5. Criminal Law § 143; Constitutional Law § 21— suspension of sentence — payment of obligations unrelated to the crime — imprisonment for debt

Suspension of a sentence of imprisonment for a criminal act on condition that the defendant pay obligations unrelated to such criminal act, however justly owing, is a use of the criminal process to enforce payment of a civil obligation in violation of Article I, § 16, Constitution of North Carolina.

6. Criminal Law § 143; Constitutional Law § 21— credit card fraud — suspension of sentence — payment of amount to bank in excess of that charged in warrant — imprisonment for debt

Where defendant was charged in a warrant with obtaining goods and services valued at $631.78 by use of a revoked bank credit card with intent to defraud the bank of that sum, condition of suspension of the sentence

imposed upon defendant's plea of guilty of non-felonious credit card fraud that defendant make payment of $7,326.29 for use and benefit of the bank *is held* invalid, since activation of the sentence for defendant's failure to make such payment would constitute imprisonment for debt in violation of Article I, § 16, Constitution of North Carolina, it being obvious from the face of the warrant that the major part of such indebtedness was not created by the criminal acts to which defendant entered his plea of guilty.

ON certiorari, on petition of defendant, to review the judgment of the Court of Appeals, reported in 7 N.C. App. 276, 172 S.E. 2d 231.

The defendant was brought to trial in the Municipal-County Court of the City of Greensboro upon a warrant. It was charged therein that he "on or about the 17, 18 and 19th day of July, 1968, * * * did unlawfully and willfully and feloniously, and knowingly purchased goods and service, valued at $631.78, from Gate City Pharmacy [and fifteen other named business establishments] all of Greensboro, North Carolina, By use of North Carolina National Bank-Americard Number 342-120-304-239, when he knew that the said credit card had been revoked by North Carolina National Bank, and with the intent to defraud North Carolina National Bank out of the said sum of $631.78, in violation of Chapter 14, Section 113.13(a)(1), General Statutes of North Carolina * * *."

In the Municipal-County Court, the defendant entered a plea: "Guilty Fraudulent Use of Credit Card Non Felony." The court entered judgment on 17 September 1968 that the defendant be confined in the county jail for one year, the judgment to be suspended for four years upon the following conditions:

> "Pay $15.00 fine and costs. Pay into the Court the Sum of $7,326.29 for the use and benefit of North Carolina National Bank, Greensboro, N. C. Payments to be made at $200.00 per month and 1st payment to begin 11-1-68 and 1st of each month thereafter until the entire amount of $7,326.29 is paid. Shall be on a general good behavior and not violate any criminal laws of the State of North Carolina for 4 years."

The defendant paid the $15.00 fine and costs. On 2 December 1968, the case was transferred from the Municipal-County Court to the District Court of Guilford County pursuant to G.S. 7A-135. On 10 January 1969, the District Court, with the consent of the defendant, amended the judgment to provide that the payments for the benefit of the bank be made directly to it.

On 3 April 1969, the State moved for the issuance of a capias and the rendition of final judgment, filing with the motion a bill of particulars alleging the entry of the above judgment and that "de-

fendant failed to comply with said conditions in that he failed to make payments into the court as ordered and is now $820.00 in arrears."

On 5 June 1969, the District Court heard the matter and found as a fact: "The defendant wilfully failed and refused to comply with the judgment in the above entitled cause in that he wilfully violated the Terms of Suspended Sentence." It thereupon ordered the sentence placed into effect, and from that order the defendant appealed to the Superior Court of Guilford County.

On 10 September 1969, the matter came on for hearing in the Superior Court before May, J. The defendant moved in arrest of judgment on the grounds that: (1) The Municipal-County Court had no jurisdiction "to render a verdict of guilty of a misdemeanor in that the only process it had before it charged a felony;" and (2) "the warrant charges no crime in that it charges the defendant 'purchased' certain items by use of a credit card and does not charge that the items were not paid for or that anyone was actually defrauded by said 'purchases', while the crime is 'obtaining property' by fraudulent use of a credit card." Both motions were denied.

The Superior Court then conducted a "hearing de novo with respect to the revocation of the suspended sentence." It found as facts the taking of the foregoing procedural steps and that "the defendant was on the date of his hearing in the District Court several hundred dollars in arrears on the restitution payments required by the terms of his suspended sentence; that this constituted a wilful and deliberate violation of the terms of said suspended sentence and said violation was without just cause or excuse." It concluded "as a matter of law that the defendant * * * wilfully violated the terms of said sentence and the said violation was without just cause and excuse." Thereupon, the Superior Court "ratified and confirmed" the judgment of the District Court and ordered that "capias and commitment issue to the end that the active sentence be placed into effect."

The defendant appealed to the Court of Appeals assigning as error only the denial of his two motions in arrest of judgment. The Court of Appeals held that the two assignments of error are without merit, but the exception to the judgment challenges the sufficiency of the judge's findings of fact. On this point, it held the Superior Court's finding that the defendant had violated the terms of the suspended sentence and was in arrears on 3 April 1969 in excess of $800.00 is not sufficient to support its conclusion that "this constituted a wilful and deliberate violation of the terms of said suspended

sentence and said violation was without just cause and excuse." For this reason, the Court of Appeals vacated the judgment of the Superior Court and remanded the proceeding for further hearing in order that the Superior Court might determine, in its discretion, whether the failure of the defendant to make the required payments was without lawful excuse.

Attorney General Morgan and Christine Y. Denson, Staff Attorney, for the State.

John W. Hinsdale for defendant appellant.

LAKE, J.

The record presents this question: Assuming the failure of the defendant to make the payments to the bank was wilful and without lawful excuse, may the sentence to jail be placed into effect for this failure? We hold that it may not.

The Constitution of North Carolina, Article I, § 16, provides, "There shall be no imprisonment for debt in this State, except in cases of fraud." The defendant, charged with the use of a revoked bank credit card with intent to defraud the bank, entered a plea of guilty. Nothing else appearing, the foregoing provision of the Constitution would not prevent his imprisonment for such conduct. However, the court which imposed the sentence to imprisonment suspended the sentence upon three specified conditions, to which the defendant consented.

[1-4] "Where a sentence in a criminal case is suspended upon certain valid conditions expressed in the sentence imposed, the prisoner has a right to rely upon such conditions, and so long as he complies therewith the sentence should stand." *State v. Robinson,* 248 N.C. 282, 285, 103 S.E. 2d 376. *Accord: State v. Seagraves,* 266 N.C. 112, 145 S.E. 2d 327; *State v. Rogers,* 221 N.C. 462, 20 S.E. 2d 297. A defendant, having consented, expressly or by implication, to the suspension, upon specified conditions, of an otherwise valid sentence to imprisonment, may not thereafter attack the validity of an order putting such sentence into effect, entered after due notice and hearing, except: (1) On the ground that there is no evidence to support a finding of a breach of the conditions of suspension; or (2) on the ground that the condition which he has broken is invalid because it is unreasonable or is imposed for an unreasonable length of time. *State v. Cole,* 241 N.C. 576, 86 S.E. 2d 203; *State v. Smith,* 233 N.C. 68, 62 S.E. 2d 495; *State v. Miller,* 225 N.C. 213, 34 S.E. 2d 143. The defendant's consent to the suspension of the prison sentence does not,

however, preclude him from contesting the reasonableness of the condition which he has broken, when such breach is made the ground for putting the prison sentence into effect. *State v. Griffin,* 246 N.C. 680, 100 S.E. 2d 49. As to the right of such defendant to challenge in the subsequent proceeding the validity of the condition upon which sentence was suspended, see also: *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476; *State v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53; *State v. Seagraves, supra; State v. Robinson, supra.* General statements found in *State v. Collins,* 247 N.C. 248, 100 S.E. 2d 492, and in *State v. Henderson,* 207 N.C. 258, 176 S.E. 758, to the effect that a defendant, having accepted a suspended sentence without appeal, cannot thereafter attack the validity of the conditions of such suspension, are in conflict with this well established rule and are, therefore, not approved. A condition which is a violation of the defendant's constitutional right, and, therefore, beyond the power of the court to impose, is *per se* unreasonable and subject to attack by the defendant upon the State's subsequent motion to put the sentence into effect for violation of that condition. See: *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651; *State v. Doughtie,* 237 N.C. 368, 74 S.E. 2d 922; *Myers v. Barnhardt,* 202 N.C. 49, 161 S.E. 715; *State v. Whitt,* 117 N.C. 804, 23 S.E. 452.

This Court has recognized the authority of the trial court to impose a prison sentence and suspend the same upon condition that the defendant make compensatory payments to the person injured by his criminal act. See: *State v. Robinson, supra; State v. Simmington,* 235 N.C. 612, 70 S.E. 2d 842; *Myers v. Barnhardt, supra; State v. Whitt, supra.* In the *Simmington* case, the Court said that the question of whether the activation of a prison sentence for the defendant's failure to make such compensatory payments amounted to imprisonment for debt in violation of the above quoted constitutional provision was not before it, but then went on to sustain the order activating the sentence, saying, "When he is imprisoned, he will be imprisoned for his breach of the criminal law and not for the failure to pay damages."

[5] We have found no decision of this Court sustaining an order putting into effect a prison sentence for the failure of the defendant to pay obligations incurred by him otherwise than as the result of the act for which he was originally convicted, with the exception of the obligation imposed by law for the support of the defendant's wife or child. In our opinion, it is not sufficient to say, as was said in *State v. Simmington, supra,* that when such defendant is imprisoned he will be imprisoned for his criminal act and not for his nonpayment of his debt. The purpose of the above quoted provision of our Con-

stitution was to prevent the use of the criminal process to enforce the payment of civil obligations, directly or indirectly. To suspend a sentence of imprisonment for a criminal act, however just the sentence may be *per se*, on condition that the defendant pay obligations unrelated to such criminal act, however justly owing, is a use of the criminal process to enforce the payment of a civil obligation and lends itself to the oppressive action which the provision of the Constitution was designed to forbid. To sustain the suspension of sentence upon such a condition would invite misuse of the practice of suspending sentence. It would substitute for the humane consideration and the objective of reformation, upon which the practice ought to rest, an entirely different purpose. See: *State v. Hilton*, 151 N.C. 687, 65 S.E. 1011; *State v. Doughtie, supra.*

[6] In the present case, the sentence of imprisonment was suspended upon three conditions: (1) Payment of a fine and costs; (2) payment "of $7,326.29 for the use and benefit of North Carolina National Bank"; and (3) remaining on general good behavior and not violating any criminal law of the State. It is not contended that the first or the third of these conditions has been broken by the defendant. He has now been ordered to jail because he has not paid the sum of money which, presumably, he lawfully and justly owes the bank. There is nothing whatever in this record to show that such indebtedness, over and above the $631.78 mentioned in the warrant, was contracted fraudulently or that it grew out of the defendant's use of the bank credit card. It is obvious from the face of the warrant upon which the defendant was tried that the major part of this indebtedness was not created by the criminal acts to which the defendant entered his plea of guilty. If, indeed, this indebtedness, or any part thereof, arose out of some other use of the credit card issued by the bank to this defendant, which use was a violation of the criminal law, the right of the State to try the defendant therefor upon proper criminal process is not before us in this case.

We do not have before us for determination the validity of the statutory provision that a series of independent and unrelated misuses of a bank credit card, each constituting a misdemeanor within itself, will, in their totality, constitute a felony, if they all occurred within a specified period of time. See: G.S. 14-113.13; G.S. 14-113.17. It is also unnecessary to determine in this case whether the process upon which the defendant is charged with the violation of G.S. 14-113.13 must charge each wrongful use of the card in a separate count.

The sole question before us is whether the second condition upon which the defendant's sentence was suspended is valid. We hold it is not and, therefore, the order of the Superior Court putting the prison sentence into effect because of his breach of this condition was error and must be vacated, irrespective of wilfulness or want of lawful excuse for the breach of the condition.

The Court of Appeals was in error in remanding this matter to the Superior Court for further hearing. It should have simply vacated the order of the Superior Court which put the prison sentence into effect, without prejudice to the right of the State to move for activation of the sentence if the defendant has violated, or hereafter violates, the third condition upon which the sentence was originally suspended. The matter is hereby remanded to the Court of Appeals for the entry of a judgment in accordance with this opinion.

Error and remanded.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. ASHEVILLE SCHOOL, INC.

No. 24

(Filed 13 May 1970)

1. Eminent Domain § 3; Highways and Cartways § 1— public purpose — private road

The Highway Commission can condemn property only for a public purpose and cannot take the land of one property owner for the sole purpose of constructing a road for the private use of another.

2. Eminent Domain § 3— public or private purpose — question for courts

When the facts are determined, the question of whether a proposed road will serve a public or private purpose is one of law for the courts.

3. Eminent Domain § 1; Highways and Cartways § 4— access road for landlocked property — "frontage road"

Road constructed by the Highway Commission to provide access to private property which would otherwise be landlocked by construction of a controlled-access highway is a "frontage road" within the meaning of G.S. 136-89.52. G.S. 136-89.49.

4. Eminent Domain § 3— public or private purpose — incidental private benefit

The exercise of the power of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that inci-

dentally a private use or benefit will result which would not of itself warrant an exercise of the power.

5. Eminent Domain § 3— condemnation to provide access to property landlocked by highway construction — public purpose — statutory authority

Condemnation of land by the State Highway Commission to provide access to private property which otherwise would have been landlocked by the Highway Commission's construction of a controlled-access interstate highway was for a public purpose and was authorized by G.S. 136-19, G.S. 136-89.49 and G.S. 136-89.52.

MOORE, J., did not participate in the consideration or decision of this case.

APPEAL by defendant under G.S. 7A-30(1) to review the decision of the Court of Appeals (5 N.C. App. 684, 169 S.E. 2d 193) reversing judgment of *McLean, J.*, 14 October 1968 Civil Session of BUNCOMBE, docketed and argued in the Supreme Court as Case No. 42 at the Fall Term 1969.

Plaintiff, North Carolina State Highway Commission, instituted this action on 11 May 1964 to condemn seven separate areas, totaling approximately 5.6 acres and contained within a 277-acre tract belonging to defendant. In its complaint and declaration of taking plaintiff asserted: (1) Those portions of defendant's property, shown on plan sheets 12, 13, 14, and 15-A attached to the complaint, are required for the construction of State Highway Project 8.19095. (This project involved the construction of a section of Interstate Highway No. 40 and the relocation of the Sand Hill Road to overpass it.) (2) Plaintiff condemns the described lands under the authority of G.S. 136-19 and G.S. 136-103 *et seq.* and takes a "fee simple title to right of way and additional easement, in perpetuity, for construction for all purposes for which the plaintiff is authorized by law to subject the same." Access is controlled and limited solely to the points designated on the plan sheets. (3) Plaintiff's estimate of just compensation for the land taken is $4,300.00 which has been deposited to defendant's credit with the Clerk of the Superior Court of Buncombe County.

Thereafter defendant withdrew the deposit and filed answer admitting all material allegations of the complaint but alleging its damage to be $30,000.00.

A consent order was entered by Anglin, J., on 20 October 1966 adjudging (1) that all issues other than the issue of damages had been resolved by consent of the parties; (2) that the State Highway Commission acquired a fee simple title to tracts 1-6 and a drainage easement in the seventh tract; and (3) that access was fully con-

trolled on new right-of-way tracts 3, 4, and 6 and on that portion of new right-of-way tract 5 lying south of a line marked "C/A" (controlled access) as shown on the official map of the project.

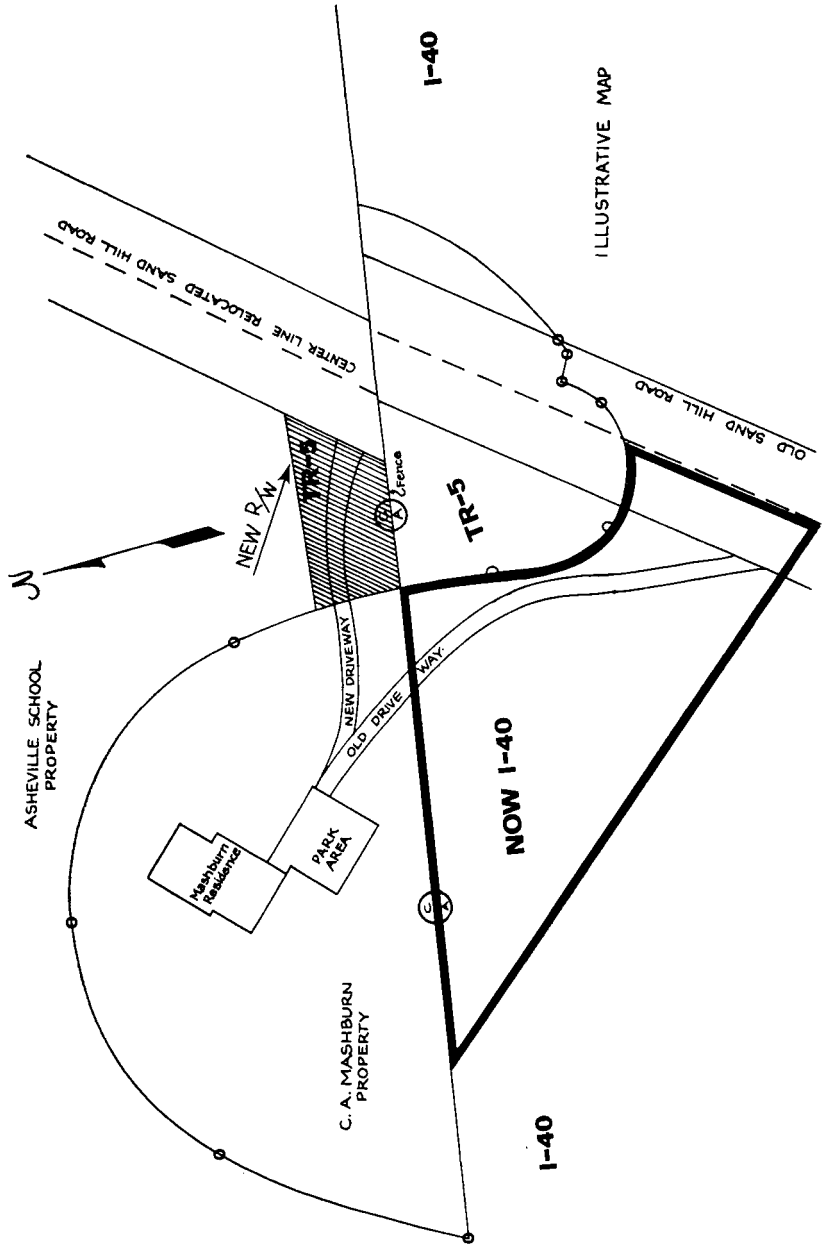
Tract No. 5 is the southeastern corner of defendant's property and contains .335 acres. This appeal, however, involves only that portion of tract 5 (containing .074 acres) which lies north of the line C/A, the shaded area on the illustrative map inserted in this opinion. The approximate dimensions of the area are 40 x 90 x 50 x 100 feet.

It is established by stipulation that C. A. Mashburn owned 1.5 acres adjoining the southeast corner of defendant's lands. On this tract is located the Mashburn one-family residence. Plaintiff required that portion of the Mashburn property lying south of the line C/A for Project 8.19095, the area within the heavy black lines on the illustrative map. The only access to the Mashburn property was a driveway through this area to the Sand Hill Road. The condemnation of the area within the heavy black lines would leave the remaining Mashburn tract landlocked.

On 3 June 1964, in consideration of $8,300.00 and plaintiff's agreement to relocate their driveway and a waterline, Mr. and Mrs. Mashburn conveyed to plaintiff the property within the heavy black lines. The conveyance specified that the relocated driveway would be 12 feet in width, approximately 105 feet long, surfaced with crushed stone and connected with Sand Hill Road. There was no other written agreement between plaintiff and the Mashburns, and there has been no conveyance of any lands or easement from plaintiff to the Mashburns. Plaintiff constructed the driveway over the hatched portion of tract 5 as shown on the illustrative map. Had not plaintiff utilized that part of tract 5 as an access road the Mashburn property would have been completely landlocked, and plaintiff's evidence tended to show it would have had to pay the Mashburns about $40,000.00 for their property.

On 10 May 1968 defendant moved for permission to amend its answer in order to allege: That part of tract 5 lying north of line C/A and east of the Mashburn property line was not required for a public purpose; it was taken for a private purpose "in that the same was appropriated to provide the said C. A. Mashburn with a private driveway leading across the property of this defendant . . . ." Judge McLean allowed the amendment on 11 June 1968. By this amendment defendant attempted, for the first time, to challenge plaintiff's power to condemn a portion of its property.

Thereafter plaintiff amended its complaint and declaration of


ILLUSTRATIVE MAP
I-40
CENTER LINE RELOCATED SAND HILL ROAD
OLD SAND HILL ROAD
NEW R/W
TR-6
TR-5
Fence
NEW DRIVEWAY
OLD DRIVE WAY
NOW I-40
ASHEVILLE SCHOOL PROPERTY
Mashburn Residence
PARK AREA
C. A. MASHBURN PROPERTY
I-40

taking to allege that it proceeded in this action under the authority of G.S. 136-19 *et seq.*, G.S. 136-18, G.S. 136-54, and G.S. 136-89.48 through G.S. 136-89.58. In a reply to the amended answer it alleged, *inter alia:* (1) When defendant withdrew the deposit on 21 May 1964 it had knowledge that plaintiff was taking the land for the purpose of providing access to the Mashburn lands, and by the withdrawal it waived any right to contest the propriety of the taking; and (2), having waited three and a half years after the completion of the driveway before amending its answer, defendant is barred by its laches from contesting plaintiff's right to take the land.

Subsequently, defendant amended its answer to allege that if G.S. 136-18(6) "purports to give plaintiff the power to condemn excess lands beyond those necessary for use in the road right of way or for maintenance. . . ." the same is unconstitutional and a violation of § 17, Article I of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States.

On 14 October 1968 Judge McLean heard this matter upon stipulations and evidence offered by both parties. In addition to facts substantially as detailed above, he found the following: (1) That portion of tract No. 5 north of the line C/A is not necessary for the maintenance or lateral support of the relocated Sand Hill Road. (2) The only reason plaintiff attempted to condemn that area was to provide access to the Mashburn property from relocated Sand Hill Road. (3) Defendant had no knowledge of the use to which plaintiff intended to put the area in dispute at the time it filed answer or on 20 October 1966, the date of the consent order settling the issues. Judge McLean concluded as a matter of law that the disputed area was not needed for a public purpose, and the taking was therefore unconstitutional. He also adjudged (1) that defendant was not bound by the consent order of 20 October 1966 and that it had not waived its "right to oppose the taking of its property for private purposes"; and (2) that plaintiff had not acquired title to the disputed area. Whereupon, he ordered plaintiff "to return dominion and control of said lands" to defendant.

Plaintiff excepted to the court's findings of fact and conclusions of law and appealed. The Court of Appeals reversed. It held: (1) In providing the landlocked Mashburn property access to Sand Hill Road over the disputed area, plaintiff was acting within its statutory and constitutional authority for a public purpose. (2) The consent order of 20 October 1966 (which defendant did not move to vacate or modify), was res judicata of plaintiff's right to condemn all of tract No. 5. (3) Defendant's withdrawal and retention of the deposit

which plaintiff had made on 11 May 1964 precluded defendant from questioning plaintiff's right to condemn all the lands described on the plan sheets attached to the complaint.

Relying upon G.S. 7A-30(1), defendant appealed to the Supreme Court alleging the violation of rights guaranteed to it by Article I § 17 of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States.

Robert Morgan, Attorney General; Harrison Lewis, Deputy Attorney General; and I. B. Hudson, Jr., Trial Attorney, for the State.

Bennett, Kelly & Long for defendant appellant.

SHARP, J.

Defendant bases its right of appeal to this Court upon the premise that plaintiff's taking of the .074-acre tract in dispute involves a substantial constitutional question. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376, *cert. denied,* 393 U.S. 1087. The appeal presents this question: In building a controlled-access highway, is the State Highway Commission empowered to condemn land reasonably necessary to furnish access to private property which would otherwise be landlocked by the construction?

An unfortunate, but unavoidable, consequence of the construction of limited-access highways is the destruction of the egress and ingress of abutting landowners. However, by G.S. 136-19, the State Highway Commission is authorized to acquire by purchase, donation, or condemnation such land and interests in land "as it may deem necessary and suitable for road construction, maintenance, and repair, and the necessary approach and ways through."

In the establishment of controlled-access facilities the Highway Commission is also granted leave to condemn private property for "service or frontage roads." G.S. 136-89.52. Such a road is defined as "a way, road or street which is auxiliary to and located on the side of another highway, road or street for service to abutting property and adjacent areas and for the control of access to such other highway, road or street." G.S. 136-89.49. In addition, G.S. 136-18(16) authorizes the Highway Commission to acquire title to land for the purpose of exchanging it for other realty to be used in establishing highways or removing dangerous obstructions at intersections.

[1, 2] It is elementary law that the Highway Commission can condemn property only for a public purpose and that it cannot take the land of one property owner for the sole purpose of constructing

a road for the private use of another. *Highway Commission v. Batts,* 265 N.C. 346, 144 S.E. 2d 126; *Charlotte v. Heath,* 226 N.C. 750, 40 S.E. 2d 600. Any highway condemnation proceeding, however, may incite controversy as to whether the proposed road will serve a public or private purpose. *Highway Commission v. Thornton,* 271 N.C. 227, 156 S.E. 2d 248; *Highway Commission v. Batts, supra.* This question, when the facts are determined, is one of law for the courts. *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688.

[3] Plaintiff did not purport to condemn the access road into the Mashburn property under G.S. 136-18(16). It retains title to the .074-acre tract in question, which is shown on the official map of Project No. 8.19095 as part of the new right of way of the Sand Hill Road. Thus the constitutionality of G.S. 136-18(16), debated in defendant's brief, is not at issue on this appeal. The "Mashburn road" comes within the statutory definition of a frontage road. G.S. 136-89.49. As such it would also be available to provide access to defendant's abutting property if the nature of the terrain permits. However, at the present time it serves only one individual's land, and the question is whether such a road constitutes a public or a private use.

Defendant, contending that the road serves only a private use relies upon *State Highway Commission v. Batts, supra,* to prevent the taking. The facts in *Batts,* however, bear no relation to this case. In *Batts,* plaintiff sought to condemn land for Project No. 5.322, a secondary road designed to serve five farm properties on which were four houses. The occupants were all members of the Batts family. It was to begin at the boundary of another secondary road and run 3,316 feet to a dead end. In a four-to-three decision, this Court held that the Batts road would serve only a private purpose and proscribed the condemnation. Project 5.322 was entirely a Batts project, instigated by the written request of Mr. and Mrs. Batts. The Mashburn road is auxiliary to, and necessitated by, the construction of Interstate Highway No. 40. It is an incidental part of a comprehensive and complex highway project of national significance.

[4] Even though the principal use of the Mashburn drive is to provide access to private property, the public interest required its establishment, and the public purpose for which the land was taken continues to be accomplished. *Redevelopment Commission v. Bank, supra.* The applicable rule is well stated in 26 Am. Jur. 2d *Eminent Domain* §§ 32, 33 at pages 681, 684 (1966): "[T]he exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or

benefit will result which will not of itself warrant the exercise of a power. . . . The controlling question is whether the paramount reason for the taking of the land to which objection is made is the public interest, to which benefits to private interests are merely incidental, or whether, on the other hand, the private interests are paramount and controlling and the public interests merely incidental."

In *Luke v. Massachusetts Turnpike Authority,* 337 Mass. 304, 149 N.E. 2d 225 (1958), a condemnation proceeding equivalent to the instant case, the Supreme Judicial Court of Massachusetts applied the foregoing rule to an access route such as the Mashburn way. It concluded that its acquisition was merely one incident of the huge undertaking of constructing a turnpike across the State and that it "would be closing the eyes to reality" to say that such an access road served no public purpose. "Procuring an easement and creating a right of way for the benefit of parcels of land incidentally deprived of all or of some means of access to an existing way are but a by-product of that undertaking." *Id.* at 309, 149 N.E. 2d at 228.

In construing a statute containing language almost identical with that of G.S. 136-89.49(3) and G.S. 136-89.52, the Supreme Court of Indiana (relying upon *Luke v. Massachusetts Turnpike Authority, supra*) held that a service road alleviating "a landlocked condition" caused by the construction of a freeway constituted a public use "whether such road served one property owner or many." *Andrews v. State,* 229 N.E. 2d 806 (Ind. 1967). Incidentally, the Court noted that "if the State of Indiana is not in a position to minimize the damages paid to landowners, then the cost of interstate highways would soar astronomically and Indiana would be dotted abnormally with landlocked real estate." *Id.* at 810.

Reason supports the "by-product" rationale, and it has been adopted by the majority of courts deciding the question here presented. The cases are collected and cited in the opinion of the Court of Appeals. *Highway Commission v. School,* 5 N.C. App. 684, 691, 169 S.E. 2d 193, 197. See also *Brown v. United States,* 263 U.S. 78; *Pitznogle v. Western Md. R. R. Co.,* 119 Md. 673; *Smouse v. Kansas City S. Rlw. Co.,* 129 Kan. 176, 282 P. 183.

[5] We hold that the taking of defendant's .074-acre tract to provide access to the Mashburn land, landlocked by the construction of Interstate Highway No. 40, was for a public purpose and that G.S. 136-19, G.S. 136-89.49, and G.S. 136-89.52 authorized the con-

demnation. This decision renders moot defendant's assignments of error involving the questions of waiver and estoppel by judgment.

The decision of the Court of Appeals is

Affirmed.

MOORE, J., did not participate in the consideration or decision of this case.

A. P. CARLTON v. W. H. ANDERSON AND RANDALL SHEPPARD

No. 45

(Filed 13 May 1970)

Frauds, Statute of § 7; Boundaries § 10; Vendor and Purchaser § 3— option contract — description of land

Description in an option contract referring to the land to be conveyed as "a certain tract or parcel of land located in ..... Township, Guilford County, North Carolina, and described as follows: About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85" *is held* insufficient to comply with the statute of frauds, and consequently the option is unenforceable. G.S. 22-2.

APPEAL by defendants from the decision of the North Carolina Court of Appeals reversing a judgment of nonsuit entered in the Superior Court of GUILFORD County at its July 7, 1969 Session. The decision of the Court of Appeals was written by Judge Brock, and concurred in by Judge Graham. However, Judge Britt, the third member of the panel, filed a dissent. The defendants appealed to this Court as a matter of right.

The plaintiff instituted this action on March 12, 1969, and filed a verified complaint in which he alleged that the defendants, in consideration of $500 paid and $39,500 to be paid, agreed to convey to the plaintiff certain lands described as follows:

> ". . . a certain tract or parcel of land located in ..... Township, Guilford County, North Carolina, and described as follows: About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85."

The plaintiff alleged that within the time specified in the option, he tendered to the defendants the sum of $39,500, and demanded a deed for the described tract of land. The defendants refused to

execute a deed. The plaintiff alleged the land, at the time he demanded the deed, was reasonably worth $100,000; that he had been damaged by the defendants' wrongful breach of the contract in the sum of $60,500, for which he demanded judgment.

The defendants, by answer, admitted that they executed the paperwriting and that they received $500 from the plaintiff, which they agreed to return. They further admitted that the plaintiff had tendered $39,500 and demanded a deed, which they refused to execute. As a plea in bar of the plaintiff's right to recover, the defendants alleged the paperwriting, a copy of which was attached to the complaint and made a part of it, was insufficient to identify any tract of land and did not comply with G.S. 22-2, which required such agreement to be in writing.

After hearing, Judge Peel entered judgment sustaining the plea in bar, ordered the defendants to return to the plaintiff the $500 which had been advanced. From the judgment sustaining the plea in bar and dismissing the action, the plaintiff appealed to the North Carolina Court of Appeals, which reversed the judgment. Judge Britt dissented. The defendants appealed to this Court.

Booth, Fish & Adams by J. Patrick Adams and H. Marshall Simpson for the plaintiff.

Jordan, Wright, Nichols, Caffrey & Hill by Luke Wright and Edward L. Murrelle for the defendants.

HIGGINS, J.

This case presents one clear-cut question of law. Does the memorandum signed by the defendants contain a description of the land sufficiently definite to meet the requirements of the statute of frauds? The requirements are easily stated. Difficulty arises in their application. Some descriptions are so precise and definite as to leave no doubt about their sufficiency. Others are so vague and indefinite as to leave no doubt as to their insufficiency. Somewhere between these extremes is a dividing line. Near the line on either side is a twilight zone where the court must decide on which side a contested description falls. Trouble arises in the borderline cases.

G.S. 22-2, in material substance, provides all contracts to sell and convey land or any interest therein ". . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized". Many times this Court has been confronted with and has decided the question whether a

description is sufficiently definite to identify the land involved. The cases are listed and annotated in Volume D1, Michie's Replacement, 1965, and in the 1969 Cumulative Supplement thereto. The general rule governing decision was stated in *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593 (opinion by Winborne, J., later C.J.):

> "This Court has uniformly recognized the principle that a deed conveying land, or a contract to sell or convey land, or a memorandum thereof, within the meaning of the statute of frauds, G.S., 22-2, must contain a description of the land, the subject matter thereof, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed, contract or memorandum refers."

We quote here the full description as disclosed in the written memorandum: ". . . a certain tract or parcel of land located in ..... Township, Guilford County, North Carolina, and described as follows: About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85." It is obvious the memorandum is sufficient to locate the intersection of the two roads. The compass will properly locate the northeast of the intersection. The description will place the beginning corner at the intersecting point of the roads. Assuming that one of the boundary lines is on Mt. Hope Church Road and the other is on Interstate 85, how are we to determine the length of each line and how are we to find the closing lines necessary to include a tract of land? We must find the location of the boundary lines from the writing, or from something referred to therein. Patently, the writing is not sufficient to complete a description. Any tract or parcel of land containing about four acres *at the intersection* is the complete description. The writing refers to nothing more. Actually, only one point in the possible perimeter is fixed by the written description — the intersection of the church road and I-85. A surveyor can locate the point of the intersection. Thereafter, nothing else is certain or capable of being made certain by anything referred to in the writing.

We hold the memorandum insufficient to meet the requirements of G.S. 22-2, for the writing itself does not point to anything except two roads. These roads do not enclose any boundary. *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759; *Kelly v. Kelly,* 246 N.C. 174, 97 S.E. 2d 872; *Deans v. Deans,* 241 N.C. 1, 84 S.E. 2d 321; *Breaid v. Munger,* 88 N.C. 297. The trial court was correct in sustaining the plea in bar. The Court of Appeals committed error in reversing the judgment. The decision is

Reversed.

STATE OF NORTH CAROLINA v. RICHARD WILLIAM ACCOR

— AND —

STATE OF NORTH CAROLINA v. WILLARD MOORE

No. 26

(Filed 13 May 1970)

1. Criminal Law § 160— correction of court minutes — patent error — remand

Criminal action is remanded to the superior court for correction of patent errors appearing on the face of the official minutes, where (1) the minute entries are in irreconcilable conflict with respect to the verdicts against the defendants and (2) the minute entries show that fourteen jurors were selected, sworn and empanelled but the entries are silent as to when the alternate jurors were excused.

2. Criminal Law § 160— correction of minutes — superior court

The correction of the official minutes of the superior court must be made in the superior court.

APPEAL by defendants from *May, Special Judge,* May 26, 1969 Session of GASTON Superior Court, docketed and argued as No. 55 at Fall Term 1969.

Defendants were tried upon the following bill of indictment, *viz.:*

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Richard William Accor and Willard Moore late of the County of Gaston on the 4th day of March, 1969, about the hour of 2:15 AM in the night of the same day, with force and arms, at and in the county aforesaid, the dwelling house of one Mr. and Mrs. Witt Martin, 1609 Jackson Road, Gastonia, North Carolina, there situate, and then and there actually occupied by Mr. and Mrs. Witt Martin, James Martin, Elizabeth Martin Carson feloniously and burglariously did break and enter, with intent, the goods and chattels of the said Mr. and Mrs. Witt Martin, James Martin, Elizabeth Martin Carson in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away clothing, goods, and other personal property of Mr. and Mrs. Witt Martin, James Martin and Elizabeth Martin Carson against the peace and dignity of the State."

At trial, each defendant was represented by court-appointed counsel, defendant Moore by Steve Dolley, Esq., of the Gaston Bar, and defendant Accor by Tim L. Harris, Esq., of the Gaston Bar.

Evidence was offered by the State and by each defendant.

After the verdicts, judgments and appeal entries referred to below, the court was advised that private counsel had been retained to

represent defendants. Thereupon, in accordance with their motions, the court entered orders allowing Messrs. Dolley and Harris to withdraw as counsel for the respective defendants.

The record on appeal is voluminous, containing 482 mimeographed and single-spaced pages. Multiple questions are raised by the assignments of error and by the appellants' brief.

The record certified to this Court shows, as the official minute entries in the office of the Clerk of the Superior Court of Gaston County in respect of the verdicts, the following:

"*JURORS — VERDICT (Accor)*

"The defendant pleads Not Guilty, whereupon the following jurors were selected, sworn, and empanelled in the above entitled case:

1. William R. Dameron
2. Basil E. Ballard
3. Ralph J. Harrison
4. Gilmer E. Saunders
5. Roger W. Yates
6. Alene O. Holloway
7. Elmer D. Thomas
8. William L. Spears
9. Rufus G. Hardin
10. Mildred H. Oates
11. R. T. Beam
12. Earsel F. Liggon
13. James P. Bigham
14. Walter A. Rials

(a) At the close of the State's evidence, the court orders a verdict of Not Guilty.

(b) At the close of the State's evidence, the defendant pleads Guilty.

(c) The jury heretofore sworn and empanelled to try the issue for their verdict say that the defendant is *Found* Guilty, of the charge of First Degree Burglary.

"This the 11th day of June, 1969.

/s/ Patricia M. Leigh
Deputy Clerk Superior Court.

"*JURORS — VERDICT (Moore)*

"The defendant pleads Not Guilty, whereupon the following jurors were selected, sworn, and empanelled in the above entitled case: William R. Dameron and 13 others, as named above.

(a) At the close of the State's evidence, the court orders a verdict of not guilty.

(b) At the close of the State's evidence, the defendant pleads Guilty.

(c) The jury heretofore sworn and empanelled to try the issue for their verdict say that the defendant is *Found* Guilty, of the charge of First Degree Burglary.

"This the 11th day of June, 1969.

/s/ Patricia M. Leigh
Deputy Clerk Superior Court."

The record before us shows that the official minute entries in the office of the Clerk of the Superior Court of Gaston County contain, *as to each defendant,* the following record in respect of the plea, verdict, judgment and commitment.

"In open court, the defendant appeared for trial upon the charge or charges of First Degree Burglary and thereupon entered a plea of Not Guilty.

"Having been found guilty of the offense of Burglary in the First Degree with recommendation that the punishment be imprisonment for life in the State's Prison, which is a violation of G.S. 14-51 and of the grade of felony.

"It is ADJUDGED that the defendant be imprisoned for the term of his natural life in the State's Prison in Raleigh, N. C.

"It is ORDERED that the Clerk deliver two certified copies of this judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction."

Notice of appeal was given by each defendant.

Attorney General Morgan, Deputy Attorney General Moody and Assistant Attorney General Harrell for the State.

Chambers, Stein, Ferguson & Lanning by J. LeVone Chambers for defendant appellants.

BOBBITT, C.J.

[1] Decision of the questions raised by defendants' assignments of error and discussed in their brief must be deferred until the patent error appearing on the face of the official minutes has been corrected by appropriate proceedings.

In respect of the verdicts as recorded in the official minutes, the portions designated (a), (b) and (c) are in irreconcilable conflict. Obviously, these minute entries were made within the framework of

a form which, if used as intended, contemplated that in any case where a verdict of guilty was returned the portions designated (a) and (b) would be stricken. Moreover the portion designated (c) shows the jury found defendant "Guilty of the charge of First Degree Burglary," but does not show the jury recommended that the punishment be imprisonment for life in the State's prison.

The case on appeal contains a statement of the proceedings when the verdicts were taken. It sets forth that, as to each defendant, the verdict as announced by the foreman of the jury was that each defendant "is guilty of burglary in the first degree with recommendation that the punishment be imprisonment for life in the State's prison . . ." Too, it shows that, as to each defendant, the jury was polled and each juror then agreed and assented to that verdict.

Moreover, as stated in the quoted official minutes, fourteen jurors were selected, sworn and empanelled. This is in accord with what is set forth in the case on appeal. The case on appeal indicates the alternate jurors were not on the jury when the verdicts were returned and the jurors were polled. However, both the official minutes and the case on appeal are silent as to when the alternate jurors were excused.

[2] The official minutes must be corrected to speak the truth in respect of the verdicts and in respect of when the alternate jurors, James P. Bigham and Walter A. Rials, were excused. The corrections of the official minutes of the superior court must be made in the superior court. *State v. Old,* 271 N.C. 341, 156 S.E. 2d 756, and cases cited.

The following from the opinion of Higgins, J., in *State v. Old, supra,* is equally applicable to the present factual situation: "(I)t becomes the duty of this Court, under its supervisory power, to remand the action to the Superior Court with directions that notice be given to counsel and parties, and after hearing, to certify any corrections necessary to make the record conform to the facts. In a criminal case, the solicitor should be given notice as well as defense counsel, and the defendant should be before the Court. It is the duty of the Superior Court to correct its own records in the manner pointed out by this Court in *State v. Cannon, supra* (244 N.C. 399, 94 S.E. 2d 339), and *State v. Stubbs,* 265 N.C. 420, 144 S.E. 2d 262."

The use of the form here involved in making minute entries has resulted in serious and recurring errors. The pitfalls are so great, the use of this form should be discontinued.

The action is remanded to the superior court for correction of the official minutes. As soon as made, the corrections shall be certi-

fied to this Court and attached to and made a part of the record on appeal.

Remanded for correction of superior court records.

IN THE MATTER OF THE IMPRISONMENT OF E. H. HENNIS

No. 34

(Filed 13 May 1970)

1. Contempt of Court §§ 2, 4— direct contempt — picketing courthouse — sufficiency of findings to support wilful interference with trial

A petitioner who was picketing the courthouse in which a superior court judge was holding trial cannot be punished for direct contempt of court on the ground that his conduct constituted a wilful interference with the trial, where there are no findings in the judge's contempt order, and no evidence in the record sufficient to support findings, that petitioner had knowledge that court was in session or that his conduct was interfering with the regular conduct of business at a court session.

2. Habeas Corpus § 2; Courts § 9— review of contempt order — authority of another trial judge

A superior court judge in a *habeas corpus* proceeding has no authority to reverse or modify the order of another superior court judge which held the petitioner in contempt of court; however, the judge does have authority to order the release of petitioner on bond while petitioner seeks to have the contempt orders reviewed on *certiorari* by the Court of Appeals.

ON *certiorari* to the Court of Appeals to review its decision reported in 6 N.C. App. 683, which affirmed an order entered July 22, 1969, by *May, Special Judge,* pursuant to *habeas corpus* hearing.

The petition of E. H. Hennis asserted he was illegally imprisoned in the Guilford County jail pursuant to orders entered July 16, 1969, by His Honor, Allen H. Gwyn, Superior Court Judge then presiding at the July 14, 1969 Session of Guilford Superior Court. Judge Gwyn found Hennis guilty of direct contempt of court and, as punishment therefor, sentenced him to jail for twenty days.

The hearing before Judge May, Superior Court Judge then presiding at the July 21, 1969 Session of Guilford Superior Court, was on Hennis' petition and Judge Gwyn's orders. Judge May made no findings of fact. He denied Hennis' petition on the grounds that the orders of Judge Gwyn were not void and, if erroneous, could be cor-

rected only by an appellate court. However, Judge May ordered the release of Hennis on bond pending appellate review.

Hennis excepted to Judge May's order and gave notice he would apply to the Court of Appeals for review on *certiorari.*

On September 3, 1969, the Court of Appeals granted Hennis' petition for *certiorari* to review Judge May's order. The Court of Appeals affirmed "(t)he order entered by Judge May denying petitioner's release on writ of habeas corpus." Judge Gwyn's findings of fact are set forth in the opinion of the Court of Appeals. On February 11, 1970, this Court allowed Hennis' petition for *certiorari.*

Attorney General Morgan, Deputy Attorney General McGalliard and Staff Attorney Blackburn for the State.

Norman B. Smith for petitioner appellant.

PER CURIAM.

[1] The case was before the Court of Appeals on *certiorari* to review Judge May's order. In response to the writ of *certiorari,* a transcript of the entire proceedings before Judge Gwyn was included in the record before the Court of Appeals and is now before us. The briefs and the opinion of the Court of Appeals relate primarily to the sufficiency of the findings of fact to support Judge Gwyn's orders. Under these circumstances, we deem it appropriate to treat the case as properly before us for determination of that question.

Judge Gwyn was presiding at the trial of a civil action for the collection of rent. According to his findings, Judge Gwyn observed "the movement of people to the windows. They appeared to be observing something that was happening on the outside." The court reporter informed him "that the court was being picketed by a man walking around the courthouse wearing a placard . . ." He left the bench and went to a window from which he observed Hennis "as he walked slowly around the courthouse wearing a picket sign . . ."

It was stipulated that it was sixty-one feet from the windows of the courtroom from which Hennis could have been observed and the closest point Hennis could have approached the courtroom and at the same time remained on the public sidewalk adjacent to the courthouse grounds. The record is silent as to the portion of the sidewalk on which Hennis was walking when observed from the (second floor) windows of the courtroom.

Pursuant to Judge Gwyn's directive, the sheriff brought Hennis from the sidewalk into the courthouse and into the courtroom where Judge Gwyn was presiding.

The findings of fact made by Judge Gwyn are based on his personal observations and on statements made to him by Hennis after the sheriff had brought Hennis before Judge Gwyn. The record contains a transcript of the colloquies between Judge Gwyn and Hennis in the courtroom. No other person gave testimony as to Hennis' conduct.

[2] Judge May's order is based on well-established principles set forth by Moore, J., in *In re Burton*, 257 N.C. 534, 540-541, 126 S.E. 2d 581, 586. He concluded that he had no authority to reverse or modify Judge Gwyn's orders even if he considered they were erroneous, but that he had authority to order the release of Hennis on bond while Hennis sought to have Judge Gwyn's orders reviewed on *certiorari* by the Court of Appeals.

[1] Examination of the transcript discloses the following: No admonition or directive was given Hennis to discontinue walking along the sidewalks adjacent to the courthouse wearing the sandwich sign. He received no notice or warning that his conduct constituted a disturbance of a court session until brought from the sidewalk to the courtroom and there questioned by Judge Gwyn. In the courtroom, when questioned by Judge Gwyn, he stated he "didn't do it with any intention of contempt," having been advised by the Police Department that this type of protest was permissible. No speaking or other noise was involved. Hennis attracted attention solely on account of the singular spectacle of a man strolling slowly along the sidewalk wearing the sandwich sign. He told Judge Gwyn: "I did not know nothing about whether you were in the courthouse today or not and to have no bearing on whatever is going on here today . . ."

There are no findings, and no evidence in the record sufficient to support findings, that Hennis had knowledge that court was in session or that he had knowledge his conduct was interfering with the regular conduct of business at a court session. Absent such findings, there is no support for the conclusion that Hennis' conduct constituted a *wilful* interference with the orderly functioning of a session of court. In our view, the general findings "that the acts and conduct of the said E. H. Hennis were wilful and malicious and tended to impair the respect due its (the court's) authority" are insufficient.

Upon the record before us, we hold that Judge Gwyn erred in ordering Hennis into custody on July 16, 1969, for direct contempt of court. Accordingly the case is remanded to the Court of Appeals

for the entry of an order directing that a judge presiding in the Superior Court of Guilford County enter an order providing for the release of Hennis from custody.

Mindful of Judge Gwyn's long and distinguished career as an enlightened, considerate and compassionate jurist, we are quite sure that he, if he were with us today, would concur in this disposition of the case.

Reversed and remanded.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BRADLEY v. TEXACO, INC.

No. 33 PC.

Case below: 7 N.C. App. 300.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 April 1970.

DISTRIBUTING CORP. v. PARTS, INC.

No. 50 PC.

Case below: 7 N.C. App. 483.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 May 1970.

IN RE SPINKS

No. 49 PC.

Case below: 7 N.C. App. 417.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 12 May 1970.

LICHTENBERGER v. INSURANCE CO.

No. 28 PC.

Case below: 7 N.C. App. 269.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 April 1970.

STATE v. BLACKBURN

No. 27 PC.

Case below: 6 N.C. App. 510.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 April 1970.

STATE v. WALKER

No. 45 PC.

Case below: 7 N.C. App. 548.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 12 May 1970.

TAYLOR v. GARRETT

No. 52 PC.

Case below: 7 N.C. App. 473.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 12 May 1970.

THARPE v. BREWER

No. 47 PC.

Case below: 7 N.C. App. 432.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 12 May 1970.

STATE EDUCATION ASSISTANCE AUTHORITY v. BANK OF STATESVILLE

No. 44

(Filed 12 June 1970)

1. Colleges and Universities; Taxation § 7— loans to college students — revenue bonds — public purpose

The issuance of revenue bonds by the State Education Assistance Authority pursuant to Chapter 1177, Session Laws of 1967, and the use of the proceeds therefrom by the Authority for the sole purpose of making loans to meritorious college and vocational students of slender means, thereby minimizing the number of qualified persons whose education or training is interrupted, *held* for a public purpose.

2. Schools § 1; Taxation § 7— education of residents — public purpose

The education of residents of this State is a recognized object of State government; hence, provision therefor is for a public purpose. N. C. Constitution, Art. IX, §§ 1, 2, 3, 6, 7.

3. Colleges and Universities— higher education — duty of General Assembly

Subject to constitutional limitations, methods to facilitate and achieve the public purpose of providing for the education or training of residents of this State in institutions of higher education or post-secondary schools are for determination by the General Assembly.

4. Colleges and Universities; Taxation § 21— college loan revenue bonds — exemption from State taxation — public purpose

The provisions of Chapter 1177, Session Laws of 1967, that exempt stu-

dent loan revenue bonds from taxation by the State or by any of its subdivisions do not contravene N. C. Constitution, Art. V, § 5, which provides that property belonging to the State or to municipal corporations shall be exempt from taxation, the enumerated properties in Art. V, § 5, not including bonds issued by the State or any State agency, since the tax-exempt provisions make possible a more favorable sale of the revenue bonds and thereby contribute substantially to the accomplishment of the public purpose for which they are issued.

5. Colleges and Universities; Constitutional Law § 7— student loan program — delegation of legislative authority — sufficiency of loan standards

Chapter 1177, Session Laws of 1967 (G.S. 116-209.1 et seq.), which authorizes the State Education Assistance Authority to issue revenue bonds and to use the proceeds therefrom for the making of loans to "residents of this State to enable them to obtain an education in an eligible institution," provides sufficient legislative standards whereby the Authority can determine to which students the loans should be made, where it is implicit in Chapter 1177 that all loans made from the bond proceeds shall be made in compliance with the standards of federal legislation which supplement the loan program of the Authority. N. C. Constitution Art. I, § 8 and Art. II, § 1.

6. Colleges and Universities— student loan program — determination of recipients

The only student loans that the Education Assistance Authority is authorized to make or purchase are student loans which qualify under the federal statutes for federal assistance in respect of interest subsidy and guaranty.

7. Statutes § 4— construction as to constitutionality

A statute will not be construed so as to raise a serious question as to its constitutionality if a different construction which will avoid the question of constitutionality is reasonable.

LAKE, J., dissenting.

APPEAL by defendant from *Bailey, J.*, at February 9, 1970 Civil Session of WAKE Superior Court, certified, pursuant to G.S. 7A-31, for review by the Supreme Court before determination by the Court of Appeals.

This action is for a declaratory judgment, G.S. 1-253 *et seq.*, determinative of the validity of $1,500,000.00 of Revenue Bonds, Series B, consisting of 1,500 bonds of $1,000.00 each, issued by the State Education Assistance Authority (Authority). North Carolina banks offered to purchase the entire issue of $1,500,000.00 at par and accrued interest. The offers included that of the Bank of Statesville for the purchase of three $1,000.00 bonds. The Bank of Statesville is ready, able and willing to accept and pay for these bonds if and when they are adjudged valid; otherwise, it refuses to do so.

The Authority was created and constituted "a political subdivision of the State" by Chapter 1180, Session Laws of 1965, referred to hereafter as the 1965 Act. (The provisions of the 1965 Act were designated G.S. 116-201 through G.S. 116-209). The 1965 Act provided: "The exercise by the Authority of the powers conferred by this Act shall be deemed and held to be the performance of an essential governmental function." G.S. 116-203.

Chapter 1177, Session Laws of 1967, referred to hereafter as Chapter 1177, amended the 1965 Act, "being G.S. 116-201 to 116-209 of the 1965 Cumulative Supplement," by adding at the end thereof sections designated G.S. 116-209.1 through G.S. 116-209.15. Chapter 1177 authorized the Authority to issue student loan revenue bonds in an aggregate principal amount outstanding at any time not exceeding $12,500,000.00.

The case was submitted to Judge Bailey on an agreed statement of facts which, in addition to matters set forth above, contained the provisions quoted (with immaterial deletions) below.

"3. At the present time, a large number of North Carolina residents are, as students, pursuing educational courses beyond the public school level; that the educational facilities of the State and of private institutions in this State and throughout the country have been greatly enlarged and expanded to meet the needs for the education of a greater number of students seeking education beyond the level of the public school system; that to meet the cost of their education, many students are in need of money and are borrowing funds to pay for their education, generally upon terms which provide for repayment after the completion of their education; that sufficient loan funds are not available through the normal channels of commercial lending and financing to meet this need of North Carolina residents; nor are student loans attractive to commercial lenders because the students seeking loans usually are persons who are not fully in income producing situations, and furthermore, the commencement of repayment of principal is deferred; that without moneys which can be made available to needy students through the State's student loan program administered by the Authority, and financed through the issuance by the Authority of student loan revenue bonds, many of these North Carolina Students will not be able to complete their formal education, or pursue educational courses beyond the public school level.

"4. . . .

"5. That acting under and by virtue of the provisions of Chapter 1177 . . . the Authority has acquired and is purchasing stu-

dent loan obligations made pursuant to the Authority's commitments to purchase said obligations, said 'student loans' being those which have enabled North Carolina students to continue their education in 'eligible institutions' as these terms are defined in G.S. 116-209.2.

"6. Acting pursuant to said Chapter 1177, the Authority did on August 29, 1968, adopt a bond resolution (Exhibit A) providing for the issuance and sale of a series of bonds designated as Series 'A' Bonds in the total sum of $3,000,000.00, . . . that the Authority sold the Series 'A' Bonds to investors through its Fiscal Agent, Wachovia Bank & Trust Company, N.A., pursuant to a contract (Exhibit B) between the Authority, Wachovia Bank & Trust Company, N.C., and College Foundation, Inc., dated August 29, 1968, . . . under which Wachovia Bank & Trust Company, N.A., as Fiscal Agent, (hereinafter referred to as 'Fiscal Agent') undertook the duties of consummating the sale of the bonds to bidders whose proposals had been accepted by the Authority, disbursing of bond proceeds to purchase student loans, and administering of bond revenues for the Authority; and under which same contract, the Authority agreed to purchase and did purchase certain student loans of North Carolina residents from College Foundation, Inc., said loans having been made to enable North Carolina residents to pursue their education in 'eligible institutions'; and that College Foundation, Inc., agreed to sell and did sell certain student loan obligations to the Authority and agreed to administer the collection of these student loans for the Authority, and to remit the proceeds to the Authority's Fiscal Agent, Wachovia Bank & Trust Company, N.A., as is more fully set out in Exhibit B; that the $3,000,000.00 realized from the sale of its Series 'A' Bonds was fully expended by the Authority in accordance with the bond resolution during the school year 1968-1969.

"7. The Authority's Bond Resolution of August 29, 1968 (Exhibit A) in addition to providing for the initial issue, provided for additional series of bonds to be issued to an aggregate principal amount outstanding at any time not exceeding $12,500,000.00.

"8. For the school year 1969-1970, the Authority determined that additional loan funds, which would not otherwise be available were needed by North Carolina students, during this school year in at least the amount of $1,500,000.00; and upon making this determination and finding, the Authority then proceeded with the issuance of additional student loan revenue bonds.

"9. On the 21st day of August, 1969, at a meeting duly called and held in its offices in Raleigh, North Carolina, the Authority adopted a resolution (Exhibit C) . . . providing for the issuance

under authority of Chapter 1177 . . . and of its bond resolution of August 29, 1968 (Exhibit A), of a series of bonds, designated as its Series 'B' Revenue Bonds, in the total amount of $1,500,000.00, in units of One Thousand Dollars, to bear interest at the rate of five and one-half (5½%) percent; and it further, by resolution (Exhibit D), authorized execution of and there was duly executed a supplemental tripartite agreement (Exhibit E) with its Fiscal Agent, Wachovia Bank & Trust Company, N.A., and College Foundation, Inc., for sale and expenditure and administration of the bond proceeds . . . .

"10. . . . .

"11. . . . .

"12. The funds which were realized by the Authority from the sale of its Series 'B' Bonds have been used or are committed for use prior to the close of the academic year 1969-70 in purchasing loans made to 2,140 students, with the average loan being in the amount of approximately $700.00; that in addition to the loans which were made with these funds, 1,039 applications were rejected by College Foundation, Inc., of which number one-half would have received favorable action if sufficient additional loan funds had been available; that in addition to those loans made or loan applications rejected by College Foundation, Inc., a survey of the Authority, as to loan needs of North Carolina residents for the academic year 1969-1970, indicates that 2,069 students in 'eligible institutions,' as that term is defined in G.S. 116-209.2, expressed to these institutions a need for loans with which to continue their education.

"13. . . . .

"14. . . . .

"15. College Foundation, Inc., is a North Carolina nonprofit public educational service corporation organized and operating for the purpose of making loans to North Carolina students for education purposes and is an 'eligible lender' under the insured student loan program administered by State Education Assistance Authority, and as such has made over ninety (90%) percent of the loans which have qualified for this program; and the members of the said corporation by its certificate of incorporation are: The Governor of the State of North Carolina; the Chairman of the North Carolina Board of Higher Education; the Treasurer of the State of North Carolina; the Chairman of the Board of Conservation and Development of the State of North Carolina; the Chairman of the Board of Directors of the Business Development Corporation of North

Carolina, and the governing trustees of the corporation by its certificate of incorporation are appointed by the Governor of North Carolina."

In their agreed statement, the parties listed eleven legal questions on which they sought a judicial declaration or adjudication. Six relate to whether Chapter 1177 is violative of designated constitutional provisions. Five relate to whether "the operating procedures followed by the Authority" are violative of "the enabling legislation," *i.e.*, Chapter 1177.

The court answered each of the legal questions in favor of plaintiff. The judgment concludes as follows:

"IT IS, THEREFORE, upon motion of attorneys for the plaintiff, State Education Assistance Authority, ORDERED, ADJUDGED AND DECREED that the three Series 'B' Student Loan Revenue Bonds, being Bonds Nos. B-476, B-477 and B-478, hereinbefore referred to, have been duly and legally authorized and duly and legally sold to the Bank of Statesville, and that the said revenue bonds, when delivered in accordance with the agreement of the Authority and the Bank of Statesville, will be valid and binding obligations as revenue bonds of the Authority, in accordance with the tenor thereof, and that such bonds shall be exempt from all taxation within this State as provided by G.S. 116-209.13.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, upon delivery of the said bonds in accordance with the said agreement, the defendant, Bank of Statesville, shall accept and pay for the same in accordance with its agreement therefor which was made by said bank."

Defendant excepted and appealed. On appeal, defendant assigns as error the "signing and entering of the judgment."

Attorney General Morgan, Deputy Attorney General McGalliard and Staff Attorney Blackburn for plaintiff appellee.

Bailey, Dixon, Wooten & McDonald, by Kenneth Wooten, Jr., and Sowers, Avery & Crosswhite, by Isaac T. Avery, Jr., for defendant appellant.

BOBBITT, C.J.

Whether defendant is legally obligated to accept and pay for the three $1,000.00 Series B Bonds is the ultimate question for decision. The answer depends upon whether *the validity* of the Series B Bonds

is subject to successful challenge by defendant on any of the grounds asserted by it.

Defendant's offer to purchase was made with full knowledge of the provisions of the Bond Resolutions of August 29, 1968, and of August 21, 1969, and of the tripartite contracts referred to therein. Hence, we pass without discussion whether "the operating procedures followed by the Authority" are "in violation of the enabling legislation" as now contended by defendant. Nothing appears to indicate that defendant is adversely affected by "the operating procedures followed by the Authority."

As stated in *Nicholson v. Education Assistance Authority,* 275 N.C. 439, 448, 168 S.E. 2d 401, 407: "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.*" (Our italics.)

Three basic constitutional questions are presented, *viz.:*

1. Do "student loans" made pursuant to Chapter 1177 constitute a use of public funds for a public purpose?

2. May the General Assembly constitutionally exempt from taxation revenue bonds issued pursuant to Chapter 1177?

3. Does Chapter 1177 provide sufficient legislative standards for making such "student loans?"

The Authority is an agency of the State. Its affairs are governed by a board of directors of seven members, each appointed by the Governor for a prescribed term. G.S. 116-203.

The sole function of the Authority is to facilitate college (and vocational) education of residents of this State at institutions of higher education (and post-secondary business, trade, technical, and other vocational schools). G.S. 116-202. It was authorized to "acquire" from banks or other lending institutions "a contingent interest" not exceeding 80% (100%) of any individual obligation. G.S. 116-206. (Note: The words and figures enclosed by parentheses indicate amendments made by Chapter 955, Session Laws of 1967.) The Authority is empowered, *inter alia,* "(t)o receive and accept from any federal or private agency, corporation, association or person grants to be expended in accomplishing the objectives of the Authority

. . ." G.S. 116-204(6). The Authority is authorized "(t)o make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act." G.S. 116-204(4). G.S. 116-209 provides that "(t)he State Treasurer shall be the custodian of the assets of the Authority."

The facts concerning the status of the Foundation as "a North Carolina nonprofit public educational service corporation" and the membership of its governing board, are set forth sufficiently in the agreed statement of facts.

The 1965 Act which created the Authority provided for an appropriation of $50,000.00 from the Contingency and Emergency Fund. The $50,000.00 so appropriated, together with money obtained from other sources, including grants "from any federal or private agency, corporation, association or person," (G.S. 116-204(6)) was constituted a trust fund. G.S. 116-209. This trust fund was for use "exclusively for the purpose of acquiring contingent or vested interests in obligations" which the Authority was authorized to acquire.

The assets of this trust fund, now referred to as the "Reserve Trust Fund," were available and used solely or primarily as a guaranty fund in respect of student loans made by banks or other lending institutions through the College Foundation, Inc. (Foundation) and serviced by the Foundation.

Prior to the enactment of Chapter 1177, the Foundation had qualified as an "eligible lender" under the federal statutes. The term "eligible lender" is defined in 20 U.S.C.A. § 1085(g). The student loans it made in behalf of banks or other lending institutions qualified for federal interest subsidy benefits, for federal guaranty benefits and for guaranty benefits provided by the Authority. The nature and extent of these benefits will be discussed in our consideration of loans made to students from the proceeds of sale of the Authority's Revenue Bonds.

The authority to issue and sell revenue bonds was conferred by Chapter 1177. It was provided that "(b)onds issued under the provisions of this act (Chapter 1177) 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." G.S. 116-209.12. It also provided that revenue bonds issued under its authority "shall at all times be free from taxation by the State or any local unit or political subdivision or other instrumentality of the State, excepting inheritance or gift taxes." G.S. 116-209.13.

Chapter 1177 provides that the Authority shall deposit the proceeds derived from the sale of its revenue bonds to the credit of a trust fund designated "State Education Assistance Authority Loan Fund" (Loan Fund). The Loan Fund is for use by the Authority in making student loans and in acquiring by purchase promissory notes or other legal instruments evidencing student loans made by banks, educational institutions, nonprofit corporations or other lenders. G.S. 116-209.3.

Pursuant to Chapter 1177, the Authority adopted the Bond Resolution of August 29, 1968, which provided for an initial issue of $3,000,000.00 of Revenue Bonds, Series A, and for additional bonds, "the aggregate principal amount . . . outstanding at any time . . . not (to) exceed Twelve Million, Five Hundred Thousand Dollars ($12,500,000)." The provisions of the Series A Bonds and attached interest coupons are set forth with particularity. The Series A Bonds are dated July 1, 1968, mature July 1, 1988, and bear interest from date at the rate of 5% per annum payable semiannually on the first days of January and July of each year. This Bond Resolution is set forth on Pages 27-100 of the record.

The $3,000,000.00 of Series A Bonds were sold to investors through the Wachovia Bank & Trust Company, which was designated in the Bond Resolution of August 29, 1968, as Fiscal Agent for the Authority, and the proceeds were used, pursuant to the terms of a "Tripartite Contract" dated August 29, 1968, between the Authority, Wachovia Bank & Trust Company and College Foundation, Inc.

The "Tripartite Contract" of August 29, 1968, referred to in the Bond Resolution of that date, provides for the purchase by the Authority from the Foundation of "student obligations," listed on an attached inventory and evidencing "student loans," for a total purchase price of $1,900,000.00, "to be paid solely from the proceeds of Series A Bonds." It also provides for the purchase by the Authority from the Foundation of "additional student obligations," evidencing "student loans" to be made by the Foundation during the period of twelve months commencing September 1, 1968, "the purchase price of which shall not exceed the lesser of (i) One Million, One Hundred Thousand Dollars ($1,100,000) or (ii) an amount equal to the balance of the proceeds of the Series A Bonds available therefor." A recital preceding the contractual provisions recites that "the additional student obligations will bear interest at the rate of six percent (6%) per annum."

The Bond Resolution adopted by the Authority on August 21, 1969, provided for an additional issue of Revenue Bonds, Series B,

of $1,500,000.00, "on a parity with the Series A Bonds," consisting of 1,500 bonds of $1,000.00 each, dated July 1, 1969, maturing July 1, 1989, and bearing interest from date at the rate of 5½% per annum, payable semiannually on the first days of January and July of each year. It was provided that, except as to designation (Series B instead of Series A), the amount of the issue, the date, the maturity, and the interest rate, and the change of name from Wachovia Bank & Trust Company to Wachovia Bank & Trust Company, N.A., Series B Bonds were to be in the form prescribed in the Resolution of August 29, 1968, for Series A Bonds.

A "Supplemental Tripartite Contract" of August 21, 1969, between the Authority, the Foundation and Wachovia Bank & Trust Company, N.A., relates specifically to the Series B Bonds. It provides for the purchase by the Authority from the Foundation of "1969-1970 student obligations," evidencing student loans made by the Foundation during the period of twelve months commencing September 1, 1969, "the purchase price of which shall not exceed the lesser of (i) One Million, Five Hundred Thousand Dollars ($1,500,000) or (ii) an amount equal to the balance of the proceeds of the Series B Bonds available for the purchase thereof." The recital in the preamble preceding the contractual provisions states that the additional funds for student assistance activities are available for loans "to students who are residents of the State of North Carolina and were enrolled in educational institutions on the date such loan was made and bearing interest at the rate of seven percent (7%) per annum . . . ."

In this Court, the parties have filed a supplement (Supplement) to their original agreed statement of facts. This Supplement discloses, *inter alia*, the following:

The Foundation, acting as "eligible lender" for the Authority, made 5,548 student loans for the period 1968-1969, which the Authority acquired by use of the proceeds from the sale of its Series A Revenue Bonds. The family income of 94% of the students who obtained these loans was $10,000.00 or less.

The Foundation, acting as "eligible lender" for the Authority, has made 2,418 (additional) student loans, which the Authority has acquired or is obligated to acquire by use of the proceeds of sale of its Series B Revenue Bonds. The family income of 90% of the students who obtained these loans is $10,000.00 or less.

All of these student loans qualify for the federal interest subsidy and the federal guaranteed loan program. 20 U.S.C.A. § 1078. The proceeds from the sale of both Series A and Series B Bonds are used

exclusively to acquire such student loans and to provide for the expenses of issuing the bonds.

In respect of a student loan, including all of those referred to above, which qualifies as a "Guaranteed Student Loan," the federal assistance is twofold:

1. INTEREST SUBSIDY. As to loans made prior to June, 1969, which were financed with the proceeds from the sale of the Series A Bonds, the Federal Government pays 6% interest thereon plus an administrative fee of 1%. As to loans made subsequent to June 1, 1969, financed with the proceeds from the sale of the Series B Bonds, the Federal Government pays 7% interest thereon (and more under special circumstances). These payments are made currently. They continue during the entire time the student is in college or vocational school. They exceed the amount necessary to meet the interest payments on the bonds during the same period.

2. PARTIAL GUARANTEE IN EVENT OF DEFAULT. When a student borrower defaults, the Federal Government pays 80% of the amount in default and 100% in the event of the student's death or disability. Where default occurs, the remaining 20% of the amount thereof is paid by the Authority from its Reserve Trust Fund which, as of April, 1970, had assets of $923,657.00. These assets were held, as provided by the 1965 Act, by the State Treasurer.

The Fiscal Agent, under the tripartite contracts, acts as agent of the Authority with reference to the issuance and sale of the bonds, the receipt and disbursement (as directed) of proceeds from bond sales, and the receipt and disbursement of the funds in a Sinking Fund established for payment of the bonds. The assets of the Sinking Fund include all receipts made on account of student loans from the Federal Government, the student borrower and the Reserve Trust Fund.

Additional factual data will be set forth in connection with our consideration of specific legal questions.

[1] Chapter 1177 is valid if and only if the purpose for which the proceeds from the sale of the bonds is authorized and required is adjudged *a public purpose.*

[2] Section 1, Article IX, of the Constitution of North Carolina, provides: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Section 2 contains a mandate that the General Assembly provide for a State

public school system. Section 3 contains a mandate that the board of commissioners of each county in the State provide the funds for the buildings and equipment necessary for the maintenance and operation of schools within the county for the constitutional term. *Constantian v. Anson County,* 244 N.C. 221, 225, 93 S.E. 2d 163, 166; *Harris v. Board of Commissioners,* 274 N.C. 343, 163 S.E. 2d 387, and cases cited. Section 6 provides for the maintenance by the General Assembly of the University of North Carolina; and Section 7 provides that "the benefits of the University, as far as practicable, be extended to the youth of the State free of expense for tuition . . . ." Unquestionably, the education of residents of this State is a recognized object of State government. Hence, provision therefor is for a public purpose. *Green v. Kitchin,* 229 N.C. 450, 455, 50 S.E. 2d 545, 549; *Jamison v. Charlotte,* 239 N.C. 682, 696, 80 S.E. 2d 904, 914.

In *Clayton v. Kervick,* 244 A. 2d 281 (N.J. 1968), the action was for a declaratory judgment in respect of the New Jersey Educational Facilities Authority. The statute which created the Authority declared it to be "a public body corporate and politic" and an instrumentality exercising "public and essential governmental functions." The Authority was authorized to issue revenue bonds for the construction of facilities, *e.g.,* dormitories, for lease by participating institutions of higher education. In sustaining the constitutionality of the statute, the court stated that the cited constitutional provisions "were designed to insure that public money would be raised and used only for public purpose"; and "(t)hat the furtherance of higher education is a proper public purpose is beyond dispute." *Id.* at 290.

[3] Subject to constitutional limitations, methods to facilitate and achieve the public purpose of providing for the education or training of residents of this State in institutions of higher education or post-secondary schools are for determination by the General Assembly.

[1] The people of North Carolina constitute our State's greatest resource. The agreed facts disclose that bond proceeds are to be used solely to make loans to meritorious North Carolinians of slender means and thereby minimize the number of qualified persons whose education or training is interrupted or abandoned for lack of funds. In our view, and we so hold, the bond proceeds are used for *a public purpose* when used to make such loans.

Of course, it is expected that a student loan will inure to the private benefit of the person who obtains it. It is equally true that the education provided throughout our entire school system is in-

tended to inure to the benefit of the individual who obtains it. However, the fact that the individual obtains a private benefit cannot be considered sufficient ground to defeat the execution of "a paramount public purpose." *Clayton v. Kervick, supra,* at 290.

The proceeds from the sale of the Series B Bonds have been used for or are committed to the purchase of specific student obligations representing loans heretofore made by the Foundation. Questions as to the identity of the persons to whom the loans were made or the identity of the institutions they attend are not raised and in any event do not adversely affect defendant.

The student loans authorized thereby being for a public purpose, we hold that Chapter 1177 does not unconstitutionally authorize use of public funds in violation of Section 3, Article V, or of Section 17, Article I, or of Section 7, Article I, of the Constitution of North Carolina, or of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[4] The parties present for decision whether the provisions of Chapter 1177 which exempt Authority's revenue bonds from taxation contravene Section 5, Article V, of the Constitution of North Carolina. Section 5, Article V, provides that "(p)roperty belonging to the State or to municipal corporations shall be exempt from taxation" and enumerates other properties the General Assembly may exempt from taxation. The enumerated properties do not include bonds issued by the State or any State agency, whether revenue bonds or full faith and credit bonds.

In *Webb v. Port Commission,* 205 N.C. 663, 172 S.E. 377, this Court considered the same question in connection with revenue bonds issued for a public purpose by the Port Commission of Morehead City. With reference thereto, the Court said: "The provision in the act by which the Port Commission was created that its property and the bonds that may be issued and sold as authorized by the act shall be exempt from taxation by the State, or any of its political subdivisions, is valid. The General Assembly has the power to so provide, for the reason that the property of the Port Commission will be held, and the bonds will be issued solely for public purposes. Whatever doubt there may be as to the validity of this provision, by reason of section 3 of Article V of the Constitution of this State, must be, under well-settled principles of constitutional construction, resolved in favor of its validity."

"It is generally considered that the legislature of a state has the power to exempt state and municipal bonds from taxation, since if such bonds are exempt from taxation the state or municipality will

be able to issue them on more favorable terms and may then save more money than it would lose by being deprived of the right to tax them. The legislature may exempt such securities from taxation, although the constitution enumerates the subjects of exemption, and does not specifically name government securities, and even in the face of a constitutional declaration forbidding passage of laws exempting 'any property.'" 51 Am. Jur. Taxation § 567, p. 558. Since the tax-exempt feature makes possible a more favorable sale of revenue bonds and thereby contributes substantially to the accomplishment of the public purpose for which they are issued, we hold that the General Assembly *may* exempt them from taxation by the State or any of its subdivisions.

In accord with *Webb v. Port Commission, supra,* we hold that the provisions of Chapter 1177 which exempt the student loan revenue bonds from taxation do not violate Section 5, Article V, of the Constitution of North Carolina.

[5] Defendant contends the provisions of Chapter 1177, which purport to authorize the Authority to make or purchase "student loans" are violative of Section 8, Article I, and of Section 1, Article II, of the Constitution of North Carolina.

Section 8, Article I, provides: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." Section 1, Article II, provides: "The legislative authority shall be vested in two distinct branches, both dependent on the people, to wit: A Senate and a House of Representatives." The question is whether, in respect of determining to whom student loans should be made, the General Assembly delegated its legislative authority without providing sufficient standards for a guide.

"It is settled and fundamental in our law that the legislature may not abdicate its power to make laws nor delegate its *supreme* legislative power to any other coordinate branch or to any agency which it may create. *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310. It is equally well settled that, as to some *specific* subject matter, it may delegate a *limited* portion of its legislative power to an administrative agency *if* it prescribes the standards under which the agency is to exercise the delegated powers." *Turnpike Authority v. Pine Island,* 265 N.C. 109, 114, 143 S.E. 2d 319, 323, and cases cited.

G.S. 116-209.2 provides: "As used in this act, the term 'eligible institution' shall have the same meaning as the definition of such term in section 996 and section 1085 of Title 20 of the United States

Code and the term 'student loan' shall mean loans to residents of this State to enable them to obtain an education in an eligible institution." 20 U.S.C.A. § 1085(a) provides: "The term 'eligible institution' means (1) an institution of higher education, (2) a vocational school, or (3) with respect to students who are nationals of the United States, an institution outside the States which is comparable to an institution of higher education or to a vocational school and which has been approved by the Commissioner for purposes of this part." 20 U.S.C.A. § 996(a), which has been repealed (88 Stat. 1084), contained a definition of "eligible institution" which was not in conflict with that prescribed in § 1085(a).

Chapter 1177 authorizes the Authority "to develop and administer programs and perform all functions necessary or convenient . . . for qualifying for loans, grants, insurance and other benefits and assistance under any program of the United States now or hereafter authorized fostering student loans." G.S. 116-209.3. The Authority was authorized "to contract with the United States of America or any agency or officer thereof . . . respecting the carrying out of the Authority's functions under this act." G.S. 116-209.6. These provisions disclose the General Assembly was well aware of the federal, State and private programs of low-interest insured loans to students in institutions of higher education and other post-secondary schools.

Pertinent provisions of the federal statutes are set forth in summary or verbatim below.

The declared purpose of the federal legislation is to enable the Commissioner of Education "(1) to encourage States and nonprofit private institutions and organizations to establish adequate loan insurance programs for students in eligible institutions (as defined in section 1085 of this title), . . . (3) to pay a portion of the interest on loans to qualified students which are made by a State under a direct loan program meeting the requirements of section 1078-(a)(1)(B) of this title, or which are insured under this part or under a program of a State or of a nonprofit private institution or organization which meets the requirements of section 1078(a)(1)(C) of this title, and (4) to guarantee a portion of each loan insured under a program of a State or of a nonprofit private institution or organization which meets the requirements of section 1078(a)(1)(C) of this title." 20 U.S.C.A. § 1071(a).

To qualify for the federal assistance, consisting of (1) interest subsidy and (2) partial guaranty in the event of default, as set forth above, the "adjusted family income" of the student-borrower must

be "less than $15,000.00 at the time of execution of the note or written agreement evidencing such loan." 20 U.S.C.A. § 1078(a)(1)(C). The total of the loans made to a student in any academic year may not exceed $1,500.00. The aggregate insured unpaid principal amount of all such insured loans made to any student shall not at any time exceed $7,500.00. 20 U.S.C.A. § 1075(a).

A loan by an eligible lender is insurable "only if — (1) made to a student who (A) has been accepted for enrollment at an eligible institution or, in the case of a student already attending such institution, is in good standing there as determined by the institution, and (B) is carrying at least one-half of the normal full-time workload as determined by the institution, and (C) has provided the lender with a statement of the institution which sets forth a schedule of the tuition and fees applicable to that student and its estimate of the cost of board and room for such a student . . ." 20 U.S.C.A. § 1077(a). § 1077(a)(2) sets out in detail the content of "a note or other written agreement" evidencing an insurable student loan including the times and terms of repayment. Subject to enumerated exceptions, such note is to provide for repayment "of the principal amount of the loan in installments over a period of not less than five years (unless sooner repaid) nor more than ten years beginning not earlier than nine months nor later than one year after the date on which the student ceases to carry at an eligible institution at least one-half of the normal full-time academic workload as determined by the institution . . . ."

The interest rate on an insurable loan may not exceed the maximum prescribed by the Secretary of Health, Education and Welfare. 20 U.S.C.A. § 1077(a)(2)(D). The Secretary cannot prescribe a maximum interest rate in excess of 7% on the unpaid principal balance of the loan. 20 U.S.C.A. 1077(b).

The foregoing indicates clearly that Congress has established sufficient standards in respect of loans that qualify for the interest subsidy and for the 80% insurance or guaranty. The agreed statement of facts (Supplement) discloses that all loans made and to be made from the proceeds of the sale of bonds are qualified for the federal assistance.

Persons who obtain "student loans" are unable to make payment on account of interest or principal until completion of their education by graduation or otherwise. The assistance of the Federal Government and coordination with its program are prerequisite to the functioning of the North Carolina student loan program.

Although not set forth in express terms, we think it implicit in the provisions of Chapter 1177, that the General Assembly contemplated and intended that no loans would be made from the proceeds from the sale of tax-exempt revenue bonds except student loans made in compliance with the standards prescribed by the federal legislation and therefore qualified for the federal assistance referred to above. Seemingly, the General Assembly realized that its specification of more precise standards for "student loans" might impede the functioning of the Authority and render it unable to qualify from time to time for the federal assistance upon which its program depended.

[6, 7] We are of the opinion, and so hold, that the only student loans the Authority is authorized to make or purchase are student loans which qualify under the federal statutes for federal assistance in respect of interest subsidy and guaranty. When the minimum standards prescribed by Chapter 1177 (G.S. 116-209.2), to wit, "loans to residents of this State to enable them to obtain an education in an eligible institution," are supplemented by the standards prescribed by the federal legislation, the legislative standards are sufficient. "To construe the statute otherwise would raise a serious question as to its constitutionality; and it is well settled that a statute will not be construed so as to raise such question if a different construction, which will avoid the question of constitutionality, is reasonable." *Milk Commission v. Food Stores,* 270 N.C. 323, 331, 154 S.E. 2d 548, 555.

Whether the North Carolina student loan program is wise or unwise is for determination by the General Assembly. Whether the tax-exempt revenue bonds should be approved for investment by fiduciaries and for deposit "for any purpose for which the deposit of bonds or obligations of the State is now or may hereafter be authorized by law," G.S. 116-209.10, is for determination by the General Assembly. Whether the purchase of these bonds is wise or unwise is for determination by the investor. Our function relates solely to the validity of the Series B Bonds.

Having determined that Chapter 1177 does not violate any of the provisions of the State or Federal Constitutions referred to in the questions posed by the parties in the agreed statement, the judgment of the court below is affirmed.

Affirmed.

LAKE, J., dissenting:

The bonds which the plaintiff proposes to deliver to the defend-

ant state upon their respective faces, "This bond shall not be deemed to constitute a debt, liability or obligation of the State of North Carolina or of any political subdivision thereof," and that the plaintiff, itself, "shall not be obligated to pay this bond or the interest" thereon, except from the revenues and other funds pledged for such payment.

Each bond further states, "This bond, its transfer and the income therefrom * * * shall at all times be free from taxation by the State of North Carolina or any local unit or political subdivision or other instrumentality of the State, excepting inheritance or gift taxes."

Although the Legislature, in G.S. 116-209.13, undertook to grant such tax exemption, it is my view that the bonds, if issued, will be subject to the tax presently levied by G.S. 105-202 upon intangible personal property and to any tax hereafter lawfully levied generally upon bonds and other evidences of indebtedness, To the extent that the statute, under which these bonds are proposed to be issued, purports to grant an exemption of these bonds from the intangible property tax, it is, in my opinion, in violation of Article V, § 5, of the Constitution of North Carolina, and, therefore, is ineffective.

Article V, § 5, of the Constitution, is entitled "Property Exempt from Taxation." It provides:

> "Property belonging to the State, counties and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable or religious purposes, and, to a value not exceeding three hundred dollars ($300.00), any personal property. * * *"

This constitutional provision applies to ad valorem taxes on property only. *Sykes v. Clayton, Commissioner of Revenue,* 274 N.C. 398, 405, 163 S.E. 2d 775; *Stedman v. Winston-Salem,* 204 N.C. 203, 167 S.E. 813. As we said in the *Sykes* case, however, it does apply to "the taxation of real and personal property, tangible and intangible, according to the value thereof." Thus, it applies to the intangible property tax levied by G.S. 105-202 upon bonds and other evidences of indebtedness. In *Sale v. Johnson, Commissioner of Revenue,* 258 N.C. 749, 129 S.E. 2d 465, Parker, J., later C.J., speaking for the Court, said, "The power to exempt from taxation, as well as the power to tax, is an essential attribute of sovereignty." However, the sovereign is the State, not the Legislature. The Legislature, like this Court, is subject to the restrictions placed upon it by the sovereign in the Constitution. In *Rockingham County v. Elon College,* 219 N.C. 342, 345, 13 S.E. 2d 618, in *Hospital v. Guilford County,*

218 N.C. 673, 12 S.E. 2d 265, and in *Odd Fellows v. Swain,* 217 N.C. 632, 637, 9 S.E. 2d 365, this Court recognized that the Legislature has no authority to exempt from ad valorem taxation any property, except by virtue of this provision of the Constitution.

These bonds, if and when issued, will be property. They will be property of the same kind as is a note, or a bond, of an individual student, or of his parent, given to the defendant bank in consideration of a loan of money to such student or parent for use by the student in paying his expenses in attending a school or college. When issued, they will be held by the plaintiff bank, or by its transferee, for the purpose of receiving the interest due thereon, as it falls due, and receiving the principal at maturity. Use of such interest and principal, when collected, by the holder of the bond is completely unrestricted. The purpose of the bank, or of its transferee, in holding these bonds will be precisely the same as its purpose in holding any other bond or note evidencing a loan made by the bank. Consequently, the exemption of the bonds from taxation cannot be supported on the basis of the purpose for which they are to be held. It is obvious that the bonds, in the hands of the bank or of its transferee, will not constitute property held for educational, scientific, literary, cultural, charitable or religious purposes. They will be held as any other property is held for investment.

The bonds, when issued, will be the property of the bank or of its transferee, not that of the issuing Authority. Consequently, except in the unlikely event of a subsequent transfer to a municipal corporation, a county, the State, or an agency of one of these, exemption of the bonds from the intangible property tax cannot be supported on the basis of the status of the holder of the bonds.

The mandatory exemption granted by the first sentence of Article V, § 5, of the Constitution, depends upon the status of the owner of the property — the State, counties or municipal corporations. The authority conferred upon the General Assembly to exempt property owned by others is limited to property held for one or more of the specified purposes. *Hospital v. Guilford County, supra; Odd Fellows v. Swain, supra.* Thus, neither the mandatory exemption nor the permissive exemption granted or authorized by Article V, § 5, of the Constitution, extends to these bonds in the hands of the defendant or its transferee. It is well settled that exemptions from taxation, constitutional as well as statutory, are to be strictly construed against the claim of exemption and in favor of the taxing power. *Isaacs v. Clayton, Commissioner of Revenue,* 270 N.C. 424, 154 S.E. 2d 532; *Yacht Co. v. High, Commissioner of Revenue,* 265 N.C. 653, 144

S.E. 2d 821; *Chemical Corp. v. Johnson, Commissioner of Revenue,* 257 N.C. 666, 127 S.E. 2d 262; *Benson v. Johnston County,* 209 N.C. 751, 185 S.E. 6; *Rich v. Doughton,* 192 N.C. 604, 135 S.E. 527; *R. R. v. Commissioners,* 75 N.C. 474.

It has been settled by decisions of this Court that, notwithstanding Article V, § 5, of the Constitution, the Legislature may exempt from taxation obligations of the State and those of its political subdivisions. *Mecklenburg County v. Insurance Co.,* 210 N.C. 171, 185 S.E. 654; *Pullen v. Corporation Commission,* 152 N.C. 548, 68 S.E. 155. The reason for this rule is not shown in the majority opinion in either of these decisions. It is stated in the dissenting opinion of Clark, C.J., in the *Pullen* case and lies in the circumstance that the exemption of the State's own obligation from taxation enables the State to obtain a lower interest rate on its indebtedness so that the effect is approximately the same as if the obligation were taxed. See also 51 Am. Jur., Taxation, § 567.

This exception to the limitation of Article V, § 5, of the Constitution, upon the power of the Legislature to exempt property from ad valorem taxation, has no application to the present case for the reason that these bonds expressly state that they are not obligations of the State or of any of its political subdivisions. Even the plaintiff Authority, itself, is not obligated to pay the principal of or the interest upon these bonds except by application of the specified revenues and other funds pledged for that purpose. Thus, the attempted exemption of these bonds from the ad valorem intangible property tax cannot be supported on the ground that it will result in a lowering of interest rates otherwise payable by the State or by one of its subdivisions.

In *Webb v. Port Commission,* 205 N.C. 663, 172 S.E. 377, the Port Commission of Morehead City was authorized by statute to issue bonds in order to provide funds with which to build terminals, wharves, piers, warehouses and other port facilities for general public and common carrier use. Clearly, this was a purpose for which the State, or its municipality, could have issued its own bonds pledging its general credit, which bonds could have been exempted from taxation under the decisions above cited. The statute authorizing the issuance of the bonds provided that they would be exempt from State, county and municipal taxation. The statute further provided that the bonds were payable solely from the income of the commission from wharfage fees and the like, although there was a provision for a tax upon property within the city for the purpose of supplying any deficiency of such funds if, but only if, such tax was approved by a

vote of the people of the city. The statute authorized and contemplated the private sale of the entire bond issue to the Reconstruction Finance Corporation, an agency of the Federal Government. The commission contemplated marketing the bonds in that manner. The authority of the Port Commission to issue the bonds was attacked on the ground that the statute was a violation of Article VIII, § 1, of the Constitution of North Carolina, in that it was an attempt to create a corporation by a special act of the General Assembly. This was the basic attack though other questions were also raised, including the validity of the provision for tax exemption. Connor (George W.), J., in his opinion, stated:

> "The provision in the act by which the Port Commission was created that its property and the bonds that may be issued and sold as authorized by the act shall be exempt from taxation by the State, or any of its political subdivisions, is valid. The General Assembly has the power to so provide, for the reason that the property of the Port Commission will be held, and the bonds will be issued solely for public purposes. Whatever doubt there may be as to the validity of this provision, by reason of *section 3* of Article V of the Constitution of this State, must be, under well settled principles of constitutional construction, resolved in favor of its validity. *Certainly, if the bonds are sold to an agency of the United States Government, as contemplated by the act, the provision is valid so long as the bonds are held by such agency, or by any person, firm or corporation holding the same by purchase from such agency.*" (Emphasis added.)

Mr. Justice Connor cited no authority for this pronouncement. His opinion makes no reference whatever to Article V, § 5, of the Constitution. His opinion makes it clear that he regarded the bonds as exempt from taxation because they were to be issued to a Federal agency (The Reconstruction Finance Corporation). Obviously, bonds held by an agency of the United States would be exempt from State taxation. This, no doubt, explains the rather casual treatment of the tax exemption, considered without respect to the status of the holder of the bonds.

At the time the Port Commission case was decided, this was a five-judge Court. Stacy, C.J., and Brogden, J., dissented. Their opinion does not mention the matter of tax exemption. Adams, J., concurred in result on the ground that the statute did not violate Article VIII, § 1, of the Constitution, his concurring opinion making no reference to the validity of the provision for tax exemption. Clarkson, J., also concurred in a separate opinion, which contained no dis-

cussion of the tax exemption but stated that the applicability of Article VIII, § 1, of the Constitution, was the "only serious question" and was the question which the Court, in its order setting the case for argument, had directed counsel to argue.

Thus, the statement in the opinion of Connor, J., in the Port Commission case concerning the validity of the provision for tax exemption of revenue bonds issued by the Port Commission, cannot be deemed a clear-cut determination by this Court of the validity under Article V, § 5, of the Constitution, of a purported grant of tax exemption to revenue bonds, declaring that they are not obligations of the State or of any of its political subdivisions, which bonds are issued to and held by private investors for investment purposes only. With the utmost respect for the opinion of our distinguished predecessor upon this Court, I cannot regard his statement, unsupported by authority and not mentioning Article V, § 5, of the Constitution, as conclusive or persuasive, upon this question which is presented for the first time in the present case.

I, therefore, conclude that Article V, § 5, of the Constitution of this State, renders invalid the legislative grant of an exemption of these bonds from the intangible property tax. This provision of the Constitution has no application to an exemption of the interest payable upon these bonds from income taxation. Article V, § 3, permits the General Assembly "to classify property and other subjects for taxation," subject only to the limitations that the power shall be exercised on a statewide basis and "in a just and equitable manner." This section expressly empowers the General Assembly to make provision for deductions from gross income in the computation of taxable income. In the absence of a constitutional limitation upon the power of the General Assembly to exempt the interest payable upon these bonds from income taxation, the power to exempt being an essential attribute of sovereignty, as declared in *Sale v. Johnson, Commissioner of Revenue, supra,* this provision in the act authorizing the issuance of the bonds here in question is within the legislative authority.

The act provides in G.S. 116-203, "There is hereby created and constituted a political subdivision of the State to be known as the 'State Education Assistance Authority.' " However, in G.S. 116-209.1 it provides, "Any of the foregoing provisions of this act which shall be in conflict with the provisions hereinbelow set forth shall be repealed to the extent of such conflict." In G.S. 116-209.12 it 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." While somewhat confusing, the net effect of these three sections of the act is, at least, that the Authority is not to be considered a political subdivision of the State for the purpose of determining the effect and validity of these bonds.

The plaintiff contracted to deliver to the defendant bonds totally exempt from State, county and municipal taxation. The bonds the plaintiff now proposes to deliver are, in my opinion, subject to the intangible property tax now levied by the State and to such other taxes as may lawfully be levied upon intangible personal property. The variance is substantial. Since the defendant is not being tendered the bonds it contracted to purchase, it should not be compelled to receive and pay for the bonds which the plaintiff now offers to it. It is my view that the superior court erred in adjudging that the bonds, themselves, are exempt from taxation and that the defendant must accept and pay for these bonds.

STATE OF NORTH CAROLINA v. PERRY SANDERS

No. 43

(Filed 12 June 1970)

1. **Homicide § 31; Criminal Law § 135— first-degree murder — bifurcated jury trial**

In this State a defendant in a first-degree murder prosecution is not entitled to a bifurcated jury trial with one jury determining the guilt or innocence and the other fixing the punishment. G.S. 14-17.

2. **Jury § 7— charge of racial discrimination — absence of Negroes from jury**

There is no merit to a Negro defendant's charge that members of his race were deliberately excluded from the petit jury which tried him, where the record discloses that (1) nine of the first 53 jurors tendered were Negroes, (2) the trial court in its discretion properly excluded one of the Negro jurors, who was 84 years old, (3) two of the Negro jurors were peremptorily challenged, and (4) the remaining six Negroes were properly excused for cause after each had stated that he was opposed to capital punishment and would not consider the death penalty.

3. **Jury § 7— racial discrimination — burden of proof**

Defendant has the burden of proof of establishing racial discrimination in the composition of the jury.

4. Jury § 7— racial discrimination — presumption

The absence of Negroes from a particular petit jury is insufficient, in and of itself, to raise a presumption of discrimination.

5. Jury § 7— demand for proportional representation of race

Defendant does not have the right to demand that his petit jury be composed in whole or in part of persons of his own race or that there be proportional representation, but only that persons of his race not be intentionally excluded from the jury because of race.

6. Jury § 7— peremptory challenge

No cause need be stated for a peremptory challenge. G.S. 9-21.

7. Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of jurors who would never return death penalty

In a 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 exclusion of those jurors who had testified on *voir dire* that they had already made up their minds that they would not return a verdict pursuant to which the defendant might lawfully be executed, whatever the evidence might be.

8. Criminal Law § 162— objection to evidence — waiver

Unless an objection is made in ample time as soon as the opponent has the opportunity to learn the evidence is objectionable, the opponent will be held to have waived it.

9. Criminal Law § 79; Homicide § 15— first-degree murder — admission by conspirators — res gestae — identity of voices

In a prosecution of defendant for the first-degree murders of two police officers, which murders were committed shortly after defendant and several companions had robbed a filling station attendant, testimony by the attendant that as defendant and a companion left the station he heard one of them say, "Shoot him, shoot him while he's down," and that the other said, "No, he's taken care of," *held* competent against the defendant notwithstanding the attendant was unable to identify the voices, since the statements were made by fellow conspirators in the course of the robbery as part of the *res gestae*.

10. Conspiracy § 5— competency of evidence of co-conspirator — res gestae

Where two of more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, any act or declaration made by one of them in furtherance of the common object, and forming a part of the *res gestæ*, may be given in evidence against the other.

11. Criminal Law § 76— admissibility of confession — waiver of right to counsel — findings

In a prosecution charging defendant with the first-degree murders of two police officers, defendant's confession to a police officer was properly admitted in evidence, where there was competent evidence on the *voir dire* to support findings by the trial court that defendant had been fully advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, and that de-

fendant freely, voluntarily, and understandingly waived his right to counsel and made his statement voluntarily and with understanding.

12. Criminal Law § 86— impeachment of defendant — prior offenses — opportunity to explain conviction

Defendant in a first-degree murder prosecution was not prejudiced by the trial court's refusal to allow him to explain on redirect examination his admission on cross examination that he had been previously convicted of assault on a female, where the record disclosed that defendant on cross examination had testified to the substance of the excluded testimony.

13. Criminal Law § 86— impeachment of defendant — opportunity of correction

A defendant is entitled to full opportunity to correct or explain his answers in response to impeaching questions.

14. Criminal Law § 167— prejudicial error — new trial

To warrant a new trial, there should be made to appear that the ruling complained of was material and prejudicial to defendant's rights and that a different result would have likely ensued.

15. Homicide §§ 18, 21— murder of police officers — premeditation and deliberation — sufficiency of evidence

In a prosecution charging defendant with the first degree murders of two police officers, which murders were committed shortly after defendant and his companions had robbed two filling stations, there was sufficient evidence of premeditation and deliberation by defendant to be submitted to the jury, where the evidence disclosed that (1) the officers, in the course of investigating the robberies, had stopped the automobile in which defendant and his companions were riding, (2) the officers attempted to arrest one of the companions for carrying a pistol, (3) the defendant then shot the first officer because he "was thinking about what I would have to face," and (4) the defendant continued to fire the cartridges of two pistols into the officers after they had fallen and were helpless.

16. Homicide § 14— murder of police officers — presumption of malice

In a prosecution charging defendant with the first-degree murders of two police officers, malice may be presumed from evidence which satisfies the jury beyond a reasonable doubt that the death of the officers proximately resulted from pistol shots intentionally fired at them by defendant.

17. Homicide § 18— premeditation and deliberation — circumstantial evidence

The elements of premeditation and deliberation are not usually susceptible to direct proof, but must be established from the circumstances surrounding the homicide.

18. Homicide § 4— premeditation defined

Premeditation means "thought beforehand" for some length of time, however short.

19. Homicide § 4— premeditation and deliberation — length of time

No fixed amount of time is required for the mental processes of pre-

meditation and deliberation constituting an element of murder in the first degree, it being sufficient if these mental processes occur prior to, and not simultaneously with, the killing.

20. Criminal Law § 113— instructions — recapitulation of evidence

The recapitulation of all the evidence is not required under G.S. 1-180, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case.

21. Homicide § 31; Criminal Law § 135; Constitutional Law § 29— death sentence for first degree murder — effect of Jackson decision

Notwithstanding the effect, if any, that *U. S. v. Jackson*, 390 U.S. 570 might have had upon the validity of [former] G.S. 15-162.1 which authorized a plea of guilty in a first degree murder prosecution, the *Jackson* decision did not, at the time of the judgment in this first-degree murder prosecution, 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.

BOBBITT, C.J., and SHARP, J., dissenting.

APPEAL by defendant from *Fountain, J.*, at the 17 November 1969 Criminal Session of FORSYTH.

The defendant appeals from judgments sentencing him to death. He was charged in two indictments with murder in the first degree and entered pleas of not guilty to each charge. The two cases were consolidated for trial, and the jury returned a verdict of guilty as charged in each of the indictments, without recommendation that his punishment be imprisonment for life. The indictments, verdicts, and judgments were all proper in form. The crimes were alleged to have occurred in Surry County, but pursuant to an order changing venue, the trial was held in Forsyth County.

The evidence favorable to the State shows the following sequence of events: About 6 p.m. on 3 February 1969 defendant Perry Sanders, his brother Laxie Sanders, Charles Monroe, and James Monroe left Sanford, North Carolina in a 1967 red Dodge convertible belonging to Charles Monroe and headed in the direction of Winston-Salem, with the intention of robbing a service station to obtain money to pay their respective debts. About 10 p.m. they came upon a service station near the airport in Winston-Salem. Charles Monroe parked the car on a side street. The other three men went into the station, and upon determining that the operator, Harvey King, was alone, Perry Sanders pulled his .22 caliber pistol and demanded money. After King surrendered his money and his wallet, he was ordered into the stockroom and told to lie down on the floor. Perry Sanders then struck King with a set of air horns and he appeared to be un-

conscious; however, he was conscious and as soon as the robbers left, King reported the robbery to the Forsyth County Sheriff's Department. The defendant and his companions then drove north toward Rural Hall where they found Wesley Hunsucker's service station open around 10:25 p.m. Perry Sanders and James Monroe went inside, and after determining that Hunsucker was alone, the defendant pulled his pistol on the victim. State's witness Hunsucker testified that Perry Sanders told him to "stand up and take it easy or he would kill [him]." After his wallet had been removed and the cash register emptied, Hunsucker was ordered to get down on the floor and was struck with a bottle by one of the robbers. He was then ordered into the service area of the station and told to get down on his knees. Monroe struck Hunsucker on the head with his pistol, and Hunsucker, pretending to "play dead," crumpled over some tires. As Sanders and Monroe were leaving, Hunsucker heard one of them say, "Shoot him, shoot him while he's down," and the other said, "No, he's taken care of." On their way out, Sanders took a .32 gauge Ivey Johnson single-barrel shotgun from the office of the service station.

According to defendant's own testimony at trial, the following is an account of the incidents leading up to the arrest of defendant on the murder charges: After the robbery of the second service station, defendant and his companions drove north through Rural Hall toward Pilot Mountain. On the Highway #52 Bypass around Pilot Mountain, a marked city police car began following the Monroe vehicle. Monroe pulled his car over when the officers in the patrol car flashed the blue light. Officers Ralph East and Glenn Branscome approached the Monroe car on the driver's side, and one of them asked Charles Monroe for his driver's license. Then one of the officers said they had heard of an armed robbery and wanted to search the car; the four agreed to permit the search and got out of the car. As Perry Sanders stepped out, he slid his .22 caliber pistol under the car. Officer Branscome first searched James Monroe and found a pistol in his belt; he told Monroe that he was going to arrest him for carrying a pistol. As Officer Branscome started to put the handcuffs on James Monroe, defendant picked up his pistol from underneath the car and fired at Branscome. Defendant testified: "I was thinking about what I would have to face, I guess. . . . The first time I just threw my hands up. I just threw the gun up and closed my eyes and fired. I didn't aim, not really. When I fired the shot he just started — he just seemed to draw up and started screaming and I started firing again. . . . I continued to fire the weapon until he stopped screaming." At this point Officer East, who was standing on the driver's side of the Monroe car, began running back to the patrol

car. Defendant testified as follows: "[Officer East] started running and I caught him out of the corner of my eye and he was screaming and I ran up to him and I fired at him once or twice and he fell and he started screaming. . . . I discovered that my own gun was empty. I think I fired at him twice out of my gun and it kept clicking and he was screaming and kicking and I just snatched his [pistol] up and started shooting. I shot him with his weapon because he just kept up this scream. . . . I quit firing after he stopped screaming." Defendant and Charles Monroe retrieved Monroe's driver's license from the shirt pocket of one of the officers, and the four men left, driving first toward Mount Airy on Highway #52 and then along Highway #601 toward Winston-Salem.

About 10:50 p.m. a motorist traveling toward Pilot Mountain on Highway #52 met a red car with one headlight burning. A few minutes later the motorist came upon the officers' patrol car parked on the shoulder of the road with its headlights burning and the blue light flashing. The bodies of Officers East and Branscome were lying within several feet of the patrol car; both had received multiple gunshot wounds in the head and body. The bodies of the two officers were taken to the hospital where a later examination disclosed that Officer Branscome had seven gunshot wounds — two in the head, one in the right shoulder, three in the chest area, and one in the right arm; and Officer East had five gunshot wounds — one in the left shoulder, one in the chest, and three through the head. Death in each case resulted from these gunshot wounds.

Between 12:15 and 12:30 a.m. on 4 February 1969, Winston-Salem Police Officer A. C. Brandon spotted a red convertible with one headlight burning, which matched the description of an automobile described earlier in a police broadcast alert. The officer began following the convertible and radioed for assistance. Police cars soon converged at an intersection, and the suspected car was stopped. The four occupants, Perry Sanders, Laxie Sanders, Charles Monroe, and James Monroe, were ordered out of the car, and each was searched. On a second search, a .22 caliber pistol was found concealed in Perry Sanders' undershorts. A search of the car disclosed over $1,000 in various denominations of currency, a brown wallet containing the identification of Harvey Woodleaf King, a black wallet containing the identification of Wesley Ronald Hunsucker, and a 7.54 caliber automatic pistol. All four men were taken into custody by the Winston-Salem police and arrived at the police station shortly after 12:30 a.m.

About 1 a.m. Detective R. E. Linville, in the presence of S.B.I.

Agent H. T. Hartley and Captain H. C. Carter of the Detective Division of the Winston-Salem Police Department, after fully advising defendant of his constitutional rights, began questioning him. With permission of defendant his statement was recorded on a tape recorder; it was transcribed and later signed by him in the Forsyth County jail about 3:30 p.m. on 4 February 1969 after he had read it and made a correction as to one of the names. The confession, which was introduced in evidence by the State's witness R. E. Linville, was substantially similar to the testimony given by the defendant on the stand, the primary difference being the number of times that defendant shot the first officer. In his confession defendant stated that he first shot Officer Branscome and then chased down Officer East, who was headed for the patrol car, and shot him from behind; he then took East's .38 caliber pistol and shot him several times in the head with it, and "ran back and shot the other one [Branscome] four or five times until [he] finished emptying the gun." However, the defendant testified on the stand that he did not go back and shoot Branscome after he had shot East.

Defendant's only evidence at trial was his own testimony, in which he described the robberies of the two service stations and the shootings of the two police officers, and the testimony of three character witnesses, Sergeant Freeman Worthy of Fort Bragg; Jasper Sanders, the defendant's father; and Mrs. Harriet Johnson, an acquaintance. Sergeant Worthy and Mrs. Johnson testified that defendant's general reputation was good.

The jury returned a verdict of guilty as charged in each indictment of first degree murder, and the death sentence was imposed by the court. From these judgments the defendant appealed.

Attorney General Robert Morgan and Staff Attorney Donald M. Jacobs for the State.

Carroll F. Gardner for defendant appellant.

MOORE, J.

[1] Defendant's first assignment of error challenges the single-verdict procedure followed by North Carolina in capital cases. He contends he is entitled to a bifurcated jury trial with one jury determining the guilt or innocence and the other fixing the punishment. Our statute, G.S. 14-17, provides:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which

shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison."

This Court has consistently upheld the single-verdict procedure established by this statute. *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886; *State v. Ruth,* 276 N.C. 36, 170 S.E. 2d 897; *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568, cert. den. 393 U.S. 1042, 89 S. Ct. 669, 21 L. ed. 2d 590 (1969); *State v. Spence and Williams,* 274 N.C. 536, 164 S.E. 2d 593. And Federal courts hold that this procedure does not violate due process or infringe upon defendant's constitutionally guaranteed right of silence. *Sequra v. Patterson,* 402 F. 2d 249 (10th Cir., 1968); and *Sims v. Eyman,* 405 F. 2d 439 (9th Cir., 1969). In *Spencer v. Texas,* 385 U.S. 554, 87 S. Ct. 648, 17 L. ed. 2d 606 (1967), the Supreme Court of the United States said: "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure."

Counsel for defendant in his brief very frankly conceded this assignment to be without merit unless the United States Supreme Court should overrule our present practice by its decision in the case of *Maxwell v. Bishop,* 398 F. 2d 138 (8th Cir., 1968), cert. granted December 16, 1968, 393 U.S. 997, 89 S. Ct. 488, 21 L. ed. 2d 462, pending in that Court at the time defendant filed his brief. *Maxwell* involves Arkansas' statutes containing provisions similar to those in our North Carolina statutes. In allowing *certiorari* the Supreme Court of the United States limited considerations to questions 2 and 3 of the petition for *certiorari,* viz:

"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"?

The United States Supreme Court has now spoken in *Maxwell,* (June 1, 1970) 398 U.S. 262, 90 S. Ct. 1578, 26 L. ed. 2d 221. Without deciding the issues involved, the case was remanded to Federal District Court in Arkansas for a hearing on the exclusion of prospective jurors who had scruples against the death penalty. The same issues raised in *Maxwell* are still pending before the United States Supreme Court in other cases, but we do not think we should anticipate that that Court will declare unconstitutional a practice approved in many states, including our own, for so many years. This assignment is overruled.

[2-6] Defendant next assigns as error the overruling of his motion to dismiss the jury for that (1) all Negroes (members of defendant's race) were deliberately excluded, and (2) all jurors who expressed opposition to the death penalty were excused either for cause or peremptorily. The motion sets out that 9 of the first 53 jurors tendered were Negroes, and 6 of these 9 were excused for cause after each had stated he was opposed to capital punishment and would not consider the death penalty. Another was 84 years of age and was excused by the court because of her age, and the two remaining were challenged peremptorily. Defendant had the burden of proof of establishing racial discrimination. *State v. Ross,* 269 N.C. 739, 153 S.E. 2d 469. The absence of Negroes from a particular petit jury is insufficient, in and of itself, to raise a presumption of discrimination. *State v. Brown,* 271 N.C. 250, 156 S.E. 2d 272. Defendant does not have the right to demand that his petit jury be composed in whole or in part of persons of his own race or that there be proportional representation, but only that persons of his race not be intentionally excluded from the jury because of race. *State v. Lowry and State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870, appeal dismissed and cert. den. in *State v. Mallory,* 382 U.S. 22, 86 S. Ct. 227, 15 L. ed. 2d 16 (1965). The court in its discretion properly excused the juror who was 84 years of age, and the remaining 6 Negroes were properly excused for cause because of their belief concerning capital punishment. No cause need be stated for a peremptory challenge. G.S. 9-21. In the absence of any evidence of racial discrimination, the court correctly overruled this part of defendant's motion.

[7] The defendant further alleges that the six Negro prospective jurors, as well as others, were excused for cause contrary to the decision in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S. Ct. 1770, 20 L.

ed. 2d 776 (1968), because they opposed capital punishment. Prior to *Witherspoon,* it was well established that under the law in North Carolina it was not error to allow challenges for cause by the State to prospective jurors who stated they had "conscientious scruples against the death penalty" in a case where such penalty might be inflicted pursuant to a verdict of guilty. *State v. Atkinson, supra; State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802, vacated 392 U.S. 649, 88 S. Ct. 2290, 20 L. ed. 2d 1350 (1968); *State v. Bumpers* (first hearing), 270 N.C. 521, 155 S.E. 2d 173, rev'd 391 U.S. 543, 88 S. Ct. 1788, 20 L. ed. 2d 797 (1968); *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453. However, in *Witherspoon* 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 that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it.
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> * * *
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> ". . . 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.)

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.*"

The record here discloses no violation of the rule in *Witherspoon.* The trial court was very careful to see that the solicitor, in exam-

ining prospective jurors for the State, adhered strictly to that rule. For example, Ruth E. Williams was excused for cause after he stated:

"I do not believe in capital punishment.

"Q. You don't know of any case in which you might return such a verdict if you were chosen as a juror?

"A. Never.

"Q. You wouldn't do it under any facts or circumstances, no matter how aggravated the case was and no matter what the facts were in the case?

"A. I wouldn't do it. My wife and I discussed it several times before, and I would not do it.

"Q. You've made up your mind about it?

"A. A long time ago."

C. C. Mertes was excused for cause:

"Q. Do you believe in capital punishment?"

"A. I assume you mean the death penalty.

"Q. Yes sir.

"A. No sir.

"Q. You don't feel that in any case, regardless of what the circumstances are or how aggravated the case was, you would give any consideration to returning a verdict that would involve the death penalty?

"A. I do not.

"Q. Have you thought about this before, sir?

"A. Considerably.

"Q. This is not just something that you thought — well, you've thought about this before?

"A. Oh, yes.

"Q. And you are opposed to it?

"A. I'm opposed to it.

"Q. If you were chosen to sit on this jury, are you saying that you would not give any consideration to returning a verdict which would involve the death penalty?

"A. I would not.

"Q. Under no circumstances, regardless of what the facts of the case were?

"A. I would not."

Mrs. Tommy M. Jones was excused for cause after stating:

"I don't believe in capital punishment. I have never sat on the jury before.

"Q. Do you feel that there's any case in which you would consider a verdict involving the death penalty?

"A. No.

"Q. You wouldn't even consider returning such a verdict no matter what kind of case it was or how aggravated it was or what the facts were?

"A. I wouldn't.

"Q. Under no circumstances?

"A. No.

"Q. Have you thought about this before?

"A. Well, all of my life I've thought of it, ever since I've been big enough to know these things."

Similar questions were asked and similar answers were given by the other prospective jurors excused for cause. It is perfectly clear from these answers 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 *Witherspoon,* these jurors made it clear that "they could never vote to impose the death penalty" or "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." We conclude, therefore, that there is no merit in defendant's contention that he has been denied any right under the Constitution of the United States or the laws of this State in the sustaining of any challenges for cause by the State by reason of the prospective juror's statement of his views on the subject of capital punishment. *Witherspoon v. Illinois, supra; State v. Roseboro, supra; State v. Ruth, supra; State v. Hill, supra; State v. Atkinson, supra; State v. Peele, supra; State v. Spence and Williams, supra.*

[8-10] Defendant's third assignment of error challenges as hear-

say certain testimony of the witness Hunsucker, the second robbery victim. After Hunsucker had been robbed, defendant and James Monroe ordered him into one of the service bays of the service station and instructed him to get down on his knees; as he did so Monroe struck him with an automatic pistol, and Hunsucker crumpled over on some tires. As defendant and Monroe were leaving, Hunsucker testified he heard one of them say, "Shoot him, shoot him while he's down," and the other one said, "No, he's taken care of." Hunsucker testified he did not know which statement was made by defendant. Defendant did not object, but after Hunsucker testified he did object and moved to strike. His motion was denied. Unless an objection is made in ample time as soon as the opponent has the opportunity to learn the evidence is objectionable, the opponent will be held to have waived it. *State v. Edwards,* 274 N.C. 431, 163 S.E. 2d 767. The Hunsucker testimony revealed from the first that he was unable to identify the spokesman. Hence, defendant should have objected, and his failure to do so constituted a waiver. However, we hold this testimony competent. Defendant and James Monroe were jointly engaged in robbing the service station operated by Hunsucker as part of a conspiracy entered into prior to the robbery. The statements to which Hunsucker testified were made in the course of the robbery as part of the *res gestæ:* "The law undoubtedly is, that where two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, any act or declaration made by one of them in furtherance of the common object, and forming a part of the *res gestæ,* may be given in evidence against the other." *State v. Davis,* 177 N.C. 573, 98 S.E. 785. Accord, *State v. Gallimore,* 272 N.C. 528, 158 S.E. 2d 505; *State v. Ross, supra.* Defendant in his brief admits that testimony concerning the two robberies was competent in the trial of the defendant for murder for the purpose of showing the identity of the accused and to properly develop the evidence in the murder cases. *State v. Atkinson, supra; State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. It follows then that statements made during the course of the robbery, whether by the defendant or his partner in crime, would be competent. This assignment is overruled.

[11] Defendant next contends his alleged confession was not voluntary because it was the product of coercion through fear, and that he did not knowingly, voluntarily, and intelligently waive his rights and, therefore, the admission of this purported confession was contrary to the decision in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. ed. 2d 694, 10 A.L.R. 3d 974 (1966), which lays down the governing principles as to the constitutional prerequisites to the ad-

missibility of statements obtained from an accused during custodial police interrogation. However, after a defendant has been properly advised of his rights as provided for in *Miranda,* he may waive these constitutional rights provided the waiver is made voluntarily, knowingly, and intelligently.

As stated in *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581, cert. den. 396 U.S. 934, 90 S. Ct. 275, 24 L. ed. 2d 232 (1969):

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

In the present case, the court, on motion of the defendant and in the absence of the jury, conducted a *voir dire* as to the voluntariness of the purported statement made by the defendant to the officers. The State offered the testimony of R. E. Linville, the detective who interrogated the defendant, and Officers Beane and Carter. The defendant testified in his own behalf. The defendant's evidence tended to show that he was scared because so many officers were present, and that before he was questioned he heard officers outside the room in which he was sitting make the statements, "We got a black boy we are fixing to lynch," and "Let us have him and take him and let him have an accident with a blackjack"; and that Officer Linville said, "If you want to make it easy on yourself and everybody else, just tell us anything you want to tell us." Defendant further said that he did not understand what Officer Linville tried to tell him about his rights and that Officer Linville did not tell him that he was entitled to a lawyer. The officers present denied that any threats were made inside or outside the room in which the defendant was located, and Officer Linville denied that he made the statement attributed to him by the defendant. Officer Linville's testimony as to

what he told defendant concerning his right to make or not make any statement and his right to have a lawyer present is correctly set out in the judge's findings of fact. Officer Carter testified that he told defendant that he was in serious trouble and "that he needed a good attorney" and that "he needed one then." After hearing the evidence the court found:

"That the defendant was detained in the Community Services Room of the second floor of City Hall in Winston-Salem, and that room adjoins a room with the office of Detective Linville; that he was kept there approximately thirty minutes in the custody of two police officers, neither of whom questioned him or talked to him during that period of time. The court further finds as a fact that at no time while the defendant was in custody did any officer or anyone else make any threat to him of any kind, nature or description, nor did any officer make any statement which was overheard by the defendant and which could constitute or be construed to constitute any threat of any nature or description.

"The court further finds as a fact that Detective Linville talked to the defendant shortly after one a.m. February 4th, 1969, which was not more than forty-five minutes from the time of the defendant's apprehension on the corner of Stratford Road and Country Club Drive and Miller Street; that before asking the defendant any questions relating to the charges against the defendant, Officer Linville did, on February the 4th, 1969, at 1:05 a.m. read to the defendant the following in quotations:

" 'Your rights. Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you by the court, before any questioning if you wish. If you decide to answer questions, now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer.'

"The defendant thereupon signed a statement appearing on the same page, reading as follows:

" 'Waiver of rights: I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am do-

ing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me by anyone.'

"That was signed by the defendant at 1:10 a.m. on February 4th, 1969. The court further finds as a fact that the defendant thereafter made a statement to Officer Linville and agreed that it may be recorded on a tape recorder to be transcribed later. The defendant thereupon freely, voluntarily, knowingly and understandingly, without any hope of reward or promise of reward, and without any duress or fear made a statement to Officer Linville. Before making the statement and while the waiver of rights was being read to him, Mr. Henry C. Carter, the chief of the detectives for the Winston-Salem Police Department, who was present at the time, told the defendant that it was his — the officer's — opinion that he needed an attorney, and a good attorney, and that he needed one then, because he was in serious trouble. The defendant replied that he knew he was in serious trouble but made no request for an attorney. On the afternoon of February the 4th, 1969, between the hours of three-thirty and six p.m., Officer Linville took the statement which had been transcribed to the county jail to the defendant and with the defendant read the statement in question and answer form as it was made, and transcribed from the tape recorder. The defendant made one correction of another person's name appearing on the statement, stated that the rest of it was correct and initialed each page except the last page which he signed. The court further finds as a fact that the defendant graduated from high school in Sanford, North Carolina, when he was eighteen years of age; that he was in February, 1969, twenty-two years of age; that before signing the waiver of rights, it was not only read to him along with a statement of his rights, but he followed it on another copy of the same document, reading it to himself as it was read to him. The defendant had a full understanding of his right to a lawyer and his right not to answer any questions, and of all other constitutional rights relating to the making of the statement to police officers. The defendant was relatively calm when he talked to the police officers in view of the gravity of the charges against him. He was informed before any questions were asked him, that he would be questioned about two armed robberies and the shooting or assault upon two police officers in Surry County; that he fully understood the purpose of the questions that were asked him, the seriousness of the accusation, and all rights which were afforded him. Upon the fore-

going findings, the court is of the opinion, and so finds that the defendant knew each of the rights and understood each of the rights set out on the document, State's Exhibit A; that he was offered no hope of reward, offered no reward and had no hope of reward. He was under no coercion or fear and that he voluntarily, knowingly, understandingly made statements to Officer Linville. Upon such Findings the objection to the evidence offered by the State is overruled, and the defendant excepts."

There is competent evidence to support the findings that defendant had been fully advised of his rights and that defendant freely, voluntarily, and understandingly waived his rights to counsel and made his statement voluntarily and with understanding. Such findings of fact by the trial judge are conclusive, and the statement made by defendant was properly admitted. *State v. Wright, supra; State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, cert. den. 386 U.S. 911, 87 S. Ct. 860, 17 L. ed. 2d 784 (1967). This assignment is overruled.

[12] Defendant next assigns as error the court's refusal to allow defendant to explain an admission made on cross-examination concerning a prior conviction. On cross-examination defendant testified: "I was convicted of simple assault in the Superior Court on a female. The charge was in Superior Court because it was bound over from a little court where they had a hearing, you know, and they bound it over. She took out a warrant and the warrant read assault with intent to commit rape and I was convicted of assault on a female. I was put on probation and am on probation now." On redirect examination defendant was asked to explain the assault charge. The State objected and the objection was sustained. Defendant excepted and for the record testified: "It stemmed from a charge of assault with intent to commit rape and whenever we went to little Court, the girl — she told lies, and whenever we got to the big Court, she told the truth, and the Judge charged me with assault on a female. I wasn't guilty of that but I just didn't say anything about it. I accepted that because he suspended the sentence."

[12-14] Defendant was entitled to full opportunity to correct or explain his answers in response to the impeaching questions. *State v. King,* 225 N.C. 236, 34 S.E. 2d 3; *State v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648; *Keller v. Furniture Co.,* 199 N.C. 413, 154 S.E. 674; Stansbury, N. C. Evidence § 36 (3d ed. 1963). But it appears here that defendant had already testified to the substance of the excluded testimony. The fact that the prosecuting witness told lies in the "little court" but told the truth in the "big court" resulting in the conviction of defendant for an assault on a female, and the fact that

he was not guilty but did not say anything about it because sentence was suspended, neither added to nor subtracted from, in any substantial manner, the testimony which defendant had already given that he was charged with assault on a female with intent to commit rape but only convicted of simple assault on a female and put on probation. We perceive no harmful or prejudicial result to defendant's cause on this account. *State v. Elder,* 217 N.C. 111, 6 S.E. 2d 840. To warrant a new trial there should be made to appear that the ruling complained of was material and prejudicial to defendant's rights and that a different result would have likely ensued. *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522; *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364; *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863; *State v. Beal,* 199 N.C. 278, 154 S.E. 604; *State v. Stancill,* 178 N.C. 683, 100 S.E. 241. In view of the serious nature of the facts in this case, we do not think this ruling affected the result. This assignment is overruled.

[15-19] Defendant next contends that the court erred in overruling his motion for judgment as of nonsuit on the charge of murder in the first degree for the reason that the evidence of premeditation and deliberation was not sufficient to submit to the jury. To sustain verdicts of murder in the first degree in this case, the evidence must be sufficient to support a finding beyond a reasonable doubt that the defendant with malice, after premeditation and deliberation, intentionally shot and killed the two officers. Malice may be presumed from evidence which satisfies the jury beyond a reasonable doubt that the death of the two officers proximately resulted from pistol shots intentionally fired at them by the defendant. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Payne,* 213 N.C. 719, 197 S.E. 573. The additional elements of premeditation and deliberation are not usually susceptible to direct proof, but must be established from the circumstances surrounding the homicide. *State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484; *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769, 96 A.L.R. 2d 1422, cert. den. 368 U.S. 851, 82 S. Ct. 85, 7 L. ed. 2d 49 (1961). Premeditation means "thought beforehand" for some length of time, however short. *State v. McClure,* 166 N.C. 321, 81 S.E. 458. This Court said in *State v. Benson,* 183 N.C. 795, 111 S.E. 869: "Deliberation means . . . an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation." *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541; *State v. Faust, supra; State v. Bowser,* 214 N.C. 249, 199 S.E. 31; 4 Strong's N. C. Index 2d, Homicide § 4. No

fixed amount of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, it being sufficient if these mental processes occur prior to, and not simultaneously with, the killing. *State v. Walters, supra; State v. Brown,* 218 N.C. 415, 11 S.E. 2d 321; *State v. Steele,* 190 N.C. 506, 130 S.E. 308; 4 Strong's N. C. Index 2d, Homicide § 4.

[15] The evidence of this tragic occasion, which comes either from defendant's statement to the officers or from his testimony at trial, is clearly sufficient to permit the jury to make a legitimate inference of premeditation and deliberation. This evidence discloses defendant shot and killed two officers of the law who were doing what their duty required — investigating two armed robberies committed a short time before by defendant and his companions. When the officers stopped the car, one of them asked Charles Monroe, the driver, for his driver's license, which Charles gave to him. The policemen told the occupants that there had been an armed robbery, and they would like to search the car. The occupants gave their permission and as they got out, the defendant slipped his pistol under the edge of the car. When Officer Branscome searched James Monroe and found a pistol under his belt, he told James he would have to take him in. As this officer started to handcuff James, defendant reached down, got his pistol, and shot Officer Branscome. The officer screamed and defendant continued shooting him until he stopped screaming. Defendant then saw Officer East running toward the patrol car, and defendant ran behind him and fired until all the bullets were out of his pistol; Officer East was screaming, so he took Officer East's pistol and shot him in the head until he stopped screaming. In his statement to the officers, defendant said he shot both officers in the head with Officer East's pistol after he had emptied his own pistol. When asked why he shot the first officer, defendant answered: "I picked up my weapon whenever he started to put the handcuffs on James. I don't, I really don't know why I picked it up. So many things I was thinking — so many things at one time. *I was thinking about what I would have to face, I guess.*" (Emphasis added.) After defendant had emptied both pistols — his, which held nine cartridges, and the one belonging to Officer East, which held six — into the two officers, defendant was still cool enough to ask Charles as they started to leave the scene if he had his driver's license. When Charles said "No," defendant and Charles rolled Officer Branscome over and took Charles' license out of the officer's shirt pocket. Defendant said the officer was bleeding at that time, but he did not know whether he was dead or not. The want of provocation, the absence of any excuse

or justification for the shooting, the number of shots fired, the further shooting of each officer after he was down and apparently helpless, and defendant's statement that he shot the first officer because *he thought of what was facing him,* all permit a reasonable inference that defendant decided to kill the officers rather than be arrested and permit a legitimate inference of premeditation and deliberation. This evidence was sufficient to go to the jury and be considered by it on the issue of murder in the first degree. *State v. Perry, supra; State v. Faust, supra; State v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188.

[20] Next the defendant contends the trial judge failed to properly state the evidence and array the contentions of the parties in his charge. The recapitulation of all the evidence is not required under G.S. 1-180, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. *State v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58. If defendant desired fuller instructions as to the evidence or contentions, he should have so requested. His failure to do so now precludes him from assigning this as error. *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477; *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198; *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876, 3 Strong's N. C. Index 2d, Criminal Law § 163. However, a careful examination of the charge as a whole leads us to the conclusion that the court fully instructed the jury as to the evidence and the contentions of the parties and defined the law applicable thereto. We find no merit in defendant's exceptions to the charge. *State v. McLean,* 234 N.C. 283, 67 S.E. 2d 75; *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548; *State v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885.

Defendant's last assignment of error relates to the court's pronouncing the judgments of death upon the verdicts. The defendant contends the death sentences authorized by G.S. 14-17 are unconstitutional under the decision in *United States v. Jackson,* 390 U.S. 570, 88 S. Ct. 1209, 20 L. ed. 2d 138 (1968). The shooting of the two officers occurred on 3 February 1969. G.S. 15-162.1 was in effect on that date but was repealed effective 25 March 1969 prior to defendant's trial in November, 1969. Defendant contends that the death penalty provision of G.S. 14-17 was invalid in the month of February, 1969, when the crimes were committed, and was also invalid in the month of November, 1969, when defendant was tried, convicted, and sentenced.

G.S. 15-162.1 provided that any person charged in the 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. If the plea was accepted, this would be tantamount to a jury verdict of guilty of the crime charged with recommendation by the jury that punishment be life imprisonment.

In *United States v. Jackson, supra,* the Court considered the Federal Kidnapping Act, 18 U.S.C. 1201, and observed in its opinion that the 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 held that the original Federal Kidnapping Act could and should stand as a separate, divisible statutory enactment apart from the 1934 amendment.

[21] Our Court has considered the effect of *Jackson* on G.S. 14-17 and G.S. 15-162.1 and has held that if G.S. 15-162.1 should be held invalid upon the grounds 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. *State v. Hill, supra* (276 N.C. 1, 170 S.E. 2d 885); *State v. Atkinson, supra* (275 N.C. 288, 167 S.E. 2d 241); *State v. Spence and Williams, supra* (274 N.C. 536, 164 S.E. 2d 593); *State v. Peele, supra* (274 N.C. 106, 161 S.E. 2d 568, cert. den. 393 U.S. 1042, 89 S. Ct. 669, 21 L. ed. 2d 590 (1969)).

Defendant did not offer to plead guilty under the provisions of

G.S. 15-162.1 which was in effect on the date of the commission of the alleged murders; hence, we are not called upon to decide what effect such a plea would have had. See *Parker v. North Carolina*, 38 U.S.L.W. 4371 (U.S. May 4, 1970); *Brady v. United States*, 38 U.S.L.W. 4366 (U.S. May 4, 1970). He was tried on a plea of not guilty to two charges of murder in the first degree under G.S. 14-17, after the repeal of G.S. 15-162.1. The jury has, upon the evidence offered, under full and correct instructions of the trial judge, found him guilty as charged, without recommendation of life imprisonment. The statute of this State authorized the jury to return such verdicts and required the judge, thereupon, to enter the judgments contained in the record. For, as was said by Higgins, J., in *State v. Hill, supra*, "the repeal of G.S. 15-162.1 did not modify, change, add to, or take from G.S. 14-17, under which the indictment here involved was drawn. The verdict of the jury as returned without a recommendation that the punishment be imprisonment for life required the court to impose the death sentence." This assignment of error is overruled.

We conclude that the evidence introduced at this trial permitted and will support findings that the defendant with malice, premeditation and deliberation, without just cause or excuse, shot and killed Officer Glenn Branscome and Officer Ralph East, who were engaged in the performance of their duty. In fact, this evidence almost compels such findings and amply sustains the verdicts.

After a careful consideration of the defendant's assignments of error, we find no error of law in the trial which would justify us in granting defendant a new trial or in vacating or modifying the judgments.

No error.

BOBBITT, C.J., and SHARP, J., dissenting as to death sentence.

We vote to vacate the judgment imposing the death sentence. In our 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.

The crime was committed on February 3, 1969, when our statutes relating to capital punishment for murder in the first degree were G.S. 14-17 and G.S. 15-162.1. It was and is our opinion that, until the repeal of G.S. 15-162.1 on March 25, 1969, the 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 (1968), and in *Pope v. United States*, 392 U.S. 651, 20 L. ed. 2d 1317, 88 S. Ct. 2145 (1968),

rendered invalid the death penalty provisions of G.S. 14-17. The reasons underlying our opinion have been stated fully in the dissenting opinions in *State v. Spence*, 274 N.C. 536, 164 S.E. 2d 593, and in *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241, and in *State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885 (1969). See also our dissenting opinion in *State v. Roseboro*, 276 N.C. 185, 171 S.E. 2d 886. In view of the basis on which the Court's opinion undertakes to distinguish the provisions of the Federal Kidnapping Act from the provisions of G.S. 14-17 and G.S. 15-162.1, reference is made to the dissenting opinion in *State v. Atkinson, supra*, for a discussion in detail of the provisions of the Federal Kidnapping Act considered in *United States v. Jackson, supra*, and of the Federal Bank Robbery Act considered in *Pope v. United States, supra*. Repetition is unnecessary.

G.S. 15-162.1 was repealed by Chapter 117, Session Laws of 1969. The 1969 Act, if construed to provide greater punishment for murder in the first degree than the punishment provided therefor when the crime was committed, would, in that respect, be unconstitutional as *ex post facto*. 16 Am. Jur. 2d Constitutional Law § 396. In our view, if the death penalty provisions of G.S. 14-17 were invalid on February 3, 1969, when the crime was committed, they were invalid as to this defendant in November, 1969, when he was tried, convicted and sentenced.

NATIONWIDE MUTUAL INSURANCE COMPANY v. CHARLES LEROY HAYES, SHAFER EWELL GWYN, SHAFER EWELL GWYN, ADMINISTRATOR OF THE ESTATE OF BERNICE O. GWYN, GLENICE KEY LYNCH, DONALD JOE LYNCH, DONNA CHERYLEEN LYNCH, AND GREAT AMERICAN INSURANCE COMPANY

No. 50

(Filed 12 June 1970)

1. Insurance §§ 79, 85; Automobiles § 5— automobile insurance — non-owner's liability coverage — transfer of title

An insured under a non-owner's liability policy whose recently purchased automobile was involved in an accident on 27 January 1968 was covered under a provision of the non-owner's policy which stated that if the insured acquired ownership of an automobile during the policy period the policy shall apply with respect to the ownership or use of the automobile "for a period of 30 days next following the date of such acquisition," the insured having acquired title to the automobile within the meaning of G.S. 20-72(b) on 28 December 1967, where the evidence was to the effect (1) that the

seller of the automobile delivered it to the insured on 26 or 27 December 1967 and received a check in full payment on 27 December 1967 and (2) that the seller on 28 December 1967 signed the certificate of title and delivered it to the insured's employer and that insured also signed the title certificate on 28 December 1967 and purchased his license tags.

2. Automobiles § 5— transfer of automobile title — pre-1961 law

Prior to 1961, a purchaser of a motor vehicle could acquire title or ownership without delivery of an executed certificate of title by the vendor and without applying for a new certificate to the Department of Motor Vehicles.

3. Automobiles § 5— transfer of automobile title — 1963 amendment to G.S. 20-72(b) — "title" and "ownership"

The General Assembly used the word "title" as a synonym for "ownership" in enacting the 1963 amendment to G.S. 20-72(b) which provides that "no title to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee."

4. Insurance § 80— automobile insurance — financial responsibility — "owner" of automobile

The Financial Responsibility Act of 1953 fixes the requirement that financial responsibility be maintained by the owner of an automobile, which includes the holder of title and a mortgagor, conditional vendee or lessee having right of purchase and right of possession. G.S. 20-279.1 et seq.

5. Insurance § 80— automobile insurance — purpose of Financial Responsibility Act

The purpose of the Financial Responsibility Act is to provide protection from damages or injuries resulting from the negligent operation of automobiles.

6. Automobiles § 5; Insurance § 80— ownership of motor vehicle — controlling statute

The provisions of G.S. 20-72(b), as amended in 1963, are controlling as to the ownership of a motor vehicle for purposes of tort liability and insurance coverage; these provisions do not conflict with the provisions of the Financial Responsibility Act of 1953, but rather they strengthen and complement the Act.

7. Automobiles § 5; Uniform Commercial Code § 16— transfer of automobile title — what law controls

For purposes of tort law and liability insurance coverage, the specific provisions of the Motor Vehicle Act relating to the transfer of ownership of motor vehicles must prevail over the provisions of the Uniform Commercial Code relating to passing of title to property generally described as "goods." G.S. 20-72, G.S. 25-2-401.

8. Uniform Commercial Code § 4; Automobiles § 5— documents of title — motor vehicle titles

The documents of title referred to in the Uniform Commercial Code do not include certificates of title to motor vehicles. G.S. 25-2-401.

9. Automobiles § 5— transfer of automobile title — mandatory requirements

The requirements governing transfer of legal title and ownership to a motor vehicle are mandatory. G.S. 20-72(b).

10. Uniform Commercial Code §§ 1, 3— scope of application — public regulations

The Uniform Commercial Code generally covers transactions in personal property and is particularly related to negotiable instruments, bills of lading and sales in general; the Code is not necessarily applicable to public regulations unless the court chooses to make it so.

11. Uniform Commercial Code § 6; Statutes § 11— laws not repealed — statute relating to transfer of automobile title

Where the Uniform Commercial Code contains a specific repealer as to ten separate acts of the General Assembly, but the repealer does not mention the Motor Vehicles Act, it would require a strained interpretation to hold that it was the intention of the General Assembly to repeal the provisions of G.S. 20-72 relating to the transfer of ownership of motor vehicles. G.S. 25-10-102.

12. Automobiles § 5— transfer of title — post-1963 law

After 1 July 1963 for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration under the Motor Vehicle Act of 1937 until (1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee, (2) there is an actual or constructive delivery of the motor vehicle, and (3) the duly assigned certificate of title is delivered to the transferee; in the event a security interest is obtained in the motor vehicle from the transferee, the requirement of delivery of the assigned certificate of title is met by delivering it to the lien holder. G.S. 20-72(b), as amended in 1963.

ON *certiorari* to the Court of Appeals to review its decision in 7 N.C. App. 294.

This case was heard before Johnston, J., at the 2 September 1969 Civil Session of Surry County.

This action for declaratory judgment was instituted by plaintiff, Nationwide Mutual Insurance Company (Nationwide), which sought a declaration that no coverage was afforded by it to Charles Leroy Hayes (Hayes) relative to actions instituted by the individual defendants named herein to recover damages for personal injuries and wrongful death resulting from an automobile accident on 27 January 1968. Plaintiff asserts that insurance coverage was afforded by Great American Insurance Company (Great American). Defendant Great American contends that Hayes had not acquired ownership of the vehicle he was driving in the accident until 28 December

1967; that the accident occurred 27 January 1968, and that therefore coverage was afforded by Nationwide under its "non-owner's" policy issued to Hayes.

The "non-owner's" policy, a policy issued to one who does not own an automobile, was issued to Hayes by Nationwide pursuant to assignment from the North Carolina Automobile Assigned Risk Plan, for the period 14 December 1967 to 14 December 1968. The policy, *inter alia*, contained the following:

> "3. If the Policyholder (Named Insured) acquires ownership of an automobile or land motor vehicle during the policy period, the insurance hereunder shall nevertheless apply with respect to the ownership, maintenance or use of such automobile or land motor vehicle for a period of 30 days next following the date of such acquisition; provided that the insurance shall not apply beyond the effective date and time that any other insurance is available to the Insured (those entitled to protection) with respect to such automobile or land motor vehicle or would be available but for the existence of this insurance."

Mr. Luther Chappell of the Surry Insurance Agency and Realty Company (Surry Agency), Dobson, North Carolina, was the producer of record of the assigned risk policy which was assigned to Nationwide and numbered No. 61 686 428.

Hayes had negotiated the sale of a 1959 Pontiac automobile from one Bertie George. Harold Hodges, Hayes' employer, agreed to furnish the money for the purchase of the automobile. The automobile was delivered to Hodges' warehouse on 26 or 27 December 1967, at which time Mr. George removed the license tags. A check dated 27 December 1967, in the amount of $450.00, was delivered to the seller on 27 December 1967, *and on 28 December 1967 seller signed the certificate of title and delivered it to Mr. Hodges. Hayes also signed the title certificate on 28 December 1967, the day he purchased his license tags.*

Mr. Hodges contacted the Surry Agency on 27 December 1967 and on 28 December 1967 and informed the agency that Hayes had a non-owner's policy with them (actually with Nationwide), that he (Hodges) had made arrangements for Hayes to obtain a car and that Hayes wanted to change his policy from a non-owner's policy to an owner's policy. The Surry Agency subsequently sent Hayes forms necessary for him to obtain license plates on the Pontiac.

Hayes was involved in a collision with a 1965 Pontiac auto-

mobile operated by Shafer Ewell Gwyn on U. S. Highway 52 in Surry County at approximately 11:52 A. M. 27 January 1968. Great American had a policy (No. 450 34 60) covering Gwyn's automobile at the time of the accident and providing protection against uninsured motorists.

Surry Agency did not notify Nationwide to convert the non-owner's policy to an owner's policy until 30 January 1968. A memorandum to Nationwide from Chappell stated:

January 30, 1968

"In reference to the above policy this is to advise that the insured bought a 1959 Pontiac 2 Door convertible, Serial No. 159W13860 on December 27, 1967. The insured's employer, H. Y. Hodges, stated that he called our office on December 27 and asked that the policy be converted from a non-owner to cover on this vehicle. We have no record, or knowledge of receiving this call.

"This policy should be converted from the non-owner to cover on this vehicle as of December 27. Please advise the difference in the premium for this change.

"The insured was driving the vehicle and was involved in an accident on January 27.

"Awaiting your reply.

Signed: Luther Chappell."

A reply, written on the same memorandum, and dated 2/2/68, indicated that Nationwide was converting the policy from a non-owner's policy to an owner's policy effective 1 February 1968, the date it received the memorandum. The reply indicated that Nationwide could not back-date the change (as requested).

Gwyn and several passengers in his car at the time of the accident have filed civil actions against Hayes, seeking to recover for personal injuries and other damages.

The cause came on for hearing and was heard by Johnston, J., without a jury, pursuant to agreement of the parties. Judge Johnston heard the evidence, made full findings of fact, reached conclusions of law, and entered judgment. Pertinent portions of the conclusions of law reached and of the judgment are quoted below.

"II. Charles Leroy Hayes acquired ownership of the 1959 Pontiac automobile involved in the accident more than 30 days prior to occurrence of the accident.

"III. No coverage is afforded to Charles Leroy Hayes by Nationwide as to claims arising out of the accident of January 27, 1968; and Nationwide has no obligation to defend Charles Leroy Hayes in said actions.

"IV. Charles Leroy Hayes was uninsured at the time of said accident, and therefore the uninsured motorist coverage of the Great American Insurance Company policy is applicable to claims arising out of said accident by Shafer Ewell Gwyn and passengers in the Gwyn automobile."

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Nationwide Mutual Insurance Company affords no coverage to and has no obligation to defend claims arising out of an automobile accident which occurred on January 27, 1968 between a 1959 Pontiac automobile owned by Charles Leroy Hayes and a 1965 Pontiac automobile owned by Shafer Ewell Gwyn; that the uninsured motorist coverage afforded under a policy of insurance issued by Great American Insurance Company to Shafer Ewell Gwyn is applicable to claims of Shafer Ewell Gwyn and his passengers arising out of said accident. . . ."

Defendant Great American appealed to the Court of Appeals. The Court of Appeals reversed the trial court. Plaintiff Nationwide and defendants Shafer Gwyn, Shafer Gwyn, Administrator of the Estate of Bernice O. Gwyn, Glenice K. Lynch, Donald J. Lynch, and Donna C. Lynch petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals pursuant to G.S. 7A-31 and Rule 2 of the Supplementary Rules of the Supreme Court. By order dated 9 April 1970 the petition was allowed.

Folger and Folger by Fred Folger, Jr., for defendant appellants, Shafer Ewell Gwyn, Shafer Ewell Gwyn, Administrator of the Estate of Bernice O. Gwyn, Glenice Key Lynch, Donald Joe Lynch, and Donna Cheryleen Lynch.

Hudson, Petree, Stockton, Stockton & Robinson by J. Robert Elster, for plaintiff Nationwide Mutual Insurance Company, appellant.

Womble, Carlyle, Sandridge and Rice by Allan R. Gitter and Jimmy H. Barnhill, for Great American Insurance Company, appellee.

BRANCH, J.

[1] Plaintiff seeks an adjudication as to which of the two insur-

ance policies afforded coverage for claims against Hayes growing out of the accident which occurred on 27 January 1968. This question will be determined by fixing the date on which Hayes acquired ownership of the Pontiac automobile which he was operating at the time of the accident. If Hayes acquired ownership of the automobile before December 28, the collision occurred more than 30 days from the time he acquired the automobile, and the protection under Gwyn's uninsured motorists insurance would apply. Conversely, if ownership of the automobile was acquired on or after the 28th day of December, 1968, the accident occurred within 30 days of the acquisition and Hayes' non-owner's policy would apply. In order to fix the date of acquisition of ownership of the automobile, we must decide whether in this state a purchaser may acquire ownership of a motor vehicle before purchaser and seller have fully met the requirements of G.S. 20-72(b).

[2] Prior to 1961, a purchaser of a motor vehicle could acquire title or ownership without delivery of an executed certificate of title by the vendor and without applying for a new certificate to the Department of Motor Vehicles. *Finance Co. v. Pittman,* 253 N.C. 550, 117 S.E. 2d 423. However, in 1961 the General Assembly amended G.S. 20-72(b) so that it read as follows:

"Sec. 20-72. TRANSFER BY OWNER.— * * *

"(b) The owner of any vehicle registered under the foregoing provisions of this article, transferring or assigning his title or interest thereto, shall also endorse an assignment and warranty of title, including in such endorsement the name and address of the transferee and the date of transfer, in form approved by the Department upon the reverse side of the certificate of title or execute an assignment and warranty of title of such vehicle and a statement of all liens or encumbrances thereon, which statement shall be verified under oath by the owner, who shall deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle, except that where deed of trust, mortgage, conditional sale or title retaining contract is obtained from purchaser or transferee in payment of purchase price or otherwise, the lien holder shall forward such certificate of title papers to the Department within twenty days together with necessary fees, or deliver such papers to the purchaser at the time of delivering the vehicle, as he may elect, but in either event the penalty provided in Sec. 20-74 shall apply if application for transfer is not made within twenty days. Any owner

selling or transferring his interest to a motor vehicle who willfully fails or refuses to endorse an assignment of title and any person who delivers or accepts a certificate of title endorsed in blank shall be guilty of a misdemeanor. *Transfer of ownership in a vehicle by an owner is not effective until the provisions of this section have been complied with.*" (Emphasis ours)

The case of *Insurance Company v. Insurance Company,* 276 N.C. 243, 172 S.E. 2d 55, construed this section as amended by the General Assembly of 1961. In that case the vendor agreed to sell an automobile to one John W. Zimmerman, and on 25 May 1963 delivered the automobile to John's home and removed the dealer license plate. The vendor had liability insurance with the defendant insurance company which covered vendor, its officers, agents and "any person while using an owned automobile — provided the actual use of the automobile is by the named insured or with his permission . . . ." On 27 May 1963, James Zimmerman, brother of John Zimmerman, was driving the automobile with John's permission and was involved in an accident. Prior to the date of the accident, plaintiff insurance company had issued to James Zimmerman an assigned risk insurance policy on an automobile belonging to him, which policy was in effect at the time of the accident. On 28 May vendor executed and delivered the certificate of title to John Zimmerman. Civil action was instituted against James Zimmerman for claims arising from the accident. Plaintiff insurance company instituted action under the Declaratory Judgment Act for a declaration of its rights. This Court, holding that the ownership of the automobile remained in the vendor on the date of the accident stated:

"The Legislature took positive action on 15 June 1961 to include in our statutes this 'pivotal provision' lacking in 1925 by amending G.S. 20-72(b) and G.S. 20-75, effective 1 July 1961 to provide: 'Transfer of ownership in a vehicle by an owner (by a dealer) is not effective until the provisions of this subsection have been complied with.'

"We hold therefore that after 1 July 1961, the effective date of the amendments, no title passed to the purchaser of a motor vehicle until (1) the certificate of title has been assigned by the vendor, (2) delivered to the vendee or his agent, and (3) application made for a new certificate of title. This accords with prior decisions in *Bank v. Motor Co., supra,* and *Credit Co. v. Norwood, supra.*"

Had there been no later change in the statutory law, in view of the fact that here delivery had occurred, *Insurance Company v. In-*

surance Company, supra, would unquestionably be controlling precedent for decision in instant case. However, in that case the Court noted that the statute (G.S. 20-72(b)) had been materially changed by the 1963 amendment. Decision in the cause now before us must be made pursuant to G.S. 20-72(b), as amended by the General Assembly in 1963, which provides:

> "(b) In order to assign or transfer title or interest in any motor vehicle registered under the provisions of this article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by the Department, including in such assignment the name and address of the transferee; *and no title to any . . . motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee.* The provisions of this section shall not apply to any foreclosure or repossession under a chattel mortgage or conditional sales contract or any judicial sale. (Emphasis ours)
>
> "Any person transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the certificate of title to the lienholder . . . ."

Appellant Insurance Company contends that the 1963 legislature intended to amend G.S. 20-72(b) so as to make it clear that its provisions applied only to formal transfer of title as related to lien law and no longer applied to the transfer of ownership of a motor vehicle for the purposes of tort liability and insurance coverage. In support of this position appellant argues that the 1963 amendment resulted from legislative reaction to the decision in *Home Indemnity Co. v. Motor Co.,* 258 N.C. 647, 129 S.E. 2d 248, and that the use of the word "title" in lieu of "ownership" is indicative of the legislature's intent.

Webster's Third New International Dictionary defines "title" as follows: "2a: The union of all the elements constituting legal ownership and being divided in common law into possession, right of possession, and right of exclusive possession; the body of facts or events that give rise to the ownership of real or personal property." It defines "owner" as: "One that owns, one that has the legal or rightful title whether the possessor or not."

In *Frank v. Forgotston,* 61 N.Y.S. 1118, 30 Misc. Rep. 816, it is stated: "The 'title to certain goods and chattels' means the right to the property, and the right of possession thereof, — in short, the ownership thereof . . . ."

In the case of *Skelly Oil Co. v. Kelly,* 134 Kansas 176, 5 P. 2d 823, the Court said:

> "The word title has a variety of meanings. It sometimes connotes the means by which property in lands is established, as in the expression 'chain of title.' It sometimes means 'property' or 'ownership' in the sense of the interest one has in land. A common meaning is complete ownership, in the sense of all the rights, privileges, powers, and immunities an owner may have with respect to land. (Am. Law. Inst., Restatement of the Law of Property, draft No. 1; introduction.)"

It is noted that in the case of *Insurance Co. v. Insurance Co., supra,* the Court, construing G.S. 20-72(b) when it contained the provision, "Transfer of ownership in a vehicle by an owner is not effective until the provisions of this subsection have been complied with," stated:

> "We hold therefore that after 1 July 1961, the effective date of the amendments, no *title* passed to the purchaser of a motor vehicle until (1) the certificate of title has been assigned by the vendor, (2) delivered to the vendee or his agent, and (3) application made for a new certificate of title. This accords with prior decisions in *Bank v. Motor Co., supra,* and *Credit Co. v. Norwood, supra.*" (Emphasis ours)

It is conceded that the legislature may have intended to clarify some questions raised by the dictum in the case of *Home Indemnity Co. v. Motor Co., supra,* when it enacted the 1963 amendment, so as to delete the language "or execute an assignment and warranty of title of such vehicle and a statement of all liens or encumbrances thereon, which statement shall be verified under oath by the owner," and further clarify the provisions of the statute when liens are involved. It is of interest to note that in *Home Indemnity Company v. Motor Co.,* the Court used the term "vesting of title," interchangeably with "transfer of ownership." The contention that the 1963 amendment changed the meaning of G.S. 29-72(b) so that it applied only to formal transfer of title as related to lien law, however, is negated by the fact that the amendment appears in Chapter 20 under "Part 4. Transfer of Title or Interest." The perfection, assessment and release of liens on motor vehicles appears in Chapter 20

under "Part 3. Registration and Certificates of Titles of Motor Vehicles."

[3] The words "title" and "ownership" are words that may be used interchangeably, and we are of the opinion that the legislature in enacting the 1963 amendment to G.S. 20-72(b) used the word "title" as a synonym for the word "ownership."

Appellant further argues that to interpret that portion of the provisions of G.S. 20-72(b) which states, "and *no title* to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to transferee" to mean that *no ownership* of the motor vehicle shall pass, would create a direct conflict with the Financial Responsibility Act of 1953. G.S. 20-279.1, *et seq.*

G.S. 20-279.1 defines "owner" as follows:

> "A person who holds the legal title of a motor vehicle, or in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purposes of this article."

[4] The Financial Responsibility Act fixes the requirement that financial responsibility be maintained by the owner, which includes the holder of title and a mortgagor, conditional vendee or lessee having right of purchase and right of possession. See *Indiana Lumberman's Mutual Ins. Co. v. Parton,* 147 F. Supp. 887 (M.D.N.C. 1957). G.S. 20-38 defines "owner" under the Motor Vehicles Act and G.S. 20-279.1 defines "owner" essentially the same way.

[5] In nearly every instance the holder of the legal title becomes a mortgagor, conditional vendee or lessee by virtue of engaging in security transactions involving the motor vehicle. The purpose of the Financial Responsibility Act is to provide protection from damages or injuries resulting from the negligent operation of automobiles. Thus in order to protect the public and close all avenues of escape from its provisions, the legislature broadly defines "owner" in the Financial Responsibility Act. Any possible conflict between the provisions of the Financial Responsibility Act and the provisions of G.S. 20-72(b) as related to security transactions is further diminished by the passage of the 1961 amendment to G.S. 20-58, which

required all security interests relative to motor vehicles to be fixed on the certificate of title.

Certainly the definition of "owner" as the holder of the legal title is compatible with G.S. 20-72(b), requiring the vendor to execute an assignment and warranty of title on the reverse of the certificate of title in order to assign or transfer any interest in the motor vehicle.

Under the provisions of G.S. 20-50 the owner must register an automobile, obtain a certificate of title therefor, and attach registration plates to the vehicle before the vehicle can be lawfully operated. The owner must show financial responsibility at the time of registration and thereafter maintain such financial responsibility throughout the period of registration. G.S. 20-309; *Swain v. Ins. Co.*, 253 N.C. 120, 116 S.E. 2d 482. If the owner sells the motor vehicle, he must remove the license plates, endorse the registration card and return the card and plates to the Department of Motor Vehicles, G.S.20-72(a); provided that he may retain the plates, to be assigned to another vehicle owned by him. G.S. 20-64.

[6] We fail to see that any material conflict will arise between the Financial Responsibility Act and G.S. 20-72(b), as amended by the legislature of 1963, by holding G.S. 20-72(b) to be controlling as to ownership of a motor vehicle for purposes of tort liability and insurance coverage. Rather, such an interpretation would strengthen and complement the purposes of the Financial Responsibility Act of 1953.

[7] Finally, appellant contends that the Uniform Commercial Code overrides the provisions of G.S. 20-72(b) relative to transfer of ownership of automobiles as affecting tort liability and insurance coverage.

The Uniform Commercial Code became effective at midnight June 30, 1967. G.S. 25-2-401 provides in part:

> "Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. . . . (2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.
>
> (a) if the contract requires or authorizes the seller to send

the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there."

[8] The documents of title referred to in the Uniform Commercial Code do not include certificates of title to motor vehicles. *Semple v. State Farm Mutual Automobile Insurance Company,* 215 F. Supp. 645, (E.D. Pa. 1963).

The most basic departure from previous law which is found in the Uniform Commercial Code is the abandonment of the concept of title as a tool for resolving sales problems. This departure is evidenced by G.S. 25-2-401 which, in effect, holds that title to goods passes from the seller to the buyer when the goods are delivered to the buyer.

Whether title to an automobile can pass pursuant to the terms of the Uniform Commercial Code and without compliance with pre-existing motor vehicle regulations and transfer statutes, is a question of first impression in North Carolina. Other states are divided on the question.

Some jurisdictions hold that title passes pursuant to the provisions of the Uniform Commercial Code, particularly section 2-401(2), upon physical delivery of the vehicle, without completion of the statutory registration formalities. *Semple v. State Farm Mutual Automobile Insurance Co., supra; Motors Insurance Corp. v. Safeco Insurance Co. of America,* 412 S.W. 2d 584 (Ky.); *Park County Implement Co. v. Craig,* 397 P. 2d 800 (Wyo.); *Indiana Insurance Co. v. Fidelity General Insurance Co.,* 393 F. 2d 204 (7th Cir. 1968); *Knotts v. Safeco Insurance Co. of America,* 78 N.M. 395, 432 P. 2d 106.

In the case of *Motors Insurance Corporation v. Safeco Insurance Company, supra,* a purchaser and an automobile dealer agreed on a trade which they both understood to be firm and final. The buyer was given possession of the automobile and all that remained to be done was to process the title papers and for the buyer to pay the remaining cash due. That evening the buyer's son wrecked the car. The court held that the car was not owned by the car dealer at the time of the accident within the meaning of the car dealer's insurance policy, and held that under Code Sec. 2-401 title passed at the time and place of delivery. This case is distinguishable from instant case in that the Kentucky statute is not one that contained mandatory

requirements concerning transfer of title to motor vehicles. The statute has been interpretated by the Kentucky court in the case of *Campbell v. State Farm Insurance Company,* 346 S.W. 2d 775 (Ky.), which held that failure to register transfer did not void the sale of an automobile under Kentucky's statute KRS 186-190.

In *Semple v. State Farm Mutual Automobile Insurance Company, supra,* the Pennsylvania law was applied in an automobile purchaser's suit against the seller's insurance company for the amount of a jury verdict arising from personal injuries caused by the buyer's operation of a motor vehicle. The seller agreed to sell the car to the buyer, and later the same night the buyer paid the purchase price to the seller. The seller gave the buyer the car keys and a certificate of title bearing seller's signature at the appropriate place. They agreed to appear before a notary public some hours later for the buyer to swear to the assignment of the certificate of title. Before that time, however, the buyer drove the car and injured a third party. In holding that the seller's insurer was not liable the Court said that under the Uniform Commercial Code, Section 2-401(2), title passed to the buyer when the seller gave the keys to the buyer, because "this constituted physical delivery of the goods." The Court further held that failure to comply with the formalities of the Pennsylvania Vehicles Code for transferring title was not controlling, because the primary purpose of the Pennsylvania Motor Vehicle Act was not to establish the ownership or proprietorship of an automobile, but rather to register the name and address of the person having the right to possession, and that therefore the statute did not prevent the actual transfer of ownership. It is apparent that this case is also distinguishable from the instant case, because of the differences in the statute relating to transfer of ownership of motor vehicles.

Most of the cases constituting this line of authority are from states which do not have statutes providing a mandatory and exclusive method of transferring title to motor vehicles. However, there are cases, such as *Park County Implement Co. v. Craig, supra,* which hold that title may pass notwithstanding failure to comply with their state motor vehicle acts containing provisions which appear to be mandatory. In that case, defendants ordered a truck chassis and cab from plaintiff and were informed that such vehicle was at the International Harvester Company in Billings, Montana. The purchaser, defendant, was a Wyoming resident; he went to Montana, received delivery of the vehicle, but did not receive any evidence of ownership or title. Defendant transferred the vehicle to Wyoming, installed

a hoist and a dump bed upon it. Thereafter the chassis and cab were destroyed by fire. The court, applying the Wyoming law, held that the transaction was controlled by the sales article of the Uniform Commercial Code and that when purchaser accepted the vehicle and altered it, he became liable to pay the contract price. The court further stated that even if there were merit to defendant's contention relating to various provisions of the motor vehicle law requiring certificates of title to be issued, "the rights of the parties under the Code do not depend upon title." Although the court did not mention any specific motor vehicle statute, the statute, Sec. 31-37(a), specifically states: "The owner of a motor vehicle for which a certificate of title is required hereunder, shall not, after 31 December 1935, sell or transfer his title or interest in or to such vehicle unless he shall . . . in every respect comply with the requirements of this section." Section (b) requires an assignment and warranty of title upon the certificate, a statement of all liens and encumbrances, *verified under oath by the owner,* and delivery of the certificate at time of delivery of the vehicle to transferee.

In other jurisdictions there is authority that the question of ownership is a matter for the jury and that the jury should be instructed as to the provisions of the Uniform Commercial Code along with other evidence of ownership, including certificates of title. *Indiana Ins. Co. v. Fidelity General Ins. Co., supra; Metropolitan Auto Sales v. Koneski,* 252 Md. 145, 249 A. 2d 141.

A South Carolina statute, § 46-150.15, Code 1962, provides:

> "§ 46-150.15. How voluntary transfer carried out; when transfer effective. — If an owner, manufacturer or dealer transfers his interest in a vehicle other than by the creation of a security interest, he shall, at the time of the delivery of the vehicle, execute an assignment and warranty of title to transferee in the space provided therefor on the certificate or as the Department prescribes and cause the certificate and assignment to be mailed or delivered to the transferee or to the Department.
>
> Except as provided in § 46-150.16, the transferee shall, promptly after delivery to him of the vehicle, execute the application for a new certificate of title in the space provided therefor on the certificate or as the Department prescribes and cause the certificate and application to be mailed or delivered to the Department.
>
> Except as provided in § 46-150.14, *and as between the parties,* a transfer by an owner is not effective until the provisions of

this section have been complied with. (1957 (50) 595.) (Emphasis ours)

In construing this statute, the courts have held that title to a motor vehicle passes to a purchaser notwithstanding the want of compliance with the title certificate law. *St. Paul Fire and Marine Ins. Co. v. Boykin,* 251 S.C. 236, 161 S.E. 2d 818. However, the passage of title is effective only as between the parties, and does not affect the rights of third party insurance carriers. *Lynch v. United States Branch, Gen. Acc. F. & L. Assur. Corp.,* 327 F. 2d 328, (4th Cir. 1964)

Many other courts have recently examined the question of when ownership of a motor vehicle passes and have held that ownership does not pass until requirements of the motor vehicle statutes have been complied with. In most of the cases hereinafter cited such ruling was made without mention of the Uniform Commercial Code, although in each case the Uniform Commercial Code had been enacted. *Roe v. Flamegas Industrial Corporation,* 16 Mich. App. 210, 167 N.W. 2d 835; *Forman v. Anderson,* 183 Neb. 715, 163 N.W. 2d 894; *McIntosh v. White,* 447 S.W. 2d 75 (Mo.); *Irion v. Glens Falls Ins. Co.,* 461 P. 2d 199 (Mont.); *Merchants Produce Bank v. Mack Trucks, Inc.,* 411 F. 2d 1174 (8th Cir., 1969); *Melton v. Prickett,* 203 Kan. 501, 456 P. 2d 34.

In the case of *Forman v. Anderson, supra,* plaintiff husband sued for personal injuries suffered by his wife and property damages inflicted to the automobile which his wife was driving when the accident occurred. Title to the motor vehicle was in the joint names of the husband and his wife. The evidence showed that the wife's negligence contributed to the accident. At the time of the accident the Nebraska law provided by Section 60-105 RRS 1943: "No person . . . acquiring a motor vehicle . . . shall acquire any right, title, claim or interest in or to such motor vehicle . . . until he shall have had issued to him a certificate of title to such motor vehicle . . . . No court in any case at law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle . . . unless evidenced by a certificate of title . . . duly issued in accordance with the provisions of this act." The court, in holding that the wife's contributory negligence was imputed to the husband, stated:

"In *Turpin v. Standard Reliance Ins. Co.,* 169 Neb. 233, 99 N.W. 2d 26, this court said: 'The purpose of the act relating to transfers and titles to motor vehicles is to provide means of iden-

tifying motor vehicles, to ascertain the owners thereof, to prevent theft of motor vehicles, and to prevent fraud.

"A certificate of title to a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle."

It is noted that although the Uniform Commercial Code is not mentioned, it was adopted in Nebraska in 1965 and included Section 2-401.

Roe v. Flamegas Industrial Corp., supra, is a case in which plaintiff sued to enforce an oral agreement to purchase a truck whereby he contended that he was to pay $50 per week until the truck was paid for. Defendant contended that payments were for rent of the truck. The Michigan statute required that every retail installment sale be in writing, that the certificate of title name the owner and security interest holder, and that the certificate of title be properly endorsed and delivered to transferee. The Michigan Court of Appeals held that the oral contract of purchase was void and that defendant must return the payments made. Michigan had previously adopted the Uniform Commercial Code, including Section 2-401.

In the case of *In re Schlutt,* 5 U.C.C. Rep. 1177, (W. D. Mich., 1968), a bankruptcy proceeding, the trustee in bankruptcy filed petition praying that Community Contract Corporation's and Ray's Auto Sales' interests be declared invalid and that the trustee hold a motor vehicle free of any interest of the respondents.

The bankrupt and his wife entered into a security agreement with Ray's Auto Sales on 9 June 1967, and made a down-payment of $375.00 plus $50 as a credit for a trade-in on an old car. The agreement was assigned with recourse to respondent, Community Contract Corporation. The down-payment was not actually made until 15 July 1967, at which time the bankrupt presented proof of insurability to the seller. "On that date, a statement of Motor Vehicle Sale was prepared and signed by Ray's and the Schlutts and the assignment of the vehicle certificate of title and application for new title were executed." The application showed the lien interest of Community Contract Corporation and was filed with the Secretary of State on 25 July 1967. A financing statement was filed in the office of the Register of Deeds of the county in which bankrupt resided on 15 June 1967. On 23 June 1967, Schlutt filed a voluntary petition for adjudication as a bankrupt. Later, the car was demolished and the value of the vehicle was paid to the respondent. The trustee contended the sale occurred on 9 June 1967 and that since the security interest was not perfected with the Secretary of State until

25 July, the respondents' rights were subordinated to the rights of the trustee pursuant to section 9-302(4) of the Uniform Commercial Code.

Respondents contended that the sale took place 15 July. Bankrupt contended there was no sale, that the trustee had no interest except for a claim for the moneys the bankrupt paid on the car. The court, holding that no sale took place until after the date of the bankruptcy, considered Section 2-106(1) and Section 2-401 of the Uniform Commercial Code, and found that notwithstanding delivery of the automobile on 9 June, the intent of the parties was not to complete the sale at that time. The court further stated:

> "In any event, any sale on June 9th would have been void. In *Vriesman v. Ross,* 9 Mich. App. 97 (1967) the court set forth the Michigan law on the sale of motor vehicles, at pp 105-106:
>
> " 'In this state the statutory language is explicit as to the requisites necessary for transferring legal title of a vehicle. Therefore in answering the plaintiff's first question we look to the pertinent provisions of CLS 1956, Section 257.233(d), as amended by PA 1959, #250 (Statutes Annotated 1960 Rev § 9.1933(d)) to determine whether the alleged transfer was validly accomplished. It reads as follows:
>
> " ' "The owner *shall* endorse on the back of the certificate of title an assignment thereof with warranty of title in the form printed thereon with a statement of all liens or encumbrances on said vehicle, *sworn to before a notary public or some other person authorized by law to take acknowledgments,* and deliver the same to the purchaser or transferee at the time of the delivery to him of such vehicle, which shall show the payment or satisfaction of any mortgage or lien as shown on the original title." ' (emphasis supplied)
>
> "The requirements of the statute are in mandatory terms, and case law has made it abundantly clear that failure to comply with the provisions negates the validity of the attempted transfer. See *Waldron vs. Drury's Van Lines, Inc.* (1965), 1 Mich. App. 601; *Drettman vs Marchand* (1953), 337 Mich. 1."

See: *Dodson v. Imperial Motors, Inc.,* 295 F. 2d 609 (6th Cir., 1961) to same effect.

Thus, at the date of bankruptcy, when the trustee's rights accrued, the sale of the vehicle, if any, was void as to the trustee.

Other cases following this line of authority after the Uniform Commercial Code had been adopted in those jurisdictions include:

Irion v. Glens Falls Insurance Co., (Mont.) *supra; Merchants-Produce Bank v. Mack Trucks, Inc.*, (8th Cir.), *supra; Melton v. Prickett*, (Kan.), *supra.*

[9] In North Carolina, by explicit terms of the statute and by interpretation of this Court, there are definite and mandatory requirements governing transfer of legal title and ownership to a motor vehicle. G.S. 20-72(b); *Insurance Company v. Insurance Company, supra.*

The Uniform Commercial Code was adopted after the passage and enactment of pertinent amendments to G.S. 20-72(b), and contains the following:

"§ 25-10-102. Special repealer; provision for transition.—

(1) The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

Uniform Negotiable Instruments Act, G.S. 25-1 through G.S. 25-199.

Uniform Warehouse Receipts Act, G.S. 27-1 through G.S. 27-53.

Uniform Bills of Lading Act, G.S. 21-1 through G.S. 21-41.

Uniform Stock Transfer Act, G.S. 55-75 through G.S. 55-98.

Uniform Trust Receipts Act, G.S. 45-46 through G.S. 45-66.

Agricultural liens for advances, G.S. 44-52 through G.S. 44-64.

Bank collections, G.S. 53-57 and 53-58.

Bulk sales, G.S. 39-23.

Factor's lien acts, G.S. 44-70 through G.S. 44-76.

Assignment of accounts receivable, G.S. 44-77 through G.S. 44-85.

(2) Transactions validly entered into before July 1, 1967, and the rights, duties, and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this act as though such repeal or amendment had not occurred."

"§ 25-10-103. General repealer.—Except as provided in the following section, all acts and parts of acts inconsistent with this act are hereby repealed."

[10] The Uniform Commercial Code, in general, covers transac-

tions in personal property and is particularly related to negotiable instruments, bills of lading and sales in general. The Motor Vehicles Act is concerned only with the automobile, and although the word "automobile" comes within the general term of "goods," automobiles are a special class of goods which have long been heavily regulated by public regulatory acts. In this connection, the official comment to section 25-2-401 seems to say that the Uniform Commercial Code makes no attempt to set out a specific line of interpretation where a public regulation is involved, but that in case a court should decide to apply this private law definition and reasoning to its public regulation, that there should be a clear and concise definitional basis for so doing. Such comment leads to the conclusion that the sales act, a private law, is not necessarily applicable to public regulations unless the court chooses to make it so.

In the case of *Food Stores v. Board of Alcoholic Control,* 268 N.C. 624, 151 S.E. 2d 582, it is stated:

> " 'Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true a fortiori when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage.' "

[7, 11] The provisions of G.S. 20-72(b) contain specific, definite and comprehensive terms concerning the transfer of ownership of a motor vehicle. Conversely, the Uniform Commercial Code does not refer to transfer of ownership of motor vehicles, but only refers to the passing of title to property generally described as "goods." As applied to the framework of this case, G.S. 20-72(b) is a special statute and the Uniform Commercial Code is a general statute. Thus, the special statute, even though earlier in point of time, must prevail. Further, it is a cardinal rule of interpretation of statutes that the intent of the legislature controls. The North Carolina General Assembly has, by enacting G.S. 20-72, provided a specific and mandatory method of transferring ownership of a vehicle. Thereafter, it adopted a more general statute, the Uniform Commercial Code,

dealing with negotiable instruments, bills of lading, sales, and most types of personal property. The act contained a specific repealer as to ten previous separate acts of the General Assembly. The Motor Vehicles Act was not mentioned in the specific repealer. It would require a strained interpretation to hold that it was the intention of the General Assembly to repeal the provisions of G.S. 20-72 without a mention of this act in the specific repealer. Nor did the legislature intend to repeal the Motor Vehicles Act in the general repealer section.

The provisions of the Uniform Commercial Code do not override the earlier Motor Vehicle statutes relating to the transfer of ownership of motor vehicle for the purpose of tort law and liability insurance coverage.

The 1963 amendment was, in effect, a rewrite of G.S. 20-72(b) which clarified the provisions of the statute when liens are involved, made clear that the statute did not apply when foreclosure and repossession procedures are invoked, and deleted the requirement that application for certificate of title be made by the transferee before ownership to the vehicle passes.

[12] We hold that after 1 July 1963 (the effective date of the 1963 amendment) for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration under the Motor Vehicle Act of 1937 until (1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee, (2) there is an actual or constructive delivery of the motor vehicle, and (3) the duly assigned certificate of title is delivered to the transferee. In the event a security interest is obtained in the motor vehicle from the transferee, the requirement of delivery of the duly assigned certificate of title is met by delivering it to the lien holder.

For the reasons stated, the result reached by the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. MARY BENTON BENTON

No. 17

(Filed 12 June 1970)

1. Witnesses § 1— competency of witness — unsoundness of mind

Unsoundness of mind does not *per se* render a witness incompetent.

2. Witnesses § 1— mental capacity of witness — discretionary ruling of court

In determining the competency of a witness the trial judge is not bound by expert testimony and, notwithstanding the opinion evidence of a psychiatrist that the State's material witness could not give reliable testimony, the judge did not abuse his discretion in ruling the witness mentally competent to testify where (1) the judge observed and questioned the witness closely on *voir dire*, (2) the witness' subsequent testimony on the trial was clear and consistent on all material matters and fully corroborated by his family and law-enforcement officers, and (3) the psychiatrist had not seen the witness for more than a year and a half prior to trial.

3. Criminal Law § 163— assignment of error to charge — requisite

An assignment of error must set out that portion of the charge which defendant contends is an erroneous statement of the law.

4. Criminal Law § 63— mental capacity of murderer — form of question to psychiatrist

The trial court properly refused to permit a psychiatrist to state if he had an opinion whether the murderer knew right from wrong on the day of the homicide.

5. Criminal Law § 5— insanity of accused — exemption from criminal responsibility

Insanity will exempt an accused from criminal responsibility only if, at the time he commits the act which would otherwise be illegal, he was incapable of knowing the nature and quality of his act or of distinguishing between right and wrong with relation thereto.

6. Criminal Law § 163— assignment of error on the failure to charge

An assignment of error based on a failure to charge should set out the defendant's contention as to what the court should have charged.

7. Criminal Law §§ 10, 168— accessory before fact to murder — instructions on guilt of principal — harmless error

In a prosecution of defendant as an accessory before the fact to the murder of her husband, in which prosecution the defendant was found guilty and given a sentence of life imprisonment, defendant was not prejudiced by trial court's failure to instruct the jury that if the murderer, by reason of insanity, was not guilty of the murder then the defendant could not be guilty as an accessory before the fact, since all the evidence tended to show that if the defendant was not an accessory then she was the principal felon and guilty of murder in the first degree.

8. Homicide § 2— parties to a murder

Parties involved in the commission of a murder are either principals or accessories.

9. Criminal Law § 9— principals in the first and second degree

A principal in the first degree is the person who actually perpetrates the deed either by his own hand or through an innocent agent; any other who is actually or constructively present at the place of the crime either aiding, abetting, assisting, or advising in its commission, or is present for that purpose, is a principal in the second degree.

10. Criminal Law § 9— distinction between principals

The distinction between principals in the first and second degrees is a distinction without a difference; both are principals and equally guilty.

11. Criminal Law § 10— accessory before the fact

An accessory before the fact is one who was absent from the scene when the crime was committed but who procured, counseled, commanded or encouraged the principal to commit it.

12. Criminal Law § 10— distinction between principal and accessory

Ordinarily, the only distinction between a principal and an accessory before the fact is that the latter was not present when the crime was actually committed.

13. Criminal Law § 9— commission of crimes through innocent agent — status of absent party

If a person causes a crime to be committed through the instrumentality of an innocent agent, he is the principal in the crime and is punishable accordingly, although he was not present at the time and place of the offense.

14. Homicide § 2; Criminal Law § 10— accessory or principal — inciting mental defective to kill another

Where one incites or employs a mental defective to kill another, the question whether the employer is guilty as a principal depends upon whether the defective was criminally responsible for his act under the McNaughten rule.

15. Homicide § 31— first degree murder — punishment

The punishment specified in G.S. 14-17 for first-degree murder is either death or imprisonment for life.

16. Criminal Law § 168— review of the charge

A charge must be construed contextually as a whole.

17. Homicide §§ 2, 23; Criminal Law § 10— accessory to murder — instructions — causal relationship between principal and accessory

In a prosecution of defendant as an accessory before the fact to the murder of her husband, the charge of the trial court, when construed as a whole, clearly instructed the jury that before they could convict the defendant they must find that her requests and demands that the principal murder her husband caused the principal to commit the crime.

18. Criminal Law § 161— assignments and exceptions

Asserted error must be based on an appropriate exception and must be properly assigned. Rules of Practice in the Supreme Court Nos. 19 and 21.

19. Criminal Law § 161— assignment of error — question presented — form and sufficiency

An assignment of error must show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself.

20. Criminal Law § 161— assignment of error — mere reference to record page

A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient.

21. Criminal Law § 146— Supreme Court — mandatory rules

The rules of practice in the Supreme Court are mandatory and will be enforced.

22. Homicide § 23; Criminal Law § 10— accessory to second-degree murder — instructions

In a prosecution of defendant as an accessory before the fact to the murder of her husband, defendant was not prejudiced by an instruction which would permit the jury to return a verdict of guilty as an accessory to murder in the second degree.

23. Homicide § 2; Criminal Law § 10— accessory to murder

There can be an accessory before the fact to murder in the second degree.

24. Statutes § 11— repeal by implication

Courts will not presume that the legislature intended a repeal by implication.

25. Statutes § 5— presumption that legislature acted with knowledge of existing law

It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law.

26. Homicide § 31; Criminal Law § 138— accessory to murder — severity of punishment — lesser sentence for murderer

Defendant was convicted as an accessory before the fact to the murder of her husband and was sentenced to life imprisonment; the actual murderer was sentenced to 20-30 years' imprisonment upon acceptance of his guilty plea to second-degree murder. *Held:* Defendant's objection that her sentence exceeded that of the murderer is without merit, since both sentences were authorized by statute.

27. Homicide § 31— accessory to murder — punishment

The punishment for an accessory before the fact to murder in any degree is imprisonment for life.

28. Homicide § 31; Constitutional Law §§ 20, 36— accessory to murder — life sentence — cruel and unusual punishment — equal protection of laws

Imposition of a sentence of life imprisonment upon defendant's conviction of accessory before the fact to the murder of her husband — the actual murderer having received a sentence of 20-30 years' imprisonment upon acceptance of his guilty plea to second-degree murder — was not cruel and unusual punishment nor did it deny defendant the equal protection of the laws in violation of the Fourteenth Amendment.

29. Constitutional Law § 20— equal protection of the laws — quantum of punishment

Equal protection of the laws is not denied by a statute prescribing the punishment to be inflicted on a person convicted of a crime unless it prescribes different punishment for the same acts committed under the same circumstances by persons in like situations.

30. Attorney and Client § 5— obligations of court-appointed counsel — compliance with rules of Supreme Court

The rules of the Supreme Court are applicable to indigent defendants and their court-appointed counsel as well as to all others, and the obligations of court-appointed counsel to his client and to the court are no less than those of privately retained counsel.

31. Criminal Law § 146; Attorney and Client § 5— infractions of Supreme Court rules — warning to court-appointed counsel

The Supreme Court cannot be expected to continue the practice of indulging infractions of its rules by court-appointed counsel in criminal cases.

APPEAL by defendant under G.S. 7A-27(a) from *Martin, J. (Harry C.)* October 1969 Criminal Session of BURKE.

This is defendant's second appeal from a judgment of life imprisonment imposed after her conviction as an accessory before the fact to the murder of her husband, Marshall Adam Benton (Benton). G.S. 14-5, G.S. 14-6. When the case was first before us at the Spring Term 1969, we arrested the judgment because of a fatal defect in the bill of indictment. *State v. Benton,* 275 N.C. 378, 167 S.E. 2d 775.

At the September Session 1969, the grand jury returned a new bill. In substance, it charged that on 27 November 1967, defendant feloniously counseled, incited, and procured Raymond Epley to murder Benton; that later, on the same day, and out of defendant's presence, Raymond Epley did feloniously kill and murder Marshall Adam Benton with premeditation, deliberation, and malice aforethought. The case was retried at the October 1969 Session.

The State relied mainly upon the testimony of Raymond Epley. When Epley was sworn, defendant challenged his competency as a

witness on the ground that he lacked sufficient mental capacity. On *voir dire* the judge elicited the following information from Epley: He went to the eighth grade in school. He could read and write "fairly well" but never passed his courses. He was "moved up from grade to grade because he was bigger than the other children in his class." After he quit school he worked two or three years for Breeden Poultry. He was then employed by Shelby Iron Works for two years before going to work at Doblin Carolina Mill (Doblin). In 1960 he got a North Carolina driver's license. He attended Sunday School and church at the Mount Olive Baptist Church.

When asked if he knew where he was at the moment, Epley told the judge that he was in the courtroom in Morganton, Burke County, North Carolina. In response to the direct question, he said that when he placed his left hand on the Bible and raised his right hand it meant to him that he was "to tell the truth about something that has happened and all the things," and that if he told a lie he believed he would be punished in some way after death.

On cross-examination he said that he was quite upset when his father died in June 1967; that thereafter his deceased father talked to him until the following March; that when he sat in places where his father used to sit his father would talk to him; that on 27 November 1967 he was taking various kinds of pills which affected his memory to the extent that he could "remember some of what happened"; that he knew what happened on 27 November 1967 and some of the things that happened several days before. He said that he remembered talking to Dr. Robert S. Darrow in jail but that it was so long ago he had forgotten many things he said to him.

Dr. Darrow, a psychiatrist engaged in private practice, testified for defendant on *voir dire* and thereafter. His testimony tended to show: During December 1967 and early in 1968 he had examined Epley in jail on four occasions. He found him to be depressed and upset both mentally and physically, concerned and preoccupied with his father's death, and subject to auditory hallucinations. Dr. Darrow gave Epley no tests, but he thought Epley's I. Q. was 60-70. It was his opinion that Epley had a mental illness, a "combination of mental deficiency and psychotic reaction," which rendered it "impossible for him to be believed and impossible for him to give reliable evidence." Epley was still mentally ill when Dr. Darrow stopped seeing him on 13 March 1968, but his illness decreased as time went on. However, it had not completely disappeared and would not for a time to come.

During the *voir-dire* examination, Judge Martin noted that Epley

sat upright in the witness chair, spoke clearly, and did not ask that questions be repeated.

At the conclusion of the *voir dire,* Judge Martin found facts which are supported by the foregoing evidence. Upon his findings he concluded that Epley understood the nature and obligations of an oath and was capable of giving a correct account of crucial events. He held him to be a competent witness.

Epley's testimony tended to show: He was 25 years old. He first met defendant Mary Benton in August 1967. Both worked the 11:00 p.m.-7:00 a.m. shift in the winding room at Doblin. Both were married. Epley was separated from his wife, who lived in Shelby. Defendant's husband, Benton, worked from 7:00 a.m. to 3:00 p.m. for a furniture company in Valdese. Defendant and Epley became friends after they began to "talk at their work." Their friendship quickly developed into intimacy, and Epley became familiar with the house where defendant and Benton lived. She told Epley that Benton treated her badly and beat her a lot. On one occasion he told defendant that if Benton ever beat her again he would kill him, and he meant it.

Benton and Epley made plans to go deer hunting on the Friday after Thanksgiving 1967 (November 25th). On Thanksgiving Day defendant told Epley that she wanted him to kill Benton while they were deer hunting, and make it look like an accident. He told her that he did not know whether he could kill Benton or not. (So far as the evidence discloses no untoward event occurred on the deer hunt.)

After he got off work on Monday morning, 27 November 1967, Epley went to his mother's home. He was worried, could not sleep, and was "taking all those pills." At about 9:00 a.m. defendant came to see him. She was crying. She told him that Benton had again "been beating her and treating her like a dog"; that if they did not kill him that night he was going to kill Epley and that she was pregnant by Epley. She also told Epley "that she had everything fixed up; that the back bedroom light would be on, the curtains pulled back, and Benton would be in bed."

After his conversation with defendant, Epley went to bed and slept until about 10:00 p.m., when he was awakened by a telephone call from defendant. She advised him that everything was ready. He told her he was scared but that he would do it.

Epley borrowed his brother's rifle on the pretense of going deer hunting and left home about 10:25 p.m. He drove past the Benton

home on the Flat Gap Road and parked his car 100-200 yards from the house. After loading the rifle he walked back "and shot through the window at a hunch in the bed that looked like a body." He said he did not know whether a bullet from his gun killed Benton "but he meant to be shooting at Marshall (Benton)." Immediately thereafter someone started shooting at him, and he ran back to his car. As he drove away he "run up" on a parked car from which five or six shots were fired at him. He drove to Shelby to the home of his father-in-law, where his wife lived. Then, after hiding the rifle in his brother-in-law's bed he went to the hospital, where his baby was a patient. There he met his wife and returned with her to her home. About 5:30 the next morning he received a telephone call from Burke County Officers McGalliard and Fowler. In consequence he met them on highway No. 18, where they arrested him for the murder of Benton. In Morganton, Epley told the officers and Sheriff Wise "the best of the truth that he could tell."

Epley was indicted and put on trial for the first-degree murder of Benton on 14 March 1968. He was represented by Lawyers Riddle and McMurray. At that time, after being asked some questions, he entered a plea of guilty of second-degree murder. He received a sentence of 20-30 years, which he was serving at the time of defendant's trial.

On direct examination, Epley testified that he did not know for sure whether a bullet from his gun killed Benton but "that he meant to kill Marshall Benton because Mary Benton had asked him to and told him that Marshall was going to kill him if he didn't do it, and she kept pushing him and he went and done it."

On cross-examination, Epley said that he did not know whose idea it was to kill Benton; that on the night of 27 November 1967 he was taking pills and not thinking straight; that he could not remember everything that happened or "what all" he did tell Dr. Darrow, but he tried to tell him the truth. He also said, *inter alia,* that in five years he would be eligible for parole if he makes a good prisoner and, for that reason, he had written defendant that with luck he would be out of jail in five years; that he really wanted to marry her and that he would get her even if he had to kill his wife.

Other evidence for the State tended to show: About 9:15 p.m. on 27 November 1967, Manuel Brittain, a deputy sheriff of Burke County, was stationed outside the Benton home observing it. (Apparently the Burke County's Sheriff's Department had learned of the plot to kill Benton, although the record is silent as to this.) The Benton house was well lighted; the bedroom curtains were drawn,

and Brittain could see through the window. At approximately 10:10 p.m. defendant left her home and drove toward highway No. 350 in the white Corvair automobile. Brittain radioed the sheriff's office that she had left. Special Deputy Harold Cook, who had been parked at the Abee Grove Church about one mile from the Benton home, was waiting when the white Corvair entered highway No. 350. He followed the automobile into Valdese, where defendant stopped at a telephone booth and placed a call. It was then between 10:15 and 10:30 p.m. After radioing the sheriff's office Cook followed defendant into Morganton and to Doblin Mill, which she entered at about 11:00 p.m.

At approximately 10:55 p.m. a 1960 Chevrolet passed by Deputy Sheriff Brittain's post of observation and stopped about 250 feet south of the Benton house. He saw a man get out of a car and walk back toward the house. Brittain was about 40-50 feet from him when he saw the flash of a gun. He shouted to the gunman to halt, but he continued to fire. Someone screamed, and Brittain "emptied his service revolver at the subject. He saw the subject make three flashes toward the bedroom from a high-powered rifle; then the subject fired in his direction and ran." Brittain entered the house and found Benton lying on his back with a large wound in his chest. He was unconscious and had no pulse beat. Brittain called the Sheriff's department to send an ambulance and to look for "a white 1960 Chevrolet headed on highway No. 350 with one subject in it."

At about 10:30 or 10:35 p.m., Deputy Sheriff Bob Fowler, who was at the Abee Chapel Church, met Epley driving a white 1960 Chevrolet toward highway No. 350. After attempting unsuccessfully to stop him, he fired at the car and followed it until it evaded him on highway No. 350.

Sheriff Wade McGalliard went to the Benton home and found Benton lying on a bed in the center bedroom fully clothed. He was dead. The double window of the bedroom was broken, and there were two holes, about the size of a pencil and six inches apart, in the lower right-hand corner. Between two trees near a bush he found empty 30.06-cartridges.

Sometime before 6:00 a.m. on November 28th Epley was arrested in Cleveland County on highway No. 18. He was operating the white 1960 Chevrolet automobile, and his wife, Molly, was with him. At her invitation the officers went to her father's home, where they obtained a 30.06 rifle.

Epley told McGalliard that he had killed Benton; that he and defendant had planned it, and he would not take all the blame. He

said he drove to the Benton house "to do it" after defendant had telephoned him "that everything was ready; that a light would be on in the room and the curtains pulled back; that after he received the call he left the house with the rifle and shot Benton through the window."

Epley's brother Jack testified that on Thanksgiving Day defendant had asked him to shoot Benton if he went hunting with him and Epley on Friday; that he declined and decided then and there not to go on the hunt; that he said nothing to Epley about this conversation; that on November 27th defendant telephoned Epley and he got him up to take the call. Jack did not hear any part of the conversation.

Epley's mother, Mrs. Elsie Epley, testified for the State. Her evidence tended to show: About 10:25 p.m. on 27 November 1967, Epley received a telephone call, and she listened to his side of the conversation. Two or three times he asked his caller if everything was ready, and a few minutes thereafter she heard him say, "You say everything is ready." His final words were, "Bye, hon, I will see you directly." After that conversation Epley got his coat and left. He seemed sleepy and acted as if he were under the influence of some kind of drug. He was taking pills. Thereafter she saw Epley in jail and asked him "if he had done it." He said he didn't know whether he had or not, that he and defendant "had made it up."

Defendant's only witness was Dr. Darrow. His testimony before the jury was substantially the same as on *voir dire*. It tended to show that on account of his mental illness and low intelligence Epley could not remember on his own the events of 27 November 1967; that he did not have the ability to distinguish between the real and the unreal, and "he could not live in reality." On cross-examination he said that on one occasion Epley had told him "that he believed that in having killed a man that he had done no wrong since his girlfriend wanted him to do so. He did it because he would do anything she wanted him to do because he loved her."

"For the purpose of corroboration or impeachment" defendant introduced scattered excerpts from the "testimony at former trials." These excerpts, constituting four pages of the mimeographed case on appeal, are not regarded as material, and are not summarized here.

At the conclusion of the evidence defendant's motion for nonsuit was overruled. The jury's verdict was guilty of the offense of accessory before the fact of murder. From the judgment of life imprisonment, defendant appealed.

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General; and D. M. Jacobs, Staff Attorney, for the State.

Byrd, Byrd & Ervin for defendant appellant.

SHARP, J.

Appellant enumerates 26 assignments of error. Those brought forward, which we deem entitled to consideration, will be discussed topically.

[1, 2] Assignments Nos. 1, 2, and 3 raise the question whether the trial judge abused his discretion in holding that Epley had sufficient mental capacity to be a competent witness. The North Carolina rule is well stated in 97 C. J. S. *Witnesses* § 57(b) (1957): "Unsoundness of mind does not per se render a witness incompetent, the general rule being that a lunatic or weak-minded person is admissible as a witness if he has sufficient understanding to apprehend the obligation of an oath and is capable of giving a correct account of the matters which he has seen or heard with respect to the questions at issue. The decision as to the competency of such a person to testify rests largely within the discretion of the trial court." *Accord, Lanier v. Bryan,* 184 N.C. 235, 114 S.E. 6, 26 A. L. R. 1488; *Carpenter, Solicitor v. Boyles,* 213 N.C. 432, 196 S.E. 850; *State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7; Stansbury, N. C. Evidence § 55 (2d ed. 1963).

[2] Defendant's thesis seems to be that the judge manifestly acted against reason when he permitted Epley to become a witness after Dr. Darrow, the psychiatrist employed at the instance of Epley's attorneys prior to his trial for murder, had testified that, in his opinion, it was impossible for Epley to give reliable testimony. This contention is untenable. The law does not say that the decision of the trial judge as to the competency of a witness shall be controlled by expert medical testimony or that the evidence of a psychiatrist, whether employed by the State or defendant, or appointed by the Court, is entitled to greater weight than that of a qualified lay witness. "Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion satisfactory to himself as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders." *In Re Will of Brown,* 203 N.C. 347, 350, 166 S.E. 72, 74; Stansbury, N. C. Evidence § 127 (2d ed. 1963).

At the time Dr. Darrow testified, he had not seen Epley since 13 March 1968, more than a year and a half prior to the trial which we

now review. Between December 1967 and 13 March 1968, Dr. Darrow had examined Epley four times while he was in jail awaiting his own trial upon a charge of first-degree murder. During that three and one-half-month period, despite the tensions, apprehensions, and uncertainties to which he was necessarily subjected, Epley's mental condition had improved. On the *voir dire,* Judge Martin observed and questioned Epley closely. He made his observations, as well as his questions, a part of the record, and from them concluded that Epley was a competent witness. The court's decision could be set aside only for a clear abuse of discretion or upon a showing that it was based upon an erroneous conception of the law. Neither abuse of discretion nor error in law appears. Indeed, Epley's subsequent testimony and conduct in court fully justified the court's ruling on *voir dire.* Although Epley's memory as to details sometimes faltered, and there were minor inconsistencies in his evidence, as to all material matters his testimony was clear and consistent. Furthermore, it was fully corroborated by the testimony of the law-enforcement officers, his brother, and his mother. Finally, we note that the jurors also had full and ample opportunity to observe Epley, and they were charged that even though defendant counseled and commanded him to kill Benton they would acquit her unless they found that Epley had sufficient mental capacity to understand and carry out her commands and unless he actually killed Benton "as the result of such alleged acts of defendant."

In her brief, appellant asserts that the question raised by assignments of error 24, 25, and 9 is as follows: "4. Did the trial judge commit error by incorrectly charging the jury as to the mental capacity required of the principal (Epley)? (Assignments of Error Nos. 24 and 25). (a) Did the trial court commit error when it excluded evidence as to the sanity of the principal at the time the act was committed? (Assignment of Error No. 9.)" These three assignments, however, do not bring into focus the main points which defendant attempts to make.

[3] Assignments 24 and 25 respectively aver that the judge committed error "in charging the jury on the mental capacity of the principal, Raymond Epley" and that he "incorrectly charged" concerning the mental capacity of Epley. These assignments present no question for the court's determination, for they do not set out that portion of the charge which defendant contends is an erroneous statement of the law. "The appellant should quote in each assignment the part of the charge to which he objects." *State v. Wilson,* 263 N.C. 533, 534, 139 S.E. 2d 736, 737. "[A] mere reference in the assignment of error to the record page where the asserted error may be dis-

covered is not sufficient." *State v. Staten*, 271 N.C. 600, 608, 157 S.E. 2d 225, 231.

[4] Assignment of error No. 9 is based upon an exception to the court's failure to permit Dr. Darrow to answer the following question: "Do you have an opinion as to whether or not Raymond Epley knew right from wrong on the 27th day of November, 1967?" If permitted to answer, Dr. Darrow would have said that, in his opinion, at the time of the alleged murder in November 1967, Epley "did not have the ability to know the difference between right and wrong because of his mental illness."

[5] The objection to the foregoing question was properly sustained. Insanity will exempt an accused from criminal responsibility only if, at the time he commits the act which would otherwise be illegal, he was incapable of knowing the nature and quality of his act or of distinguishing between right and wrong with relation thereto. In other words, the question is the capacity of a defendant "to distinguish between right and wrong at the time and in respect of the matter under investigation." *State v. Jones*, 229 N.C. 596, 598, 50 S.E. 2d 723, 724. *Accord, State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241; *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328. The question is not whether a defendant knows or knew right from wrong generally.

[6, 7] In her brief, appellant says that she should "have had the benefit of a charge by the court to the effect that if Raymond Epley was insane at the time the alleged killing occurred, then it would be the duty of the jury to find the defendant not guilty." The record, however, fails to show that appellant excepted in any manner to the court's failure to so charge. *State v. Hill*, 266 N.C. 103, 145 S.E. 2d 346. To be effective "[a]n assignment based on failure to charge should set out the defendant's contention as to what the court should have charged." *State v. Wilson*, 263 N.C. 533, 534, 139 S.E. 2d 736, 737.

[7] Neither assignments 24, 25 nor assignment 9 presents the question of the court's failure to charge upon Epley's alleged exemption from criminal responsibility by reason of insanity as bearing upon defendant's guilt as his accessory. However, we can perceive no prejudice to defendant from the court's failure to instruct the jury that if Epley, by reason of insanity, was not guilty of the murder of Benton then appellant could not be guilty as an accessory before the fact in the murder charged, for all the evidence tends to show that if defendant was not an accessory she was the principal felon and guilty of murder in the first degree.

[8-11] Parties involved in the commission of a murder are either

principals or accessories. *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844. "A principal in the first degree is the person who actually perpetrates the deed either by his own hand *or through an innocent agent.*" (Emphasis added.) Any other who is actually or constructively present at the place of the crime either aiding, abetting, assisting, or advising in its commission, or is present for that purpose, is a principal in the second degree. Miller, Criminal Law §§ 73, 74, 75 (1934). *Accord, State v. Burgess,* 245 N.C. 304, 96 S.E. 2d 54; *State v. Jarrell,* 141 N.C. 722, 53 S.E. 127. In our law, however, "the distinction between principals in the first and second degrees is a distinction without a difference." Both are principals and equally guilty. *State v. Allison,* 200 N.C. 190, 194, 156 S.E. 547, 549; *accord, State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485; *State v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398. An accessory before the fact is one who was absent from the scene when the crime was committed but who procured, counseled, commanded or encouraged the principal to commit it. *State v. Benton,* 275 N.C. 378, 167 S.E. 2d 775; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580; Miller, *supra,* § 76; 22 C. J. S. *Criminal Law* § 90 (1961).

[12, 13] Thus, ordinarily, the only distinction between a principal and an accessory before the fact is that the latter was not present when the crime was actually committed. In some states, by statute, all distinction between a principal and accessory before the fact has been abolished. 22 C. J. S. *Criminal Law* § 90 (1961); 1 Wharton's Criminal Law and Procedure § 110 (Anderson, 1957); 40 Am. Jur. 2d *Homicide* § 28 (1968). *See. State v. Bryson,* 173 N.C. 803, 92 S.E. 698, and the comments thereon in 41 N. C. L. Rev. 118 and *State v. Jones,* 254 N.C. 450, 119 S.E. 2d 213. Actual presence, however, becomes immaterial when a person causes a crime to be committed by an innocent agent, that is, one who is not himself legally responsible for the act. "If a person causes a crime to be committed through the instrumentality of an innocent agent, he is the principal in the crime, and punishable accordingly, although he was not present at the time and place of the offense. . . . Under such circumstances, an exception to the rules applicable to principals and accessories, in the trial of criminal cases arises *ex necessitate legis.*" 22 C. J. S. *Criminal Law* § 84(b) (1961). *Accord, State v. Minton, supra; People v. Pounds,* 336 P. 2d 219 (Calif. C/A); *Johnson v. Alabama,* 142 Ala. 70, 38 So. 182, 2 L. R. A. (NS) 897; 4 Blackstone's Commentaries, Ch. 3, p. 34; 1 Anderson, Wharton's Criminal Law and Procedure § 106 (1957); 21 Am. Jur. 2d *Criminal Law* § 21 (1965). Note, 2 L. R. A. (NS) 897 (1906).

[14] Where one incites or employs a mental defective to kill an-

other the question whether the employer is guilty as a principal depends upon whether the defective was criminally responsible for his act under the McNaughten rule. "If the agent is legally responsible for his own acts, the instigator is only an accessory before the fact, if he is absent when the crime is committed. When one acts through an agent, he can himself be guilty as a principal in the first degree only when the agent is innocent." Miller, *supra*, § 74; *accord, People v. Adams*, 3 Denio 190 (N.Y.), 45 Am. De. 468.

[7, 15] The punishment specified in G.S. 14-17 for first-degree murder is either death or imprisonment for life. Had defendant been convicted of first-degree murder she could not have received a lesser sentence than the one from which she appeals. Prima facie, she could have incurred the death penalty (but *see 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). In any event, having been convicted as an accessory before the fact to the murder of her husband and having received a life sentence, she may not complain that she was not convicted of his first-degree murder. *State v. Bryson, supra* at 806, 807. At best, she could not have improved her situation.

[16, 17] Defendant's assignment of error No. 26 is that the judge erred "in failing to charge the jury of the necessity of a causal relationship between the action of the accessory and the commission of the act by the principal." It is elementary that a charge must be construed "contextually as a whole," 4 Strong, N. C. Index *Trial* § 33 (1961). When so construed, it is apparent that the jurors were instructed that before they could convict defendant they must find that her request and demands that Epley murder Benton caused him to commit the crime. Furthermore, in this connection, the jurors were instructed that for the State to prove that defendant procured Epley to murder Benton it must first show that he had sufficient mental capacity to understand and carry out defendant's commands; that, lacking such capacity, he could not have killed Benton as the result of defendant's procurement, and she would not be guilty. *Inter alia*, the judge also told the jury that to be guilty as an accessory before the fact to murder "a defendant must (have) incited, procured or encouraged the commission of the crime so as to participate therein by some words or acts," and must have given instructions, directions or counsel which were "substantially followed."

We are convinced that the jury could not have misunderstood that defendant's guilt depended upon whether she "procured" Epley to murder Benton. Assignment of error No. 26 is overruled.

Defendant's fourth assignment of error is that the trial judge committed error in denying defendant's motion to strike Epley's statement that he "was in prison for the murder of Marshall Adam Benton." Immediately following this statement there appears in the transcript, "Exception No. 4." The question which elicited this answering statement is not set out. The case on appeal shows no objection to the question and no motion to strike the answer to it. Furthermore, shortly thereafter on cross-examination, counsel for defendant elicited from Epley the information "that he was charged with first degree murder and entered a plea of second degree murder for which he received a sentence of twenty (20) to thirty (30) years." We also note that at the first trial of this case in November 1968, "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 the 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." *State v. Benton,* 275 N.C. 378, 384, 167 S.E. 2d 775, 779.

Obviously, Epley's statement was not prejudicial to defendant for it is upon the fact of his conviction (plea of guilty) of murder in the second degree that defendant bases her main arguments on appeal. However, with reference to assignment No. 4 we direct attention to *Lewis v. Parker,* 268 N.C. 436, 437, 150 S.E. 2d 729, 730. There, we reiterated what we have said many times before:

[18-21] "Rules 19 and 21, Rules of Practice in the Supreme Court, 254 N.C. 783, 795, 803, require that asserted error must be based on an appropriate exception, and must be properly assigned. We have repeatedly said that these rules require an assignment of error to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. . . . The rules of practice in this Court are mandatory and will be enforced. . . ." (Copious citations of authority omitted.) *See also State v. Hill,* 266 N.C. 103, 145 S.E. 2d 346; *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736.

The above comments are equally applicable to defendant's assignments of error 1-3, 5-7, 10-14, 22-26. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416.

[22] By assignments of error 22 and 23 defendant challenges the

following portions of the judge's charge: "In order to convict the defendant . . . the State must prove to you beyond a reasonable doubt that Raymond Epley committed the offense of second degree murder on Marshall Benton. . . . If the State has satisfied you beyond a reasonable doubt . . . that Raymond Epley intentionally shot Marshall Adam Benton with a 30.06 rifle . . . and inflicted wounds upon Marshall Benton that caused his death, malice in that event is implied by the law and nothing else appearing Epley would be guilty of murder in the second degree, and it would be your duty to so find."

Appellant does not contend that the judge incorrectly stated the law with reference to second-degree murder. She states her thesis as follows: "If a murder is committed pursuant to the counseling, procuring, and advising of an accessory, that murder must be one which is committed with premeditation and deliberation" (murder in the first degree). For that reason "the defendant was entitled to have the jury charged on the elements of first degree murder and not second degree murder."

[23] We deduce from the foregoing that defendant's proposition is that there can be no accessory before the fact to second-degree murder. Admittedly the concept of accessory before the fact presupposes some arrangement between the accessory and the principal with respect to the commission of the crime. *State v. Bass, supra* at 51, 120 S.E. 2d at 587. It does not follow, however, that there can be no accessory before the fact to second-degree murder, which (as Judge Martin charged) imports a specific intent to do an unlawful act. Since malice, express or implied, is a constituent element of murder in *any* degree, there may be accessories before the fact to the crime of murder in both degrees. The principle is stated in Wharton on Homicide § 59 (3d ed. 1907) as follows: "There may, of course, be accessories before the fact in all kinds of murder with deliberation, or premeditation, or malice aforethought, including murder in the second degree, which involves malice." *Accord,* 1 Wharton's Criminal Law and Procedure (Anderson, 1957) § 111 and cases cited in footnote 12; *accord,* 40 Am. Jur. 2d *Homicide* § 28 (1968); 40 C. J. S. *Homicide* § 9(b) p. 839 (1944). (For comparison with manslaughter see Annots., 44 A. L. R. 576 (1926); 95 A. L. R. 2d 175 (1964); 40 Am. Jur. 2d *Homicide* § 30 (1968).

In *Jones v. State,* 13 Tex. 168, 62 Am. Dec. 550 (1854), the principal, George Jones, was indicted for murder in the first degree under a statute equivalent to G.S. 14-17. He was convicted of murder in the second degree. At the same time, Nancy Jones was convicted as

an accessory before the fact to his crime. She moved for her discharge "because there could be no accessory before the fact to murder in the second degree." In denying the motion the court said that to constitute the offense of murder in the second degree "there must be malice, and if malice, it would admit of complicity. . . . *The conclusion that we arrive at is that as murder in the second degree can only be committed with malice, that it admits of accessories,* and there was no error in refusing to discharge the appellant Nancy Jones." (Emphasis added.)

Prior to 1893 there were no degrees of murder in North Carolina. Any unlawful killing of a human being with malice aforethought, express or implied, was murder and punishable by death. *State v. Streeton,* 231 N.C. 301, 56 S.E. 2d 649; *State v. Dalton,* 178 N.C. 779, 101 S.E. 548; *State v. Rhyne,* 124 N.C. 847, 33 S.E. 128; *State v. Boon,* 1 N.C. 191. "*Malice aforethought* was a term used in defining murder prior to the time of the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or *preconceived* disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. *S. v. Crawford,* 13 N.C., 425. As used in C.S., 4200, now G.S. 14-17, the term *premeditation* and *deliberation* is more comprehensive and embraces all that is meant by *aforethought,* and more." *State v. Hightower,* 226 N.C. 62, 64, 36 S.E. 2d 649, 650 (emphasis added); *accord, State v. Smith,* 221 N.C. 278, 20 S.E. 2d 313; *State v. Pike,* 49 N.H. 399; 6 Am. Rep. 533.

By Ch. 85, N. C. Public Laws of 1893, in addition to felony murder, the General Assembly characterized as murder in the first degree any murder perpetrated by means of poison, lying in wait, imprisonment, starving, torture or any other kind of wilful deliberate and premeditated killing. (The latter, at common law, was murder with express malice. *State v. Steeves,* 29 Ore. 85, 43 P. 947.) All other kinds of murder were designated murders in the second degree. "Under statutes of this description, murder in the second degree is commonlaw murder but the killing is not accompanied by the distinguishing features of murder in the first degree." 40 C. J. S. *Homicide* § 35 (1944).

[22] Murder in the first degree is sometimes defined briefly as murder in the second degree plus premeditation. Thus, if Epley was guilty of murder in the first degree, a fortiori, his guilt encompassed murder in the second degree. There being no degrees of guilt *for an accessory* before the fact to murder, no possible prejudice resulted to

appellant from the challenged instructions with reference to second-degree murder.

The 1893 Act fixed the punishment for murder in the second degree at not less than two nor more than thirty years. Death remained the mandatory punishment for murder in the first degree until 1949, when the legislature provided life imprisonment as an alternative punishment if, at the time of rendering its verdict in open court, the jury shall so recommend. N. C. Sess. Laws 1949, Ch. 299 (now G.S. 14-17).

Since the enactment of N. C. Pub. Laws 1874-75, Ch. 210 (now G.S. 14-6), the law has provided that "any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary, or rape shall be imprisoned for life in the State's prison." The punishment prescribed for an accessory before the fact to any other felony (except horse or mule stealing) is a fine or imprisonment for not more than ten years.

Thus, the wording of G.S. 14-6 has remained unchanged for more than ninety-five years and for more than seventy-five years since the legislature divided murder into degrees. Notwithstanding, in addition to her contention that there can be no accessory before the fact to murder in the second degree, by assignments 17, 19, and 20, appellant contends that the statute does not authorize a life sentence for such an accessory, even conceding the possibility of his existence. She argues that the history of G.S. 14-6 manifests the legislature's intent that an accessory before the fact in murder would be sentenced to life imprisonment only when the principal was subject to the death penalty. Upon that premise she contends that the maximum punishment which can now be imposed upon an accessory before the fact in second-degree murder is ten years. Neither contention is tenable.

[24-26] Courts will not presume that the legislature intended a repeal by implication, 50 Am. Jur. *Statutes* § 539 (1944); nor will we assume that the legislature's division of murder into degrees and reduction of the punishment for murder in the second degree implied the reduction in the sentence for an accessory before the fact in second-degree murder, which defendant suggests. Had the legislature intended this revision it would undoubtedly have made it *ipsissimis verbis*. It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law. *State v. Lance*, 244 N.C. 455, 94 S.E. 2d 335; *Lumber Co. v. Trading Co.*, 163 N.C. 314, 79 S.E. 627; 82 C. J. S. *Statutes* § 316 (1953). Defendant's contention that the sentence of an accessory may not exceed that of the principal in murder in the second

degree is clearly refuted by the decision in *State v. Mozingo,* 207 N.C. 247, 176 S.E. 582 (1934).

[26] In *Mozingo,* the evidence tended to show that the defendant procured Fred Wade to shoot and kill Bennie Mozingo from ambush. Wade, who was awaiting trial as the principal in the murder, testified against defendant as a witness for the State. Defendant was convicted as an accessory before the fact to murder and sentenced to life imprisonment. Thereafter Wade was allowed to plead guilty to murder in the second degree and received a term of thirty years. Upon appeal, the defendant complained that his sentence as an accessory was for life while that of the principal was only thirty years. The Court disposed of this complaint summarily:

"It is sufficient to say that both the judgment against the defendant and the judgment against Fred Wade are authorized by statute. C.S. 4171, and C.S. 4200. The statute prescribing imprisonment for life upon conviction as an accessory before the fact to the crime of murder was in force at the time the statute defining murder in the first degree and murder in the second degree, respectively, and prescribing the punishment upon a conviction of murder in the first degree as death and the punishment upon a conviction of murder in the second degree as imprisonment for not less than two nor more than thirty years, was enacted. The former statute has not been amended or repealed. It is now in full force and effect." *Id.* at 250, 176 S.E. at 583.

[27] From the silence of the legislature we may assume that the lawmaking body was satisfied with the interpretation this Court has placed upon G.S. 14-6, and that the punishment for an accessory before the fact to a murder in any degree remains imprisonment for life. *Hewett v. Garrett,* 274 N.C. 356, 163 S.E. 2d 372; 50 Am. Jur. *Statutes* § 326 (1944).

[28, 29] Defendant's assignment of error No. 18 is that a life sentence for second-degree murder is constitutionally impermissible in that it (1) constitutes cruel and unusual punishment and (2) denies her the equal protection of the laws in violation of the Fourteenth Amendment. We dispose of the first contention, that defendant's life sentence is cruel and unusual punishment, by saying that it is the punishment fixed by the applicable statute, and that it is not disproportionate to her offense or unduly harsh in comparison with Epley's sentence. In this case — as is often true, no doubt — the culpability of the accessory exceeds that of the principal. *See State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854; *State v. Greer,* 270 N.C. 143, 153 S.E. 2d 849; *State v. Elliott,* 269 N.C. 683, 153

S.E. 2d 330; 24B C. J. S. *Criminal Law* § 1978 (1962). As to the second contention, the rule is well established that "equal protection of the laws is not denied by a statute prescribing the punishment to be inflicted on a person convicted of crime unless it prescribes different punishment for the same acts committed under the same circumstances by persons in like situation." 16A C. J. S. *Constitutional Law* § 564 (1956). *Accord, State v. Fowler,* 193 N.C. 290, 136 S.E. 709. G.S. 14-6 specifies life imprisonment for all persons convicted as accessories before the fact in the crime of murder.

There is no assignment No. 15; assignment of error No. 16 is formal. Assignment No. 8 (to the denial of the motion for nonsuit) and assignment No. 21 (to the overruling of the motion in arrest of judgment), being patently without substance, were not brought forward. Assignments 5-7 and 10-14 are not deemed to merit discussion.

[30] Because this appeal is from the second trial of a serious felony, we have considered every assignment of error which defendant attempted to bring forward notwithstanding appellant's failure to comply with our rules in many instances. However, we again point out that our rules are applicable to indigent defendants and their court-appointed counsel as well as to all others, and that the obligations of court-appointed counsel to his client and to the court are no less than those of privately retained counsel. *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655; *State v. Price,* 265 N.C. 703, 144 S.E. 2d 865.

[31] Today, an unsuccessful appeal in a criminal case — it matters not how skillfully and vigorously prosecuted or that the appeal may have been totally devoid of merit — is often followed by irresponsible and unjustified charges from the prisoner that his "court-appointed counsel was incompetent." Clearly, a failure on the part of attorneys to comply with the rules of the appellate courts invite such charges. To forestall these accusations against competent lawyers, who have nevertheless neglected to familiarize themselves with our rules, we have indulged lately infractions which formerly would not have been countenanced. However, we cannot be expected to continue this practice, which is neither in the interest of the Court nor the Bar.

In this case, after having carefully considered every assignment of error, we find in the trial below

No error.

RALEIGH MOBILE HOME SALES, INC. v. TRAVIS H. TOMLINSON, MAYOR OF THE CITY OF RALEIGH, NORTH CAROLINA, AND GEORGE B. CHERRY, EARL H. HOSTETLER, SEBY B. JONES, WILLIAM B. 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. 49

(Filed 12 June 1970)

1. Municipal Corporations § 32; Constitutional Law § 14— validity of Sunday observance ordinance — prohibiting sale of mobile homes

A municipal ordinance which prohibits the sale on Sunday of mobile homes but which does not prohibit the sale on Sunday of conventional homes *is held* valid, since a classification based on the differences between the two types of selling — presence or absence of traffic, congestion, and noise — bears a reasonable relation to the purpose of the ordinance in establishing Sunday as a day of rest and relaxation. N. C. Constitution, Art. I, §§ 17, 26; U. S. Constitution, Amendment XIV.

2. Sundays and Holidays; Constitutional Law § 14— day of rest — choice of Legislature

The choice of the day of the week to be observed as the day of rest and relaxation is for the Legislature.

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

A law requiring the observance of Sunday as a day of rest and relaxation does not cease to be a reasonable exercise of the police power of the State merely because it is in harmony with the religious beliefs of most Christian denominations.

4. Constitutional Law § 14— validity of ordinance — reasonable relation to State objective — observance of Sunday

The validity of a specific statute or ordinance depends upon its reasonable relation to the accomplishment of the State's legitimate objective, which, in the case of a Sunday observance ordinance, is the promotion of the public health, safety, morals and welfare by the establishment of a day of rest and relaxation.

5. Constitutional Law § 14— validity of Sunday observance laws — arbitrary discrimination between persons or activities

Sunday observance legislation may not discriminate arbitrarily either as between persons, or groups of persons, or as between activities which are prohibited and those which are permitted; yet, neither the State nor the Federal Constitution requires that such legislation be held invalid unless it prohibits every activity which could be brought within its scope.

6. Constitutional Law § 14— Sunday observance laws — determination of prohibited activities

The legislative body has a wide discretion in determining which activities do and which activities do not interfere with the observance of Sunday

as a day of general rest and relaxation sufficiently to justify the prohibition of those activities on that day.

7. Pleadings § 19— demurrer — conclusions of law

The demurrer does not admit the pleader's conclusions of law.

BOBBITT, C.J., and SHARP, J., concur in result.

HUSKINS, J., dissenting.

BRANCH and MOORE, JJ., join in the dissenting opinion.

APPEAL from the decision of the Court of Appeals, reported in 7 N.C. App. 289.

The plaintiff operates a mobile home sales lot in the City of Raleigh. It brought this action to enjoin the defendants from enforcing against the plaintiff and other mobile home dealers an ordinance of the City of Raleigh entitled "An Ordinance to Provide for the Due Observance of Sunday." A temporary injunction was granted and the defendants were ordered to appear to show cause why it should not be continued to the final hearing and disposition of the action.

At such hearing before Hobgood, J., at the September 1968 Non-Jury Assigned Session of Wake, the defendants demurred ore tenus to the complaint. The court concluded that the complaint does not state facts sufficient to constitute a cause of action against the defendants in that it appears from the face of the complaint that the ordinance does not violate the Constitution of North Carolina or the Constitution of the United States. Consequently, the superior court entered judgment sustaining the demurrer and dismissing the action.

It continued the restraining order in effect pending the determination of the plaintiff's appeal to the Court of Appeals. The Court of Appeals affirmed the judgment of the superior court. The plaintiff appealed to the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved.

The material portions of the ordinance provide:

> "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 midnight Saturday and 12 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; * * *."

[Then follows a list of commodities which may not be sold on Sunday, irrespective of any other provision of the ordinance, and provisions that certain types of establishments may be kept open on Sunday, certain sports and amusement activities may be conducted on Sunday and certain commodities may be sold thereat.]

In substance, the material allegations of the complaint (renumbered) are as follows:

(1) The foregoing ordinance was adopted 3 June 1968.

(2) The plaintiff operates a mobile home sales lot in the City of Raleigh and thereon "sells, offers and exposes for sale only mobile homes."

(3) The plaintiff has for many years sold, offered or exposed for sale mobile homes seven days per week.

(4) The said ordinance is being enforced against "mobile home dealers and their agents and employees by preventing the selling, offering or exposing mobile homes for sale on Sunday," warrants having been issued against employees of such dealers charging them with violation of the ordinance, but the "ordinance is not being enforced as to dealers in the sale, offering or exposing for sale of conventional homes on Sunday."

(5) Enforcement of the ordinance will result in a multiplicity of actions, fines and penalties against the plaintiff, will cause it to suffer substantial direct economic injury and will subject it to irreparable damage for which it has no adequate remedy at law.

(6) The plaintiff is in direct competition with persons selling, offering or exposing for sale conventional homes, the sale of which on Sunday is not prohibited by law.

(7) "Conventional homes are sold, offered and exposed for sale in the City of Raleigh, North Carolina, on Sunday."

(8) Prospective purchasers of conventional homes are also prospective purchasers of mobile homes and the dealers and sellers of the two types of homes are similarly situated, are in the same class, and "there is no reasonable or legal basis for distinguishing between the sellers of mobile homes and the sellers of conventional homes," and, therefore, the ordinance discriminates between those in the same class and similarly situated.

(9) The ordinance permits certain sales and activities (i.e., the operation of grocery stores and curb markets) on Sunday, except between the hours of 10 a.m. and 12 noon, and "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."

(10) The continued enforcement of the ordinance against the plaintiff, while sellers of conventional homes are permitted to sell such homes on Sunday, will constitute the enforcement of a discriminatory and unconstitutional ordinance, will deprive the plaintiff of its property without due process of law and deny to it the equal protection of the law in violation of Article I, § 17, of the Constitution of North Carolina and of the First and Fourteenth Amendments to the Constitution of the United States.

(11) The enforcement of the ordinance will violate the foregoing constitutional provisions because: (a) It does not affect all persons "in the same class as plaintiff and engaged in similar operations to that of the plaintiff"; (b) it is a "use of the State's coercive power to aid * * * the Christian religion"; (c) "the classification of articles prohibited by the ordinance is arbitrary and discriminatory in that it excludes real property and includes personal property"; (d) the classification has no reasonable relationship to the public peace, welfare, safety and morals; and (e) the ordinance is "vague and indefinite."

The prayer of the complaint is for permanent injunction restraining the defendants from enforcing the ordinance or, alternatively, from enforcing it against the plaintiff and other mobile home dealers, their agents and employees. The plaintiff further prays that the ordinance be declared null and void and that a temporary injunction issue.

Phillip C. Ransdell for plaintiff appellant.

Donald L. Smith and Broxie J. Nelson for defendant appellee.

LAKE, J.

The ordinance here in question was before this Court in *Kresge Co. v. Tomlinson,* 275 N.C. 1, 165 S.E. 2d 236. We there held that legislative authority for its adoption was conferred upon the City of Raleigh by its charter and by G.S. 160-52 and G.S. 160-200(6), (7), and (10). We also there held, upon the authority of *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370, and *Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 134 S.E. 2d 364, that the provisions of the ordinance are not unreasonable, arbitrary or discriminatory as applied to the plaintiffs in that action, they being operators of depart-

ment stores in the city selling various articles of merchandise. In the *Kresge* case, the principal ground of attack upon the ordinance was that it violated the First Amendment to the Constitution of the United States. This Court rejected that contention, citing as authority *McGowan v. Maryland,* 366 U.S. 420, 81 S. Ct. 1101, 6 L. ed. 2d 393, and *Two Guys v. McGinley,* 366 U.S. 582, 81 S. Ct. 1135, 6 L. ed. 2d 551, reh. den. 368 U.S. 869, 82 S. Ct. 21, 7 L. ed. 2d 69.

[1] The ordinance prohibits the sale or offering for sale within the city on Sunday of "any goods, wares or merchandise," except as expressly permitted by the ordinance. It does not refer to or apply to sales of real property. The plaintiff in this action does not contend that the ordinance discriminates unconstitutionally against it by reason of the provisions authorizing sales on Sunday of certain types of "goods, wares and merchandise" other than mobile homes. Its contention is that by an ordinance, otherwise valid, a city may not prohibit the selling or offering for sale on Sunday of mobile homes, by a general prohibition of the selling or offering for sale of "goods, wares and merchandise," if the city does not also prohibit the selling or offering for sale on Sunday of "conventional homes"; that is, homes so affixed to land as to become real property. This is the only question presented by this appeal which has not previously been determined by this Court.

It is well established that the provisions of Article I, § 17, and Article I, § 26, of the Constitution of North Carolina, do not deprive the Legislature of authority to prohibit by a statute, otherwise valid, the carrying on of and engaging in, on Sunday, any and all labor and the operation of industrial and commercial pursuits, except for works of necessity and acts which, themselves, are in exercise of the constitutional right to worship. *Kresge Co. v. Tomlinson, supra; Charles Stores v. Tucker, supra; Clark's Charlotte, Inc. v. Hunter, supra; State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783; *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198. The Legislature may delegate this power to municipalities. *State v. McGee, supra.*

It is equally well settled that such legislation is within the police power of the State and, nothing else appearing, is not a violation of the Fourteenth Amendment to the Constitution of the United States or of the First Amendment thereto, now deemed incorporated into the Fourteenth. *McGowan v. Maryland, supra.*

Human experience has demonstrated that there is a close relationship between health, morality and general welfare on the one hand and the regular observance of one day in seven as a day of rest and recreation on the other. It has also demonstrated the practical

necessity of legislation, designating a specific day in the week for that purpose and prohibiting activities on that day which interfere substantially with the accomplishment of such purpose. It would not be practicable for the State, or the municipality, simply to require for all of its citizens one day of rest in seven, leaving it to each individual to choose the day most convenient for him. See *McGowan v. Maryland, supra.* As the Supreme Court of the United States said in the *McGowan* case, *supra,* at page 450:

> "[T]he State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility — a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the every day intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days."

[2, 3] The choice of the day of the week to be observed as the day of rest and relaxation is for the Legislature. Obviously, it cannot choose a day which accords with the wishes and religious convictions of all of the people. In making its choice, the Legislature may take into account the fact that Sunday is the day of the week which a great proportion of the people would observe as a day of rest apart from the statute, whether this be due to the religious conviction of such persons or to their traditions and customs. The choice of Sunday by the Legislature does not render the statute unconstitutional, as a law establishing a religion or interfering with freedom of worship, merely because other persons are required by their religious convictions to rest from their labors on a different day of the week, or, having no religious convictions, consider Sunday as an exceptionally promising day for business. *McGowan v. Maryland, supra; Henningtón v. Georgia,* 163 U.S. 299, 16 S. Ct. 1086, 41 L. ed. 166; *State v. McGee, supra.* Laws against murder, larceny, adultery and perjury are not rendered invalid by reason of the fact that these acts are also forbidden by the Ten Commandments. Similarly, a law requiring the observance of Sunday as a day of rest and relaxation does not cease to be a reasonable exercise of the police power of the State, merely because it is in harmony with the religious beliefs of most Christian denominations.

[4, 5] The validity of a specific statute or ordinance depends, however, upon its reasonable relation to the accomplishment of the State's legitimate objective, which, in this instance, is the promo-

tion of the public health, safety, morals and welfare by the establishment of a day of rest and relaxation. Legislation for this purpose, like other legislation, may not discriminate arbitrarily either as between persons, or groups of persons, or as between activities which are prohibited and those which are permitted. *State v. Smith,* 265 N.C. 173, 143 S.E. 2d 293.

[5] On the other hand, neither the State nor the Federal Constitution requires that a statute or ordinance, enacted for this purpose, be held invalid unless it prohibits every activity which could be brought within its scope. The general prohibition is not invalidated by excepting therefrom activities which may reasonably be thought to contribute to the rest, relaxation or other need of a segment of the public to a degree sufficient to outweigh the interference resulting therefrom to the rest and relaxation of the remainder. The weighing of such benefits and detriments is for the legislative body in the first instance. Its determination will not be disturbed by the courts unless clearly unreasonable.

In *State v. Trantham, supra,* this Court, speaking through Barnhill, J., later C.J., with reference to an ordinance prohibiting secular pursuits on Sunday, said:

> "Legislative bodies may distinguish, select, and classify objects of legislation. It suffices if the classification is practical. (Citations omitted.) They may prescribe different regulations for different classes, and discrimination as between classes is not such as to invalidate the legislative enactment."

To the same effect, see: *Clark's Charlotte, Inc. v. Hunter, supra; State v. Towery,* 239 N.C. 274, 79 S.E. 2d 513; *State v. McGee, supra.*

With reference to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, the Supreme Court of the United States, speaking through Stone, J., later C.J., said in *Silver v. Silver,* 280 U.S. 117, 50 S. Ct. 57, 74 L. ed. 221, 65 A.L.R. 939:

> "[T]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied — that the legislature must be held rigidly to the choice of regulating all or none. * * * It is enough that the present statutes strike at the evil where it is felt and reaches the class of cases where it most frequently occurs."

Again, in *Dominion Hotel v. Arizona,* 249 U.S. 265, 268, 39 S. Ct. 273, 63 L. ed. 597, the Court, speaking through Holmes, J., said:

> "The Fourteenth Amendment is not a pedagogical requirement of the impractical. The equal protection of the law does

not mean that all occupations that are called by the same names must be treated in the same way. The power of the State 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' *Armour & Co. v. North Dakota,* 240 U.S. 510, 517. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the Legislature of Arizona could not have had any reasonable ground for believing that there were public considerations for the distinction made by the present law."

[1] The contention of the plaintiff is that an arbitrary discrimination has been made by the city in that the ordinance prohibits the sale on Sunday of mobile homes, along with other "goods, wares and merchandise," but does not prohibit the sale on Sunday of "conventional homes," so attached to land as to become real property. Obviously, there are differences between the two types of property, and between the businesses of selling the two types of property, which will make reasonable and, therefore, constitutionally valid, some differences between legislation relating to the one and legislation relating to the other. The question which we are required by this appeal to determine is whether it may reasonably be thought that there is a difference between the two types of business, or between the customary procedures in conducting them, which makes reasonable the prohibition of the sale of one type of property on Sunday without prohibiting the sale of the other type of property on Sunday. The objective of the ordinance being the establishment of Sunday as a day of general rest and relaxation, the difference in treatment of the two types of business must be supported by a reasonable basis for the conclusion that one, substantially more than the other, will interfere with such use and enjoyment of the day. *McGowan v. Maryland, supra; Clark's Charlotte, Inc. v. Hunter, supra; State v. Towery, supra;* 50 Am. Jur., Sundays and Holidays, § 11.

[6] The legislative body has a wide discretion in determining which activities do and which activities do not interfere with the observance of Sunday as a day of general rest and relaxation sufficiently to justify the prohibition of those activities on that day. The burden rests upon the person complaining to establish the absence of a reasonable basis for such determination. In *Metropolitan Casualty Insurance Co. v. Brownell,* 294 U.S. 580, 584, 55 S. Ct. 538, 79 L. ed. 1070, the Court, speaking through Stone, J., later C.J., said:

"It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests upon him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. *A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.*" (Emphasis added.)

In *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 31 S. Ct. 337, 55 L. ed. 369, the Court, speaking through VanDevanter, J., said:

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, *if any state of facts reasonably can be conceived* that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. *One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.*" (Emphasis added.)

In *Patsone v. Commonwealth of Pennsylvania*, 232 U.S. 138, 144, 34 S. Ct. 281, 58 L. ed. 539, the Court, speaking through Holmes, J., said:

"[W]e start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those *from whom the evil mainly is to be feared,* it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. * * * It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. (Citation omitted.) The State 'may direct its law

against what it deems the evil as it actually exists without covering the whole field of possible abuses.' *Central Lumber Co. v. South Dakota,* 226 U.S. 157, 160." (Emphasis added.)

More recently, and with specific reference to laws designed to establish Sunday as a day of rest and relaxation, the Supreme Court of the United States said, in *McGowan v. Maryland, supra,* at pages 425-426:

"The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of fact reasonably may be conceived to justify it.

* * *

"The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment."

The same assumption in favor of the reasonableness of the legislative classification applies with reference to the requirements of Article I, § 17, of the Constitution of North Carolina. See *Clark's Charlotte, Inc. v. Hunter, supra.* See also Annot., 46 A.L.R. 290, 291.

The only case which has come to our attention in which the contention was made that a law forbidding the sale of personal property on Sunday was unconstitutional because it permitted the sale of real estate is *Motor Car Dealers' Ass'n. v. Fred S. Haines Co.,* 128 Wash. 267, 222 P. 611, 36 A.L.R. 493. The Supreme Court of Washington disposed of the contention summarily in favor of the validity of the statute.

[7] Since this appeal comes before us upon a demurrer to the complaint, the facts must be taken as stated therein. The demurrer does not admit the pleader's conclusions of law. When so considered, "the record is barren" of any showing that there is no reasonable basis for the classification made by this ordinance.

[1] The distinction drawn by this ordinance between the two types of business is not necessarily permissible because one sells personal property and the other sells real property. Conversely, the difference in the treatment of the two is not necessarily impermissible because in each instance the thing sold is designed for use as a residence and to some buyers both types of home are attractive. The determina-

tive question is whether the legislative body could reasonably conclude that the customary practices and procedures followed in selling mobile homes, not yet located where they are to be used as homes, are substantially more likely to impair Sunday as a day of general rest and relaxation than are the customary practices and procedures followed in selling homes already built upon the lots on which their owners will live in them. It is not determinative that the complainant shows, or the court takes notice of, the fact that, in particular instances, the offering for sale of a home already affixed to the land at the site of its intended use is accompanied by as much traffic congestion, noise and disturbance of the neighborhood as exist in particular instances of the offering for sale of a mobile home.

Without attempting to enumerate all the differences between the two types of business, we are mindful that in the mobile home business, many units are exhibited and offered for sale simultaneously on the same lot and, as sold, are promptly removed and replaced by other units, so that the sale at this location goes on Sunday after Sunday, resulting in more or less continuous traffic movement, congestion and noise in the vicinity. The proprietor of the business, naturally, uses all reasonable means to maintain this condition Sunday after Sunday. In the case of the conventional homes, a sale once made is not soon repeated, and even in the case of an effort to sell many houses in a new development, the area affected is larger, the congestion of traffic less and the seller seeks to terminate the selling process at that location as quickly as possible. One of the principal attractions to a purchaser of a home is a quiet, restful neighborhood. This may reasonably be supposed to be borne in mind by the seller of a conventional home in his choice of selling procedures. The lack of restful quiet at the mobile home sales lot is not likely to chill the interest of the prospective buyer. In the absence of a showing by the complainant that these or other reasonable bases for the legislative conclusion do not exist in the City of Raleigh, we cannot hold it arbitrary.

Affirmed.

BOBBITT, C.J. and SHARP, J., concur in result.

HUSKINS, J., dissenting.

The basic question posed by this appeal is accurately stated in the majority opinion as follows: "The ordinance prohibits the sale or offering for sale within the city on Sunday of 'any goods, wares or merchandise,' except as expressly permitted by the ordinance. It

does not refer to or apply to sales of real property. The plaintiff in this action does not contend that the ordinance discriminates unconstitutionally against it by reason of the provisions authorizing sales on Sunday of certain types of 'goods, wares and merchandise' other than mobile homes. Its contention is that by an ordinance, otherwise valid, a city may not prohibit the selling or offering for sale on Sunday of mobile homes, by a general prohibition of the selling or offering for sale of 'goods, wares and merchandise,' if the city does not also prohibit the selling or offering for sale on Sunday of 'conventional homes'; that is, homes so affixed to land as to become real property. This is the only question presented by this appeal which has not previously been determined by this Court." Elsewhere in the majority opinion the question is stated in these words: "The determinative question is whether the legislative body could reasonably conclude that the customary practices and procedures followed in selling mobile homes, not yet located where they are to be used as homes, are substantially more likely to impair Sunday as a day of general rest and relaxation than are the customary practices and procedures followed in selling homes already built upon the lots on which their owners will live in them."

Pertinent portions of the ordinance in question and the essential allegations of the complaint are accurately stated in the majority opinion. The demurrer admits the truth of these allegations. It is my view that the demurrer should be overruled, the temporary order restraining enforcement of the ordinance against plaintiff continued until the final hearing, and, if plaintiff's allegations are sustained by proof upon the trial, defendant should be permanently restrained from the discriminatory enforcement of said ordinance against this plaintiff.

Requiring the observance of Sunday as a day of rest has a reasonable relationship to the public peace, welfare, safety and morals, and therefore rests within the police power of the State — a power delegated by the State to its municipalities. *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370; *Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 134 S.E. 2d 364; *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198.

In enacting ordinances for the observance of Sunday, a municipality may determine and classify the pursuits, occupations or businesses to be excluded from Sunday operations; and if the classifications are based upon reasonable distinctions and have some reasonable relationship to the public peace, welfare, safety and morals, they will be upheld. *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783;

State v. Towery, 239 N.C. 274, 79 S.E. 2d 513. "The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination." *State v. Trantham, supra.* Conversely, if the classifications are based upon unreasonable distinctions and have no reasonable relationship to the public peace, welfare, safety and morals, they violate due process and deny equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 17, of the Constitution of North Carolina.

Involved in this case is the business of *selling homes.* As I view it, no legitimate reason appears why the *sale* of conventional homes tends to "sustain life, promote health, and advance the enjoyment of Sunday as a day of rest" (*Charles Stores v. Tucker, supra*) so as to come within the permissible Sunday pursuits, while the *sale* of mobile homes profanes the Sabbath and offends the purposes for which the ordinance was enacted so as to come within the impermissible Sunday pursuits. Such classification, in my opinion, is founded upon unreasonable distinctions, discriminates against those engaged in the sale of mobile homes, and has no reasonable relation to the stated objective of the ordinance. Hence, insofar as the ordinance attempts to put the *sale* of mobile homes and the *sale* of conventional homes in different classifications for enforcement purposes — the one prohibited and the other allowed — it is unconstitutional and should not be upheld. Businesses which are essentially the same (selling homes) must not be treated in law as though they are different. Discrimination exists when, under the same conditions, persons engaged in the same business are subjected to different restrictions and permitted to enjoy different privileges. Such discrimination impairs equality of protection and denies due process of law which is vouchsafed for all by both State and Federal Constitutions.

Furthermore, plaintiff has had no opportunity to support its allegations with evidence. So far as we know at this juncture, the customary practices and procedures followed in selling mobile homes are no more likely to impair Sunday as a day of general rest and relaxation than the customary practices and procedures followed in selling conventional homes. To conclude otherwise upon the hearing of a demurrer ore tenus is unwarranted. Plaintiff is entitled to its day in court.

For the reasons stated, I respectfully dissent.

BRANCH and MOORE, JJ., join in this dissent.

STATE OF NORTH CAROLINA v. RAY HAMBY

— AND —

STATE OF NORTH CAROLINA v. CRAIG BARRY CHANDLER

No. 4

(Filed 12 June 1970)

1. Homicide § 21— first-degree murder — sufficiency of evidence — premeditation and deliberation — intoxication of defendants

In a prosecution charging two defendants with the first-degree murder of a 74-year-old man by slitting his throat and by hitting him over the head with a cue stick, notwithstanding there was evidence of the State which raised an inference that at the time of the murder the judgment and dexterity of the defendants had been impaired by intoxication, the State's evidence was sufficient to establish that each defendant had formed the specific intent to kill deceased and that this intent was preceded by premeditation and deliberation; consequently, the issue of defendants' guilt of murder in the first degree was properly submitted to the jury.

2. Homicide § 21— first-degree murder — elements of proof

In order to convict a defendant of first-degree murder, the State is required to produce evidence which satisfies the jury beyond a reasonable doubt that he unlawfully killed the deceased with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation.

3. Homicide § 8— first-degree murder — effect of intoxication

If, at the time of the killing, a defendant was so drunk as to be utterly incapable of forming a deliberate and premeditated intent to kill the deceased, defendant could not be guilty of murder in the first degree, for an essential element of that crime would be lacking.

4. Homicide §§ 4, 8— intoxication — effect on premeditation and deliberation

Whether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions; no inference of the absence of deliberation and premeditation arises, as a matter of law, from intoxication.

5. Criminal Law § 106— nonsuit — evidence exonerating defendant

When the State's evidence tends only to exonerate a defendant from a particular charge, his motion for judgment of nonsuit or a directed verdict as to that charge should be allowed.

6. Homicide § 8— intoxication of defendant — effect on intent to kill — jury question

As a general rule, it is for the jury to determine whether the mental condition of the accused was so far affected by intoxication that he was unable to form a guilty intent to kill, unless the evidence is not sufficient to warrant the submission of the question to the jury.

7. Homicide § 18— premeditation and deliberation — indicia of proof

The indicia of premeditation and deliberation include: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; threats and declarations of defendant before and during the course of the occurrence giving rise to the death of the deceased; the dealing of lethal blows after deceased has been felled and rendered helpless.

APPEAL by defendants under G.S. 7A-27(a) from *Hasty, J.*, 8 September 1969 Session of LINCOLN.

Defendants, Ray Hamby and Craig Barry Chandler, were tried upon separate but identical bills of indictment in which each was charged with the first-degree murder of Alfred Hendricks. On 8 September 1969 defendants were arraigned and the cases consolidated for trial. Both defendants were represented by court-appointed counsel and entered pleas of not guilty.

Defendants are two young white men. The deceased, Alfred Hendricks was a white man about 74 years old. He lived alone on a dirt road between Lincolnton and Maiden in the community of Providence. The leading witness for the State was 13-year-old Mildred Grant. She testified in substance as follows:

She saw defendants about 8:00 p.m. on the evening of 7 April 1969 at the home of her sister, Jeanette Pritchard. They brought with them 24 small cans of beer and two pint bottles of wine. Mildred, Jeanette and the two defendants consumed the wine and 18 cans of the beer. Sometime during the evening the four went to the home of Hendricks, and Mildred borrowed $10.00 from him. She and Hendricks had been friends for six or seven months, and it was her custom to visit him for about a half an hour on Mondays and Tuesdays. Two weeks earlier he had loaned her $5.00.

About 11:30 p.m. the two defendants left Mildred at her sister's home, and she went to bed. Sometime after midnight, however, defendants returned to get Mildred to go with them to "Hoyle's No. 2" on the Maiden highway for some drinks. Chandler was drunk, and Hamby drove the automobile to Hoyle's, where they got three drinks (what kind of drinks, the evidence does not disclose). Thereafter, about 1:30 a.m. on 8 April 1969, Mildred and the two defendants went back to Hendricks' home. He opened the door for Mildred and went back to bed. When she requested more money he told her he had only $63.00 and no change. As she turned to leave, defendants came in. Chandler hit Hendricks on the head with a flashlight three or four times. Hamby jumped on top of Hendricks in the bed and attempted to smother him. Chandler took the $63.00 out of Hen-

dricks' pocket and gave it to Mildred. She returned $10.00 to Chandler, gave Hamby $20,00, and kept $33.00 for herself.

Hendricks was bleeding from the head. Defendants got him out of the bed, washed his face with a cloth, and dressed him. They then collected two pounds of ham, a dozen eggs, six soft drinks, and a box of cartridges. They wrapped these items in two sheets and a pillowcase and put them in the car. They also took Hendricks' television and a pillow from his bed. Hamby found a can of kerosene and, before leaving the house, poured it on the floors. His final act was to throw a burning cigarette lighter into the house. It was then about 2:00 a.m. Defendants (according to Mildred) "wasn't as drunk as they could be." They put Hendricks in the back seat of the automobile with Chandler. Mildred got in the front with Hamby, who drove the car to a deserted spot on a dead-end dirt road in Lincoln County.

En route Hamby told Hendricks that he had better smoke his cigarette because it would be the last one he would get. He also told Hendricks that if he would give him a gun he would not kill him. Hendricks said he did not know where a gun was. When Hamby stopped the car the three got out, and Hamby hit Hendricks over the head with a cue stick, which the old man had used as a cane. Hendricks fell to the ground, and "Hamby slit his throat twice with a knife." Chandler then "jobbed (him) in the side of the head with a knife." When the knife broke, Chandler "got mad and stomped Hendricks in the belly." After that he took a piece of wire and tied Hendricks' hands. Defendants then burned the pillow and, about 3:00 a.m., they left Hendricks lying on the ground with his throat cut and his head "busted open."

The three went back to Jeanette's home and got her out of bed. The four then went to Newport, Tennessee. Defendants shared the driving over "winding, difficult mountain roads." The trip to Newport took about three and one-half hours. After two hours there they began the return trip and arrived at Mildred's home in Lincoln County sometime after noon. At unspecified times between 8:00 p.m. on 7 April 1969 and defendants' return to Lincoln County from Tennessee, Mildred saw Hamby take three green pills with beer and wine.

Other evidence for the State tended to show: On Wednesday morning, 9 April 1969, after defendant Chandler had breakfasted at a grill with his friend, Danny Smith, he told Smith he had killed a man. Smith thought he was joking, but Chandler kept repeating the statement. Finally he bought Smith $2.00 worth of gas and asked

him to drive to a place behind Tojo Peeler's on highway No. 27, about two miles west of Lincolnton. At first, Smith could not locate the spot and accused Chandler of "killing his time." Chandler said, "Go up one more road and if you see a pillow as you go up the road, there's where he lays." Smith followed instructions and soon saw the pillow and the body of Hendricks, which was down an embankment. He immediately left the scene, stopped at the first filling station, and telephoned the police while Chandler remained in the car. Officers came to the filling station, took custody of Chandler, and went to the place where Hendricks' body lay. "His hands were tied in front of him. His throat was cut, and his head was swelled out of proportion. You couldn't identify him." A broken cue stick, a pair of glasses, false teeth, flashlight batteries, "a plug," the head of a flashlight, three unfired 22-magnum cartridges, a bloody handkerchief, and pieces of burned cloth were scattered on the ground near the body.

At Hendricks' home, officers found the front and back doors shut but unlocked. On the front steps was an open cigarette lighter bearing the initials "R. H." There were puddles of kerosene on the uneven floors of the kitchen and bedroom. Two spots of blood stained the kitchen floor and two washcloths were on the table. In the bedroom, the bed was turned upside down.

An autopsy revealed a large fracture extending across the vertex of Hendricks' skull, numerous cuts and superficial abrasions on each side of the head, and three deep cuts on the right side of the neck. Both the jugular vein and the carotid artery had been lacerated. A cut extended from under the right side of the chin deep into the floor of the mouth and another began in the upper lip and extended to the nostril. Either the cuts in the neck or the injuries to the brain resulting from the fractured skull would have caused death.

At the conclusion of the State's evidence defendants' motion for judgment of nonsuit on the charge of murder in the first degree was overruled. Defendants offered no evidence. The jury found each "guilty of murder in the first degree." As required by the law, the Court sentenced each defendant to death. Both appealed.

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General; and Donald M Jacobs, Staff Attorney, for the State.

M. T. Leatherman and Sheldon M. Roper for defendant-appellants.

SHARP, J.

[1] Defendants bring forward one assignment of error. They spe-

cify that the only question presented by this appeal is whether the court erred in overruling their motion for judgment of nonsuit on the charge of murder in the first degree. They contend that "the State offered positive, direct and substantial evidence that the defendants were drunk before and at the time the crime was committed and therefore could not have acted with premeditation and deliberation."

[2-4] In order to convict each defendant the State was required to produce evidence which satisfied the jury beyond a reasonable doubt that he unlawfully killed Hendricks with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation. If, at the time of the killing, either defendant was so drunk as to be utterly incapable of forming a deliberate and premeditated intent to kill Hendricks, he could not be guilty of murder in the first degree, for an essential element of that crime would be lacking. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560, and the cases cited therein. However, whether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. "No inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law." *State v. Murphy,* 157 N.C. 614, 619, 72 S.E. 1075, 1077. "[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree." *State v. Thompson,* 110 Utah 113, 123, 170 P. 2d 153, 158.

[5] Judge Hasty fully explained the foregoing principles to the jury in a charge which defendants do not attack. The specific question for decision is whether all the State's evidence, when considered in the light most favorable to the State, tends to show that either defendant (or both of them) was so intoxicated at the time of the killing that he was utterly incapable of forming a deliberate and premeditated purpose to kill Hendricks. If reasonable minds must agree that all the evidence points unerringly to that conclusion, the judge should have withdrawn the issue of defendants' guilt of murder in the first degree from the jury. When the State's evidence tends only to exonerate a defendant from a particular charge his motion for judgment of nonsuit or a directed verdict as to that charge should be allowed. *State v. Carter,* 254 N.C. 475, 119 S.E. 2d 461; *State v. Jarrell,* 233 N.C. 741, 65 S.E. 2d 304; *State v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740; *State v. Todd,* 222 N.C. 346, 23 S.E. 2d 47; 2 Strong, N. C. Index 2d *Criminal Law* § 106 (1967). However, if there is any evidence which reasonably tends to show that defend-

ants formed the specific intent to kill Hendricks and that this intention was preceded by premeditation and deliberation, their motions were properly overruled. *State v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904.

[6] Defendants have cited no case, and our research has revealed none, in which any court has dismissed a charge of murder in the first degree on the ground that all the evidence tended to show a degree of intoxication which negated the possibility of premeditation and deliberation as a matter of law. On the contrary, when a defendant has committed an overt lethal act, the decision has been that whether his "intoxication (was) so gross as to preclude a capacity intentionally to kill is normally a fact issue for the jury to resolve." *King v. State,* 80 Nev. 269, 272, 392 P. 2d 310, 311. As stated in 23A C.J.S. *Criminal Law* § 1131 (1961), "As a general rule, it is for the jury to determine whether the mental condition of accused was so far affected by intoxication that he was unable to form a guilty intent, unless the evidence is not sufficient to warrant the submission of the question to the jury." *See State v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684; *State v. Hammonds,* 216 N.C. 67, 3 S.E. 2d 439 for comments indicating the court's belief that the defendant's conduct at the time of the homicide was incompatible with "his defense of drunkenness and mental irresponsibility."

[7] The following indicia of premeditation and deliberation are listed in *State v. Faust,* 254 N.C. 101, 107, 118 S.E. 2d 769, 773: Want of provocation on the part of the deceased; the conduct of defendant before and after the killing; threats and declarations of defendant before and during the course of the occurrence giving rise to the death of the deceased; the dealing of lethal blows after deceased has been felled and rendered helpless. *Accord, State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484.

[1] In this case there was ample evidence to establish that defendants killed Hendricks with malice after having deliberated and premeditated his murder. Judge Hasty correctly overruled the motion to dismiss the charge of murder in the first degree. Although the evidence with reference to their intoxication raises the inference that the judgment and dexterity of each were impaired, we cannot say as a matter of law that defendants were so intoxicated as to be incapable of premeditated murder. On the contrary, the evidence of premeditation and an actual, specific intent to kill fully justified the jury's verdict: (1) Defendants went to Hendricks' home for the specific purpose of obtaining money. (2) When he was reluctant to give them more money, each defendant, without the slightest provo-

cation and by concerted action, attacked him as he lay helpless in bed. (3) Chandler took from Hendricks' pocket the money defendants had come to get, and they then looted the house. (4) Defendants forcibly removed Hendricks from his bed, dressed him, and put him in their automobile. (5) Except for the television, which they put in the trunk of the automobile, defendants wrapped the stolen articles in bedclothes taken from Hendricks' bed. (6) In an attempt to conceal their crime, defendants attempted to burn down the house by pouring kerosene on the floors. The plan failed because Hamby's aim was poor and his lighter fell short of the mark. (7) Defendants then proceeded with Hendricks to a deserted spot previously known to them. (8) En route Hamby told Hendricks (a) that he would not kill him if he would get them a gun, and (b) that Hendricks should smoke his cigarette "because it would be the last one he would get." (9) After arriving at their destination, Hamby hit Hendricks over the head with a cue stick and slit his throat. Chandler jabbed Hendricks in the head with a knife, stomped him, and tied his hands with wire obtained from the automobile. (10) Leaving the scene of their crime, defendants decided to go to Tennessee. They aroused Jeannette so that she and Mildred might accompany them. (11) The two defendants shared the drive to Tennessee over treacherous mountain roads and returned without mishap to Lincoln County by afternoon. (12) The next day Chandler, well aware of what he had done, confessed the crime to a friend, and told him that a pillow marked the spot where the body was.

As pointed out by Higgins, J., in *State v. Miller, post,* p. 681, since the murder with which defendants were charged occurred on 8 April 1969 — after the repeal of G.S. 15-162.1 on 25 March 1969 — we are not confronted with the question relating to capital punishment which was debated in *State v. Spence and Williams,* 274 N.C. 536, 545 *et seq.,* 164 S.E. 2d 593, 600; *State v. Atkinson,* 275 N.C. 288, 315-321, 323-328, 167 S.E. 2d 241, 258-260, 262-265; *State v. Hill,* 276 N.C. 1, 16 *et seq.,* 170 S.E. 2d 885, 895; *State v. Ruth,* 276 N.C. 36, 44 *et seq.,* 170 S.E. 2d 897, 902; *State v. Roseboro,* 276 N.C. 185, 197, 171 S.E. 2d 886, 894.

In the trial below, we find

No error.

STATE OF NORTH CAROLINA v. ROGER VERNON MILLER

No. 14

(Filed 12 June 1970)

1. Criminal Law § 76— confession — defendant's nervous state — effect on admissibility

The fact that the defendant became nervous and highly excited during his confession to the sheriff that he kidnapped and strangled a 13-year-old girl does not impeach the confession or reflect upon defendant's ability to make it, and the trial court was not required to make a finding of fact that the defendant was nervous at the time of the confession.

2. Criminal Law § 112— instructions on reasonable doubt

The charge of the trial court, when considered contextually, properly placed upon the State the burden of proving beyond a reasonable doubt every essential element of the offenses charged.

3. Constitutional Law § 29; Criminal Law § 135; Jury § 7— capital case — exclusion of jurors who would never return death penalty

In a prosecution of a defendant charged with first degree murder, the trial court properly sustained the State's challenge for cause to each juror who stated that in no event and under no circumstances could he render a verdict of guilty against any person, regardless of the evidence, if the punishment was death. U. S. Constitution, Amendments V, VI and XIV; N. C. Constitution, Art. I, § 13.

4. Criminal Law § 75— admissibility of confession — voluntariness — defendant in jail

Defendant's confession to the sheriff, which was made while defendant was under arrest for kidnapping and homicide and was confined in jail, *held* properly admitted in evidence, where there were findings, supported by evidence, that (1) the defendant himself had sought the interview with the sheriff in order to get the crimes "off his chest" and (2) the sheriff gave the defendant the necessary warnings prior to the confession.

5. Criminal Law § 135; Homicide § 31— validity of death penalty — repeal of G.S. 15-162.1

The question whether G.S. 14-17 and G.S. 15-162.1, when construed together in the light of *U. S. v. Jackson*, 390 U.S. 570, will render unenforceable the death penalty for murder in this State *held* immaterial in this first degree murder prosecution, G.S. 15-162.1 being repealed prior to the commission of the offense.

6. Statutes § 1— enactment of statute — determination of date — use of Senate journal

The repeal of the statute providing for a sentence of life imprisonment upon the acceptance of a defendant's guilty plea to a capital crime, G.S. 15-162.1, *is held* to have antedated by a few hours the commission of a homicide by strangulation, both the repeal of the statute and the homicide occurring on the same day, where it appeared from the Senate journal that, within a few minutes after the beginning of the legislative day at 12 Noon on 25 March 1969, the House bill repealing the statute had been

ratified by the Senate and had been enrolled and sent to the Secretary of State, and where the evidence for the state in the homicide prosecution established that the defendant charged therein had committed the offense sometime after 2:30 p.m. on 25 March 1969.

7. Statutes § 1— enactment date of statute — admission of evidence as to precise time

Generally, a statute will be held effective from the first moment of the day of its enactment, although a court will hear evidence and determine the precise moment of enactment whenever it becomes necessary to prevent a wrong or to assert a meritorious right.

8. Criminal Law § 135; Homicide § 31; Constitutional Law § 29— capital case — determination of punishment — recommendation of mercy

The 1949 amendment to the capital felony statutes providing that the jury, as a part of its guilty verdict, might by recommendation fix the punishment at life imprisonment rather than death, *held* not an unlawful division of powers between the court and the jury.

APPEAL by defendant from jury verdicts of guilty and judgments thereon entered by *Fountain, J.* at the September 8, 1969 Session, DUPLIN Superior Court.

This criminal prosecution was based on the following bill of indictment duly returned by the Grand Jury on May 12, 1969:

"The State of North Carolina

v INDICTMENT

Roger Vernon Miller

First Count:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Roger Vernon Miller late of the County of Duplin on the 25th day of March, 1969 with force and arms, at and in the county aforesaid, unlawfully, wilfully, feloniously, forcibly and fraudulently did kidnap Reba Jacquelyn Stone contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

Second Count:

AND THE JURORS FOR THE STATE UPON THEIR OATH FURTHER PRESENT, That Roger Vernon Miller, late of the county of Duplin on the 25th day of March, 1969, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously, and of his malice aforethought, did kill and murder Reba Jacquelyn Stone against the form of the stat-

ute in such case made and provided and against the peace and dignity of the State.

WALTER T. BRITT
Solicitor"

On March 29, 1969 Judge Hubbard of the Fourth Judicial District, on inquiry, found the defendant was in custody, charged by warrant with the offenses of kidnapping and murder, and that he was indigent and was without counsel. Based on the findings, Judge Hubbard appointed Hubert E. Phillips attorney for the defendant.

After his appointment, Attorney Phillips applied for and obtained an order that trial jurors be drawn from Wayne County. Three writs of venire facias were issued before the twelve regular jurors and one alternate juror were selected and empaneled to try the charges contained in the indictment.

During the jury selection the State was permitted, over defendant's objection, to challenge for cause jurors who testified they had religious or conscientious scruples against capital punishment for any crime, and for that reason it would be impossible for them to return, or even consider returning, any verdict of guilty in a capital case, and that in no event and under no circumstances could they render a guilty verdict against any person regardless of the evidence if the punishment was death.

The State's evidence, in short summary, is here reported. On March 25, 1969, Reba Jacquelyn (Jackie) Stone, aged 13, and her two sisters, Robin Elaine, aged 9, and Letha, aged 6, were students attending the junior high and elementary schools at Wallace in Duplin County. Between 2:30 and 3:00, after school was out, the sisters met on the school grounds to go home. Robin Elaine testified: "We came to a parked car on East Hall Street. The man stopped us and asked Jackie what was her father's name. Jackie said 'Leon W. Stone' and then the man said, 'Your mother has been in a car wreck and she is in the hospital and she wants you to come'. Jackie got in his car. The man then said, (to Letha and me) 'You go on home there is somebody waiting there to take care of you' . . . when I got home my mother was sitting in the house reading." The alarm immediately went out that Jackie had been kidnapped by a man driving a Ford automobile with a white body and a black top.

A number of witnesses testified they saw a white automobile with a black top on the afternoon of March 25 between Wallace and Kenansville, 16 miles to the north. Some witnesses knew the defendant and identified him as the driver of the automobile. Some saw a

female in the vehicle with him as he drove at great speed. Between 3:00 and 3:30, the afternoon of the 25th, one witness saw a white Ford with a black top parked on a bridge over Stocking Head Creek, several miles north of Wallace, in the direction of Kenansville. One witness testified that she saw a man standing beside the vehicle on the bridge over Stocking Head Creek. The man was slender and generally of the defendant's build. The bridge was on a dirt road a short distance off the highway between Wallace and Kenansville.

During the night of March 25, Harry W. Pridgen, a highway patrolman, found the dead body of Jackie Stone in about five feet of water just below the bridge over Stocking Head Creek. The autopsy, performed by a pathologist, disclosed to his satisfaction, and he so testified, that death was caused by manual strangulation and not by drowning. One of Jackie's school books was found in the creek below the bridge.

Each of the Stone girls positively identified the defendant as the man who told Jackie her mother was injured and wanted her to come to the hospital.

T. E. Revelle, Sheriff of Duplin County, was called as a witness for the State. When asked if the defendant had made to him any incriminating statements concerning the death of Jackie Stone, defense counsel objected. Thereupon, Judge Fountain, in the absence of the jury, conducted a voir dire examination. Both the sheriff and the defendant testified at this examination. The sheriff said that the defendant, who was then in jail in Burgaw, the county seat of Pender County, had sent for him to come to the jail. "He sent for me to come down. He said he wanted to talk to me. . . ." Before he permitted the defendant to make any admissions, however, Sheriff Revelle gave him the warnings that he had a right not to talk; that if he did make any admissions they could and would be used against him in any trial; that he was entitled to a lawyer and if he was not able to employ a lawyer one would be selected for him. "(H)e said that he did not want one, that he wanted to get it off his chest." The admissions will be repeated later.

The defendant testified on the voir dire that he had been drinking excessively. He said he recalled the date that Sheriff Revelle came to see him in jail at Burgaw but he didn't remember the sheriff giving him any messages or warnings. He didn't remember the sheriff telling him that he had a right not to talk. On cross examination the defendant said: "I was sober. I knew the sheriff. I asked the sheriff to come down to Burgaw. I wanted to talk to him. I had sent for him. . . . I do remember telling him I wanted to get it off my

chest, that is the reason I sent for him. He made notes of what I told him. I don't remember whether he read it back to me or not. I do remember initialing each page of that. . . ."

At the conclusion of the voir dire, Judge Fountain found facts, among them that proper warnings were given by the sheriff and that no inducements were offered, and that the admissions made to the sheriff were freely, understandingly and voluntarily made and were properly admissible in evidence.

At the trial, Sheriff Revelle testified that he went to the jail on March 26 about 8:30 p.m. and the defendant voluntarily told this story. After describing his loss of sleep on the night of the 24th, he drank a large quantity of beer and drove many miles, part of the time alone, and part of the time with a companion, Milton Maler. He said:

". . . (H)e put Maler out at the depot in Wallace about two-thirty, and then after he put Maler out, he drove down the road toward the schoolhouse, down Railroad Street, and went by the schoolhouse; he said he saw three or four girls walking along the sidewalk and he stopped and asked the largest girl what her father's name was and she told him her daddy's name. He couldn't remember what she had told him her father's name was; he told the oldest girl that her mother had been hurt and in the hospital and her father had sent him after her and told him to take her to the hospital and sent the other girls home, said there was somebody there to look after them.

* * *

He said she got in the car and he proceeded south, down Railroad Street until he got to the Test Farm in Pender County. . . .

* * *

(H)e turned left on the dirt road and as he turned left the girl told him, 'Don't go this way,' and she immediately jumped up and tried to open the door and jump out of the car and he immediately put on the brakes and grabbed her and put her back down in the car and put his hand around her neck and held her down and closed the door and drove on down the dirt road. He followed that 1737 straight on across the bridge of Stocking Head Creek out to Dobson's Chapel Church on Highway 50 and said he crossed Highway 50 and proceeded on down 1737 about a mile to an old house nobody lived in — he said some of his folks used to live there. That she was kicking and screaming and carrying on so he pulled into the driveway and stopped.

He said he told her to be quiet and he would take her home, but she wouldn't, just kept on kicking and carrying on so and he took a grease rag that he had under his seat and put it around her neck and twisted it back of her head and held her down with that and he said pretty soon she relaxed and then he came back down 1737 to Dobson's Chapel and crossed Highway 50 and came back to Stocking Head Creek and stopped in the middle of the bridge and he got out of the car and walked around the car and took her out of the other side — he said she was laying still — he assumed she was dead — so he took her out of the car and threw her into the creek — over the railing of the bridge into the creek and he got back in the car and drove up the road about a quarter of a mile . . . ."

After the State rested, the defendant testified that he did not sleep any; that he went to work at midnight and got off at 8:30 a.m. on the 25th. "I rode about and drank about twelve to fourteen cans of beer before two-thirty that evening. I was loaded and intoxicated. I was drunk and had no sleep. From that point on I don't know what I did." The defendant offered a number of character witnesses who testified to his good character. One, however, testified his character was not very good. On cross examination, the defendant admitted some minor infractions of the law. He was 23 years old.

At the conclusion of the evidence, argument of counsel, and the charge of the court, the jury returned these verdicts: On the first count "guilty of kidnapping"; on the second count "guilty of Murder in the First Degree as charged and make no recommendations". On the first count, the court imposed a sentence of imprisonment for life in the State's prison. On the second count, which charged murder in the first degree, the court imposed a sentence of death by the administration of lethal gas as required by law. From the judgment, the defendant appealed.

Robert Morgan, Attorney General, Millard R. Rich, Jr., Assistant Attorney General, for the State.

H. E. Phillips for the defendant.

HIGGINS, J.

The defendant, through the diligent attorney appointed to represent him, brings to this Court five assignments of error which he contends warrant a new trial. Assignments of Error (C) and (D) may be dismissed without extensive discussion or citation of authority.

[1] By assignment (C) the defendant contends the court, in the voir dire examination, should have found the defendant was highly nervous at the time he confessed to Sheriff Revelle. Actually, the sheriff testified the defendant became nervous and excited as he described the kidnapping, the strangulation of his victim, and the disposal of her body in Stocking Head Creek. Why should he not have become disturbed and highly excited in the course of repeating and reliving the horrible acts which he had committed? Under such circumstances a feeling of excitement and nervousness neither impeaches his confession nor reflects on his ability to make it. This assignment of error is not sustained.

[2] Assignment of Error (D) refers to the court's charge "on reasonable doubt". The charge as given by Judge Fountain, when considered contextually, as it must be, is full, accurate, complete, and places upon the State the burden of proving beyond a reasonable doubt every essential element of the offenses charged. The charge is free from error. *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548. Exceptive Assignment (D) is not sustained.

[3] As his first serious challenge to the validity of the trial, the defendant contends the court, by sustaining the State's challenge of jurors for cause, violated his constitutional right to a fair and impartial jury as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and by Article I, Section 13, Constitution of North Carolina. The record before us discloses that only those veniremen were successfully challenged for cause who stated that because of their conscientious scruples against the imposition of the death penalty for crime, it would be impossible for them to render or to consider rendering any verdict of guilty of any offense for which the punishment would be death. Each juror stated "that in no event and under no circumstances could (the juror) render a verdict of guilty against any person regardless of the evidence if the punishment was death". Only after the same or similar statements did the court sustain the State's challenge for cause to any juror. In this respect, Judge Fountain applied a more exacting test than the Supreme Court of the United States intimates would be a proper basis for such challenge. *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776. See also *State v. Spence & Williams*, 274 N.C. 536, 164 S.E. 2d 593; *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241; *State v. Ruth*, 276 N.C. 36, 170 S.E. 2d 897; *State v. Roseboro*, 276 N.C. 185, 171 S.E. 2d 886. The court's rulings sustaining the challenges in the instant case were correct. *Swain v. Alabama*, 380 U.S. 202. The defendant's assignment of error based thereon is not sustained.

[4] The defendant contends the court committed error in permitting Sheriff Revelle to relate to the jury the confession the defendant made to him while under arrest and while confined in the jail at Burgaw. Specifically, the defendant argues the court should have excluded the confession as involuntary. The contention does not find support in the record. True, the defendant was in jail charged with kidnapping and murder. However, Sheriff Revelle was not seeking to interrogate the defendant. The defendant called the sheriff for his own purpose. Even so, the sheriff gave him the necessary warnings before permitting him to make any disclosure. The defendant himself sought the interview and stated he wanted "to get it off his chest". The admissions appear to have been prompted altogether to relieve the pressure on his conscience by his sense of guilt. Nevertheless, before the sheriff even permitted the defendant to talk about the charges under which he was held, he gave the warnings. Actually the warnings do not appear to have been necessary because the prisoner was not acting under any inducement, force or compulsion, but entirely of his own free will. Judge Fountain, after full hearing, found the statements were freely, understandingly and voluntarily made and admitted them in evidence.

"As a general rule, voluntary admissions of guilt are admissible in evidence in a trial. To render them inadmissible, incriminatory statements must be made under some sort of pressure." *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541; *Hoffa v. United States*, 385 U.S. 293, 17 L. Ed. 2d 374. In *Hoffa*, the Supreme Court of the United States said: "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." The evidence of Sheriff Revelle was properly admitted. The exception thereto is not sustained.

[5, 6] Finally, the defendant argues that G.S. 14-17 and G.S. 15-162.1, when considered and read together, render unenforcible the death penalty for murder in North Carolina, citing as authority *United States v. Jackson*, 390 U.S. 570. Since the decision in *Jackson*, the members of this Court have not been in agreement on the question whether capital punishment is lawful in North Carolina. See opinions in *State v. Spence & Williams, supra; State v. Atkinson, supra; State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885. In this case, any difference of opinion is rendered immaterial by the repeal of G.S. 15-162.1.

During the 1969 session of the General Assembly, House Bill No. 135, repealing G.S. 15-162.1, was introduced in the House on Feb-

ruary 13, 1969. The bill passed its third and final reading in the House on March 11, 1969, and was then sent to and received by the Senate, where it passed its third and final reading on March 21, 1969, and ordered enrolled. The final formalities incident to enrollment required the presiding officers of the Senate and the House to sign the bill and send it to the Office of the Secretary of State. The Senate Journal shows the Senate convened at 12 Noon on March 25. After the opening prayer, the reading of the Journal was dispensed with, the courtesies of the gallery were extended to a few visitors, and the Chowan College Choir sang two songs, then the enrolling clerk of the Senate reported that a number of bills, included House Bill No 135, (an act to repeal G.S. 15-162.1, relating to a plea of guilty in first degree murder, first degree burglary, arson, and rape) had been properly ratified, enrolled, and sent to the Secretary of State. The bill provided that it should become effective upon its ratification.

While a record of the time is not noted when each act of the Senate occurred during the legislative day, nevertheless the Journal reports the activities in the order in which they occurred. It seems certain, therefore, the report that House Bill No. 135 had been ratified, enrolled and sent to the Office of the Secretary of State was made in the Senate within a few minutes after the legislative day began at 12 Noon, March 25, 1969. The repeal of G.S. 15-162.1 antedated the offenses charged against the defendant.

[7] In determining the time a statute becomes effective, the rule was stated by Justice Hoke in *Lloyd v. Railroad,* 151 N.C. 536, 66 S.E. 604: "The better doctrine seems to be that, while a court will hear evidence and determine the precise moment of time when a statute was enacted, whenever this becomes necessary to prevent a wrong or to assert a meritorious right, in the absence of any such evidence or means of proof the statute will be held effective from the first moment of the day of its enactment. Mr. Bishop, in his work on Statutory Crimes, states this to be the rule. Bishop Stat. Crimes, p. 21, sec. 28. And an examination will show this to be a correct deduction from the decisions. *Louisville v. Bank,* 104 U.S., 469; *Burgess v. Salmon,* 97 U.S., 381; *Lapeyne v. United States,* 84 U.S., 191; *Kennedy v. Palmer,* 72 U.S., 316; *Arrow v. Hamering,* 39 Ohio St., 573."

Five of this Court's members entertain the view that the infliction of the death penalty prior to the repeal of G.S. 15-162.1 is not precluded by the decision in *United States v. Jackson, supra.* At least the repeal of G.S. 15-162.1 would seem to remove all objection to the validity of the death sentence on account of G.S. 15-162.1. See also

Parker v. State of North Carolina, No. 268, October Term, 1969; *Brady v. United States*, No. 270, October Term, 1969, both decided by the Supreme Court of the United States on May 4, 1970.

[8] In 1949, the General Assembly amended the capital felony statutes providing that the jury, as a part of its guilty verdict, might by recommendation fix the punishment at life imprisonment rather than death. The amendment is not an unlawful division of the powers between the court and the jury, and a verdict without the recommendation requires the infliction of the death penalty. *State v. Hill, supra; State v. Atkinson, supra.* In *Jackson v. Denno*, 378 U.S. 368, in Footnote 19, the Supreme Court of the United States said: "(T)he states are free to allocate functions between the judge and the jury as they see fit."

After full and careful review, we conclude that the defendant has had a trial free from error; that the judgment imposed should be and is affirmed. In the record, we find

No error.

STATE OF NORTH CAROLINA v. AMOS BALDWIN, JR.

No. 12

(Filed 12 June 1970)

1. Criminal Law §§ 22, 170— arraignment — defendant's utterance of guilty — harmless effect

Defendant was not prejudiced by his remark during the arraignment, "No, sir, I have to plead guilty, your Honor," which remark was made in response to the solicitor's request that the court enter a plea of not guilty for defendant, who was standing mute, where (1) the prospective jurors were not questioned as to whether they had heard defendant's remark and were biased thereby, (2) defendant did not challenge the array or exhaust his peremptory challenges, and (3) the trial court entered a plea of not guilty for the defendant.

2. Jury § 7— challenge to special venire — waiver

Objection to a special venire is waived by failure to challenge the array.

3. Jury § 7— objection to individual jurors — waiver

Defendant may not object to the acceptance of individual jurors when he has failed to exhaust his peremptory challenges.

4. Criminal Law § 91; Constitutional Law § 31— motion for continuance — additional tests to determine defendant's pathological intoxication

Motion by defense counsel for a continuance on the ground that there

was a possibility the defendant was suffering from pathological intoxication at the time he allegedly murdered the deceased and that therefore defendant should be administered a brain wave test following his ingestion of alcohol to determine if he was subject to such intoxication, *held* properly denied by the trial court in the exercise of its discretion and with no denial of defendant's constitutional rights, where (1) the motion was made on the opening day of a special term of court ordered for this trial, (2) a special venire of 150 jurors from another county had been summoned on motion of defendant, (3) defense counsel had learned of a psychiatrist's views on pathological intoxication at least one month prior to trial and could have ascertained at that time if defendant had been given a test following alcohol ingestion, and (4) a test result favorable to defendant would not have given him a valid defense to first degree murder in this State.

5. Criminal Law § 91; Constitutional Law § 31— motion for continuance — discretionary and constitutional grounds

A motion for continuance is ordinarily addressed to the sound discretion of the trial court, whose ruling thereon is not subject to review absent an abuse of discretion; but where the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable.

6. Constitutional Law § 31— due process — time to procure evidence — confrontation

Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony.

7. Criminal Law § 6— legal excuses — voluntary drunkenness — crimes of specific intent

The general rule that voluntary drunkenness is no legal excuse for crime does not obtain with respect to crimes where, in addition to the overt act, it is required that a definite, specific intent be established as an essential feature.

8. Homicide § 4— first degree murder — specific intent crime

Murder in the first degree is a specific intent crime in that a specific intent to kill is a necessary ingredient of premeditation and deliberation.

9. Homicide § 8— defense of intoxication — first degree murder

The fact that, after his intent to kill was deliberately and premeditately formed when sober, defendant voluntarily drank enough intoxicants to produce pathological intoxication and then executed his murderous intent, *held* not to constitute a valid defense to murder in the first degree in this State.

10. Criminal Law § 166— the brief — abandonment of assignments

Assignments of error not discussed in defendant's brief are deemed abandoned. Rules of Practice in the Supreme Court No. 28.

11. Criminal Law § 163— broadside exception to charge

An assignment of error based on an exception "to the entire charge of

the court" is broadside and is ineffectual to bring up any part of the charge for review.

12. Criminal Law § 163— objection to statement of contentions — waiver

Objections to the statement of contentions must ordinarily be brought to the attention of the court before verdict; otherwise they are deemed to have been waived.

13. Criminal Law § 163— broadside exception to charge

An assignment of error that "the charge to the jury was not fair and impartial and was prejudicial to the defendant," *held* broadside and ineffectual.

14. Criminal Law § 146— mandatory rules of Supreme Court

The rules of the Supreme Court are mandatory and will be enforced.

15. Criminal Law § 161— appeal as exception to judgment — irregularity in verdict — review

Even though defendant in a first-degree murder prosecution did not except to the verdict or to the judgment of life imprisonment based thereon, his appeal was an exception to the judgment and to any other matter of law appearing on the face of the record; consequently, the Supreme Court could consider the irregularity in the verdict and determine that defendant had not been prejudiced thereby.

16. Criminal Law § 135; Homicide § 31— punishment of life imprisonment — irregularity in verdict

Although the jury's verdict of "recommendation of mercy" in a first-degree murder prosecution was not in accord with G.S. 14-17, the trial court was correct in treating the verdict as if the jury had recommended that the punishment be imprisonment for life and in imposing a sentence of life imprisonment.

APPEAL by defendant from *Beal, S.J.*, November 1969 Special Session, ORANGE Superior Court.

Criminal prosecution upon a bill of indictment charging that Amos Baldwin, Jr., on 4 June 1969, in Orange County, with force and arms, feloniously, willfully, and of his malice aforethought, did kill and murder Theodore Roosevelt Cole contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

The State's evidence tends to show that on the morning of 4 June 1969 defendant went to the home of Dorothy Burnett (Dorothy) in Carrboro where Ralph William Baldwin (Ralph) was then living. Defendant and Ralph talked for about two hours. They went to the "7-Eleven" and bought a quart of beer. Returning to Dorothy's house, they drank beer and played records. During this time defend-

ant told Ralph he had seen a policeman named Paul Minor that morning and, thinking he was Policeman Ted Cole, started to shoot him. Defendant had been saying all week that he was going to kill someone. "Amos stated that we were going to read his name in the newspaper." He said he was going to kill Ted Cole because he had given him a speeding ticket. Defendant was sober at that time.

Defendant then took Ralph to the Chapel Hill police station to appear in court, but the case against Ralph was continued. Defendant drove to Marley's Barber Shop on Franklin Street in Chapel Hill where Ralph borrowed $5.00. They were riding in defendant's blue Ford Falcon in which defendant had a fold-up shotgun and a pistol. They rode around drinking beer most of the day. Defendant was driving all right and did not seem to be drunk.

Later in the day they bought gas and defendant inquired at the gas station where Policeman Minor lived. He didn't ask where Ted Cole lived but "Amos knew Ted Cole lived right beside Paul Minor." Leaving the service station, defendant drove down a dirt road and asked a little boy where Ted Cole lived. He then drove to Cole's house and stopped the car. Cole was standing in his yard. Defendant asked Cole "why he told lies on him — them damn lies on him." Defendant then jumped out of his car "with his shotgun in his hand and Cole was standing up in the yard. Amos shot him — shot him right quick. After Amos shot him, he fell and then Amos shot him again after he fell to the ground." Defendant then got in his car, "took off fast" and drove to his home. On arrival there, Ralph jumped out of the car, caught a ride to the police station and reported that defendant had shot a policeman. Shortly thereafter, defendant was arrested and charged with first degree murder.

Defendant, testifying in his own behalf, stated that he had been drinking continuously for about a week and had "no recollection of anything that transpired on Tuesday, June 3, or Wednesday, June 4, 1969, and I have no recollection of Ted Cole's death." His wife testified that he was under the influence of liquor on June 4 and "did not seem right."

The case was submitted to the jury and it returned a verdict of "guilty of first degree with mercy." The court then asked, "You have reached a verdict of murder in the first degree with recommendation of mercy?" The foreman replied, "Yes sir." The jury was polled at defendant's request and each juror stated that his verdict was "guilty of murder in the first degree with recommendation of mercy." The court thereupon pronounced a sentence of life imprisonment. Defend-

ant gave notice of appeal to the Supreme Court assigning errors as noted in the opinion.

C. B. Hodson and Robert L. Satterfield, Attorneys for defendant appellant.

Robert Morgan, Attorney General, and Burley B. Mitchell, Jr., Staff Attorney, for the State.

HUSKINS, J.

[1] On motion of defendant a special venire of 150 persons had been summoned from Person County and was present in court when defendant was arraigned. Upon arraignment the solicitor read the bill of indictment and addressed the prisoner as follows: "How say you, Amos Baldwin, Jr., are you guilty of the felony of murder wherein you stand indicted or not guilty?" The solicitor then addressed the court and said, "The defendant stands mute; if your Honor please, I would like the court to enter a plea of not guilty for him." The defendant, speaking for himself, answered, "No sir, I have to plead guilty, your Honor." Defense counsel thereupon said, "Motion." The motion was denied, and the court entered a plea of not guilty for the defendant. Defendant assigns as error the denial of his motion.

[1-3] As shown by the record, no grounds for the "motion" were stated. In a conference at the bench defense counsel advised the court "that the entire jury panel had heard the defendant and that motion as for nonsuit should be allowed." In his brief counsel refers to "defendant's motion for a mistrial made during the arraignment." It is obvious that defendant's motion — by whatever name it may be called — was not in order at that point. No plea had been entered, no jury had been impaneled, and no evidence had been offered. Furthermore, defendant's position is not strengthened by treating — as we do — the motion as one for continuance on the ground that defendant's remarks had prejudiced his case with the prospective jurors then present in court so that he could not obtain a fair trial. This is true because no prejudice is shown. There was no challenge to the array before plea as there might have been. *State v. Rorie,* 258 N.C. 162, 128 S.E. 2d 229; *State v. Corl,* 250 N.C. 258, 108 S.E. 2d 615. The jurors were not questioned as to whether they heard defendant's unsolicited, spontaneous utterance and were biased as a result. None were challenged for cause or peremptorily on that ground. If defendant exhausted his peremptory challenges, the record fails to show it. Objection to the special venire was waived by failure to challenge

the array (*State v. Kirksey*, 227 N.C. 445, 42 S.E. 2d 613); and defendant may not object to the acceptance of individual jurors when he has failed to exhaust his peremptory challenges. *State v. Anderson*, 228 N.C. 720, 47 S.E. 2d 1; *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341. How, then, can it be determined if the jurors who served in this case heard the defendant's statement and, if so, were prejudiced thereby? The record fails to show that any juror was accepted to which defendant had legal objections upon any ground. The judge in his discretion overruled the motion and entered a plea of not guilty. His action in that respect effectively removed the slightest suggestion of prejudice which might otherwise be attributed to the occurrence. We see no merit in this assignment, and it is overruled.

[4] Defendant's second assignment is based on the denial of his motion for continuance on the grounds of newly discovered evidence. Examination of the record is necessary to bring this assignment into focus.

On 18 June 1969, Charles B. Hodson, defendant's court-appointed counsel, filed affidavit and motion that, in his opinion, defendant did not know right from wrong and did not have sufficient mental capacity to undertake his defense. Counsel therefore moved that defendant be committed forthwith to the State Hospital at Goldsboro, North Carolina, for a period of sixty days for observation in accordance with the provisions of G.S. 122-91. The motion was allowed. At the end of the observation period, the superintendent of the hospital was directed to report his findings and recommendations to the Clerk of the Superior Court of Orange County as provided by law.

In obedience to said order, defendant was admitted, examined and observed for sixty days; and on 20 August 1969 a Clinical Summary containing findings and recommendations was submitted to the Clerk of the Superior Court of Orange County signed by E. C. Fowler, M.D., Clinical Director, and Bruce Kyles, M.D., F.A.P.A., Assistant Superintendent. Copies were furnished for the solicitor and defense counsel. This summary shows defendant has an IQ of 84 (indicating dull, normal intelligence) and contains the following pertinent information:

> "Family history said to be negative for nervous or mental disorder. . . . He denies DT's or other disturbances. . . . Hallucinations of any kind at any time were denied and none were apparent. . . . The content of thought showed no evidence of a thinking disorder, delusional material or any other

abnormality. . . . Because of the complaint of blackout following drinking an electroencephalogram (EEG, brain wave test) was done. This was reported as normal and there is no indicated basis found for 'blackouts when drinking' other than the amount of liquor that would be taken. Skull x-ray was normal. . . . Subject stated that he had never had a nervous disorder and was not a regular drinker but did over drink when he would get upset. . . . and stated that there was nothing wrong with his mind but 'I was just out that day.' He states he had been upset as he stated he had found out his wife had been out all night and . . . that perhaps Mr. Cole, the victim, had been at the same party which was in that neighborhood. Careful examination failed to elicit any significant disorder and subject understood his charge and his situation quite clearly.

DIAGNOSIS: WITHOUT MENTAL DISORDER.

DISPOSITION: 1. Return to court as able to stand trial.

2. It is the carefully considered opinion of the medical staff of this hospital that Amos Baldwin, 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."

Following arraignment and in the absence of all prospective jurors, defense counsel moved for continuance on the ground of newly discovered evidence which had come to his attention on Sunday afternoon (the day before the arraignment). Counsel stated that he had been supplied "some information regarding alcoholic pathological intoxication, which I understand, is a form of insanity which occurs with automatic behavior and frequently results in violence. . . ." Counsel stated that he had previously caused Dr. Silas B. Coley, a psychiatrist with the Pathological Service Center of Hillsborough, North Carolina, to make a personal examination of the defendant "and had him examine the report from Goldsboro." Dr. Coley, an expert in the field of psychiatry, then testified under oath that, based on his interview with defendant and on information supplied by defense counsel, he had come to the conclusion "that there was a possibility that at the time the crime of murder was alleged to have taken place, that the prisoner Amos Baldwin, Jr. was suffering from a state that is known as pathological intoxication." Dr.

Coley stated that such condition was difficult to prove without some documentation and that proof would be provided by an abnormal reading in an EEG (electroencephalogram) following the ingestion of alcohol; that a person suffering from pathological intoxication would be capable of complicated behavior including violent behavior and, based on the description of defendant's personality state and mental state at the time the crime was committed, "it bears a strong resemblance to the condition of alcoholic pathological." Dr. Coley went on to state that from what he had seen of defendant "it sounded like an abrupt change in personality" and that he felt the psychiatric investigation made during the period defendant was under observation at Cherry Hospital in Goldsboro was incomplete in that it lacked the test of administering alcohol prior to the EEG which, if done, would reveal whether or not defendant was subject to pathological intoxication. Dr. Coley recommended that defendant be given an EEG following a test dose of alcohol — a neurological procedure that he was not in a position to perform. He stated that the professional fee for this procedure would be approximately $500.00.

Defense counsel thereupon requested a continuance in order to carry out such an examination at public expense. The court in its discretion denied the motion, and this constitutes defendant's second assignment of error.

The record shows counsel had received a letter from Dr. Coley dated October 2, 1969, containing the doctor's conclusion that defendant possibly could have been suffering from pathological intoxication when the murder was committed and further shows that on Sunday afternoon at approximately one o'clock counsel received a telephone call "which brought forth new evidence in this matter." The content of the telephone call is not revealed. The only *newly discovered evidence* mentioned is information that defendant had not ingested a test dose of alcohol prior to being given the brain wave test at Cherry Hospital. The record is unclear as to when counsel received this information. Apparently that constitutes the newly discovered evidence relied on as the basis for a continuance.

[5] A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion. 2 Strong's N. C. Index 2d, Criminal Law § 91; *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617; *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593; *State v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666; *State v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229; *State v. Stroud,* 254 N.C. 765, 119 S.E. 2d 907; *Cleeland*

v. Cleeland, 249 N.C. 16, 105 S.E. 2d 114. If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable. *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386; *State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389; *State v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778; *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520. Defendant urges both abuse of discretion and denial of constitutional rights as error.

[4] This continuance was sought on the opening day of a special term of court which had been ordered specifically for the trial of this case. On defendant's motion, a special venire of 150 jurors summoned from another county was present in court to insure him a fair trial by an impartial jury. Defendant and his counsel had known Dr. Coley's views on the subject of pathological intoxication since October 2, 1969. A copy of the Clinical Summary containing the findings and recommendations of Drs. Fowler and Kyles, based on a sixty-day observation of defendant at the State Hospital at Goldsboro, had been in their possession since approximately 20 August 1969. If they desired a further examination of defendant for the purpose of making a brain wave test (EEG) after ingestion of alcohol, diligence required them to bring such desire to the court's attention before the term was set and the veniremen summoned. The judge was fully justified in his discretionary denial of a last-minute motion for continuance when it could and should have been made before extensive preparation for trial had been completed. No abuse of discretion has been shown.

[6] Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony. *State v. Utley,* 223 N.C. 39, 25 S.E. 2d 195; *State v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322; *State v. Whitfield,* 206 N.C. 696, 175 S.E. 93; *Powell v. Alabama,* 287 U.S. 45, 77 L. ed 158, 53 S. Ct. 55; 2 Strong's N. C. Index 2d, Constitutional Law § 29; 14th Amendment, U. S. Constitution; Art. I, §§ 11 and 17, N. C. Constitution.

Pathological intoxication has been described as follows:

> "In this syndrome the patient is apparently susceptible to extremely small amounts of alcohol and reacts to such amounts violently. He consumes a small amount of alcohol, perhaps 2 or 3 drinks, and develops total amnesia for the events that follow. He often carries out automatic behavior and sometimes this behavior is violent and dangerous to others. From this standpoint

the illness is of considerable importance as a medico-legal problem. While patients suffering from alcoholism are responsible for their acts, a patient with acute pathological intoxication is insane at the time and therefore not responsible for his acts.

"A peculiar and interesting relationship between pathological intoxication, psychopathic personality, and psychomotor epilepsy has been found by this writer, and the evidence, particularly electroencephalographic, points to the fact that the disorders are essentially identical. This interesting association of some cases of psychopathic personality with psychomotor epilepsy and pathological alcoholic intoxication indicates that pathological alcoholic intoxication and psychomotor epilepsy may be the same disease under two different names. In one case (psychomotor epilepsy), psychomotor epileptic attacks simply occur spontaneously; in the other (pathological intoxication), psychomotor attacks occur under the stimulus of alcohol." Thompson, Alcoholism, p. 467 (1956)

Several states have adopted a so-called theory of diminished responsibility with respect to *specific intent* crimes and hold that defendant may offer evidence of an abnormal mental condition, although not sufficient to establish legal insanity, for the purpose of showing that he did not have the capacity to deliberate or premeditate at the time the homicide was committed — elements necessary for a conviction of murder in the first degree. *People v. Gorshen,* 51 Cal. 2d 716, 336 P. 2d 492 (1959); *Becksted v. People,* 133 Colo. 72, 292 P. 2d 189 (1956); *State v. Gramenz,* 256 Iowa 134, 126 N.W. 2d 285 (1964); *State v. Vigliano,* 43 N.J. 44, 202 A. 2d 657 (1964). But California is apparently the only state which thus far recognizes pathological intoxication as a defense to first degree murder. *People v. Castillo,* 70 A.C. 274, 74 Cal. Rptr. 385, 449 P. 2d 449 (1969); *People v. Conley,* 64 Cal. 2d 310, 49 Cal. Rptr. 815, 411 P. 2d 911. The problem was discussed in *Kane v. United States,* 399 F. 2d 730 (9th Cir. 1968), cert. den., 393 U.S. 1057, 21 L. ed 2d 699, 89 S. Ct. 698 (1969). The Court held that the disability which prevented Kane from knowing the nature and quality of his action at the time he shot his wife was acquired from drinking liquor — an act within his own control — and could not be classified as a mental illness excusing criminal responsibility.

[7, 8] The general rule that voluntary drunkenness is no legal excuse for crime (*State v. Potts,* 100 N.C. 457, 6 S.E. 657; *State v. Wilson,* 104 N.C. 868, 10 S.E. 315) does not obtain with respect to crimes where, in addition to the overt act, it is required that a

definite, specific intent be established as an essential feature. *State v. Murphy,* 157 N.C. 614, 72 S.E. 1075. Murder in the first degree is a *specific intent* crime in that a specific intent to kill is a necessary ingredient of premeditation and deliberation. Intoxication which renders an offender utterly unable to form the required intent may be shown as a defense. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (murder in the first degree); *State v. Arnold,* 264 N.C. 348, 141 S.E. 2d 473 (attempting to burn a dwelling house); *State v. Oakes,* 249 N.C. 282, 106 S.E. 2d 206 (murder in the first degree); *State v. Bunton,* 247 N.C. 510, 101 S.E. 2d 454 (murder in the first degree); *State v. Absher,* 226 N.C. 656, 40 S.E. 2d 26 (murder in the first degree). Even so, where the facts show that the intent to kill was deliberately formed when sober and executed when drunk, intoxication is no defense to the capital charge. *State v. Kale,* 124 N.C. 816, 32 S.E. 892; *State v. Murphy, supra.*

"All the authorities agree that to make such defense available the evidence must show that *at the time of the killing* the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. . . . [A]nd where the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent in order to carry out the design will not avail as a defense." *State v. Shelton,* 164 N.C. 513, 79 S.E. 883; *accord, State v. English,* 164 N.C. 497, 80 S.E. 72; *State v. Foster,* 172 N.C. 960, 90 S.E. 785. See Annotation, "Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge," 8 A.L.R. 3d 1236, for a collection of cases in other jurisdictions relating to intoxication as a defense.

[4, 9] Had the opinion of Dr. Coley been substantiated by a brain wave test following ingestion of alcohol by defendant, it would not have established an insanity defense in the usual sense nor a defense that defendant was so drunk that he was *utterly unable* to form the required specific intent to kill. It would have established only that, after the intent to kill was deliberately and premeditatedly formed when sober, defendant voluntarily drank enough intoxicants to produce pathological intoxication and then executed his murderous intent. This is not recognized in North Carolina as a valid defense to murder in the first degree. Hence denial of the motion for continuance nowise impinged upon defendant's constitutional rights. Due process does not include the right to fish in psychiatric ponds for immaterial evidence.

For decisions in other jurisdictions relating to abnormal mental

conditions and purposes for which evidence thereof may be considered, see Annotation, "Comment Note. — Mental or Emotional Condition as Diminishing Responsibility for Crime," 22 A.L.R. 3d 1228. Defendant's second assignment of error is overruled.

[10] Assignments of Error Nos. 3, 4 and 5 are not discussed in defendant's brief and are therefore deemed abandoned under Rule 28, Rules of Practice in the Supreme Court. *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781; *State v. Cole,* 270 N.C. 382, 154 S.E. 2d 506; *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416.

Defendant's Assignment No. 6 is based on Exception No. 6 which appears on page 75 of the Record in these words: "The defendant excepts to the entire charge of the court." The charge covers thirty-nine pages. In his brief, defendant asserts that "the Court erred in its entire charge to the jury in that he gave more weight, stress and credibility to the evidence of the State than to that of the defendant."

[12] This is a broadside assignment which is ineffectual to bring up any part of the charge for review by this Court. *State v. Kirby, supra; Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729; *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736. Objections to the statement of contentions must ordinarily be brought to the attention of the court before verdict — otherwise they are deemed to have been waived. *Doss v. Sewell,* 257 N.C. 404, 125 S.E. 2d 899; *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745; 1 Strong's N. C. Index 2d, Appeal and Error § 31.

[13] Defendant next contends the court erred in that the "charge to the jury was not fair and impartial and was prejudicial to the defendant." This is designated as Assignment No. 7.

This assignment is likewise broadside and ineffectual. "Assignments of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged." *State v. Kirby, supra; State v. Wilson, supra; Samuel v. Evans and Cooper v. Evans,* 264 N.C. 393, 141 S.E. 2d 627.

[14] The requirements of the rules and the reasons for them have been reiterated throughout our Reports. These rules are mandatory and will be enforced. *State v. Kirby, supra; Walter Corp. v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313; *Pamlico County v. Davis,* 249 N.C. 648, 107 S.E. 2d 306; *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126.

[15] Defendant does not except to the verdict or to the judgment

of life imprisonment based thereon. Even so, the appeal itself is an exception to the judgment and to any other matter of law appearing upon the face of the record. *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364; *Dilday v. Board of Education,* 267 N.C. 438, 148 S.E. 2d 513; *Cratch v. Taylor,* 256 N.C. 462, 124 S.E. 2d 124. *The record,* in the sense here used, refers only to the essential parts of the record, such as the pleadings, verdict and judgment. "It refers only to such constituted matters of the action as must necessarily go upon and constitute the record of it, and which the Court sees and must take notice of, such as the pleadings, the verdict, and the judgment; it does not refer to such matters and things as are of, but incident to the action and do not necessarily go upon the record, such as the rulings of the Court upon questions arising upon motions, evidence, its instructions to the jury, and the like. Such matters as those last mentioned, do not go upon and become part of the record, unless the correctness of the decisions of the court, upon them is questioned, in which case, they are made part of the record, to the end, the complaining party may enter his objections, and the grounds thereof, and assign error. Such decisions of the court are presumed to be correct and acceptable to the parties, in the absence of objections so made." *Thornton v. Brady,* 100 N.C. 38, 5 S.E. 910; *State v. Stokes,* 274 N.C. 409, 163 S.E. 2d 770; *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729; *In re Will of Adams,* 268 N.C. 565, 151 S.E. 2d 59; *Lowie and Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271.

[16] While defendant does not assign the form of the verdict as error, we call attention to the fact that the jury's "recommendation of mercy" is not in accord with G.S. 14-17. "The punishment specified in G.S. 14-17 for first degree murder is either death or imprisonment for life." *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793. Even so, the court treated the verdict as if the jury had recommended that "the punishment be imprisonment for life in the State's prison" and imposed a sentence of life imprisonment. Hence the irregularity in the verdict has not prejudiced defendant and the judgment will not be disturbed. *State v. Locklear,* 253 N.C. 813, 117 S.E. 2d 763; *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165; *State v. Foye,* 254 N.C. 704, 710, 120 S.E. 2d 169, 173.

Since prejudicial error has not been shown and error of law does not appear upon the face of the record proper, the verdict and judgment will be upheld.

No error.

STATE OF NORTH CAROLINA v. WILLIE B. WILLIAMS

No. 41

(Filed 12 June 1970)

1. Criminal Law §§ 75, 76— voluntariness of confession — failure of defendant to object — duty of court

In the absence of an objection by the defendant, the trial court is not required *sua sponte* to conduct a *voir dire* into the voluntariness of defendant's confession, unless there is indication that the confession was anything less than voluntary.

2. Criminal Law § 76— voluntariness of confession — burden of proof

The burden of showing the voluntariness of a confession is now upon the State.

3. Criminal Law § 61— tire tracks — competency of evidence

It was competent for an officer to testify that the tire tracks discovered at the scene of a homicide were compared with the tires on the automobile driven by defendant and that the tread on both tracks and tires was the same.

4. Criminal Law § 34— testimony that defendant was on work release — competency — identity of defendant

Testimony in a homicide prosecution that the defendant was on "work release" the day the crime was committed was competent as proof of the identity of defendant and as a fact in the chain of events leading up to the commission of the crime.

5. Criminal Law § 102— argument of solicitor — return of death penalty by jury

In a first-degree murder prosecution, it was permissible for the solicitor to argue that in view of the brutality of defendant's conduct in the killing of his victim, a bride of nine days, the jury should find the defendant guilty of murder in the first degree without any recommendation that punishment be life imprisonment. G.S. 15-176.1.

6. Criminal Law § 102— argument of counsel — discretion of court

In this jurisdiction wide latitude is given to counsel in the argument of contested cases; what constitutes an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge.

7. Criminal Law § 102— argument in capital cases — prejudicial effect — time of exception

The general rule that exceptions to improper remarks of counsel during argument must be taken before verdict or else be lost does not apply to death cases where the remarks are so prejudicial to defendant that their effect cannot be removed from the jurors' minds by any instruction the trial judge might give.

BOBBITT, C.J., and SHARP, J., dissenting as to death sentence.

APPEAL by defendant from *Braswell, J.*, at the April 21, 1969 Criminal Session, Superior Court of BLADEN County.

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 indictment, verdict, and judgment were all in proper form.

Prior to the trial, because of defendant's behavior, his privately employed counsel, Harold D. Downing, moved that the defendant be committed to State Hospital at Raleigh for observation and examination pursuant to the provisions of G.S. 122-91. This was done, and on 12 March 1969 the hospital submitted its report and recommendations as follows:

"*Diagnosis:* Without Psychosis (Not Insane).

APA Code: *91.10*

"*Recommendations:* Examination, observation and testing revealed no evidence of insanity or any other mental disturbance that might interfere with his ability to plead to the bill of indictment. Mr. Williams can distinguish between right and wrong, he understands the nature and consequences of his criminal charges and he is able to assist in his own defense. This patient should return to court as being competent to stand trial."

When the case was called for trial on the morning of 22 April 1969, the defendant at first refused to come into the courtroom but remained in his cell wrapped in a blanket, apparently nude. The court then requested that Dr. O. A. Barnhill, a practicing physician in Elizabethtown, examine the defendant. Dr. Barnhill did so and reported to the court that he had not elicited anything from the defendant that would lead him to believe that he was insane. At the opening of court that afternoon, the defendant came into court fully and neatly clothed, apparently in possession of his faculties, and the scene was completely calm. Counsel for the defendant participated in the selection of the jury. However, after the jury was selected, the defendant announced that he did not want Downing or any other lawyer to represent him, that he understood the charges against him and understood his rights, but he did not want the court to appoint a lawyer for him and this decision was his own free choice. Whereupon, the court announced:

"Then, Mr. Williams, I would say to you and to Mr. Downing, since the law of North Carolina provides for a defendant

charged with murder in the first degree to have counsel, I will require Mr. Downing to be available at court during the course of your trial; to be available for consultation with you if you want him; to be available where you can talk to him about any of the legal technicalities which may come up if you want to talk to him; to be available to answer questions to you if you want to ask him questions; and to be available to examine and cross-examine any witnesses if you should choose at any time that you want him to examine or cross-examine any witnesses. He will not be required to directly participate in the trial unless you at some stage or at any stage of the trial shall change your mind, and decide you want him to help you. If you at any time should decide you want him to help you, he will be immediately available and by your side to help you. He will not be giving you advice during the course of the trial unless you shall ask him for it. Do you have any questions you want to ask me concerning what I have just said to you and to him?"

The defendant answered that he had no questions and no objections to Mr. Downing being with him.

The trial then proceeded and the State offered evidence tending to show: The victim, Mary Diane Johnson Smith, a bride of nine days, lived with her husband in a house trailer on a rural road off Highway #210 in Bladen County. She returned home from work about 4:45 p.m. on 7 October 1968. When the deceased's husband returned from work about 6:30 p.m. his wife was not at home; his razor, a class ring, a pair of trousers, a pair of shoes, and a small train case containing $360 were missing from the trailer. A sixteen-gauge shotgun was standing unloaded in the corner although it had been loaded when the husband left for work that morning.

At approximately 7:30 p.m. Deputy Sheriff King went to the Smith trailer and, with the aid of another deputy and other people, made an examination of the trailer and a search of the immediate surrounding area. The body of the deceased, clad in underclothes and a shirt, was found in the bottom of a shallow drainage ditch in a field across the road from the trailer. There was a hole in the back of her head approximately one inch in diameter and another hole in the left temple a little larger than the one in the back of her head.

Deputy King observed automobile tracks in the vicinity leading to a spot of blood which covered an area of about two and one-half feet. The tracks then led to a soybean field and circled back by the blood spot. The deputy poured a cast of the tire prints for identi-

fication purposes. A pair of safety boots was also found in the drainage ditch about thirty feet east of the body of the deceased.

On the morning of 9 October 1968, in response to a call from authorities in Fayetteville, Sheriff Allen and Deputy King of Bladen County and two other officers went to Fayetteville and received custody of the defendant and a 1967 white Chevrolet automobile. The automobile had four practically new tires bearing the marking "Pure Pride" on the sidewall. This same marking was present in the tracks found by Deputy King in the soybean field. The automobile was examined, and soybean plants and soil were removed from the chassis of the automobile. The soil and soybeans taken from the car were compared with samples taken from the soybean field where the body was discovered, and the samples were found by a chemist with the State Bureau of Investigation to be of the same type.

At approximately 9 a.m. on 9 October 1968 Deputy King and Agent Bryan of the State Bureau of Investigation began interrogation of the defendant. They advised him fully of his constitutional rights, and the defendant then made a statement to the officers in substance as follows: On the morning of 7 October 1968 he got a drink of liquor in Wilmington; he saw the keys in the 1967 Chevrolet automobile and took the automobile intending to go to Fayetteville; on the way he stopped at a house and took a camera, some jewelry, and a tape machine and then went to a second house where he got a shotgun, a rifle and some gun shells; he got lost, pulled off the highway and slept awhile. When he awoke he drank some more liquor and continued on to Fayetteville. He passed a trailer, saw the door open, and decided to go in and get some more clothes; he found Mrs. Smith in the trailer and held the gun on her while he was there, telling her she would not be harmed if she did as he said. He ate some food, took several items from the trailer including a train case containing $360 and other articles, and then ordered Mrs. Smith to leave with him in the automobile. He forced her to take off her trousers which he said was for the purpose of searching for money. When she refused to get into the car and began to run and holler, he shot her. He put the body in a drainage ditch where he also disposed of his boots. Then he got into the car and drove across the soybean field until he could go no farther; there he turned around and returned to the road. Later, he stopped the car somewhere near Fayetteville and disposed of the clothes, guns, and other items he had taken and then drove on to Fayetteville where he spent the night.

The next day the defendant took the officers to the place in the

woods where he had disposed of the articles taken from the houses and the trailer, and they recovered the train case belonging to the deceased with approximately $360 in it, a shotgun, a rifle, and several other items.

During the course of the trial defendant did not cross-examine the State's witnesses nor did he offer witnesses or testify in his own behalf, and at the close of the evidence he stated he did not want to make a speech to the jury and that he did not want Attorney Downing to do so.

At the close of all the testimony, the court called Dr. Andrew L. Laczko who testified in the absence of the jury that he examined the defendant at the State Hospital at Raleigh while the defendant was under his direction, care, and responsibility from 7 February 1969 until 13 March 1969; and as a result of a request from the court he had attended the trial and observed the defendant; he attempted to talk to the defendant but defendant refused to talk to him; he had not during his attendance at the trial, or in observing the defendant, seen or observed anything to cause him to form an opinion different from that previously expressed as to whether or not he now has a psychosis.

After the jury returned its verdict and the court imposed the death sentence, the defendant stated he did not want to appeal. However, his attorney moved for a new trial, which motion was overruled. The attorney then gave notice of appeal and, on a finding by the court that the defendant was an indigent, he was permitted to appeal without giving security for costs.

Attorney General Robert Morgan and Deputy Attorney General Ralph Moody for the State.

Downing, Downing & David by Harold D. Downing for defendant appellant.

MOORE, J.

Despite the fact that defendant did not want to appeal, his attorney filed a brief posing four questions for decision.

[1] Defendant contends first that the trial court erred when it admitted defendant's confession and other evidence obtained as a result thereof without first inquiring into its voluntariness. Defendant did not object to this testimony, so the real question is: should the trial court in the absence of an objection inquire *sua sponte* into the voluntariness of an alleged confession offered by the State? We

think not. The general rule is stated in 29 Am. Jur. 2d Evidence § 583 as follows:

> "While there is some authority to the effect that it is the duty of the trial court, in the absence of objections by the defendant, to conduct an inquiry into the admissibility of a confession, it is more generally held that a defendant in a criminal case who objects to the introduction in evidence of a confession by him, on the ground that it was involuntary, should make a timely offer of evidence showing the incompetency of the confession, or should request that a preliminary investigation of the matter be made, which offer or request should be made before the court rules on the evidence offered. *Where no proper and timely objection to the voluntariness of a confession is made, or no request is made for an examination as to its voluntariness, no preliminary examination or hearing is required with respect to such question, and the defendant cannot, upon an appeal, raise the issue that the court erred in failing to conduct such a preliminary examination.*" (Emphasis ours.)

In *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481, Branch, J., carefully reviewed the authorities concerning the admission of confessions, reaffirming the long-established rule in North Carolina that admissions or confessions to the police officer would not be rendered incompetent solely because defendant was under arrest when they were made, and that an extrajudicial confession is admissible against a defendant when and only when it was voluntarily and understandingly made. In *Vickers* the Court held that a general objection to testimony concerning an alleged confession was sufficient to require a *voir dire* to determine its voluntariness, saying:

> "For a long period of time North Carolina has remained squarely within the rule that a confession is presumed to be voluntary until the contrary appears (*State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494; *State v. Rogers, supra* [233 N.C. 390, 64 S.E. 2d 572]; *State v. Stubbs, supra* [266 N.C. 274, 145 S.E. 2d 896]), and that when a confession is offered into evidence the burden is on defendant to show the contrary. *State v. Hamer, supra* [240 N.C. 85, 81 S.E. 2d 193]; *State v. Biggs,* 224 N.C. 23, 29 S.E. 2d 121; *State v. Stubbs, supra* [266 N.C. 274, 145 S.E. 2d 896]. However, it becomes evident from the authorities herein cited that when an alleged confession *is challenged by objection* the necessity for a voir dire hearing in the absence of the jury is no longer controlled by these principles.

"See 3 Wigmore, 3d Ed., § 860, 1964 Pocket Supplement, for full note and cites as to modern trend in other jurisdictions.

"We hold that hereafter when the State offers a confession in a criminal trial *and the defendant objects*, the trial judge shall determine the voluntariness of the admissions or confession by a preliminary inquiry in the absence of the jury." (Emphasis ours.)

[2] It is no longer the rule that a confession is presumed to be voluntary and the burden is on a defendant to show the contrary. The burden of showing the voluntariness of a confession is now upon the State. *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171, *State v. Vickers, supra.*

In both *Vickers* and *Thorpe* objections were made to the introduction of the testimony concerning the alleged confessions. This Court has generally held that there is no necessity for a *voir dire* when there is no objection to the proffered testimony. *State v. Stubbs*, 266 N.C. 274, 145 S.E. 2d 896; *State v. Camp*, 266 N.C. 626, 146 S.E. 2d 643. Due to "peculiar" circumstances, this rule was relaxed to some extent in *State v. Pearce*, 266 N.C. 234, 237, 145 S.E. 2d 918, 921. There, speaking for the Court, Higgins, J., said:

"By reason of the Superior Court's failure for two months to appoint counsel as it was its duty to do promptly, the prisoner was deprived of the protection from the pressure of questioning which an alert attorney could have vouchsafed him. In the absence of such protection at a time when he was under a charge which could cost his life, the officers continued their questioning which obviously was for the sole purpose of extracting damaging admissions. The defendant was in the county jail under Superior Court indictment. Nevertheless, the admission testified to by Mr. Morris was obtained in the interrogation room of the detective bureau where perhaps the surroundings were even less reassuring than his cell in the county jail. We hold the admissions to the officer finally obtained from him in this setting were so lacking in voluntary character as to make them inadmissible as evidence against him. True, the record fails to show objection to the officer's testimony. However, the court, of its own motion, should have excluded the statement as involuntary. Under the peculiar circumstances here disclosed, we hold the court's failure so to do was prejudicial error."

[1] The instant case can be clearly distinguished from *Pearce*. The error there was the continuation of the interrogation over a period

of two months while the defendant was in custody on a capital charge without benefit of counsel. Here the defendant made his statement to the officer the day after the crime was committed after having been fully advised by the officer of his constitutional rights; namely, he had a right to be silent; anything he said could be used against him in court; he had a right to talk to the lawyer for advice before he was asked any questions and to have him with him during the questioning; if he could not afford a lawyer, one would be appointed for him before he was questioned if he so wished; and if he decided to answer questions without a lawyer being present, he had the right to stop answering questions at any time. He stated he understood his rights, and then made his statement to the officer. There is nothing in this record to indicate that the confession was anything less than voluntary, and we hold that in the absence of such indication no *voir dire* is necessary unless there is an objection to the testimony concerning the alleged confession. *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6.

In *United States v. Inman,* 352 F. 2d 954 (4th Cir. 1965), the Circuit Court of Appeals for the Fourth Circuit seemed to take the opposite view when it said:

> ". . . On proffer of the confession, even though there be no objection, the court should let the jury withdraw, and then take evidence upon the confession and its factual setting. On this voir dire the defendant may testify without prejudice to his privilege not to take the stand before the jury, but he may be examined or cross-examined only with regard to the origin and character of the confession, not upon his innocence or guilt. The court will thereupon independently determine whether the confession is admissible."

However, the same Court in *Morris v. Boles,* 386 F. 2d 395 (4th Cir. 1967), cert. den. 390 U.S. 1043, 88 S. Ct. 1640, 20 L. ed. 2d 304 (1968), later acknowledged that what was said in *Inman* did not prescribe a rule of constitutional application to prosecutions in state courts within the Circuit, but was based on the court's supervisory power over district courts within the Circuit. In a more recent opinion written by Judge Burger (now Chief Justice) the Court of Appeals for the District of Columbia chose specifically not to follow the *Inman* decision. In *Woody v. United States,* 379 F. 2d 130 (D.C. Cir. 1967), cert. den. 389 U.S. 961, 88 S. Ct. 342, 19 L. ed. 2d 371 (1967), Judge Burger said:

> "There is dictum in *United States v. Inman* that the trial judge should *sua sponte* order a hearing on the voluntariness of

a confession and, if he finds it voluntary, instruct the jury with respect to their role in deciding on the use of the confession. Even assuming we were disposed to follow the dictum in *Inman*, which we elect not to do, it should be noted that it has no application to a situation such as existed here. Not only did appellant fail to make objection to use of the statements, but he also denied making them.

* * *

"We do not rest solely on the futility of remand. Appellant never contested the voluntariness of the statements and never asked for a hearing on voluntariness; we see no basis for a remand to afford him an opportunity to make a claim he has heretofore eschewed."

Woody has been approved in *State v. Olivia*, 183 Neb. 620, 163 N.W. 2d 112 (1968), cert. den. 395 U.S. 925, 89 S. Ct. 1780, 23 L. ed. 2d 242 (1969), and in *State v. Armstrong*, 103 Ariz. 280, 440 P. 2d 307 (1968). We think this is the correct rule, and this assignment of error is overruled.

[3] Defendant next assigns as error the admission of testimony by Deputy Sheriff King concerning the comparison of tire tracks found at the scene of the crime with the tires on the car which the defendant admitted he was driving. A plaster cast was made of the tire marks at the scene and compared with the tires on the 1967 Chevrolet which defendant was using. The car was equipped with four tires bearing the trademark of "Pure Pride." The witness, without objection, said the tread on the plaster cast was compared with the tires and found to be the same. This was simply a statement of fact derived from observation of facts presented to him, and we think it is competent. *State v. Moore*, 276 N.C. 142, 171 S.E. 2d 453; *State v. Leak*, 156 N.C. 643, 72 S.E. 567. Stansbury, N. C. Evidence § 129 (2d ed. 1963).

[4] Next defendant contends the court erred in allowing the testimony to the effect that the defendant was on "work release" the day the alleged crime was committed. The defendant himself made that statement to the officer, and the officer, without objection, simply repeated what defendant told him. The term "work release" does not relate to any specific crime or the degree or nature of any crime. While it is undoubtedly the rule of law that evidence of a distinct substantive offense is inadmissible to prove another independent crime, this rule is subject to well-established exceptions where the two crimes are disconnected and not related to each other. Proof of the commission of other like offenses to show a chain of circumstan-

tial evidence with respect to the matter on trial or to show the identity of the person charged is competent. *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667; *State v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322; *State v. Dail,* 191 N.C. 231, 131 S.E. 573; *State v. Simons,* 178 N.C. 679, 100 S.E. 239; *State v. Weaver,* 104 N.C. 758, 10 S.E. 486. The testimony that defendant was on "work release" was competent as proof of the identity of defendant and as a fact in the chain of events leading up to the commission of the alleged crime.

[5] The final question posed by the brief filed in behalf of defendant is: "Were the solicitor's remarks in his argument to the jury so prejudicial as to constitute reversible error?" We think not. The solicitor reviewed the evidence and argued with great zeal that in view of the brutality of defendant's conduct in connection with the killing of Mary Diane Johnson Smith that the punishment therefor should be death and that the jury should find the defendant guilty of murder in the first degree without any recommendation that punishment should be life imprisonment. Prior to 1961 such argument would have been prejudicial error. *State v. Pugh,* 250 N.C. 278, 108 S.E. 2d 649. The General Assembly changed this rule by the enactment of G.S. 15-176.1 in 1961, which must now be construed with G.S. 14-17. G.S. 14-17 reads in pertinent part: "A murder . . . which shall be committed in 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." G.S. 15-176.1 provides: "In the trial of capital cases, the solicitor or other counsel appearing for the State may argue to the jury that a sentence of death should be imposed and that the jury should not recommend life imprisonment."

[6, 7] In this jurisdiction wide latitude is given to counsel in the argument of contested cases. Moreover, what constitutes an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge. *State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466; *State v. Christopher, supra.* However, it is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury, the argument and conduct of counsel being largely in the control and discretion of the presiding judge. *State v. Correll,* 229 N.C. 640, 50 S.E. 2d 717. Ordinarily, exceptions to improper remarks of counsel during argument must be taken before verdict. *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35; *State v. Tyson,* 133 N.C. 692, 45 S.E. 838. Such excep-

tions, like those to the admission of incompetent evidence, must be made in apt time or else be lost. This general rule has been modified in recent years so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that in this Court's opinion it is doubted that the prejudicial effect of such argument could have been removed from the jurors' minds by any instruction the trial judge might have given. *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335; *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664.

[5] In the instant case, no objections were made to the solicitor's remarks, but after a careful review we hold that in view of the evidence in this case and the provisions of G.S. 15-176.1 the argument made by the solicitor was permissible. *State v. Christopher, supra.* This assignment of error is overruled.

This case has caused this Court grave concern because of defendant's refusal to accept assistance of counsel or to authorize an appeal so this Court might review his trial for possible errors. This strange and puzzling behavior of defendant under circumstances involving his life or death has caused us to meticulously review the entire record.

The able trial judge, consonant with the highest tradition of our judiciary, fully advised defendant of his rights and painstakingly sought to protect those rights throughout every step and phase of the trial.

In the trial we find no error of law which would justify us in granting defendant a new trial or in vacating or modifying the judgment.

No error.

BOBBITT, C.J., and SHARP, J., dissenting as to death sentence.

We vote to vacate the judgment imposing the death sentence. In our 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.

The crime was committed on October 7, 1968, when our statutes relating to capital punishment for murder in the first degree were G.S. 14-17 and G.S. 15-162.1. It was and is our opinion that, until the repeal of G.S. 15-162.1 on March 25, 1969, the 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 (1968), and in *Pope v. United States,* 392 U.S. 651, 20 L. ed. 2d 1317, 88 S. Ct. 2145 (1968), rendered invalid the death penalty provisions of G.S. 14-17. The

reasons underlying our opinion have been stated fully in the dissenting opinions in *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593, and in *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241, and in *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969). See also our dissenting opinion in *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886, and in *State v. Sanders, ante,* 598, 174 S.E. 2d 487. Repetition is unnecessary.

G.S. 15-162.1 was repealed by Chapter 117, Session Laws of 1969. The 1969 Act, if construed to provide greater punishment for murder in the first degree than the punishment provided therefor when the crime was committed, would, in that respect, be unconstitutional as *ex post facto.* 16 Am. Jur. 2d Constitutional Law § 396. In our view, if the death penalty provisions of G.S. 14-17 were invalid on October 7, 1968, when the crime was committed, they were invalid as to this defendant in April, 1969, when he was tried, convicted and sentenced.

STATE OF NORTH CAROLINA v. TYRONE WILLIAM BLACKWELL

No. 38

(Filed 12 June 1970)

1. Constitutional Law § 29; Criminal Law § 135; Homicide § 31— due process — capital case — jury determination of guilt and punishment

It is not a denial of due process that G.S. 14-21 allows the same jury in a capital case to determine a defendant's guilt or innocence and to recommend life imprisonment upon a verdict of guilty.

2. Criminal Law § 66— in-court identification of defendant — identification based on observation at crime scene

The record in a rape prosecution clearly establishes that the prosecuting witness' in-court identification of the defendant as one of her assailants, which identification was made without objection by defendant, was based upon her observation of the defendant immediately before and during the time the rape was committed; and consequently the in-court identification was admissible notwithstanding defendant's contention that the in-court identification was tainted by an allegedly illegal identification of defendant at the police station.

3. Criminal Law § 162— objection to evidence — motion to strike

When a specific question is asked, objection should be made before the witness has time to answer; however, when admissibility is not indicated by the question and only becomes apparent by the content of the answer,

objection should be made immediately by a motion to strike the answer or the objectionable part of it.

4. Criminal Law § 162— incompetent testimony — waiver of objection

Failure to *object in apt time* to incompetent testimony results in a waiver of objection unless the evidence is forbidden by statute or results from questions asked by a trial judge or a juror.

5. Criminal Law § 91— adversary nature of criminal trials

Under our system of jurisprudence the trial of criminal cases is adversary in nature.

6. Criminal Law § 146— nature of appellate review — defendant restricted to theory of trial

An accused, represented by counsel, will *not* be allowed to choose one theory of trial and, upon an adverse verdict, call upon the appellate court to grant relief on the *ground* that the presiding judge should have intervened and guided his defense to another theory.

7. Criminal Law § 161— broadside assignment of error

An assignment of error which attempts to present several questions of law is broadside and ineffective. Rule of Practice in the Supreme Court No. 19(3).

8. Criminal Law § 176— review of nonsuit motion — challenge to evidence

In reviewing an exception to the denial of a *motion for nonsuit*, the Supreme Court in this case considered all evidence admitted at the trial, whether competent or incompetent; consequently, the nonsuit motion did not properly bring challenged testimony before the Court for review.

9. Criminal Law § 66— identification of defendant — voir dire — necessity for objection

In proper cases the *voir dire* procedure may be invoked concerning identification testimony; however, the defendant must at least enter a general objection before such procedure is invoked.

10. Criminal Law § 66— photographic identification of defendant — contention of suggestiveness

The procedure whereby a rape victim identified her assailants from 15 or 20 photographs supplied by police officers, *held* free from any suggestiveness that might have given rise to a substantial likelihood of misidentification, and there is no merit to the defendant's contention that the victim's subsequent in-court identification of him as one of the assailants was tainted by the identification from the photographs.

11. Criminal Law § 86— cross-examination of defendant — prior crimes — discretion of court

When a defendant voluntarily becomes a witness in his own behalf, he may be cross-examined with respect to previous convictions of crime; whether the cross-examination goes too far or is unfair is a matter largely within the discretion of the trial judge.

12. Criminal Law § 86— cross-examination of defendant — prior crimes — absence of prejudice

When the defendant took the stand in his own behalf in a rape prosecution, it was competent for the solicitor to cross-examine the defendant about his convictions in New York; and defendant's answers that he had been convicted of "fighting the girl that I have the kids by" and also had been charged with nonsupport were not prejudicial where he had previously admitted, without objection, that he had been convicted of malicious injury to property, assault with a deadly weapon, public drunkenness, disorderly conduct, assault, nonsupport, violation of prohibition laws, and escape.

SHARP, J., concurs in result.

APPEAL by defendant from *Seay, J.*, at 3 November 1969 Criminal Session of FORSYTH Superior Court.

Defendant was tried on a bill of indictment charging him with the rape of Fannie P. Dillard on or about 5 September 1969.

The evidence pertinent to decision in this case is narrated below.

Fannie P. Dillard, the prosecuting witness, testified that on the night of 4 September 1969 she left her home at a late hour in order to purchase a sandwich and a drink of wine. The store where she intended to purchase the sandwich was closed and she decided to go to a "drink house" to get a drink of wine, but upon arriving she found it to be closed for the night. A man was sitting on the porch and upon her promise to pay him one dollar so that he could buy a drink of gin for himself, he escorted her to another "drink house." He left after she paid him the one dollar. When the prosecuting witness entered the establishment, she noticed a clock which indicated that the time was 12:06 A.M. She there purchased two 50¢ drinks of wine. She testified, "And when I got up to leave my legs were wobbly and I staggered and I said out loud, 'Oh, I wish Sonny was here to walk me home . . . because I am afraid the police will get me.' . . . After I made that statement Tyrone Blackwell, that I did not know but I have since learned, said, 'Lady, I will walk you home.'" The witness thereupon, without objection on the part of counsel for defendant, identified defendant Tyrone Blackwell as being one of the persons who raped her. She said that she accepted his offer to walk her home and that when they left the drink house "we went on out the door and we started across the porch and when we started down the stairs he reached to embrace me around my waist and I did likewise. And I said jokingly to him, "I will give you ten dollars to walk me home'; that I only lived three blocks,

on the corner of Chestnut and Seventh. And when I said that, Tyrone said back to me, 'Baby, I will walk you home for nothing.'" Defendant convinced her that they should detour through a housing project called "Patterson Court", and as they proceeded through Patterson Court four men emerged from a vacant lot and came toward them. She was surrounded by the men, and defendant and another man drug her to an old shed where defendant first raped her and she was then raped by two other men. She identified one Jesse Williams as being the second man who raped her and testified that Williams struck her in the face several times. After the third man raped her, they all ran. She never identified the third man. She then found her way out of the shed and was walking down a driveway when another unidentified man grabbed her. She was then close to her house and began to call for help and to struggle with her assailant. A neighbor, one Mozelle Booker, summoned two men to her aid and the unidentified assailant fled. She was taken to a hospital where she was admitted for emergency and further treatment.

Concerning her ability to observe the assailants, she said:

> "It was not dark. There was plenty of light coming over that hedge wall. I could see them very well when they got on me. The light was coming from that street light direct opposite the driveway. I would say it is almost seventy-five feet (from the shed to the street) but there was plenty of light coming back up there."

On cross-examination by defense counsel, prosecuting witness was questioned as to how she identified the men who raped her. She testified:

MR. HAYES: Did you know Tyrone — Tyrone Blackwell?

A. No, sir. I did not know him.

Q. Under what circumstances did you identify him?

A. I picked his picture.

Q. Where?

A. I picked his picture in the sheriff's office — no, I picked his picture at my home. Detective Koontz brought pictures out to my bedroom and I picked his picture there.

Q. These pictures — were there more than one?

A. There was a whole lot of pictures.

Q. Of him?

A. I don't know if more than one was of him or not but

there was a whole lot of pictures. They won't tell you anything. They just give you pictures to look at.

Q. And after you picked his picture did you later on pick him out of a lineup or anything of that sort?

A. No, sir.

Q. Did you later on see him?

A. Yes sir. I saw him in the detective's office.

Q. After you had picked his picture?

A. After I had picked his picture and he had come in, I saw him in the detective's office.

Q. What process was undertaken in connection with identifying him there?

A. Well, I don't know what they said to him before they sent out for me but when I went in they asked him had he ever seen me before and they talked to me and they told him to talk to me. And we talked to each other and then they took me out and they asked me if he was the man. They told me if he was the man to tell them — if he wasn't the man to say No; if he was the man to tell them.

Q. He told you he had never seen you before, didn't he?

MR. YOKLEY: OBJECTION, your Honor.

THE COURT: SUSTAINED. EXCEPTION NO. 4.

Q. Well, was he instructed there in the detective's office to hug you?

A. Yes, I asked them to ask him to embrace me around my waist.

Q. What was that for?

A. That was to see how near I come to his shoulder.

Q. Well, you could tell how near you came to his shoulder without embracing him, couldn't you?

A. I wanted proof.

Q. You could have stood beside him, couldn't you?

A. I perhaps could have but it was my privilege to ask and be very careful.

Q. For an embrace?

A. Yes.

. . . .

"(I saw the defendant Blackwell at the Winston-Salem Police Department after I had identified his photograph) and I noticed he was bald headed. He had cut and shaved his hair off, and he had a white earring in his ear. (His hair was not like that on the night of September 4, 1969) no, sir."

The State also offered Detective Sergeant Koontz of the Winston-Salem Police Department, who testified in corroboration by reading to the jury a statement made by Fannie Dillard.

Defendant offered evidence in the nature of an alibi, and testified in his own behalf. He stated that he had never seen the prosecuting witness.

The jury returned a verdict of guilty of rape with recommendation that punishment be imprisonment for life in the State's prison. From judgment entered upon the verdict defendant appealed to this Court pursuant to G.S. 7A-27(a).

Attorney General Morgan and Deputy Attorney General Bullock for the State.

James M. Hayes, Jr., and W. Warren Sparrow for defendant.

BRANCH, J.

[1] Defendant first contends that he is deprived of due process because the provisions of G.S. 14-21 allowed the same jury in this capital case to determine his innocence or guilt and to recommend imprisonment for life upon a verdict of guilty.

Defendant correctly concedes that this argument is contrary to North Carolina authority. We adhere to the decisions of this Court. *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886; *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885; *State v. Ruth,* 276 N.C. 36, 170 S.E. 2d 897; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593.

[2] Defendant also assigns as error the failure of the trial court to grant his motion for judgment as of nonsuit. His motion is founded on the contention that the vital in-court identification by the prosecuting witness was tainted by illegal out-of-court identification, thereby making all testimony relative to identification inadmissible.

Defendant's counsel made no objection to the in-court identification by the prosecuting witness, nor did he move to strike the testimony concerning the in-court identification. On cross-examination

he elicited testimony concerning identification of defendant by photograph and the testimony concerning identification of defendant by a confrontation in the police station.

[3] When a specific question is asked, objection should be made before the witness has time to answer. However, when admissibility is not indicated by the question and only becomes apparent by the content of the answer, objection should be made immediately by a motion to strike the answer, or the objectionable part of it. Stansbury, North Carolina Evidence 2d, § 27, at 51; *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599; *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341.

[4] Failure to object in apt time to incompetent testimony results in a waiver of objection so that admission of the evidence will not be reviewed on appeal unless the evidence is forbidden by statute or results from questions asked by the trial judge or a juror. *State v. McKethan, supra; State v. Battle, supra; State v. Warren*, 236 N.C. 358, 72 S.E. 2d 763; *State v. Merrick*, 172 N.C. 870, 90 S.E. 257.

It is apparent that defendant's able and experienced trial lawyer chose to waive the right to interpose objection for the purpose of high-lighting and accentuating his skillful attack by cross-examination on the veracity and credibility of the prosecuting witness' testimony.

[5, 6] Both this Court and the United States Supreme Court recognize that under our system of jurisprudence the trial of criminal cases is adversary in nature. To hold that an accused, represented by counsel, may choose one theory of trial and, upon an adverse verdict, call upon the appellate court to grant relief on the ground that the presiding judge should have intervened and guided his defense to another theory, would destroy the adversary system of trial and further tilt the scales of justice in favor of the criminal by prolonging ad infinitum the pronouncement of judgment in criminal cases.

The exceptions upon which this assignment of error is based are Exceptions Nos. 4, 6, 7 and 9. Exception 4 relates to a ruling on evidence when prosecuting witness was under cross-examination. She had testified concerning the identity of defendant at the police station. She was asked:

> Q. He told you he had never seen you before, didn't he?
>
> MR. YOKLEY: OBJECTION, your Honor.
>
> THE COURT: SUSTAINED. EXCEPTION NO. 4.

[7] Exception No. 6 concerns a question on direct examination relative to identification of defendant from photographs. The record shows:

> Q. At that time when you selected those photographs did you know the photographs matched the names that you had given Officer Koontz?
>
> MR. HAYES: OBJECTION.
>
> THE COURT: OVERRULED. EXCEPTION NO. 5.
>
> A. No, sir.

Exceptions 7 and 9 relate to denial of defendant's motion for nonsuit at the close of the State's evidence and at the close of all the evidence. This assignment of error does not comply with our Rules because it attempts to present several different questions of law in one assignment, thereby becoming broadside and ineffective. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416; *Hines v. Frink and Frink v. Hines,* 257 N.C. 723, 127 S.E. 2d 508; Rule of Practice in the Supreme Court No. 19(3).

[8] Further, when this Court passes upon an exception to the trial court's refusal to grant a defendant's motion for judgment as of nonsuit, it must consider all evidence admitted at the trial, whether competent or incompetent. Thus, it is apparent that defendant's motion for judgment as of nonsuit did not challenge the evidence identifying defendant so as to properly bring it before us upon appeal. *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252; *State v. Mitchell,* 265 N.C. 584, 144 S.E. 2d 646.

[9] In this jurisdiction, when the State offers a confession by a defendant, and the defendant objects, the proper and better procedure requires the trial judge to excuse the jury and in its absence hear evidence, find facts, and thereupon determine the admissibility of the evidence. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581; *State v. Vickers,* 274 N.C. 311, 311, S.E. 2d 481; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. However, such evidence is not necessarily rendered incompetent by failure to hold a voir dire hearing. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353. In proper cases the voir dire procedure may be invoked concerning identification testimony; however, defendant cannot challenge an in-court identification so as to obtain a voir dire hearing, and a ruling on the offered testimony on the basis that it was "tainted" by prior photographic identification procedures, a "line-up", or other in-custody confrontation without, at least, a general objection. This Court still adheres to the rule requiring at least a general objection by defendant before the voir dire

procedure is invoked. *State v. Vickers, supra.* See also: *Woody v. United States,* 379 F. 2d 130 (D.C. Cir. 1967); *Morris v. Boles,* 286 F 2d 395 (4th Cir. 1967).

The Rules of the Supreme Court have been dictated by experience and stem from a desire to expedite business. They are mandatory and will be enforced. However, because of the seriousness of the charge and the severity of the punishment necessarily imposed upon the return of the verdict of guilty in this case, we have further considered this record.

[10] We first consider defendant's contention that the pretrial identification of defendant by photograph was improper and tainted the in-court identification of defendant.

This identification by photograph was made before any personal confrontation between the prosecuting witness and defendant, before he was served with warrant, and apparently before defendant was in custody. The prosecuting witness had been given the names of defendants by some person and she had in turn given their names to the police. The names furnished were not names of persons known to her. Thereafter, Officer Koontz presented her with fifteen or twenty photographs to examine in an attempt to identify her assailants. She picked defendants' photographs without any information as to which photograph was a likeness of each defendant. She was then told that she had chosen the photographs of the men whose names she had furnished to the police. In connection with this identification process, the prosecuting witness testified: ". . . there was a whole lot of pictures. They won't tell you anything. They just give you pictures to look at." She selected this defendant's photograph from the group as being one of the men who raped her.

In *Simmons v. United States,* 390 U.S. 377, 19 L. ed 2d 1247, 88 S. Ct. 967, the United States Supreme Court stated:

> "We are unwilling to prohibit its employment (initial identification by photograph), either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . ."

This record does not show that the procedure used in identifying defendant by photograph was so suggestive "as to give rise to a very

substantial likelihood of irreparable misidentification." The use of the photographs was proper and did not taint the in-court identification.

We are well aware of the rules adopted by the cases of *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; and *Stovall v. Denno,* 388 U.S. 293, 18 L. ed 2d 1199, 87 S. Ct. 1967, which hold that in cases of in-custody identification where there was a "line-up" or a presentation of the suspect alone to the witness, the suspect has the constitutional right to have counsel present, and when counsel is not present, testimony of witnesses' identification is inadmissible and renders inadmissible any in-court identification of the suspect unless it is first determined that the in-court identification is of independent origin and is untainted by the illegal line-up or other in-custody confrontation.

The instant case is distinguishable from *Wade v. United States, supra,* and *Gilbert v. California, supra.* In *Wade,* the defendant's counsel moved to strike the courtroom identification after the confrontation testimony was elicited on cross-examination. In *Gilbert,* defendant's counsel moved, in the absence of the jury, to strike as soon as the in-court testimony was offered. In the instant case no such motion was ever made. In *United States v. Wade, supra,* it is stated:

> "We think it follows that the proper test to be applied in these situations is that quoted in *Wong Sun v. United States,* 371 U.S. 471, 488, 9 L. ed 2d 441, 445, 84 S. Ct. 407, ' "[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ' * * * Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup."

In the instant case defendant had ample opportunity to observe

defendant; there was no discrepancy between defendant's actual description and the pre-lineup description; there was no identification, prior to the in-custody confrontation, of another person; there was an identification by picture of defendant prior to the in-custody confrontation; there was no failure to identify defendant on a prior occasion; and the in-custody identification was made within five or six days of the alleged criminal act.

[2] We think this record clearly establishes that the in-court identification was based upon observation of the suspect immediately before and at the time the crime was committed, so that the in-court identification was of independent origin and untainted by any illegality in the identification by photograph or the in-custody confrontation.

For reasons stated, this assignment of error is overruled.

Defendant assigns as error the admission in evidence of a portion of the solicitor's cross-examination of defendant, as follows:

> Q. What were you charged and convicted of in New York?
>
> MR. HAYES: OBJECT, your Honor.
>
> THE COURT: OVERRULED. EXCEPTION NO. 8.
>
> A. I don't mind telling. I was charged and convicted of fighting the girl that I have the kids by. I was charged (also) with nonsupport but she dropped the charges. That is all I remember at the time.

[11, 12] When a defendant voluntarily becomes a witness in his own behalf, he may be cross-examined with respect to previous convictions of crime. The answers given are conclusive and are admissible as affecting his credibility as a witness. Whether the cross-examination goes too far or is unfair is a matter for determination of the trial judge and rests largely in his sole discretion. *State v. Brown*, 266 N.C. 55, 145 S.E. 2d 297; *State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195; *State v. Neal*, 222 N.C. 546, 23 S.E. 2d 911; *State v. Howie*, 213 N.C. 782, 197 S.E. 611; Stansbury, North Carolina Evidence, 2d ed., § 112; *State v. Snipes*, 166 N.C. 440, 81 S.E. 409; and *State v. Little*, 174 N.C. 793, 94 S.E. 97. Here, no abuse of discretion is shown and the question is within the scope of proper cross-examination. Defendant shows no prejudice because he had previously admitted, without objection, that he had been convicted of malicious injury to property, assault with a deadly weapon, public drunkenness, disorderly conduct, assault, nonsupport, violation of prohibition laws, and escape.

This assignment of error is without merit.

In the trial below we find

No error.

SHARP, J., concurs in result.

LONNIE RAYVON SURRATT v. STATE OF NORTH CAROLINA

No. 47

(Filed 12 June 1970)

1. Habeas Corpus § 2— determination of legality of restraint

Superior court properly denied a prisoner's petition for writ of *habeas corpus*, where it made findings that the court which tried the prisoner had jurisdiction over both the prisoner and the offense at the time of his trial and that the judgment entered was authorized by law.

2. Habeas Corpus § 4— review of habeas corpus proceedings

Except in cases involving the custody of minor children an appeal is not allowed from a judgment entered in a *habeas corpus* proceeding, such judgment being reviewable only by way of *certiorari* if the court in its discretion chooses to grant such writ.

APPEAL by petitioner under G.S. 7A-30(1) from decision of the North Carolina Court of Appeals in 7 N.C. App. 398, 172 S.E. 2d 102.

At the 18 March 1963 Session of Davidson Superior Court, petitioner, indicted for murder in the first degree, through counsel entered a plea of guilty of murder in the second degree and was sentenced to a prison term of not less than 25 nor more than 30 years. At the same term he also pleaded guilty to a charge of breaking, entering, and larceny and was sentenced to a prison term of 7 to 10 years, to begin at the expiration of the sentence imposed on the murder charge. Petitioner is now serving these sentences.

In June, 1968 petitioner filed a petition for a writ of habeas corpus which was heard before Judge Allen Gwyn, Judge Presiding at the November, 1968 Special Criminal Session of Davidson County Superior Court. Judge Gwyn took the petition under advisement but rendered no decision thereon. On 9 May 1969 petitioner, represented by court-appointed attorney, was allowed to withdraw the petition filed before Judge Gwyn. On 17 June 1969 he filed an amended ap-

plication for writ of habeas corpus alleging that his imprisonment is illegal because of constitutional violations in connection with his arrest and trial. A hearing was held on this amended application on 2 October 1969 before Judge Hubert May, Judge Presiding at the 22 September 1969 Criminal Session of the Superior Court of Davidson County. After hearing the testimony of the petitioner and his witnesses, Judge May held that petitioner was lawfully restrained and denied petitioner's prayer that he be released. Petitioner appealed to the North Carolina Court of Appeals. In an opinion written by Britt, J., concurred in by Brock and Graham, JJ., the appeal was dismissed for the reason that no appeal lies from a judgment rendered on a return of a writ of habeas corpus to obtain freedom from restraint, review being solely by *certiorari.* The Court of Appeals, treating the purported appeal as a petition for *certiorari,* denied *certiorari.*

Attorney General Robert Morgan and Staff Attorney Edward L. Eatman, Jr., for the State.

William H. Steed for petitioner appellant.

PER CURIAM.

The petitioner appealed to this Court under G.S. 7A-30(1).

Judge May, in the judgment entered 2 October 1969, found that the Superior Court of Davidson County had jurisdiction over both the petitioner and the offense at the time of his trial and that the judgment entered was authorized by law. Upon this finding Judge May properly denied the petition for writ of habeas corpus. *State v. Cannon,* 244 N.C. 399, 94 S.E. 2d 339. The Court of Appeals correctly held that except in cases involving the custody of minor children an appeal is not allowed from a judgment entered in a habeas corpus proceeding, such judgment being reviewable only by way of *certiorari* if the court in its discretion chooses to grant such writ. *State v. Lewis,* 274 N.C. 438, 164 S.E. 2d 177; *In re Lee Croom,* 175 N.C. 455, 95 S.E. 903; 4 Strong's N. C. Index 2d, Habeas Corpus § 4.

The Court of Appeals dismissed the appeal and in its discretion refused to grant *certiorari.* In this we find no error.

The decision of the Court of Appeals is

Affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BRAKE v. HARPER

No. 82 PC.

Case below: 8 N.C. App. 327.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 12 June 1970.

EPPS v. MILLER

No. 73 PC.

Case below: 7 N.C. App. 656.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 24 June 1970.

MARKETING SYSTEMS v. REALTY CO.

No. 77 PC.

Case below: 8 N.C. App. 43.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 12 June 1970.

MEEKS v. ATKESON

No. 61 PC.

Case below: 7 N.C. App. 631.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 12 June 1970.

HIGHWAY COMMISSION v. REEVES

No. 78 PC.

Case below: 8 N.C. App. 47.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 24 June 1970.

IN RE WHICHARD

No. 15.

Case below: 8 N.C. App. 154.

Motion of Attorney General to dismiss appeal allowed and petition for stay of execution denied 24 June 1970.

STATE v. MIDGETT

No. 14.

Case below: 8 N.C. App. 230.

Motion of Attorney General to dismiss appeal allowed and petition for stay of execution denied 24 June 1970.

STATE v. TAYLOR and STATE v. CHAPMAN and STATE v. ABERNETHY

No. 64 PC.

Case below: 8 N.C. App. 88.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 24 June 1970.

SUPPLY CO. v. MOTOR LODGE

No. 65 PC.

Case below: 7 N.C. App. 701.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 24 June 1970.

TICKLE v. INSULATING CO.

No. 63 PC.

Case below: 8 N.C. App. 5.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 12 June 1970.

TIGHTS, INC. v. HOSIERY CO.

No. 54 PC.

Case below: 7 N.C. App. 369.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 12 June 1970.

YAGGY v. B.V.D. CO.

No. 67 PC.

Case below: 7 N.C. App. 590.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 12 June 1970.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

YODER v. BOARD OF COMMISSIONERS

No. 62 PC.

Case below: 7 N.C. App. 712.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 12 June 1970.

APPENDIXES

AMENDMENT TO RULES GOVERNING
ADMISSION TO THE
PRACTICE OF LAW

GENERAL RULES OF PRACTICE
FOR THE SUPERIOR AND DISTRICT COURTS
SUPPLEMENTAL TO THE
RULES OF CIVIL PROCEDURE
ADOPTED PURSUANT TO G.S. 7A-34

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendment to the Rules Governing Admission to the Practice of Law in the State of North Carolina was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

Rule VII, Section 1, (5) of the Rules Governing Admission to the Practice of Law in the State of North Carolina is amended by rewriting Rule VII, Section 1, (5) as appears in 275 N.C. 695 as follows:

(5) *Prove* 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, *and time spent teaching law in North Carolina on a full time basis in a law school approved by the Board may be considered as "practice of law in the state or states of his former residence".* 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;

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 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 9th day of September, 1970.

B. E. JAMES, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendment 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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of September, 1970.

WILLIAM H. BOBBITT
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment 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 10 day of September, 1970.

MOORE, J.
For the Court

GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS SUPPLEMENTAL TO THE RULES OF CIVIL PROCEDURE ADOPTED PURSUANT TO G.S. 7A-34

1. *Philosophy of General Rules of Practice.*

These rules are applicable in the Superior and District Court Divisions of the General Court of Justice. They shall at all times be construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them.

2. *Calendaring of Civil Cases.*

Subject to the provisions of Rule 40(a), Rules of Civil Procedure, and G.S. 7A-146:

(a) A ready calendar shall be maintained by the Clerk of the Superior Court. Five months after a complaint is filed the clerk shall place that case on the ready calendar, unless the time is extended by written order by a resident or presiding judge or any district court judge in his respective jurisdiction.

(b) The clerk, who shall act as chairman, plus two or more attorneys selected by members of the local bar, shall be the calendar committee. Acting under the direction of the senior presiding superior court judge (or the Chief District Court Judge in district court matters), the calendar committee shall prepare a tentative trial calendar from the ready calendar. The tentative trial calendar shall be mailed to each attorney of record and to each presiding judge and resident judge four weeks before the first day of court. If, at the tentative calendar meeting of the local bar, the attorneys and the clerk cannot agree on the cases to be calendared for trial, the presiding judge, or his designate as calendar judge, shall settle the conflict.

(c) A final trial calendar, prepared by the above committee, shall be mailed to each attorney of record and to each presiding judge no later than two weeks prior to the first day of court.

(d) When an attorney desires a case placed on the ready calendar earlier than five months after complaint is filed, he shall file a certificate of readiness with the clerk, with copy to opposing counsel. The clerk shall immediately place said case on the ready calendar. (A suggested form for a certificate of readiness is attached.)

(e) Insofar as possible, requests for a peremptory setting

should be made to the presiding judge at the first civil session after January 1 and July 1. No case shall be peremptorily set by request unless a certificate of readiness is on file. A peremptory setting shall be had only for good and compelling reasons and shall be ordered by the presiding judge, or Chief District Court Judge. A resident judge, on his own motion, may set a case peremptorily. When two or more civil sessions are being held simultaneously the senior civil presiding judge shall have control over peremptory settings.

(f) On the final trial calendar, cases shall be set in the order in which they were filed.

(g) At the first civil session in January and July the senior presiding judge of the superior court, or the Chief District Judge of the District Court, shall each review all cases on the ready calendar of his court and shall make appropriate disposition and orders in each; to insure full use of court time, he shall confer regularly with the chairman of the calendar committee.

(h) When a case on the published calendar is settled, the clerk must be notified of the settlement within twenty-four hours thereafter. Attorneys for each party shall have the duty to provide such notice. The notice to the clerk shall state who will present the judgment, and when.

3. *Continuances.*

An application for a continuance shall be made to the presiding judge of the court in which the case is calendared.

When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Federal Court, Superior Court, District Court, Magistrate's Court.

At mixed sessions, criminal cases in which the defendant is in jail shall have absolute priority.

4. *Enlargement of Time.*

The judge or clerk of the court in which the action is pending may by order extend the time for filing answer.

When counsel, by consent under Rule 6 (b), agree upon an enlargement of time, the agreement shall be reduced to writing and filed with the clerk.

5. *Form of Pleadings.*

If feasible, each paper presented to the court for filing shall be flat and unfolded, without manuscript cover, and firmly bound.

6. *Motions in Civil Actions.*

All motions, written or oral, shall state the rule number or numbers under which the movant is proceeding. (See Rule 7 of Rules of Civil Procedure.)

Motions may be heard and determined either at the pre-trial conference or on motion calendar as directed by the presiding judge.

Every motion shall be signed by at least one attorney of record in his individual name. He shall state his office address and telephone number immediately following his signature. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief, there are good grounds to support it; and that the motion is not interposed for delay. (See Rule 7 (b) (2); also Rule 11).

7. *Pre-Trial Procedure.* (See Rule 16)

There shall be a pre-trial conference in every civil case, unless counsel for all parties stipulate in writing to the contrary and the court approves the stipulation. Upon its own motion or upon request of any party, the court may dispense with or limit the scope of the pre-trial conference or order.

In uncontested divorce, default, and magistrate cases and magistrate appeals, a pre-trial conference or order is not required.

A party who has not requested a pre-trial conference may not move for a continuance on the ground that it has not been held.

At least twenty-one days prior to trial date, the plaintiff's attorney shall arrange a pre-trial conference with the defendant's attorney to be held not later than seven days before trial date. At such conference a pre-trial order shall be prepared and signed by the attorneys.

If, after due diligence, plaintiff's attorney cannot arrange a conference with defendant's attorney, he may apply to the presiding judge or other judge holding court in the district (or district court judge with respect to district court cases) who shall make an appropriate order. The defense attorney may initiate pre-trial under the same rules applicable to plaintiff's attorney.

The pre-trial order shall be in substance as shown on the attached sample form.

8. *Discovery.*

All desired discovery shall be completed within 120 days of the date of the last required pleading. For good cause shown, a judge having jurisdiction may enlarge the period of discovery.

Counsel are required to begin promptly such discovery proceedings as should be utilized in each case, and are authorized to begin even before the pleadings are completed. Counsel are not permitted to wait until the pre-trial conference is imminent to initiate discovery.

9. *Opening Statements.*

At any time before the presentation of evidence counsel for

each party may make an opening statement setting forth the grounds for his claim or defense.

The parties may elect to waive opening statements.

Opening statements shall be subject to such time and scope limitations as may be imposed by the court.

10. *Opening and Concluding Arguments.*

In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

In a criminal case, where there are multiple defendants, if any defendant introduces evidence the closing argument shall belong to the solicitor.

In a civil case, where there are multiple defendants, if any defendant introduces evidence, the closing argument shall belong to the plaintiff, unless the trial judge shall order otherwise.

11. *Examination of Witnesses.*

When several counsel are employed by the same party, the examination or cross-examination of each witness for such party shall be conducted by one counsel, but the counsel may change with each successive witness or, with leave of the court, in a prolonged examination of a single witness.

12. *Courtroom Decorum.*

Except for some unusual reason connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

Counsel are at all times to conduct themselves with dignity and propriety. All statements and communications to the court other than objections and exceptions shall be clearly and audibly made from a standing position behind the counsel table. Counsel shall not approach the bench except upon the permission or request of the court.

The examination of witnesses and jurors shall be conducted from a sitting position behind the counsel table except as otherwise permitted by the court [see *S. vs. Bass,* 5 N.C. App. 429, 431 (1969)]. Counsel shall not approach the witness except for the purpose of presenting, inquiring about, or examining the witness with respect to an exhibit, document, or diagram.

Any directions or instructions to the court reporter are to be made in open court by the presiding judge only, and not by an attorney.

Business attire shall be appropriate dress for counsel while in the courtroom.

All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided.

Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited.

The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness. Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority; nor shall he offer evidence which he knows to be inadmissible. In an argument addressed to the court, remarks or statements should not be interjected to influence the jury or spectators. (See Rule 22, Canons of Ethics and Rules of Professional Conduct, N. C. State Bar, G.S. 4A p. 273.)

Suggestions of counsel looking to the comfort or convenience of jurors should be made to the court out of the jury's hearing. Before, and during trial, a lawyer should attempt to avoid communicating with jurors, even as to matters foreign to the cause.

Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court. (See Rule 1, Canons of Ethics and Rules of Professional Conduct, N. C. State Bar, G.S. 4A p. 269.)

13. *Presence of Counsel During Jury Deliberation.*

The right to be present during the trial of civil cases shall be deemed to be waived by a party or his counsel by voluntary absence from the courtroom at a time when it is known that proceedings are being conducted, or are about to be conducted. In such event the proceedings, including the giving of additional instructions to the jury after they have once retired, or receiving the verdict, may go forward without waiting for the arrival or return of counsel or a party.

After the jury has retired to deliberate upon a verdict in a criminal case, at least one attorney representing the defendant shall remain in the immediate area of the courtroom so as to be available at all times during the deliberation of the jury and when the verdict is received.

14. *Custody and Disposition of Evidence at Trial.*

Once any item of evidence has been introduced, the clerk (not the court reporter) is the official custodian thereof and is responsible for its safekeeping and availability for use as needed at all adjourned sessions of the court and for appeal.

After being marked for identification, all exhibits offered or ad-

mitted in evidence in any cause shall be placed in the custody of the clerk, unless otherwise ordered by the court.

Whenever any models, diagrams, exhibits, or materials have been offered into evidence and received by the clerk, they shall be removed by the party offering them, except as otherwise directed by the court, within 30 days after final judgment in the trial court if no appeal is taken; if the case is appealed, within 60 days after certification of a final decision from the appellate division. At the time of removal a detailed receipt shall be given to the clerk and filed in the case file.

If the party offering an exhibit which has been placed in the custody of the clerk fails to remove such article as provided herein, the clerk shall write the attorney of record (or the party offering the evidence if he has no counsel) calling attention to the provisions of this rule. If the articles are not removed within 30 days after the mailing of such notice, they may be disposed of by the clerk.

15. *Photographs and Reproduction of Court Proceedings.*

The taking of photographs in the courtroom, or in the corridors immediately adjacent thereto, during the progress of judicial proceedings, or during any recess thereof, is prohibited. The transmission or recording of such proceedings for broadcast by radio or television is likewise prohibited.

Nonjudicial ceremonies such as administering oaths of office, presentation of portraits, and similar ceremonial occasions, may be photographed in or broadcast from the courtroom under the supervision of the court.

16. *Withdrawal of Appearance.*

No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court. (See *Smith vs. Bryant,* 264 N.C. 208. See also Rule 43 of Rules of the N. C. State Bar, Volume 4A of General Statutes of North Carolina, page 278, entitled "Withdrawal from employment as attorney or counsel.")

17. *Entries on Records.*

No entry shall be made on the records of the Superior or District Court by any person except the clerk, his regular deputy, a person specifically directed by the presiding judge, or the judge himself.

18. *Custody of Appellate Reports.*

The clerks of the Superior Court shall be officially responsible for the care and preservation of the volumes of the Appellate Division Reports furnished by the State pursuant to G.S. 147-45, and for the

General Statutes of North Carolina furnished by the Administrative Office of the Courts under G.S. 7A-300(9).

Each clerk of the Superior Court shall report to the presiding judge of the Superior Court at the first session of court held in January and July each year what volumes, if any, of said reports are missing or have been lost since the last report to the end that the judge may enter an appropriate order for replacement of same pursuant to G.S. 147-51.

19. *Recordari; Supersedeas; Certiorari.*

The Superior Court shall grant the writ of recordari only upon petition specifying the grounds of the application. The petition shall be verified and the writ may be granted with or without notice. When notice is given the petition shall be heard upon answer thereto duly verified and upon the affidavits and other evidence offered by the parties. The decision thereupon shall be final, subject to appeal as in other cases. If the petition is granted without notice, the petitioner shall give an undertaking for costs and for the writ of supersedeas, if prayed for. In such case the writ of recordari shall be made returnable to the session of the Superior Court of the county in which the judgment or proceeding complained of was granted, and ten days' written notice shall be given to the adverse party before the session of the court to which the writ is returnable. At that session the respondent may move to dismiss, or may answer the writ, and the answer shall be verified. After hearing the application upon the petition, answer, affidavits, and evidence offered, the court shall dismiss it or order it placed on the trial docket.

In proper cases and in like manner, the court may grant the writ of certiorari. When a diminution of the record is suggested and the record is manifestly imperfect, the court may grant the writ upon motion in the cause.

20. *Sureties.*

No member of the bar, in any case, suit, action or proceeding in which he appears as counsel, and no employee of the General Court of Justice, employee of the Sheriff's Department, or other law enforcement officer, shall act as a surety in any suit, action or proceeding pending in any division of the General Court of Justice.

These rules supersede all rules of practice in the Superior Court as contained in Volume 4A, pp. 201-206 of the General Statutes of North Carolina and rules of the conference of Superior Court Judges.

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

.....COUNTY .....COURT DIVISION

FILE #:.....

FILM #:.....

PLAINTIFF

-v - CERTIFICATE OF READINESS

DEFENDANT

As counsel of record for..... .....(name the party you represent), who is a plaintiff, defendant, third party, (underline one) I hereby certify that:

A. I know of no procedural matters which would delay the trial of the case when called for jury trial;

B. All motions existing of record this date have been heard or otherwise disposed of;

C. I know of no parties or witnesses desired that will not be available on the trial date;

D. I know of no current reason that would cause me to move for a continuance;

E. I am ready for trial.

This the..... day of..... .....

.....

Attorney

IN THE GENERAL COURT OF JUSTICE

.....COURT DIVISION

Plaintiff(s))
)
- v -)
)
Defendant(s))

FILE #: .....

FILM #:.....

ORDER ON FINAL PRE-TRIAL CONFERENCE

Pursuant to the provisions of Rule 16 of the State Rules of Civil Procedure, and Rule 7, General Rules of Practice, a final pre-trial conference was held in the above-entitled cause on the.....day of....., 19..... ....., Esquire, appeared as counsel for the plaintiff(s); ....., Esquire, appeared as counsel for the defendant(s).

(1) It is stipulated that all parties are properly before the court, and that the court has jurisdiction of the parties and of the subject matter.

Note: If the facts are otherwise they should be accurately stated.

(2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.

Note: If the facts are otherwise, they should be accurately stated.

(3) If any of the parties is appearing in a representative capacity, it should be set out whether there is any question concerning the validity of the appointment of the representatives. Letters or orders of appointment should be included as exhibits.

(4) Any third-party defendant(s) or cross-claimant(s) should follow the same procedure as set out in paragraphs (4) and (5) for plaintiff(s) and defendant(s).

(5) In addition to the other stipulations contained herein, the

parties hereto stipulate and agree with respect to the following undisputed facts:

(a)

(b)

Note: Here set out all facts not in genuine dispute.*

(6) The following is a list of all known exhibits the plaintiff(s) may offer at the trial:

(a)

(b)

Note: Here list the pre-trial identification numbers and a brief description of each exhibit.

(7) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the plaintiff(s), except:

---

*IN CONTRACT CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) whether the contract relied on was oral or in writing; (b) the date thereof and the parties thereto; (c) the substance of the contract, if oral; (d) the terms of the contract which are relied upon and the portions in controversy; (e) any collateral oral agreement, if claimed, and the terms thereof; (f) any specific breach of contract claimed; (g) any misrepresentation of fact claimed; (h) if modification of the contract or waiver of covenant is claimed, what modification or waiver, and how accomplished, and (i) an itemized statement of damages claimed to have resulted from any alleged breach, the source of such information, how computed, and any books or records available to sustain such damage claimed.

IN MOTOR VEHICLE NEGLIGENCE CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) the owner, type and make of each vehicle involved; (b) the agency of each driver; (c) the place and time of accident, conditions of weather, and whether daylight or dark; (d) nature of terrain as to level, uphill or downhill; (e) traffic signs, signals and controls, if any, and by what authority placed; (f) any claimed obstruction of view; (g) presence of other vehicles, where significant; (h) a detailed list of acts of negligence or contributory negligence claimed; (i) specific statutes, ordinances, rules, or regulations alleged to have been violated, and upon which each of the parties will rely at the trial to establish negligence or contributory negligence; (j) a detailed list of nonpermanent personal injuries claimed, including the nature and extent thereof; (k) a detailed list of permanent personal injuries claimed, including nature and extent thereof; (l) the age of any party alleged to have been injured; (m) the life and work expectancy of any party seeking to recover for permanent injury; (n) an itemized statement of all special damages, such as medical, hospital, nursing, etc., with the amount and to whom paid; (o) if loss of earnings is claimed; (p) a detailed list of any property damages, and (q) in death cases, the decedent's date of birth, marital status, employment for five years before date of death, work expectancy, reasonable probability of promotion, rate of earnings for five years before date of death, life expectancy under mortuary table, and general physical condition immediately prior to date of death.

IN THE EVENT THIS CASE DOES NOT FALL WITHIN ANY OF THE CATEGORIES ENUMERATED ABOVE, OR ANY OF THE CATEGORIES SUGGESTED BY THIS FORM, COUNSEL SHOULD, NEVERTHELESS, SET FORTH THEIR POSITIONS WITH AS MUCH DETAIL AS POSSIBLE.

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

(8) It is stipulated and agreed that each of the exhibits identified by the plaintiff(s) is genuine and, if relevant and material, may be received in evidence without further identification or proof, except:

Note: Here set out with particularity the basis of objection to specific exhibits.

It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(9) The following is a list of all known exhibits the defendant(s) may offer at the trial:

(a)

(b)

Note: Here list the pre-trial identification numbers and a brief description of each exhibit.

(10) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the defendant(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

(11) It is stipulated and agreed that each of the exhibits identified by the defendant(s) is genuine, and, if relevant and material, may be received in evidence without further identification or proof, except:

Note: Here set out with particularity the basis of objection to specific exhibits. It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(12) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to exhibits as required of plaintiff(s) and defendant(s).

Note: Attention is called to the provisions of the pre-trial rule with respect to the obligation to immediately notify opposing counsel if additional exhibits are discovered after the preparation of this order.

(13) The following is a list of the names and addresses of all known witnesses the plaintiff(s) may offer at the trial:

Note: If either plaintiff's or defendant's attorney discovers additional witnesses after this listing, attention is called to obligation to notify opposing counsel. There shall be no requirement that all witnesses listed by a party be used, and the court may after satisfactory explanation, in his discretion, permit the use of a witness not listed.

The trial judge may, for good cause made known to him, relieve a party of the requirement of disclosing the name of any witness.

(14) The following is a list of the names and addresses of all known witnesses the defendant(s) may offer at the trial:

(15) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to witnesses as above outlined for plaintiff(s) and defendant(s). Counsel shall immediately notify opposing counsel if the names of additional witnesses are discovered after the preparation of this order.

(16) There are no pending motions, and neither party desires further amendments to the pleadings, except:

Note: Here state facts regarding pending or impending motion. If any motions are contemplated, such as motion for the physical examination of a party, motion to take the deposition of a witness for use as evidence, etc., such motions should be filed in advance of the final pre-trial conference so that they may be ruled upon, and the rulings stated in the final pre-trial order. The same procedure should be followed with respect to any desired amendments to pleadings.

(17) Additional consideration has been given to a separation of the triable issues, and counsel for all parties are of the opinion that a separation of issues in this particular case would (would not) be feasible.

(18) The plaintiff(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

(19) The defendant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

(20) Any third-party defendant(s) and cross-claimant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

Note: In all instances possible, the parties should agree upon the triable issues and include them in this order in the form of a stipulation, in lieu of the three preceding paragraphs.

(21) Counsel for the parties announced that all witnesses are available and the case is in all respects ready for trial. The probable length of the trial is estimated to be.....days.

(22) Counsel for the parties represent to the court that, in advance of the preparation of this order, there was a full and frank discussion of settlement possibilities. Counsel for the plaintiff will immediately notify the clerk in the event of material change in settlement prospects.

Note: Counsel shall be required to conduct a frank discussion concerning settlement possibilities at the time of the conference of attorneys, and clients shall either be consulted in advance of the conference concerning settlement figures or be available for consultation at the time of the conference. The court will make inquiry at the time of trial as to whether this requirement was strictly observed.

.....

Counsel for Plaintiff(s)

.....

Counsel for Defendant(s)

Date:..... Approved and Ordered Filed.

.....

Judge Presiding

I certify that the foregoing General Rules for the Superior and District Courts, supplemental to the Rules of Civil Procedure, were adopted by the Supreme Court of North Carolina in conference on 14 May 1970, These General Rules shall be effective on and after 1 July 1970.

HUSKINS, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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SEARCHES AND SEIZURES
STATUTES
SUNDAYS AND HOLIDAYS

TAXATION
TRIAL
TRUSTS

UTILITIES COMMISSION
UNIFORM COMMERCIAL CODE

VENDOR AND PURCHASER

WILLS
WITNESSES

ADMINISTRATIVE LAW

§ 2. Exclusiveness of Statutory Remedy

Landowners were not required to apply to administrative agency for a zoning permit before they could be entitled to assert the inapplicability of the zoning ordinance, where the agency was not authorized to issue the permit. *Town of Hillsborough v. Smith*, 48.

Taxpayer who seeks a writ of mandamus to compel county commissioners to revalue all real property at its true value in money must first exhaust his administrative remedies in the county board of equalization and review and in the State Board of Assessments. *King v. Baldwin*, 316.

ADVERSE POSSESSION

§ 1. Actual, Hostile and Continuous Possession

A plaintiff can acquire title by adverse possession only if the possession is open, notorious, and adverse. *Board of Education v. Lamm*, 487.

§ 2. Hostile and Permissive Use

If a plaintiff enters into possession with the permission of the owner, such possession is not adverse unless plaintiff disclaims such arrangement and makes the owner aware of such disclaimer. *Bd. of Education v. Lamm*, 487.

§ 24. Competency and Relevancy of Evidence

In an action by a board of education to quiet title to property used as a school since 1923, the following evidence was admissible: (1) statement of the school board amounting to a declaration accompanying the act of taking possession of the property, and (2) property owner's declaration against interest. *Bd. of Education v. Lamm*, 487.

APPEAL AND ERROR

§ 1. Jurisdiction in General

The Supreme Court dismisses an appeal from the Court of Appeals where appellant failed to show that a substantial constitutional question was involved. *Bundy v. Ayscue*, 81.

§ 3. Review of Constitutional Questions

The Supreme Court dismisses an appeal from the Court of Appeals where appellant failed to show that a substantial constitutional question was involved. *Bundy v. Ayscue*, 81.

§ 24. Form of and Necessity for Objections, Exceptions and Assignments of Error

The rules of the Supreme Court have been dictated by experience and stem from a desire to expedite the public business. *S. v. Kirby*, 123.

The Supreme Court rules are mandatory and will be enforced. *Ibid.*

§ 26. Exceptions to the Judgment

Exceptions to the judgment present the face of the record for review. *S. v. Kirby*, 123.

§ 30. Objections and Assignments of Errors to Evidence

The rule that evidence is admissible over a general objection if it is com-

APPEAL AND ERROR — Continued

petent for any purpose held inapplicable where the challenged testimony violated the Dead Man's statute. *Whitley v. Redden*, 263.

§ 48. Harmless and Prejudicial Error in Admission of Evidence

Not every erroneous ruling on the admissibility of evidence will result in a new trial. *Bd. of Education v. Lamm*, 487.

§ 53. Error Cured by Verdict

In an action to recover on notes executed by defendant testator, failure of trial court to submit issues requiring a jury finding whether the payees had notice of testator's mental incapacity held cured by jury's verdict declaring testator to have been mentally competent at the time he executed the notes. *Whitley v. Redden*, 263.

§ 55. Orders Relating to Pleadings

In passing upon a demurrer the Supreme Court must accept as true the facts alleged. *Enterprises, Inc. v. Heim*, 475.

§ 57. Review of Findings

Findings of fact by a trial judge are conclusive when supported by competent evidence, even when there is a conflict in the evidence, but an exception to a finding of fact not supported by competent evidence must be sustained. *Morse v. Curtis*, 371.

§ 67. Force and Effect of Decisions of Supreme Court

A decision of the Supreme Court must be interpreted within the framework of the facts of the particular case. *Insurance Co. v. Insurance Co.*, 243.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

The likelihood of evasion of arrest is not a factor to be considered in determining right of an officer to arrest without warrant when the offense, felony or misdemeanor, has been committed in the presence of the officer or the officer has reasonable ground to believe the offense has been committed in his presence by the person to be arrested. *S. v. Roberts*, 98.

Law officers had reasonable ground to believe defendant was committing felony in their presence by possession of LSD where confidential informer advised officers that defendant had possession of and was selling LSD and officers observed defendant acting in a manner consistent with such information, and arrest of defendant by the officers without a warrant was legal. *Ibid.*

Reasonable ground for belief, which is an element of an officer's right to arrest without a warrant under G.S. 15-41(2) and under one of the situations provided for in G.S. 15-41(1), may be based upon information given to the officer by another. *Ibid.*

Except where authorized by statute, arrest without a warrant is illegal. *S. v. McCloud*, 518.

Defendant's overnight occupancy of a motel room with his girl friend did not justify a police officer's uninvited entry into the room to arrest defendant without a warrant on a charge that the offense of occupying a motel room for immoral purposes had been committed in the presence of the officer; consequently the arrest of defendant and the seizure of coins from the motel room were unlawful. *Ibid.*

The fact that defendant was not immediately taken before a magistrate following his arrest did not affect the validity of his trial. *Ibid.*

§ 5. Method of Making Arrest

Absent special or emergency circumstances, a police officer may not lawfully enter a private home without invitation or permission to make an arrest therein unless he first gives notice of his authority and purpose and makes a demand for and is refused entry. *S. v. Sparrow*, 499.

§ 6. Resisting Arrest

One who resists an illegal entry into a private home is not resisting an officer in the discharge of his duties. *S. v. Sparrow*, 499.

In prosecution for obstructing a police officer in his attempt to serve a juvenile arrest order on a minor in a house rented by defendants, trial court erred in failing to instruct the jury with regard to the rights of defendants if jury should find entry by the officers into the house was illegal, where the evidence for the State and for defendants was conflicting as to whether officers lawfully entered the house. *Ibid.*

Trial court properly denied motion of one defendant for nonsuit of a charge of obstructing a police officer in the performance of his duties. *Ibid.*

§ 9. Right to Bail

The purpose of bail is to assure the presence of the defendant at trial. *S. v. McCloud*, 518.

Defendant who was placed under $25,000 bond on a charge of possession of burglary tools and under $25,000 bond on the charge of breaking and entering and larceny failed to show that he was prejudiced by the large amount of bail. *Ibid.*

ASSIGNMENTS FOR BENEFIT OF CREDITORS

§ 1. Transactions Operating as Assignment

Allegations by a judgment creditor of an insolvent defendant that defendant assigned savings certificates to a corporation in exchange for the issuance to defendant of shares in the corporation, which shares defendant used to satisfy his own creditors, held insufficient to constitute an assignment for the benefit of creditors. *Wilson v. Development Co.*, 198.

An assignment for the benefit of creditors is ordinarily a conveyance by a debtor without consideration. *Ibid.*

ATTORNEY AND CLIENT

§ 5. Representation of Client

The rules of the Supreme Court are applicable to indigent defendants and their court-appointed counsel. *S. v. Benton*, 641.

The Supreme Court cannot be expected to continue the practice of indulging infractions of its rules by court-appointed counsel in criminal cases. *Ibid.*

AUTOMOBILES

§ 5. Transfer of Title

After 1 July 1961, no title passes to the purchaser of a motor vehicle until the certificate of title has been assigned by the vendor and delivered to

AUTOMOBILES — Continued

the vendee, and application has been made for a new certificate of title. *Insurance Co. v. Insurance Co.*, 243.

Where the vendor of an automobile involved in an accident on 27 May 1963 had transferred possession of the automobile to the vendee prior to the date of the accident, but vendor did not transfer title to vendee or execute and acknowledge an application for a new certificate of title until the day after the accident, the ownership of the automobile remained in the vendor on the date of the accident. *Ibid.*

For purposes of tort law and liability insurance coverage, the specific provisions of the Motor Vehicle Act relating to the transfer of ownership of motor vehicles must prevail over provisions of the Uniform Commercial Code relating to the passing of title to property. *Insurance Co. v. Hayes*, 620.

An insured under a non-owner's policy was covered thereunder when his recently purchased automobile was involved in an accident, the insured having acquired title to the automobile only when the seller and the insured complied with the mandatory provisions of G.S. 20-72(b) relating to the transfer of title. *Ibid.*

The General Assembly used the word "title" as a synonym for "ownership" in enacting the amendment to G.S. 20-72(b). *Ibid.*

§ 23. Brakes and Defects in Automobiles

Operator of motor vehicle upon public highways has duty to see that it is in reasonably good condition and properly equipped. *Dupree v. Batts*, 68.

§ 30. Speed in General

Driving in excess of lawful speed limit is negligence. *Dupree v. Batts*, 68.

§ 68. Sufficiency of Evidence of Defective Vehicle

Evidence held sufficient for jury on issue of negligence in placing oversized unbalanced tire on automobile. *Dupree v. Batts*, 68.

§ 105. Sufficiency of Evidence on Issue of Respondeat Superior

Proof of registration of automobile in name of femme defendant is insufficient to take case to jury as to her under G.S. 20-71.1, where complaint failed to allege that defendant driver was agent of femme defendant. *Dupree v. Batts*, 68.

§ 108. Family Purpose Doctrine

Evidence held insufficient to show that automobile was family purpose automobile. *Dupree v. Batts*, 68.

AVIATION

§ 1. Creation of Airport Authorities

The Federal Aviation Agency has full responsibility for the use of runways at municipal airports and the manner of approach and departure. *Hoyle v. Charlotte*, 293.

§ 4. Trespass and Injuries to Persons or Property on Ground

Landowner's evidence of frequent overflights through his airspace by commercial jets approaching and departing from municipal airport held sufficient to be submitted to the jury on question whether municipality appropriated a flight easement through plaintiff's airspace. *Hoyle v. Charlotte*, 293.

AVIATION — Continued

Landowner's cause of action for inverse condemnation accrued with the beginning of frequent and regular overflights of commercial jet aircraft through his airspace. *Ibid.*

Landowner's compensation for the inverse condemnation of his airspace by a municipal airport is the difference in the value of his property immediately before and immediately after the taking by the airport. *Ibid.*

BILLS AND NOTES

§ 20. Sufficiency of Evidence

In an action to recover on two sealed notes, one in the sum of $120,000 and the other $65,000, the trial court did not err in failing to submit to the jury an issue on the amount defendant owed plaintiff — although it might have been the better practice to do so — where the notes were introduced into evidence without objection. *Whitley v. Redden*, 263.

In an action to recover on notes executed by defendant testator, failure of trial court to submit issues requiring a jury finding whether the payees had notice of testator's mental incapacity held cured by jury's verdict declaring testator to have been mentally competent at the time he executed the notes. *Ibid.*

The introduction in evidence of past due notes under seal makes out a prima facie case as to the entire amount of the notes. *Ibid.*

BOUNDARIES

§ 10. Sufficiency of Description

Description in an option contract referring to the land to be conveyed as "a certain tract or parcel of land located in ..... Township, Guilford County, North Carolina, and described as follows: About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85" *is held* insufficient to comply with the statute of frauds, and consequently the option is unenforceable. *Carlton v. Anderson*, 564.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence

Evidence held sufficient for jury in prosecution for aiding and abetting in felonious breaking and entering of a cottage. *S. v. Catrett*, 86.

§ 6. Instructions

In prosecution for felonious breaking and entering, trial court properly charged on State's burden of proof and presented contentions of both parties. *S. v. Virgil*, 217.

§ 8. Punishment

Non-burglarious breaking and entering with felonious intent is punishable by imprisonment of not less than four months nor more than ten years. *S. v. Virgil*, 217.

§ 9. Elements of Offense of Possessing Housebreaking Implements

In a prosecution for possession of burglary tools, the burden is on the State to show that the person charged had in his possession implements of housebreaking and that such possession was without lawful excuse. *S. v. McCloud*, 518.

BURGLARY AND UNLAWFUL BREAKINGS — Continued

§ 10. Prosecution for Possessing Housebreaking Implements

In a prosecution for the possession of burglary tools, trial court committed prejudicial error in instructing the jury that defendant had the burden of proving lawful excuse. *S. v. McCloud*, 518.

COLLEGES AND UNIVERSITIES

The provisions of Chapter 1177, Session Laws of 1967, that exempt student loan revenue bonds from taxation by the State or by any of its subdivisions do not contravene N. C. Constitution, Art. V, § 5, which provides that property belonging to the State or to municipal corporations shall be exempt from taxation, the enumerated properties in Art. V, § 5, not including bonds issued by the State or any State agency. *Education Assistance Authority v. Bank*, 576.

Issuance of revenue bonds by the State Education Assistance Authority and the use of the proceeds therefrom for the sole purpose of making loans to needy college and vocational school students is for a public purpose. *Ibid.*

The Act authorizing student loan revenue bonds provides sufficient legislative standards whereby the appropriate agency can determine to which students the loans should be made. *Ibid.*

CONSPIRACY

§ 1. Elements of Civil Conspiracy

Where a person knowingly enters into a conspiracy with an employee to violate the employee's covenant not to engage in competitive employment, that person is jointly liable with the employee for the breach. *Enterprises v. Heim*, 475.

§ 5. Competency of Evidence of Criminal Conspiracy

Any declaration made by a conspirator in furtherance of the conspiracy and forming part of the *res gestæ* may be given in evidence against the other conspirators. *S. v. Sanders*, 598.

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions

One may not, in the same proceeding, seek advantage of a specific statute and at the same time deny the constitutionality of the statute. *Utilities Comm. v. Electric Membership Corp.*, 108.

§ 5. Separation of Powers

The Legislative Branch makes the laws, the Judicial Branch interprets them, and the Executive Branch executes them. *S. v. Hill*, 1.

§ 6. Legislative Powers in General

Appeals for changes in the law should be made to the Legislature; appeals for relief from its penalties after conviction should be made to the Governor. *S. v. Hill*, 1; *S. v. Roseboro*, 185.

§ 7. Delegation of Powers by the General Assembly

The Act authorizing student loan revenue bonds provides sufficient legislative standards whereby the appropriate agency can determine to which students the loans should be made. *Education Assistance Authority v. Bank*, 576.

CONSTITUTIONAL LAW — Continued

§ 9. Executive Powers

Appeals for changes in the law should be made to the Legislature; appeals for relief from its penalties after conviction should be made to the Governor. *S. v. Hill*, 1; *S. v. Roseboro*, 185.

§ 10. Judicial Powers

Supreme Court has neither the power to change the law nor to remit the penalty which the law provides for its violation. *S. v. Hill*, 1; *S. v. Roseboro*, 185.

§ 11. Police Power in General

Citizen's private property rights must be subordinated to reasonable regulations required by public interest. *Walker v. Charlotte*, 166.

§ 13. Safety

Statute and municipal ordinances authorizing municipal authorities to condemn unsafe buildings held constitutional. *Walker v. Charlotte*, 166.

§ 14. Morals and Public Welfare

A municipal ordinance which prohibits the sale on Sunday of mobile homes but which does not prohibit the sale on Sunday of conventional homes is valid. *Mobile Home Sales v. Tomlinson*, 661.

The validity of a statute promoting public health and welfare depends upon its reasonable relation to the accomplishment of the State's legitimate objective. *Ibid.*

§ 20. Equal Protection

Imposition of a sentence of life imprisonment upon defendant's conviction of accessory before the fact to the murder of her husband — the actual murderer having received a sentence of 20-30 years' imprisonment upon acceptance of his guilty plea to second-degree murder — was not cruel and unusual punishment nor did it deny defendant the equal protection of the laws in violation of the Fourteenth Amendment. *S. v. Benton*, 641.

§ 21. Right to Security in Person and Property

Constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure without a search warrant where no search is required and the contraband matter is fully disclosed and open to the eye and hand. *S. v. Virgil*, 217.

Where defendant was charged in a warrant with obtaining goods valued at $631.78 by fraudulent use of a revoked bank credit card, condition of suspension of defendant's prison sentence that defendant pay $7,326.29 for benefit of the bank is held a violation of constitutional prohibition of imprisonment for debt. *S. v. Caudle*, 550.

Suspension of a sentence of imprisonment for a criminal act on condition that the defendant pay obligations unrelated to such criminal act, however justly owing, is a use of the criminal process to enforce payment of a civil obligation in violation of Article I, § 16, Constitution of North Carolina. *Ibid.*

§ 23. Scope of Protection of Due Process

The test of whether a tax law violates due process is whether the tax-

CONSTITUTIONAL LAW — Continued

ing power exerted by the State bears fiscal relation to protection and benefits given by the State. *Transfer Corp. v. County of Davidson*, 19.

§ 28. Necessity for and Sufficiency of Indictment

A defendant is entitled to be informed of the accusations against him. *S. v. Riera*, 361.

§ 29. Right to Indictment and Trial by Duly Constituted Jury

Death sentence must be vacated under the decision of *Witherspoon v. Illinois* where trial court allowed State's challenges for cause to seven prospective jurors who stated simply a general objection to or conscientious scruples against capital punishment, and there being no jury verdict which will support a constitutional sentence, the cause must be remanded to superior court for a new trial as to guilt and punishment. *S. v. Ruth*, 36.

Neither Supreme Court nor superior court has authority to impose upon any defendant charged with any crime, to which he has entered a plea of not guilty, any sentence not supported by a verdict of guilty rendered by a jury properly selected and constituted. *Ibid.*

Trial court properly denied defendant's motion to quash the indictment on ground that persons of defendant's economic class and race were systematically excluded from the grand jury which returned the indictment. *S. v. Roseboro*, 185.

Record fails to disclose violation of defendant's constitutional rights in selection of trial jury where court found upon proper evidence that special veniremen were impartially selected from a properly compiled jury list and overruled challenges for cause by the State of prospective jurors opposed to capital punishment if they stated they could return a verdict based on the evidence and law as defined by the court. *Ibid.*

A contention by Negro defendants that the trial court violated their constitutional rights under the 14th Amendment by denying their motion to quash the jury venire and by preventing them from making an evidentiary showing on the motion held without merit. *S. v. Spencer*, 535.

Trial court properly excluded those jurors who testified on voir dire that they had already made up their minds that they would not return a verdict pursuant to which the defendant might lawfully be executed, whatever the evidence might be. *S. v. Sanders*, 598; *S. v. Miller*, 681.

§ 30. Due Process in Trial in General

After guilt in a capital case has been established by the jury, its recommendation as to punishment does not violate defendant's constitutional rights. *S. v. Roseboro*, 185.

Statute permitting jury to recommend life imprisonment for first degree murder is not unconstitutional in failing to prescribe any standard or rule to govern jury in its determination. *Ibid.*

Capital punishment for first degree murder was not abolished by former statute which permitted defendant to receive life imprisonment upon accepted plea of guilty. *Ibid.*

Total circumstances surrounding lineup do not reveal procedures unnecessarily suggestive and conducive to irreparable mistaken identification as to violate due process. *S. v. Austin*, 391.

Defendant's right to trial by impartial jury was not violated when two

CONSTITUTIONAL LAW — Continued

deputy sheriffs who were witnesses for the State were allowed to act as court officers or bailiffs during the trial. *S. v. Macon*, 466.

The fact that defendant was not immediately taken before a magistrate following his arrest did not affect the validity of his trial. *S. v. McCloud*, 518.

§ 31. Right of Confrontation, Time to Prepare Defense, and Access to Evidence

Trial court did not err in denying defendant's motion that State's counsel be required to permit defendant's counsel to examine typewritten transcript of notes made by SBI agent during interrogation of defendant. *S. v. Macon*, 466.

Due process requires that every defendant be allowed a reasonable opportunity to gather evidence. *S. v. Baldwin*, 690.

Motion by defense counsel for continuance so that defendant could be administered a brain wave test to determine if he was subject to pathological intoxication held properly denied by the trial court. *Ibid.*

§ 32. Right to Counsel

Defendant was not prejudiced by waiver of a preliminary hearing without counsel. *S. v. Hill*, 1.

Defendant charged with a capital offense may waive his right to counsel during in-custody interrogation. *S. v. McRae*, 308.

Defendant had no constitutional right to presence of counsel at lineup conducted in May 1967. *S. v. Austin*, 391.

§ 33. Self-incrimination

The privilege against self-incrimination relates only to testimonial or communicative acts of the person seeking to exercise the privilege and does not apply to acts not communicative in nature. *S. v. Strickland*, 253.

Use of talking motion picture of accused in a criminal prosecution does not violate accused's privilege against self-incrimination. *Ibid.*

§ 36. Cruel and Unusual Punishment

Imposition of a sentence of life imprisonment upon defendant's conviction of accessory before the fact to the murder of her husband — the actual murderer having received a sentence of 20-30 years' imprisonment upon acceptance of his guilty plea to second-degree murder — was not cruel and unusual punishment nor did it deny defendant the equal protection of the laws in violation of the Fourteenth Amendment. *S. v. Benton*, 641.

Where defendants appealed to the superior court from a conviction and sentence in the district court, the imposition of a greater sentence in superior court than sentence imposed in the district court did not violate defendants' constitutional rights. *S. v. Spencer*, 535; *S. v. Sparrow*, 499.

§ 37. Waiver of Constitutional Guaranties

Defendant charged with a capital offense may waive his right to counsel during in-custody interrogation. *S. v. McRae*, 308.

CONTEMPT OF COURT

§ 2. Direct or Criminal Contempt

A petitioner who was picketing the courthouse in which a superior court judge was holding trial was improperly punished for direct contempt on the

CONTEMPT OF COURT — Continued

ground that his conduct constituted a wilful interference with the trial, where there were no findings that petitioner had knowledge that the court was in session. *In re Hennis*, 571.

CONTRACTS

§ 4. Consideration

While a promise void for incapacity of the promisor will not support a counter-promise, if the void promise is actually performed, the performance may become sufficient consideration to support the counter-promise. *Olive v. Biggs*, 445.

§ 7. Contracts in Restraint of Trade

Where a person knowingly enters into a conspiracy with an employee to violate the employee's covenant not to engage in competitive employment, that person is jointly liable with the employee for the breach. *Enterprises v. Heim*, 475.

The complaint of a corporation states a cause of action against its former employee for violation of a covenant not to engage in silk screen processing or any other business competitive with plaintiff in the U.S. for a period of two years; such covenant is valid and enforceable. *Ibid.*

§ 21. Performance and Breach

While a promise void for incapacity of the promisor will not support a counter-promise, if the void promise is actually performed, the performance may become sufficient consideration to support the counter-promise. *Olive v. Biggs*, 445.

CONTROVERSY WITHOUT ACTION

§ 1. Nature and Scope of Remedy

Since the effective date of the new Code of Civil Procedure, 1 January 1970, there can be no further proceedings under the remedy known as "contro versy without action." *Land Corp. v. Styron*, 494.

§ 2. Hearings and Judgment

Controversy without action abated on effective date of new Code of Civil Procedure. *Land Corp. v. Styron*, 495.

CONVICTS AND PRISONERS

§ 1. Status

Status of defendant confined in county jail without privilege of bail from date of arrest until conclusion of his third trial was that of a person under indictment awaiting trial, and time thus spent may not be credited on his subsequent prison sentence. *S. v. Virgil*, 217.

CORPORATIONS

§ 12. Transactions Between Corporation and its Officers or Agents

Corporation is deemed to have acquired interest in savings certificates with notice of facts then known to shareholder assigning the certificates. *Wilson v. Development Co.*, 198.

CORPORATIONS — Continued

§ 21. Corporate Powers

The assets of a corporation are not held by it in trust but may be sold in the operation of its business. *Wilson v. Development Co.*, 198.

§ 28. Dissolution

A corporation upon dissolution is under a duty to apply its assets in accordance with the law. *Wilson v. Development Co.*, 198.

COUNTIES

§ 5.5. County Subdivision Regulation

As prerequisite to conviction for violation of G.S. 153-266.6, it must be alleged and established that an ordinance regulating the subdivision of land was adopted by the board of county commissioners in accordance with authority conferred by statute. *S. v. McBane*, 60.

Statutory provisions setting forth what may and what must be included in a county subdivision ordinance do not constitute authorizing the laying out, opening, altering, maintaining or discontinuing of highways or streets in violation of N. C. Constitution. *Ibid.*

In this prosecution for the misdemeanor of selling or transferring land subject to a county subdivision ordinance with reference to a plat showing a subdivision of land before such plat had been properly approved under the ordinance and recorded in violation of G.S. 153-266.6, the warrant is fatally defective where it fails to allege that defendant was the owner or agent of the owner of land within the platting jurisdiction granted to the county commissioners by G.S. 153-266.1. *Ibid.*

What G.S. 153-266.6 condemns as a misdemeanor is the description of land in any contract of sale, deed or other instrument of transfer by reference to a subdivision plat that has not been properly approved and recorded, it being immaterial whether the contract of sale, deed or other instrument of transfer is recorded. *Ibid.*

COURTS

§ 3. Original Jurisdiction of Superior Court

Superior court has no original jurisdiction of actions under Workmen's Compensation Act. *Morse v. Curtis*, 371.

§ 7. Appeals from Inferior Court to Superior Court

Upon appeal from the district court, a defendant is entitled to a trial *de novo* in the superior court even though he pleaded guilty in the district court. *S. v. Sparrow*, 499.

§ 9. Jurisdiction of Superior Court After Order of Another Superior Court Judge

A superior court judge in a habeas corpus proceeding has no authority to reverse or modify the order of another superior court judge which held petitioner in contempt of court; however, the judge did have authority to order the release of petitioner on bond pending review of the contempt order on certiorari by the Court of Appeals. *In re Hennis*, 571.

CRIMINAL LAW

§ 5. Mental Capacity in General

Insanity will exempt an accused from criminal responsibility only if, at the time he commits the act which would otherwise be illegal, he was incapable of knowing the nature and quality of his act or of distinguishing between right and wrong with relation thereto. *S. v. Benton*, 641.

§ 6. Mental Capacity as Affected by Intoxicating Liquor

Voluntary drunkenness is a legal excuse for those crimes in which a specific intent is an essential element. *S. v. Baldwin*, 690.

§ 9. Principals in the First or Second Degree; Aiders and Abettors

Principal in the first degree and second degree defined. *S. v. Benton*, 641.

If a person causes a crime to be committed through the instrumentality of an innocent agent, he is a principal in the crime and is punished accordingly. *Ibid.*

In consolidated trial of two defendants for homicide committed in perpetration of attempted armed robbery, trial court's instructions relating to guilt of each defendant if attempted robbery and murder were committed pursuant to a conspiracy to commit robbery were not unclear and ambiguous and were favorable to defendants. *S. v. Henderson*, 430.

§ 10. Accessories Before the Fact

Accessory before the fact defined. *S. v. Benton*, 641.

There can be an accessory before the fact to murder in the second degree. *Ibid.*

§ 13. Jurisdiction in General

A valid warrant or indictment is an essential of jurisdiction. *S. v. McBane*, 60.

§ 18. Jurisdiction on Appeals to Superior Court

Defendants who are convicted in district court are entitled to a trial de novo in superior court even though their trials in the inferior court were free from error. *S. v. Spencer*, 535.

§ 21. Preliminary Proceedings

Defendant was not prejudiced by waiver of a preliminary hearing without counsel. *S. v. Hill*, 1.

§ 22. Arraignment and Pleas

Defendant's remark during his arraignment, "No, sir, I have to plead guilty, your Honor," held not prejudicial. *S. v. Baldwin*, 690.

§ 25. Plea of Nolo Contendere

Evidence held sufficient to support defendant's contentions that his plea of nolo contendere was conditionally tendered and accepted in violation of N. C. Constitution, Art. I, § 13, and that the trial court was without authority to pronounce judgment thereon. *S. v. Norman*, 75.

§ 32. Burden of Proof and Presumptions

Prima facie evidence does not compel a verdict adverse to the defendant. *S. v. Riera*, 361.

CRIMINAL LAW — Continued

Ordinarily, the establishment of *prima facie* evidence does not shift the burden of the issue from the State to the defendant. *Ibid.*

§ 34. Evidence of Defendant's Guilt of Other Offenses

Where an officer, in response to the solicitor's question whether he had a warrant for defendant's arrest for felonious assault, inadvertently stated that he had two warrants charging defendant with assault, any harmful effect from the officer's reference to a second warrant was corrected by the court's instruction to the jury to disregard the evidence of a second warrant. *S. v. Perry*, 339.

Testimony that defendant was on "work release" the date the crime was committed held competent. *S. v. Williams*, 703.

§ 43. Photographs and Motion Pictures

The trial court in a homicide prosecution properly admitted the photograph used by a State's witness to illustrate his testimony relating to the position and appearance of deceased's body. *S. v. Barrow*, 381.

Trial court properly admitted photographs of the body of deceased and place where found for illustrative purposes. *S. v. Moore*, 142.

G.S. 114-19 does not prohibit admission of photographs and motion pictures of defendant charged with a misdemeanor. *S. v. Strickland*, 253.

Use of talking motion pictures of accused in a criminal prosecution does not violate accused's privilege against self-incrimination. *Ibid.*

Where motion pictures are relevant and authenticated, they are admissible in evidence. *Ibid.*

Trial court erred in admission of sound motion pictures containing incriminating in-custody statements of defendant without conducting a voir dire hearing in the absence of the jury to determine whether defendant's statements were voluntarily and understandingly made after he had been fully advised of his constitutional rights. *Ibid.*

Upon defendant's request, trial judge should allow defense counsel to preview motion picture offered into evidence so that he can intelligently enter objections. *Ibid.*

§ 50. Expert and Opinion Testimony in General

In homicide prosecution, trial court properly admitted testimony that on certain occasions defendant was "mad" or "nervous" and that deceased was "unconscious." *S. v. Moore*, 142.

Testimony by solicitor that State's witness had been reluctant to talk but suddenly began to talk and was very forthright and complete and gave an articulate statement is admissible as a shorthand statement of fact. *S. v. Henderson*, 430.

§ 53. Medical Expert Testimony

A pathologist who performed the autopsy on the body of deceased may testify in a homicide prosecution as to the cause of the death. *S. v. Perry*, 339.

§ 61. Evidence as to Tire Tracks

It was competent for an officer to testify that the tire tracks discovered at the scene of a homicide had the same tread as the tires on the car driven by defendant. *S. v. Williams*, 703.

CRIMINAL LAW — Continued

§ 63. Evidence as to Sanity of Defendant

The test of mental capacity is not limited to whether defendant knew right from wrong generally. *S. v. Benton*, 641.

§ 65. Evidence as to Emotional State

In homicide prosecution, trial court properly admitted testimony that on certain occasions defendant was "mad" or "nervous" and that deceased was "unconscious." *S. v. Moore*, 142.

§ 66. Evidence of Identity by Sight

Defendant had no constitutional right to presence of counsel at lineup conducted in May 1967. *S. v. Austin*, 391.

State's evidence on voir dire was clear and convincing that robbery victim's in-court identification of defendant was based upon his observation of defendant at time of the robbery and was in no way related to a pretrial lineup. *Ibid.*

Where defendants were granted a new trial by Court of Appeals for failure to hold voir dire hearing to determine admissibility of victim's in-court identification of defendant, trial court at retrial did not err in stating, in presence of victim, that voir dire hearing would be conducted in conformity with decision of the Court of Appeals, and in reading excerpt from that decision. *Ibid.*

Total circumstances surrounding lineup do not reveal procedures unnecessarily suggestive and conducive to irreparable mistaken identification as to violate due process. *Ibid.*

Robbery victim's in-court identification of three defendants was not tainted by pretrial photographic identification of two defendants or by accidental confrontation with third defendant at police station. *S. v. McPherson*, 482.

There is nothing unlawful or inherently wrong in the police submitting to an armed robbery victim photographs of seven or eight persons who fit generally the victim's description of the robbers for possible identification by the victim of his assailants. *Ibid.*

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

Record in a rape prosecution clearly establishes that the prosecuting witness' in-court identification of defendant as one of her assailants was based upon her observations of defendant before and during the rape and not upon a subsequent police station confrontation. *S. v. Blackwell*, 714.

The procedure whereby a rape victim identified her assailants from 15 or 20 photographs supplied by police officers was free from any suggestiveness that might have led to misidentification. *Ibid.*

In proper cases the voir dire procedure may be invoked concerning identification testimony. *Ibid.*

§ 71. "Short-hand" Statement of Facts

In homicide prosecution, trial court properly admitted testimony that on certain occasions defendant was "mad" or "nervous" and that deceased was "unconscious." *S. v. Moore*, 142.

CRIMINAL LAW — Continued

§ 75. Test of Voluntariness of Confession; Admissibility in General

Contention by 17 year old defendant in first degree murder prosecution that her confession made in the absence of counsel should have been excluded because of her age and immaturity is without merit. *S. v. Hill*, 1.

Evidence supported trial court's findings that the confession of defendant was freely and voluntarily made, despite defendant's contention that he had been drinking heavily and taking drugs prior to the confession. *S. v. Haynes*, 150.

In-custody statements attributed to a defendant are inadmissible either as substantive evidence or for impeachment purposes unless, after a voir dire hearing in the absence of the jury, the court makes factual findings based upon sufficient evidence that such statements were voluntarily and understandingly made after defendant had been fully advised of his constitutional rights. *S. v. Catrett*, 86.

Solicitor's attempt to cross-examine defendant with regard to defendant's purported in-custody statement that had not been previously introduced in evidence was not prejudicial where trial court instructed jury to disregard such examination. *S. v. Barrow*, 381.

Defendant's contention that he did not voluntarily make incriminating statements or intelligently waive his right to counsel while in police custody because he was unaware of the rule of law which could make him guilty of first degree murder even though he did not actually commit the act which ended deceased's life is without merit. *S. v. McRae*, 308.

Defendant charged with a capital offense may waive his right to counsel during in-custody interrogation. *Ibid.*

Where a defendant charged with homicide told his jailmate that he had shot the deceased, the jailmate's testimony of defendant's incriminating statement was admissible in evidence without the necessity of a *voir dire* hearing to determine whether the statement was freely and voluntarily made. *S. v. Perry*, 339.

Voluntariness remains the test of the admissibility of a confession. *S. v. McCloud*, 518.

A confession following an illegal arrest is not ipso facto involuntary and inadmissible. *S. v. McCloud*, 518.

Defendant's argument that his confession to police officers was involuntary in that the confession was triggered by the identification of stolen coins that had been illegally seized from defendant's motel room held without merit. *Ibid.*

Defendant's confession to the sheriff, which was made while defendant was under arrest for kidnapping and homicide and was confined in jail, *held* properly admitted in evidence, where there were findings, supported by evidence, that (1) the defendant himself had sought the interview with the sheriff in order to get the crimes "off his chest" and (2) the sheriff gave the defendant the necessary warnings prior to the confession. *S. v. Miller*, 681.

§ 76. Determination and Effect of Admissibility of Confession

Question of voluntariness of confession is for the trial judge in absence of jury and should not be submitted to the jury. *S. v. Hill*, 1.

When sound motion picture offered into evidence contains incriminating statements made by defendant from his knowledge of the offense, upon defendant's objection the trial judge must conduct a voir dire to determine the

CRIMINAL LAW — Continued

admissibility of the in-custody statements or admissions contained in the sound picture. *S. v. Strickland*, 253.

Trial judge's findings as to the voluntariness of a confession are conclusive on appeal when based on competent evidence in the record. *S. v. McRae*, 308.

Where a defendant charged with homicide told his jailmate that he had shot the deceased, the jailmate's testimony of defendant's incriminating statement was admissible in evidence without the necessity of a *voir dire* hearing to determine whether the statement was freely and voluntarily made. *S. v. Perry*, 339.

The Supreme Court must consider the entire record to determine whether a confession was in fact voluntary. *S. v. McCloud*, 518.

Defendant's confession was properly admitted in evidence. *S. v. Sanders*, 598.

The fact that defendant became nervous and highly excited during his confession does not impeach the confession. *S. v. Miller*, 681.

In the absence of an objection by defendant, the trial court is not required sua sponte to conduct a voir dire into the voluntariness of defendant's confession. *S. v. Williams*, 703.

The burden of showing the voluntariness of a confession is now upon the State. *Ibid.*

§ 79. Acts and Declarations of Companions

Testimony by a filling station attendant that as defendant and a companion were leaving the station he heard one of them say "shoot him" was competent, notwithstanding defendant was unable to identify the voices. *S. v. Saunders*, 598.

§ 80. Records and Private Writings

Trial court did not err in denying defendant's motion that State's counsel be required to permit defendant's counsel to examine typewritten transcript of notes made by SBI agent during interrogation of defendant. *S. v. Macon*, 466.

§ 84. Evidence Obtained by Unlawful Means

Trial court properly admitted LSD pills found upon defendant by search incident to his arrest without a warrant where officers had reasonable grounds to believe that defendant at the time of his arrest was committing a felony in their presence by possession of the LSD. *S. v. Roberts*, 98.

Piece of chrome removed from exterior of defendant's car without a search warrant was gained by a lawful search and seizure and was properly admitted into evidence where it was fully disclosed to the naked eye and no search was required to obtain it. *S. v. Virgil*, 217.

Officers lawfully searched defendant's room and interior of his automobile without a warrant where defendant was present and consented to the search. *Ibid.*

Warnings required by *Miranda* are inapplicable to searches and seizures. *Ibid.*

Officers investigating a crime are not required to preface a request to search the premises with advice to the occupant that he does not have to

consent to the search, that he has a right to insist on a search warrant, and that fruits of the search may be used against him. *Ibid.*

Defendant's overnight occupancy of a motel room with his girl friend did not justify a police officer's uninvited entry into the room to arrest defendant without a warrant on a charge that the offense of occupying a motel room for immoral purposes had been committed in the presence of the officer; consequently the arrest of defendant and the seizure of coins from the motel room were unlawful. *S. v. McCloud*, 518.

The warrantless seizure of burglary tools and other articles from the car in which defendant was riding as a passenger was lawful, and these tools and articles were properly admitted in the trial of defendant for possession of burglary tools. *Ibid.*

§ 86. Credibility of Defendant and Parties Interested

Solicitor's attempt to cross-examine defendant with regard to defendant's purported in-custody statement that had not been previously introduced in evidence was not prejudicial where trial court instructed jury to disregard such examination. *S. v. Barrow*, 381.

A defendant is entitled to full opportunity to explain his answers in response to impeaching questions. *S. v. Sanders*, 598.

Defendant's testimony on cross-examination concerning his prior convictions was not prejudicial. *S. v. Blackwell*, 714.

§ 88. Cross-examination

The limits of legitimate cross-examination are largely within the discretion of the trial judge. *S. v. McPherson*, 482.

§ 91. Time of Trial and Continuance

Motion by defense counsel for continuance so that defendant could be administered a brain wave test to determine if he was subject to pathological intoxication held properly denied by the trial court. *S. v. Baldwin*, 690.

§ 98. Custody of Witnesses

The practice of sequestration of witnesses is discretionary with the trial court, whose ruling thereon is not reviewable in the absence of abuse of discretion. *S. v. Barrow*, 381.; *S. v. Sparrow*, 499.

§ 99. Expression of Opinion by Court on Evidence During Trial

Defendants were not prejudiced by remarks made by court in presence of jury during exchanges with defendant's counsel. *S. v. McPherson*, 482.

§ 101. Custody of Jury; Witnesses

A State's witness is disqualified to act as "custodian" or "officer in charge" of the jury in a criminal case. *S. v. Macon*, 466.

§ 102. Argument and Conduct of Solicitor

Trial court did not err in refusing to have the solicitor's argument to the jury recorded. *S. v. Sparrow*, 499.

In a first degree murder case it was permissible for the solicitor to argue that the jury should find defendant guilty of murder without any recommendation that punishment be life imprisonment. *S. v. Williams*, 703.

CRIMINAL LAW — Continued

§ 103. Function of Court and Jury

In a criminal case the jury is at full liberty to acquit the defendant if it is not satisfied from all the evidence — including *prima facie* evidence — that defendant's guilt has been proven beyond a reasonable doubt. *S. v. Riera*, 361.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

When the State's evidence tends only to exonerate a defendant from a particular charge, his motion for judgment of nonsuit must be allowed. *S. v. Hamby*, 674.

§ 112. Instructions on Burden of Proof and Presumptions

The trial court did not commit prejudicial error in using in one portion of the charge the words "if you find from the evidence" instead of "if you find from the evidence beyond a reasonable doubt." *S. v. Henderson*, 430.

The charge of the trial court, when considered contextually, properly placed upon the State the burden of proving beyond a reasonable doubt every essential element of the offenses charged. *S. v. Miller*, 681.

§ 113. Statement of Evidence and Application of Law Thereto

It is not error for the court to fail to define words of common usage in the absence of a request for such instructions. *S. v. Jennings*, 157.

The recapitulation of all the evidence is not required. *S. v. Sanders*, 598.

In consolidated trial of three defendants for kidnapping and rape, charge of the court, when considered as a whole, is not subject to construction that jury should convict all three defendants if it found one defendant guilty of the particular crime charged. *S. v. Tomblin*, 273.

§ 115. Instructions on Lesser Degree of Crime

Where there is evidence of defendant's guilt of a lesser included offense, the court must charge thereon. *S. v. Riera*, 361.

§ 117. Charge on Character Evidence and Credibility of Witness

Trial court properly instructed jury to scrutinize carefully the testimony of defendant as a witness interested in the outcome of the verdict. *S. v. Barrow*, 381.

§ 118. Charge on Contentions of the Parties

Trial court's statement of the State's contentions was supported by evidence from which inferences related by the court could logically be drawn. *S. v. Virgil*, 217.

Defendants were not prejudiced by the court's frequent reference to discrepancies and conflicts in the evidence while reviewing the contentions of the State. *S. v. Henderson*, 430.

Defendants were not prejudiced when the court, while reviewing the contentions of the State, expressed the view that he thought a witness "put it very accurately" in stating that there was a marked reluctance on the part of the State's principal witness to testify against one defendant. *Ibid.*

§ 126. Unanimity of Verdict and Polling the Jury

Certificate obtained from clerk of superior court shows that when the jury was polled each juror assented to the verdict of first degree murder with recommendation of life imprisonment. *S. v. Henderson*, 430.

CRIMINAL LAW — Continued

§ 127. Arrest of Judgment

A motion in arrest of judgment may be made at any time, even in the Supreme Court on appeal. *S. v. Kirby*, 123.

§ 128. Discretionary Power of Court to Declare Mistrial

In prosecution for homicide of defendant's wife, trial court did not err in failing to declare a mistrial when, in response to questions by solicitor as to whether defendant had made a statement to two State's witnesses concerning what he would do to his wife if she left him, one witness stated on four occasions and another on one occasion that defendant stated "he had killed one person," where trial judge struck witness' unresponsive answers and instructed jury not to consider them, and defendant made no motion for mistrial. *S. v. Moore*, 142.

Mistrial may be ordered in capital cases without consent of accused only in cases of necessity in attaining ends of justice. *Ibid.*

§ 130. New Trial for Misconduct Affecting Jury

Defendant's right to trial by impartial jury was not violated when two deputy sheriffs who were witnesses for the State were allowed to act as court officers or bailiffs during the trial. *S. v. Macon*, 466.

A State's witness is disqualified to act as "custodian" or "officer in charge" of the jury in a criminal case. *Ibid.*

§ 132. Setting Aside Verdict as Contrary to Weight of Evidence

Motion to set aside verdict as contrary to weight of evidence is addressed to discretion of trial judge. *S. v. Henderson*, 430.

§ 134. Form and Requisites of Judgment

A judgment by a court in a criminal case must conform strictly to the statute, and any variation from its provisions, either in the character or the extent of punishment, renders the judgment void. *S. v. Ruth*, 36.

§ 135. Judgment and Sentence in Capital Cases

Where the jury returns a verdict of guilty of murder in the first degree without a recommendation that the punishment be imprisonment for life, the trial court is required to impose the death sentence. *S. v. Hill*, 1; *S. v. Roseboro*, 185.

Jury's verdict was sufficient to support imposition of the death penalty where the jury foreman announced that the jury found defendant guilty of first degree murder and, upon inquiry by the court, stated that the jury made no recommendation with that verdict. *S. v. Hill*, 1.

The repeal by the 1969 Legislature of G.S. 15-162.1, which provided for a sentence of life imprisonment to be imposed upon an accepted plea of guilty of a capital crime, did not modify, change, add to or take from G.S. 14-17, which provides for the sentence to be imposed for first degree murder upon a verdict returned by a jury. *Ibid.*

While G.S. 14-17 gives the jury discretion to "recommend" life imprisonment for first degree murder, it confers no discretionary power on superior court or Supreme Court to impose sentence different from that fixed by the jury. *S. v. Ruth*, 36.

Death sentence must be vacated under the decision of *Witherspoon v. Illinois* where trial court allowed State's challenges for cause to seven pros-

pective jurors who stated simply a general objection to or conscientious scruples against capital punishment, and there being no jury verdict which will support a constitutional sentence, the cause must be remanded to superior court for a new trial as to guilt and punishment. *Ibid.*

After guilt in a capital case has been established by the jury, its recommendation as to punishment does not violate defendant's constitutional rights. *S. v. Roseboro*, 185.

Capital punishment for first degree murder has not been abolished by former statute which provided for sentence of life imprisonment upon acceptance of plea of guilty. *Ibid.*

Statute permitting jury to recommend life imprisonment for first degree murder is not unconstitutional in failing to prescribe any standard or rule to guide jury in its determination. *Ibid.*

Trial court properly excluded those jurors who testified on voir dire that they had already made up their minds that they would not return a verdict pursuant to which the defendant might lawfully be executed whatever the evidence might be. *S. v. Sanders*, 598; *S. v. Miller*, 681.

The question whether G.S. 14-17 and G.S. 15-162.1 when construed together in the light of *U. S. v. Jackson* will render unenforceable the death penalty in this State held immaterial when G.S. 15-162.1 was repealed prior to the commission of the crime. *S. v. Miller*, 681.

The statute providing that the jury, as a part of its guilty verdict, might by recommendation fix the punishment at life imprisonment rather than death, held not an unlawful division of powers between the court and jury. *Ibid.*

Although the jury's verdict of "recommendation of mercy" in a first-degree murder prosecution was irregular, the trial court correctly imposed a sentence of life imprisonment. *S. v. Baldwin*, 690.

A defendant in a first-degree murder prosecution is not entitled to a bifurcated jury trial. *S. v. Sanders*, 598; *S. v. Blackwell*, 714.

§ 137. Conformity of Judgment to Indictment, Verdict or Pleas

Neither Supreme Court nor superior court has authority to impose upon any defendant who pleads not guilty sentence not supported by a verdict of guilty returned by a jury properly selected and constituted. *S. v. Ruth*, 36.

No sentence to imprisonment or any other punishment for a criminal offense can be valid unless supported by a plea of guilty, a plea of nolo contendere, or verdict of a properly constituted jury. *Ibid.*

§ 138. Severity of Sentence and Determination Thereof

Appeals for changes in the law should be made to the Legislature; appeals for relief from its penalties after conviction should be made to the Governor. *S. v. Hill*, 1.

While credit must be given for time served under a previous sentence for the same conduct, a defendant is not entitled to credit for time spent in custody while awaiting trial. *S. v. Virgil*, 217.

Defendant is not entitled to credit for time spent in custody on capital charge without privilege of bail from date of his arrest until conclusion of his third trial. *Ibid.*

Statute requiring credit on a prison sentence for time spent in custody pending appeal is not retroactive. *Ibid.*

CRIMINAL LAW — Continued

Defendant was convicted as an accessory before the fact to the murder of her husband and was sentenced to life imprisonment; the actual murderer was sentenced to 20-30 years' imprisonment on his guilty plea to second-degree murder. *Held:* Defendant's objection that her sentence exceeded that of the murderer is without merit. *S. v. Benton*, 641.

Where defendants appealed to the superior court from a conviction and sentence in the district court, the imposition of a greater sentence in superior court than sentence imposed in the district court did not violate defendants' constitutional rights. *S. v. Spencer*, 535; *S. v. Sparrow*, 499.

In an obstructing traffic prosecution, the sentencing of one defendant to a nine month jail term and the sentencing of the other defendant to a six month jail term were lawful; but where pending appeal of defendants the legislature reduced the maximum term of imprisonment to six months, the defendant who received nine months is entitled to mitigation of his sentence to six months. *S. v. Spencer*, 535.

§ 143. Revocation of Suspension of Sentence

A defendant has a right to rely upon conditions of a suspended sentence. *S. v. Caudle*, 550.

Defendant's consent to suspension of a prison sentence does not preclude him from contesting the reasonableness of the condition which he has broken when such breach is made ground for putting sentence into effect. *Ibid.*

A condition which is a violation of defendant's constitutional right is per se unreasonable and subject to attack by defendant upon the State's subsequent motion to put the sentence into effect for violation of that condition. *Ibid.*

Where defendant was charged in a warrant with obtaining goods valued at $631.78 by fraudulent use of a revoked bank credit card, condition of suspension of defendant's prison sentence that defendant pay $7,326.29 for benefit of the bank is held a violation of constitutional prohibition of imprisonment for debt. *Ibid.*

Suspension of a sentence of imprisonment for a criminal act on condition that the defendant pay obligations unrelated to such criminal act, however justly owing, is a use of the criminal process to enforce payment of a civil obligation in violation of Article I, § 16, Constitution of North Carolina. *Ibid.*

§ 146. Nature and Grounds of Appellate Jurisdiction in Criminal Cases

Supreme Court has neither power to change the law nor to remit the penalty which the law provides for its violation. *S. v. Hill*, 1.

The rules of the Supreme Court are mandatory and will be enforced in criminal cases. *S. v. Kirby*, 123; *S. v. Benton*, 631; *S. v. Baldwin*, 690.

The Supreme Court cannot be expected to continue the practice of indulging infractions of its rules by court-appointed counsel in criminal cases. *S. v. Benton*, 641.

An accused may not proceed on one theory in the trial court and demand relief in the appellate court upon another theory. *S. v. Blackwell*, 714.

In appeal from sentence imposed on 16 year old defendant, Supreme Court cannot consider questions and arguments based on defendant's age which do not involve matters of law or legal inference. *S. v. Roseboro*, 185.

Assertion by defendant for the first time in his notice of appeal to the Supreme Court that he was a tenant of the room wherein he lay asleep and

CRIMINAL LAW — Continued

drunk when a ring was taken from his finger by a police officer, and that the constitutional question which he now attempts to raise with reference to the taking of the ring was not raised in the Court of Appeals because defendant's status as a tenant was only recently communicated to defendant's attorney, if true, does not exempt defendant from the rule that constitutional questions not properly raised in the trial court and the Court of Appeals will not be considered by the Supreme Court. *S. v. Mitchell*, 404.

§ 154. Case on Appeal

Argument of counsel need not be recorded and included in the record on appeal. *S. v. Sparrow*, 499.

§ 160. Correction of Record

The correction of the official minutes of the superior court must be made in the superior court. *S. v. Accor*, 567.

Criminal action is remanded to the superior court for correction of patent errors appearing on the face of the official minutes, where (1) the minute entries are in irreconcilable conflict with respect to the verdicts against the defendants and (2) the minute entries show that fourteen jurors were selected, sworn and empanelled but the entries are silent as to when the alternate jurors were excused. *Ibid.*

§ 161. Necessity for, Form and Requisites of, Exceptions and Assignments of Error

Assignments of error should expressly point out the alleged errors relied upon. *S. v. Kirby*, 123.

Exception to the judgment presents the face of the record for review. *Ibid.*

Assignment of error to the examination and selection of jurors, which referred to 152 pages of *voir dire* examination without specifying a single instance in which a juror was improperly excused, is ineffective. *Ibid.*

An assignment of error must show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. *S. v. Benton*, 641.

A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Ibid.*

An assignment of error which attempts to present several questions of law is broadside and ineffective. *S. v. Kirby*, 123; *S. v. Blackwell*, 714.

Even though defendant in a first-degree murder prosecution did not except to the verdict or to the judgment of life imprisonment based thereon, his appeal was an exception to the judgment and to any other matter of law appearing on the face of the record; consequently, the Supreme Court could consider the irregularity in the verdict and determine that defendant had not been prejudiced thereby. *S. v. Baldwin*, 690.

§ 162. Objections, Exceptions, and Assignments of Error to Evidence

Rules relating to objections to evidence. *S. v. Blackwell*, 714.

Assignment of error relating to restrictions placed on defendant's cross-examination of the State's witnesses is ineffectual when it does not contain any question put to any witness. *S. v. Kirby*, 123.

Unless an objection is made in ample time as soon as the opponent has the opportunity to learn the evidence is objectionable, the opponent will be held to have waived it. *S. v. Sanders*, 598.

CRIMINAL LAW — Continued

§ 163. Exceptions and Assignments of Error to Charge

Assignment of error to the charge should quote that portion of the charge to which appellant objects. *S. v. Kirby*, 123; *S. v. Benton*, 641.

An assignment of error based on a failure to charge should set out the defendant's contention as to what the court should have charged. *S. v. Benton*, 641.

Objections to the charge in reviewing evidence and stating contentions of the parties must be made before the jury retires. *S. v. Virgil*, 217.

Assignment of error to the entire charge of the court is broadside and ineffectual. *S. v. Baldwin*, 690.

Assignment of error that the charge was not impartial is broadside. *Ibid.*

Assignments of error which quote excerpts from the charge and merely assert that the court erred in so charging the jury are insufficient. *S. v. Henderson*, 430.

An exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge on the same or another aspect of the case. *Ibid.*

An exception to a portion of the charge embracing a number of propositions is insufficient if any of the propositions are correct. *Ibid.*

§ 166. The Brief

Assignments of error not discussed in the brief are deemed abandoned. *S. v. Kirby*, 123; *S. v. Henderson*, 430; *S. v. Baldwin*, 690.

§ 168. Harmless and Prejudicial Error in Instructions

Trial court's instruction relating to defendant's guilt as an accessory before the fact to the murder of her husband held not prejudicial. *S. v. Benton*, 641.

The trial court did not commit prejudicial error in using in one portion of the charge the words "if you find from the evidence" instead of "if you find from the evidence beyond a reasonable doubt." *S. v. Henderson*, 430.

Defendants were not prejudiced by the court's frequent reference to discrepancies and conflicts in the evidence while reviewing the contentions of the State. *Ibid.*

Defendants were not prejudiced when the court, while reviewing the contentions of the State, expressed the view that he thought a witness "put it very accurately" in stating that there was a marked reluctance on the part of the State's principal witness to testify against one defendant. *Ibid.*

Defendants were not prejudiced by court's confusing statements in the charge relating to purpose of the State's rebuttal evidence. *Ibid.*

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of testimony is not prejudicial; this rule also applies to questions asked on cross-examination. *S. v. Kirby*, 123.

Trial court did not err in denying request of defense counsel to permit answer of witness to be inserted in trial record after court had sustained objection to question asked the witness. *S. v. McPherson*, 482.

CRIMINAL LAW — Continued

Any prejudice from officer's inadvertent testimony was properly cured by trial court's instruction to the jury to disregard the testimony. *S. v. Perry*, 339.

Where the court sustains objection to questions asked by the solicitor, no prejudice results. *S. v. Barrow*, 381.

The admission of technically incompetent evidence is not prejudicial unless it is made to appear that a different result would have likely ensued had the evidence been struck. *Ibid.*

Admission of incompetent evidence is not ground for new trial where there was no objection at time evidence was offered, even though appellant asserts evidence was obtained in violation of his constitutional rights. *S. v. Mitchell*, 404.

§ 170. Harmless and Prejudicial Error in Remarks of Court, Argument of Solicitor and Incidents During Trial

Improper argument of counsel is cured by the court's action promptly sustaining an objection thereto and cautioning the jury not to consider it. *S. v. Sparrow*, 499.

Trial court did not err in refusing to have the solicitor's argument to the jury recorded. *Ibid.*

Defendant's remark during his arraignment, "No sir, I have to plead guilty, your Honor," held not prejudicial. *S. v. Baldwin*, 690.

§ 174. Questions Necessary to Determination of Appeal

Assertion by defendant for the first time in his notice of appeal to the Supreme Court that he was a tenant of the room wherein he lay asleep and drunk when a ring was taken from his finger by a police officer, and that the constitutional question which he now attempts to raise with reference to the taking of the ring was not raised in the Court of Appeals because defendant's status as a tenant was only recently communicated to defendant's attorney, if true, does not exempt defendant from the rule that constitutional questions not properly raised in the trial court and the Court of Appeals will not be considered by the Supreme Court. *S. v. Mitchell*, 404.

§ 175. Review of Findings and Discretionary Orders

The Supreme Court must consider the entire record to determine whether a confession was in fact voluntary. *S. v. McCloud*, 518.

§ 176. Review of Judgments on Motion to Nonsuit

A motion for nonsuit does not properly bring challenged testimony before the appellate court for review. *S. v. Blackwell*, 714.

§ 178. Law of the Case

Motion for nonsuit in second trial must be denied where on prior appeal Supreme Court determined upon substantially the same evidence that motion for nonsuit was properly denied. *S. v. Moore*, 142.

DEATH

§ 3. Nature and Grounds of Action for Wrongful Death

The 1969 Act rewriting the wrongful death statute created a new right of action for wrongful death, and the Act does not have retroactive application to an action for wrongful death when the death occurred prior to April 14, 1969. *Smith v. Mercer*, 329.

ELECTRICITY

§ 2. Service to Customers

In the assignment of rural territorial rights to electricity suppliers pursuant to G.S. 62-110.2, the Utilities Commission has authority to direct that an electric membership cooperative alone serve all users in a rural service area whose demand for power does not exceed 400 KW and that any users therein whose demand exceeds 400 KW be served either by the cooperative or by electric power companies, with the users to choose the supplier. *Utilities Comm. v. Electric Membership Corp.*, 108.

In assigning rural service areas to electric suppliers, the Utilities Commission may consider development of natural resources and employment opportunities, capital required for supplying electric power to large users, and the preference of potential users for one supplier over another. *Ibid.*

Order of the Utilities Commission setting a demand level of 400 KW as the boundary between areas to be served by a cooperative and a power company held supported by the findings of fact. *Ibid.*

EMINENT DOMAIN

§ 1. Nature and Extent of Power

Where private property is taken by a municipality under circumstances in which landowner has no applicable statutory remedy, the owner in the exercise of his constitutional rights may maintain an action to obtain just compensation for the taking. *Hoyle v. Charlotte*, 293.

Access road for property landlocked by construction of a controlled-access highway is a "frontage road" within the meaning of G.S. 136-89.52. *Highway Comm. v. School*, 556.

§ 2. Acts Constituting a "Taking"

Overflights by commercial jet aircraft in departing from and approaching a municipal airport constitute a taking of landowner's airspace where such flights at low altitudes substantially impair the landowner's use thereof. *Hoyle v. Charlotte*, 293.

§ 3. What is a "Public Purpose"

Question of whether a proposed road will serve a public or private purpose is one of law for the courts. *Highway Comm. v. School*, 556.

Condemnation of land by State Highway Commission to provide access to private property which otherwise would have been landlocked by construction of controlled-access highway was for a public purpose and was authorized by statute. *Ibid.*

Highway Commission cannot take land of one property owner for the sole purpose of constructing a road for the private use of another. *Ibid.*

§ 4. Delegation of Power

Municipal airport had power to condemn a flight easement over landowner's property. *Hoyle v. Charlotte*, 293.

§ 5. Amount of Compensation

A plaintiff cannot, by deferring the institution of his action for inverse condemnation, select a later date for determination of the compensation to which he is entitled. *Hoyle v. Charlotte*, 293.

EMINENT DOMAIN — Continued

§ 13. Action by Owner for Compensation or Damages

Where landowner's evidence was to the effect that defendant municipality appropriated a flight easement over his airspace beginning January or February 1962 with frequent flights of jet aircraft at low altitudes, defendant's easement vested in the municipality on that date, which date also determined landowner's compensation; consequently, trial court erred in instructing jury that compensation was determinable with reference to market value of landowner's property at time of the trial in December 1968. *Hoyle v. Charlotte*, 293.

ESTATES

§ 1. Nature and Incidents of Estates in Fee

In adjudicating the relative property rights in the airspace, the courts generally have found it necessary to modify the ancient maxim, "he who owns the soil owns it to the heavens." *Hoyle v. Charlotte*, 293.

EVIDENCE

§ 3. Facts Within Common Knowledge

It is common knowledge that liability insurance must be renewed periodically and that renewal policy often has slight modifications as to vehicles or employees insured. *Galligan v. Chapel Hill*, 172.

§ 8. Prima Facie Proof

Prima facie evidence is no more than sufficient evidence to establish the vital facts without further proof. *S. v. Riera*, 361.

§ 11. Transactions With Decedent or Lunatic

In action to recover on two notes executed and given by the decedent to plaintiff, plaintiff's testimony concerning his personal transactions with decedent, which testimony was purportedly offered on the issue of decedent's mental competency to execute the notes, held inadmissible under the Dead Man's statute, notwithstanding trial court restricted the testimony to the issue of mental competency. *Whitley v. Redden*, 263.

§ 17. Competency of Negative Evidence

Plaintiff's evidence that none of the survivors of a crossing accident heard a signal prior to the collision with defendant's locomotive held sufficient to justify a jury finding that defendant failed to give any warning. *Brown v. R. R. Co.*, 398.

§ 34. Admissions and Declarations Against Interest by Parties to the Action

Ordinarily, evidence of an offer to compromise or settle a disputed claim will not be admitted. *Bd. of Education v. Lamm*, 487.

In an action by a board of education to quiet title to school property, certain statements of the property owner were admissible as declarations against interest, but other statements were inadmissible as self-serving declarations. *Ibid.*

Declaration against interest defined. *Ibid.*

EVIDENCE — Continued

§ 42. Nonexpert Opinion Evidence as Constituting "Shorthand" Statement of Fact

Testimony by solicitor that State's witness had been reluctant to talk but suddenly began to talk and was very forthright and complete and gave an articulate statement is admissible as a shorthand statement of fact. *S. v. Henderson*, 430.

§ 50. Expert Medical Testimony

The "same locality" rule is no longer the standard by which to judge a doctor's procedures, but a medical expert may testify as to a simple operative procedure when he is familiar with practice in "similar communities." *Wiggins v. Piver*, 134.

FRAUDS, STATUTE OF

§ 7. Contracts to Convey or Devise

A joint will executed by a husband and wife may itself be a sufficient memorandum of a contract between the two that the survivor will not revoke the document as his will. *Olive v. Biggs*, 445.

Description in an option contract referring to the land to be conveyed as "a certain tract or parcel of land located in ..... Township, Guilford County, North Carolina, and described as follows: About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85" *is held* insufficient to comply with the statute of frauds, and consequently the option is unenforceable. *Carlton v. Anderson*, 564.

GRAND JURY

§ 3. Challenge to Composition

Trial court properly denied defendant's motion to quash indictment on ground that persons of defendant's economic class and race were systematically excluded from grand jury which returned indictment. *S. v. Roseboro*, 185.

HABEAS CORPUS

§ 2. Determination of Legality of Restraint

Superior court properly denied a prisoner's petition for writ of habeas corpus. *Surratt v. State*, 725.

A superior court judge in a habeas corpus proceeding had no authority to reverse or modify the order of another superior court judge which held petitioner in contempt of court; however, the judge did have authority to order the release of petitioner on bond pending review of the contempt order on certiorari by the Court of Appeals. *In re Hennis*, 571.

§ 4. Review

Except in cases involving custody of minor children an appeal is not allowed from a judgment entered in a habeas corpus proceeding. *Surratt v. State*, 725.

HIGHWAYS AND CARTWAYS

§ 1. Powers of Highway Commission

Highway Commission cannot take land of one property owner for the sole purpose of constructing a road for the private use of another. *Highway Comm. v. School*, 556.

HIGHWAYS AND CARTWAYS — Continued

§ 4. What Constitutes a State Highway or Public Road

Access road for property landlocked by construction of a controlled access highway is a "frontage road" within the meaning of G.S. 136-89.52. *Highway Comm. v. School*, 556.

§ 10. Obstruction of Public Road

Conduct of defendants in walking back and forth across a public highway for five minutes and thereby causing vehicular traffic on the highway to come to a stop, held within the purview of the statute making it unlawful for any person wilfully to stand upon a highway and impede the regular flow of traffic. *S. v. Spencer*, 535.

In an obstructing traffic prosecution, the sentencing of one defendant to a nine month jail term and the sentencing of the other defendant to a six month jail term were lawful; but where pending appeal of defendants the legislature reduced the maximum term of imprisonment to six months, the defendant who received nine months is entitled to mitigation of his sentence to six months. *Ibid.*

HOMICIDE

§ 2. Parties and Offenses

There can be an accessory before the fact to murder in the second degree. *S. v. Benton*, 641.

Parties to a homicide are either principals or accessories. *Ibid.*

§ 4. Murder in the First Degree

Murder in the first degree is a specific intent crime in that a specific intent to kill is a necessary ingredient of premeditation and deliberation. *S. v. Baldwin*, 690.

Premeditation means "thought beforehand" for some length of time, however short. *S. v. Perry*, 339; *S. v. Sanders*, 598.

Whether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions; no inference of the absence of deliberation and premeditation arises from intoxication as a matter of law. *S. v. Hamby*, 674.

§ 5. Murder in the Second Degree

Murder in the second degree defined. *S. v. Jennings*, 157.

§ 6. Manslaughter

Manslaughter defined. *S. v. Roseboro*, 185.

Where there are circumstances strongly calculated to excite passion of terror, the homicide may be mitigated from murder to manslaughter. *S. v. Jennings*, 157.

§ 8. Effect of Intoxication Upon Mental Capacity

It is ordinarily for the jury to determine whether the mental condition of the accused was so far affected by intoxication that he was unable to form a guilty intent to kill. *S. v. Hamby*, 674.

The fact that, after his intent to kill was deliberately and premeditately formed when sober, defendant voluntarily drank enough intoxicants to produce pathological intoxication and then executed his murderous intent, *held* not to

HOMICIDE — Continued

constitute a valid defense to murder in the first degree in this State. *S. v. Baldwin*, 690.

§ 9. Self-defense

On question of self-defense, whether defendant is free from blame or fault will be determined by his conduct at the time and place of the killing. *S. v. Jennings*, 157.

The fact that defendant has previously engaged in immoral conduct with the wife of deceased does not, standing alone, deprive him of his right of self-defense. *Ibid.*

§ 12. Indictment

An indictment drawn pursuant to G.S. 15-144 is sufficient to sustain a verdict of murder in the first degree, notwithstanding there was no allegation that the killing was done either with premeditation and deliberation or in the perpetration or attempted perpetration of a robbery; if defendant desires further information, he should apply for a bill of particulars. *S. v. Haynes*, 150.

§ 14. Presumptions and Burden of Proof

Evidence that deceased died from a wound inflicted intentionally by defendant with a rifle gives rise to the presumption that the killing was unlawful and done with malice. *S. v. Jennings*, 157.

Defendant has the burden to show mitigation or self-defense. *Ibid.*

Malice may be presumed from the intentional use of a deadly weapon which proximately caused the death of deceased. *S. v. Perry*, 339.

Malice may be presumed from evidence that death resulted from pistol shots intentionally fired by defendant. *S. v. Sanders*, 598.

§ 15. Relevancy and Competency of Evidence

Trial court properly admitted testimony tending to show defendant's conduct and attitude toward deceased on numerous occasions prior to her death. *S. v. Moore*, 142.

In homicide prosecution, trial court properly admitted testimony that on certain occasions defendant was "mad" or "nervous" and that deceased was "unconscious." *Ibid.*

A pathologist who performed the autopsy on the body of deceased may testify in a homicide prosecution as to the cause of death. *S. v. Perry*, 339.

§ 17. Evidence of Threats, Motive and Malice

In prosecution for homicide of defendant's wife, trial court properly admitted testimony of defendant's mother-in-law that when she went to defendant's trailer to see about her daughter shortly after defendant had beaten her a few months before the homicide occurred, defendant told her it was none of her business and that she was nothing and deceased was nothing and that she should get out of the trailer. *S. v. Moore*, 142.

§ 18. Evidence of Premeditation and Deliberation

The indicia of premeditation and deliberation. *S. v. Hamby*, 674.

The elements of premeditation and deliberation are not usually susceptible to direct proof, but must be established from the circumstances surrounding the homicide. *S. v. Sanders*, 598.

HOMICIDE — Continued

In first degree murder prosecution of a defendant, a passenger in one car, who fired a pistol at a stranger driving another car in a parallel lane, thereby fatally wounding him, there is sufficient evidence of defendant's premeditation and deliberation to take the case to the jury. *S. v. Perry*, 339.

§ 20. Demonstrative Evidence — Photographs

Trial court properly admitted photographs of the body of deceased and place where found for illustrative purposes. *S. v. Moore*, 142; *S. v. Barrow*, 381.

§ 21. Sufficiency of Evidence and Nonsuit

Evidence of defendant's guilt of murder in the second degree held sufficient to be submitted to the jury. *S. v. Jennings*, 157.

State's evidence held sufficient to permit jury finding that defendant killed deceased with malice, after premeditation and deliberation, and in the perpetration or attempt to perpetrate a felony. *S. v. Roseboro*, 185.

In first degree murder prosecution of a defendant, a passenger in one car, who fired a pistol at a stranger driving another car in a parallel lane, thereby fatally wounding him, there is sufficient evidence of defendant's premeditation and deliberation to take the case to the jury. *S. v. Perry*, 339.

In this prosecution for first degree murder committed in the perpetration of an attempted armed robbery, the State's evidence, including an in-court identification of defendants as the perpetrators of the robbery and murder and testimony that a witness overheard defendants planning the robbery, *is held* sufficient for the jury. *S. v. Henderson*, 430.

In a prosecution charging defendant with first-degree murder of two police officers, evidence of premeditation and deliberation was sufficient to be submitted to the jury. *S. v. Sanders*, 598.

State's evidence was sufficient to establish that each defendant had formed the specific intent to kill deceased and that this intent was preceded by premeditation and deliberation, notwithstanding State's evidence also raised an inference that each defendant's judgment had been impaired by intoxication. *S. v. Hamby*, 674.

§ 24. Instructions on Presumptions

Trial court properly instructed the jury on the presumptions arising from the intentional use of a deadly weapon proximately resulting in death. *S. v. Barrow*, 381.

§ 25. Instructions on First Degree Murder

When the indictment and evidence disclose a killing in the perpetration of a robbery, only a verdict of guilty as charged, guilty as charged with a recommendation of life imprisonment, or not guilty may be returned by the jury, and the court should so instruct the jury. *S. v. Hill*, 1.

In homicide prosecution under indictment drawn pursuant to G.S. 15-144, an instruction that the killing of a human being in the perpetration of a robbery is first-degree murder irrespective of premeditation, deliberation or malice, held without error. *S. v. Haymes*, 150.

In consolidated trial of two defendants for homicide committed in perpetration of attempted armed robbery, trial court's instructions relating to guilt of each defendant if attempted robbery and murder were committed pursuant

HOMICIDE — Continued

to a conspiracy to commit robbery were not unclear and ambiguous and were favorable to defendants. *S. v. Henderson*, 430.

§ 27. Instructions on Manslaughter

Evidence in first-degree murder prosecution justified instruction on voluntary manslaughter. *S. v. Jennings*, 157.

The terms "heat of passion" and "heat of blood" are synonymous. *Ibid.*

§ 28. Instructions on Defenses

Evidence that defendant had been engaged in improper conduct with deceased's wife necessitated an instruction by the trial court defining and explaining the meaning of the words "without fault" and "free from blame" as it applied to the law of self-defense. *S. v. Jennings*, 157.

An instruction on self-defense that defendant could use no more force than was reasonably necessary is erroneous in omitting the element of apparent necessity. *Ibid.*

§ 30. Submission of Guilt of Lesser Degree of the Crime

Where all evidence shows a killing in the perpetration of a robbery, trial court should not instruct jury that it could return a verdict of second degree murder. *S. v. Hill*, 1.

In first degree murder prosecution, trial court did not err in failing to charge that jury might return verdict of guilty of manslaughter. *S. v. Roseboro*, 185.

§ 31. Verdict and Sentence

Where the jury returns a verdict of guilty of murder in the first degree without a recommendation that the punishment be imprisonment for life, the trial court is required to impose the death sentence. *S. v. Hill*, 1.

When the indictment and evidence disclose a killing in the perpetration of a robbery, only a verdict of guilty as charged, guilty as charged with a recommendation of life imprisonment, or not guilty may be returned by the jury, and the court should so instruct the jury. *Ibid.*

Jury's verdict was sufficient to support imposition of the death penalty where the jury foreman announced that the jury found defendant guilty of first degree murder and, upon inquiry by the court, stated that the jury made no recommendation with that verdict. *Ibid.*

The repeal by the 1969 Legislature of G.S. 15-162.1, which provided for a sentence of life imprisonment to be imposed upon an accepted plea of guilty of a capital crime, did not modify, change, add to or take from G.S. 14-17, which provides for the sentence to be imposed for first degree murder upon a verdict returned by a jury. *Ibid.*

While G.S. 14-17 gives jury discretion to "recommend" life imprisonment for first degree murder, it confers no discretionary power on superior court or Supreme Court to impose sentence different from that fixed by the jury. *S. v. Ruth*, 36.

The punishment for an accessory before the fact to murder in any degree is imprisonment for life. *S. v. Benton*, 641.

Imposition of a life sentence upon defendant's conviction of accessory before the fact to the murder of her husband was not cruel and unusual. *Ibid.*

HOMICIDE — Continued

A defendant in a first-degree murder prosecution is not entitled to a bifurcated jury trial. *S. v. Sanders*, 598; *S. v. Blackwell*, 714.

Defendant was convicted as an accessory before the fact to the murder of her husband and was sentenced to life imprisonment; the actual murderer was sentenced to 20-30 years' imprisonment on his guilty plea to second-degree murder. Held: Defendant's objection that her sentence exceeded that of the murderer is without merit. *S. v. Benton*, 641.

The decision in *U. S. v. Jackson* does not forbid the court in this first-degree murder prosecution to impose the sentence of death pursuant to G.S. 14-17. *S. v. Sanders*, 598.

The question whether G.S. 14-17 and G.S. 15-162.1, when construed together in the light of *U. S. v. Jackson*, will render unenforceable the death penalty in this State held immaterial when G.S. 15-162.1 was repealed prior to the commission of the crime. *S. v. Miller*, 681.

The statute providing that the jury, as a part of its guilty verdict, might by recommendation fix the punishment at life imprisonment rather than death, held not an unlawful division of powers between the court and jury. *Ibid.*

Although the jury's verdict of "recommendation of mercy" in a first-degree murder prosecution was irregular, the trial court correctly imposed a sentence of life imprisonment. *S. v. Baldwin*, 690.

HUSBAND AND WIFE

§ 4. Contracts Between Husband and Wife

A contract between husband and wife prescribing the testamentary disposition of their property is not binding upon the wife unless the contract is acknowledged by her in conformity with the statute. *Olive v. Biggs*, 445.

§ 14. Estates by Entireties in General

Where a husband and wife own a home as tenants by the entireties, the husband is responsible for the condition of the premises. *Freeze v. Congleton*, 178.

§ 17. Termination and Survivorship of Estates by Entireties

Wife's will cannot devise to the husband property which at the time of her death was owned by them as tenants by the entireties. *Olive v. Biggs*, 445.

INDICTMENT AND WARRANT

§ 9. Charge of Crime

Nothing in G.S. 15-153 or in G.S. 15-155 dispenses with the requirement that the warrant or indictment charge all the essential elements of the offense. *S. v. McBane*, 60.

A warrant or indictment merely charging in general terms a breach of a statute and referring to it in the indictment is not sufficient. *Ibid.*

A warrant or indictment following substantially the language of the statute is sufficient if and when it thereby charges the essentials of the offense in plain, intelligible and explicit manner. *Ibid; S. v. Sparrow*, 499.

Where a statute sets forth several ways by which the offense may be committed, the warrant or indictment correctly charges conjunctively. *S. v. Riera*, 361.

INDICTMENT AND WARRANT — Continued

§ 14. Grounds and Procedure on Motion to Quash

When a warrant or indictment is challenged by a timely motion to quash on the ground it fails to charge a criminal offense, decision must be based solely on the contents of such warrant or indictment. *S. v. McBane*, 60.

INFANTS

§ 1. Protection and Supervision by Courts

Under common law, persons are classified as infants until they attain the age of 21 years. *Personnel Corp. v. Rogers*, 279.

§ 2. Liability of Infants on Contracts

Concept of "necessaries" of an infant is enlarged to include such articles of property and such services as are reasonably necessary to enable the infant to earn the money required to provide the necessities of life for himself and those legally dependent upon him. *Personnel Corp. v. Rogers*, 279.

Evidence held sufficient for jury in action by employment agency to recover upon infant's contract for services rendered in assisting the infant to find employment as a draftsman. *Ibid.*

§ 7. Contributing to Delinquency of Minor

Statute making it a misdemeanor to contribute to the delinquency of a minor is not unconstitutional for vagueness. *S. v. Sparrow*, 499.

A minor need not be convicted of the charges contained in a juvenile petition before a person may be prosecuted for contributing to the delinquency of the minor. *Ibid.*

Warrant was sufficient to charge defendant with contributing to the delinquency of a minor by harboring and providing lodging for her and wilfully concealing her from officers with knowledge that they had petitions for her arrest. *Ibid.*

In prosecution under a warrant charging that defendant obstructed a police officer in the performance of his duties by kicking the officer while he attempted to arrest a minor, there was a material variance between the warrant and proof where all the evidence tended to show that when defendant kicked the officer, the officer already had the minor in his custody. *Ibid.*

Trial court properly denied motion of one defendant for nonsuit of a charge of contributing to the delinquency of a minor. *Ibid.*

INSURANCE

§ 6. Construction of Policies

Rules for construction of an insurance policy. *Trust Co. v. Ins. Co.*, 349.

§ 68. Automobile Personal Injury Policy

Automobile liability policy providing medical payments coverage for two described vehicles is one contract, not two separate contracts. *Trust Co. v. Ins. Co.*, 349.

The term "struck by an automobile" as used in medical payments provision of an automobile liability policy includes one who is injured when the vehicle occupied by him is struck by another automobile and is not limited to collisions between automobiles and pedestrians. *Ibid.*

Purpose of provision in medical payments coverage for bodily injuries received by insured in an accident if he was "struck by an automobile" was to

INSURANCE — Continued

afford coverage to insured when "struck by an automobile" while he was neither the occupant of an "owned automobile" nor the occupant of a "non-owned automobile" as defined in the policy. *Ibid.*

Where family automobile policy covering two vehicles provided medical payment coverage of $5000 per person, limit of insurance company's liability for injuries received by insured in collision with another vehicle while operating one of the insured vehicles is $5000, notwithstanding insured paid separate medical payments premiums for each vehicle covered by the policy. *Ibid.*

§ 79. Liability Insurance Generally

An insured under a non-owner's policy was covered thereunder when his recently purchased automobile was involved in an accident, the insured having acquired title to the automobile only when the seller and the insured complied with the mandatory provisions of G.S. 20-72(b) relating to the transfer of title. *Insurance Co. v. Hayes*, 620.

§ 80. Vehicle Financial Responsibility Act

The purpose and effect of the Financial Responsibility Act. *Insurance Co. v. Hayes*, 620.

§ 85. Liability Coverage of Other Vehicles Used by Insured

An insured under a non-owner's policy was covered thereunder when his recently purchased automobile was involved in an accident, the insured having acquired title to the automobile only when the seller and the insured complied with the mandatory provisions of G.S. 20-72(b) relating to the transfer of title. *Insurance Co. v. Hayes*, 620.

§ 87. "Omnibus" Clause; Drivers Insured

Where express permission to use an automobile is relied upon, it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. *Insurance Co. v. Insurance Co.*, 243.

§ 88. Garage and Dealers' Liability Insurance

Evidence held insufficient to support a finding that prospective purchaser of an automobile had vendor's permission, express or implied, to operate the automobile at the time purchaser's brother wrecked it in an accident; consequently the purchaser was without authority to extend driving privileges to his brother and thereby bind vendor's liability carrier. *Insurance Co. v. Insurance Co.*, 243.

JUDGMENTS

§ 24. Setting Aside Judgment for Mistake, Surprise, or Excusable Neglect

A motion to set aside a former judgment on the grounds of mistake, surprise or excusable neglect is addressed to the court, and questions of fact arising on the motion are not issues of fact for the jury. *Bundy v. Ayscue*, 81.

JURY

§ 7. Challenges

Death sentence must be vacated under the decision of *Witherspoon v. Illinois* where trial court allowed State's challenges for cause to seven pros-

pective jurors who stated simply a general objection to or conscientious scruples against capital punishment, and there being no jury verdict which will support a constitutional sentence, the case must be remanded to superior court for a new trial as to guilt and punishment. *S. v. Ruth*, 36.

If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon defendant to establish it; but once the *prima facie* case of racial discrimination is established, the burden of going forward with rebuttal evidence is upon the State. *S. v. Spencer*, 535.

A contention by Negro defendants that the trial court violated their constitutional rights under the 14th Amendment by denying their motion to quash the jury venire and by preventing them from making an evidentiary showing on the motion held without merit. *Ibid.*

In prosecution for first degree murder, record fails to disclose violation of defendant's constitutional rights in selection of trial jury where court found upon proper evidence that special veniremen were selected from properly prepared jury list and jury was chosen in accordance with *Witherspoon* decision. *S. v. Roseboro*, 185.

There is no merit to a Negro defendant's charge that members of his race were deliberately excluded from the petit jury which tried him. *S. v. Sanders*, 598.

Objection to a special venire is waived by failure to challenge the array. *S. v. Baldwin*, 690.

The absence of Negroes from a particular petit jury is insufficient to raise a presumption of discrimination. *S. v. Sanders*, 598.

Trial court properly excluded those jurors who testified on voir dire that they had already made up their minds that they would not return a verdict pursuant to which the defendant might lawfully be executed whatever the evidence might be. *S. v. Sanders*, 598; *S. v. Miller*, 681.

Defendant may not object to the acceptance of individual jurors when he has failed to exhaust his peremptory challenges. *S. v. Baldwin*, 690.

LARCENY

§ 7. Sufficiency of Evidence

Evidence held sufficient for jury in prosecution for aiding and abetting in larceny. *S. v. Catrett*, 86.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time From Which Statute Begins to Run

Statute of limitations begins to run when plaintiff's right to maintain an action for the wrong alleged accrues. *Wilson v. Development Co.*, 198.

Landowner's cause of action for inverse condemnation against municipality for the taking of a flight easement over landowner's property accrued with the beginning of frequent and regular overflights of commercial jet aircraft at low altitudes. *Hoyle v. Charlotte*, 293.

§ 5. Accrual of Cause of Action for Trespass

The three-year statute of limitations is applicable to an action for trespass upon real property. *Hoyle v. Charlotte*, 293.

LIMITATION OF ACTIONS — Continued

§ 7. Fraud

A cause of action to set aside an instrument for fraud accrues when the aggrieved party discovers the fraud. *Wilson v. Development Co.*, 198.

§ 12. Institution of Action and Amendment

The fact that plaintiff in good faith pursued another remedy between the accrual of the cause of action and the institution of the present action, which remedy proved unavailable, does not extend the time allowed for the institution of the action. *Wilson v. Development Co.*, 198.

§ 16. Procedure to Set Up Defense of the Statute

Allegations in defendant's further answer were sufficient to raise a plea of the statute of limitations as a bar to plaintiff's action to have declared transfer of assets an assignment for the benefit of creditors. *Wilson v. Development Co.*, 198.

MANDAMUS

§ 1. Nature and Grounds of the Writ

Mandamus cannot be invoked if other adequate means are available to correct the wrong for which redress is sought. *King v. Baldwin*, 316.

§ 2. Discretionary Duty

Mandamus will not lie to control the discretion vested in a governmental agency. *King v. Baldwin*, 316.

MASTER AND SERVANT

§ 11. Agreements Not to Engage in Like Employment After Termination of Employment

The complaint of a corporation states a cause of action against its former employee for violation of a covenant not to engage in silk screen processing or any other business competitive with plaintiff in the U.S. for a period of two years; such covenant is valid and enforceable. *Enterprises v. Heim*, 475.

§ 58. Negligence or Wilful Act of Injured Employee

Employee who becomes mentally deranged and deprived of normal judgment as result of a compensable accident and commits suicide in consequence thereof does not act wilfully within meaning of G.S. 97-12, and his death is compensable under the Compensation Act. *Petty v. Transport, Inc.*, 417.

§ 85. Nature and Extent of Jurisdiction of Industrial Commission

Industrial Commission is not a court of general jurisdiction but is an administrative board with quasi-judicial functions. *Morse v. Curtis*, 371.

The Industrial Commission, in a proper case, may grant a rehearing and hear additional evidence. *Petty v. Transport, Inc.*, 417.

§ 87. Exclusion of Common-Law Action

Where plaintiff had filed a workmen's compensation claim with the Industrial Commission and defendant had admitted liability under the Workmen's Compensation Act, plaintiff was not precluded from thereafter filing in the superior court a civil action for personal injuries, absent an unchallenged determination of jurisdiction by the Industrial Commission coupled with action resulting in recovery by plaintiff, or a challenge to its jurisdiction resulting in

MASTER AND SERVANT — Continued

a final appellate holding establishing the Commission's jurisdiction. *Morse v. Curtis*, 371.

Where defendant alleged as a plea in bar to plaintiff's action for personal injuries that plaintiff was limited to action under the Compensation Act, trial court followed the proper procedure in determining the plea in bar by hearing evidence, finding facts, reaching conclusions of law and entering judgment. *Ibid.*

In hearing upon defendant's plea in bar to plaintiff's action for personal injuries on ground that plaintiff was an employee of defendant and was limited to workmen's compensation, evidence does not support trial judge's findings upon which he based his conclusions of law that plaintiff, who was a counselor at defendant's summer camp, was an independent contractor and that the superior court had jurisdiction of the matter. *Ibid.*

§ 93. Prosecution of Claim and Proceedings Before Commission

When workmen's compensation claim is filed with the Industrial Commission, the Commission's first order of business is to determine if claim is properly before it. *Morse v. Curtis*, 371.

When objection is made to questions propounded to a witness in a workmen's compensation hearing, proper procedure is for the commissioner to require counsel to state the grounds of objection and then make his ruling. *Petty v. Transport, Inc.*, 417.

Doctor's answers "for the record" to hypothetical questions seeking to establish a direct causal relation between employee's accident and suicide were competent. *Ibid.*

§ 97. Disposition of Appeal

Where claim for compensation for death of an employee who committed suicide while totally disabled from a compensable accident was heard in the Industrial Commission under a misapprehension of the law, cause must be returned to the Commission for proper findings under the applicable law. *Petty v. Transport, Inc.*, 417.

MUNICIPAL CORPORATIONS

§ 12. Liability Generally

A police officer in the performance of his duties is engaged in a governmental function. *Galligan v. Chapel Hill*, 172.

In absence of affirmative action by a municipality, the purchase of motor vehicle liability insurance constitutes a waiver of its governmental immunity to the extent of the insurance policy so obtained. *Ibid.*

Municipality did not waive its governmental immunity for negligence in operation of police car by a police officer by its renewal in 1965 of a liability policy on such vehicle, where governing body had in 1951 passed a resolution against waiver of its governmental immunity. *Ibid.*

§ 30. Zoning Ordinances and Building Permits

Landowners acquired vested right to construct and use a proposed building for a dry cleaning business in reliance upon a building permit issued to them by a municipality, notwithstanding the subsequent enactment of a zoning ordinance prohibited such use, where there was sufficient evidence that the

MUNICIPAL CORPORATIONS — Continued

landowners incurred substantial expenses in the construction of the building and in the purchase of dry cleaning equipment. *Hillsborough v. Smith*, 48.

There is no basis for distinction between the landowner who spends money resulting in visible, physical changes in the land and the owner who expends a like amount incurring contractual obligations in reliance upon a building permit. *Ibid.*

In an action by a municipality seeking to restrain landowners who were holders of a building permit issued by the municipality from continuing construction on their land until they obtain a zoning permit in compliance with a zoning ordinance enacted after the issuance of the permit, the municipality is not entitled to injunctive relief as a matter of law. *Ibid.*

§ 32. Regulations Relating to Public Morals

A municipal ordinance which prohibits the sale on Sunday of mobile homes but which does not prohibit the sale on Sunday of conventional homes is valid. *Mobile Home Sales v. Tomlinson*, 661.

§ 37. Regulations Relating to Health

Statute and municipal ordinance authorizing municipal authorities to condemn unsafe buildings held constitutional. *Walker v. Charlotte*, 166.

NARCOTICS

§ 1. Elements and Essentials of Statutory Offenses

It is a felony to possess LSD in any quantity for any purpose absent proof that the possession was lawful under the provisions of the Narcotic Act. *S. v. Roberts*, 98.

The felony of possession of LSD is a continuing offense committed as long as a person has such substance in his possession. *Ibid.*

In a prosecution under the Uniform Narcotic Drug Act, the State is not required to negative any exception, excuse or exemption contained in the Act; these are matters which defendant may prove as a defense. *S. v. Riera*, 361.

The misdemeanor of unlawful possession of barbiturates is a lesser included offense of the felony of possession of barbiturates for the purpose of sale. *Ibid.*

§ 4. Sufficiency of Evidence

In a prosecution for possession of barbiturates for sale, the State's evidence was sufficient to go to the jury under the statutory provision making the possession of 100 or more capsules prima facie evidence that the possession was for the purpose of sale. *S. v. Riera*, 361.

In a prosecution charging defendant with the felony of possession of barbiturates for the purpose of sale, trial court erred in failing to submit an issue of defendant's guilt of the misdemeanor of unlawful possession of barbiturates. *Ibid.*

NEGLIGENCE

§ 10. Intervening Negligence

Foreseeable intervening forces are within the scope of the original risk, and hence of defendant's negligence; intervening causes which fall within this category will not supersede defendant's responsibility. *Brown v. R. R. Co.*, 398.

NEGLIGENCE — Continued

§ 59. Duties and Liabilities to Licensees

In action for injuries received by a five-year-old social guest when he walked or ran into a clear and unmarked glass door in defendant's home, plaintiff's evidence was insufficient to be submitted to the jury on issue of defendant's negligence, where it showed that plaintiff knew that the door had been closed and that her son was walking towards it but that she failed to take timely action to prevent the accident. *Freeze v. Congleton*, 178.

Ordinarily, when the parent of an infant licensee is present with the infant and has full knowledge of the condition of the premises, the duty to warn of defective conditions falls on the parent. *Ibid.*

NUISANCE

§ 1. Private Nuisance

Operation of a motor vehicle speedway is not a nuisance per se but may be a private nuisance per accidens. *Jones v. Speedways*, 231.

Mere violation of a municipal ordinance does not constitute a nuisance. *Ibid.*

§ 2. Noise and Disturbance

Operation of defendant's motor vehicle racetrack violated a municipal anti-noise ordinance. *Jones v. Speedways, Inc.*, 231.

§ 7. Damages and Abatement

In action to enjoin operation of motor vehicle racetrack as a nuisance, trial court erred in failing to abate the nuisance as found by the jury and in permitting defendant to continue operation of the track under conditions imposed by the court. *Jones v. Speedways*, 231.

PHYSICIANS AND SURGEONS

§ 11. Malpractice Generally

A physician or surgeon must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess, and even though he possesses such qualifications, he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case. *Wiggins v. Piver*, 134.

§ 15. Competency and Relevancy of Evidence of Malpractice

Medical expert may testify as to good surgical practice for a simple operative procedure when he is familiar with practice in "similar communities," the "same locality" rule no longer being the standard by which to judge a doctor's procedures. *Wiggins v. Piver*, 134.

PLEADINGS

§ 15. Pleas in Bar

Where defendant alleged as a plea in bar to plaintiff's action for personal injuries that plaintiff was limited to action under the Compensation Act, trial court followed the proper procedure in determining the plea in bar by hearing evidence, finding facts, reaching conclusions of law and entering judgment. *Morse v. Curtis*, 371.

In hearing upon defendant's plea in bar to plaintiff's action for personal injuries on ground that plaintiff was an employee of defendant and was limited

PLEADINGS — Continued

to workmen's compensation action, evidence does not support trial judge's findings upon which he based his conclusions of law that plaintiff, who was a counselor at defendant's summer camp, was an independent contractor and that the superior court had jurisdiction of the matter. *Ibid.*

§ 19. Office and Effect of Demurrer

A complaint is not demurrable for reason that it shows upon its face that the cause of action alleged is barred by the statute of limitations. *Wilson v. Development Co.*, 198.

The demurrer does not admit the pleader's conclusions of law. *Mobile Home Sales v. Tomlinson*, 661.

§ 36. Variance Between Proof and Allegation

Court cannot submit case to jury on a particular theory unless such theory is supported by both pleadings and evidence. *Dupree v. Batts*, 68.

Variance between pleading and proof does not require nonsuit where defendant was neither misled nor otherwise prejudiced. *Hoyle v. Charlotte*, 293.

§ 38. Motions for Judgment on the Pleadings

On motion for judgment on the pleadings, the complaint must be liberally construed in plaintiff's favor. *Wilson v. Development Co.*, 198.

Motion for judgment on the pleadings is in nature of a demurrer. *Ibid.*

A party who moves for judgment on the pleadings does not admit epithets such as "fraud". *Ibid.*

On motion for judgment on the pleadings an exhibit attached to the pleadings controls other allegations of the pleadings attempting to paraphrase the exhibit. *Ibid.*

Trial court is not required to specify its reason for allowing judgment on the pleadings. *Ibid.*

RAILROADS

§ 5. Crossing Accidents

Evidence that the driver of a truck drove toward a railroad crossing at an undiminished speed of 30 to 35 mph despite her knowledge that the crossing was visually obstructed held sufficient to establish the negligence of the driver. *Brown v. R. R. Co.*, 398.

In a wrongful death action arising out of a crossing collision, plaintiff's evidence that defendant's locomotive approached the crossing without giving any warning and that the driver of the truck drove toward the crossing at an undiminished speed despite her knowledge that the crossing was visually obstructed, held sufficient to support a jury finding that defendant's negligence concurred with that of the truck driver in proximately causing the deaths of plaintiff's intestates. *Ibid.*

§ 6. Warning Devices at Crossings

Plaintiff's evidence that none of the survivors of a crossing accident heard a signal prior to the collision with defendant's locomotive, held to justify a jury finding that defendant failed to give any warning. *Brown v. R. R.*, 398.

A railroad is negligent if it fails to protect the traveling public from the approach of its locomotive toward a crossing which is little used by the railroad and much used by the public. *Ibid.*

RAILROADS — Continued

§ 7. Injuries to Passengers in Automobiles in Crossing Accident

Truck driver's negligence in approaching at undiminished speed a railroad crossing which she knew was visually obstructed held not imputable to the passengers in the truck. *Brown v. R. R. Co.*, 398.

ROBBERY

§ 4. Sufficiency of Evidence

State's evidence, including in-court identification of defendant, was sufficient to carry case to jury in armed robbery prosecution. *S. v. Austin*, 391.

RULES OF CIVIL PROCEDURE

§ 85. Validity and Effect

Since the effective date of the new Code of Civil Procedure, 1 January 1970, there can be no further proceedings under the remedy known as "controversy without action", and such an action abated on effective date of new Rules. *Land Corp. v. Styron*, 494.

SALES

§ 22. Actions for Defective Goods or Materials

Evidence held sufficient for jury on issue of automobile manufacturer's negligence in manufacturing and placing on the market an automobile with a defective wheel. *Dupree v. Batts*, 68.

A manufacturer's negligence may arise by selecting materials for use in the manufacturing process or by failing to make reasonable inspection for hidden defects. *Ibid.*

SCHOOLS

§ 1. Establishment, Maintenance and Supervision

The education of residents of this State is a recognized object of State government; hence, provision therefor is for a public purpose. *Education Assistance Authority v. Bank*, 576.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest. *S. v. Roberts*, 98.

Police officers legally arrested and searched defendant without a warrant where they had reasonable grounds to believe that defendant was committing a felony in their presence by the possession of LSD. *Ibid.*

Piece of chrome removed from exterior of defendant's car without a warrant was gained by lawful search and seizure where the chrome was fully disclosed and open to the eye and hand and no search was required to obtain it. *S. v. Virgil*, 217.

Officers lawfully searched defendant's room and interior of his automobile without a warrant where defendant was present and consented to the search. *Ibid.*

Warnings required by *Miranda* are inapplicable to searches and seizures. *Ibid.*

The warrantless seizure of burglary tools and other articles from the car

SEARCHES AND SEIZURES — Continued

in which defendant was riding as a passenger was lawful, and these tools and articles were properly admitted in the trial of defendant for possession of burglary tools. *S. v. McCloud*, 518.

Defendant's overnight occupancy of a motel room with his girl friend did not justify a police officer's uninvited entry into the room to arrest defendant without a warrant on a charge that the offense of occupying a motel room for immoral purposes had been committed in the presence of the officer; consequently the arrest of defendant and the seizure of coins from the motel room were unlawful. *Ibid.*

STATUTES

§ 1. Enactment of Statutes

Generally, a statute will be held effective from the first moment of the day of its enactment, although a court will hear evidence to determine the precise moment of enactment whenever it becomes necessary to prevent a wrong. *S. v. Miller*, 681.

§ 2. Constitutional Prohibition Against Enactment of Local or Special Acts

Statutory provisions setting forth what may and what must be included in a county subdivision ordinance do not constitute authorizing the laying out, opening, altering or discontinuing of a highway or street in violation of N. C. Constitution. *S. v. McBane*, 60.

§ 4. Construction in Regard to Constitutionality

A statute will not be construed so as to raise a serious question as to its constitutionality if a different construction which would avoid the question of constitutionality is reasonable. *Education Assistance Authority v. Bank*, 576.

§ 5. General Rules of Construction

The intent of the Legislature controls the interpretation of a statute. *Galligan v. Chapel Hill*, 172.

It is presumed that the legislature acted in accordance with reason and common sense and that it did not intend an unjust or absurd result. *King v. Baldwin*, 316; *S. v. Spencer*, 535.

It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law. *S. v. Benton*, 641.

§ 7. Construction of Amendments

In construing a statute with reference to an amendment it is presumed that the legislature intended either to change the substance of the original act or to clarify the meaning of it. *Insurance Co. v. Insurance Co.*, 243.

§ 8. Prospective and Retroactive Effect

A retrospective law is one which creates a new obligation in respect to transactions already passed. *Smith v. Mercer*, 329.

Remedial or procedural statutes do not ordinarily come within the legal conception of a retrospective law. *Ibid.*

§ 10. Construction of Criminal Statutes

Criminal statutes must be strictly construed but not stintingly or narrowly construed. *S. v. Spencer*, 535.

STATUTES — Continued

§ 11. Repeal

When statutes providing a particular remedy are unconditionally repealed, the remedy is gone. *Land Corp. v. Styron*, 494.

Courts will not presume that the legislature intended to repeal by implication. *S. v. Benton*, 641; *Insurance Co. v. Hayes*, 620.

SUNDAYS AND HOLIDAYS

A Sunday observance law is not invalid merely because it is in harmony with the religious beliefs of most Christian denominations. *Mobile Home Sales v. Tomlinson*, 661.

TAXATION

§ 7. Public Purpose

The education of residents of this State is a recognized object of State Government; hence, provision therefor is for a public purpose. *Education Assistance Authority v. Bank*, 576.

Issuance of revenue bonds by the State Education Assistance Authority and the use of the proceeds therefrom for the sole purpose of making loans to needy college and vocational school students is for a public purpose. *Ibid.*

§ 9. Taxes Constituting Burden on Interstate Commerce

The ad valorem property tax may be levied upon personal property of an individual or corporation engaged in interstate commerce as long as the effect of such taxation does not place interstate commerce at a competitive disadvantage with intrastate commerce. *Transfer Corp. v. County of Davidson*, 19.

§ 21. Property of the State and Political Subdivisions

The provisions of Chapter 1177, Session Laws of 1967, that exempt student loan revenue bonds from taxation by the State or by any of its subdivisions do not contravene N. C. Constitution, Art. V, § 5, which provides that property belonging to the State or to municipal corporations shall be exempt from taxation, the enumerated properties in Art. V, § 5, not including bonds issued by the State or any State agency. *Education Assistance Authority v. Bank*, 576.

§ 24. Situs of Property for Taxation

Tax situs of a corporation's tangible personal property is at the place of the corporation's principal office in this State unless such property has a tax situs elsewhere. *Transfer Corp. v. County of Davidson*, 19.

Common carrier of freight in interstate commerce, who maintained its principal office in a county in this State, failed to show that any of its vehicles engaged in interstate commerce acquired a non-domiciliary tax situs and that inclusion of those vehicles by the county in its tax assessment cast an undue burden on interstate commerce. *Transfer Corp. v. County of Davidson*, 19.

§ 25. Ad Valorem Taxes

By virtue of statutes which provide for appeals to the county board of equalization and the State Board of Assessment, the legislature has provided adequate means whereby the individual taxpayer may contest the tax

TAXATION — Continued

list or the entire assessment roll, and the taxpayer must exhaust these administrative remedies before he can resort to the courts. The decision in *Stocks v. Thompson*, 1 N.C. App. 201, is expressly disapproved. *King v. Baldwin*, 316.

Taxpayer who seeks a writ of mandamus to compel county commissioners to revalue all real property at its true value in money must first exhaust his administrative remedies in the county board of equalization and review and in the State Board of Assessments. *Ibid.*

§ 28. Income Tax; Individuals

Taxpayer's loss of timber by fire is an "other disposition of property" within the meaning of the statute providing a method for the ascertainment of gain or loss, and therefore the income tax deduction allowable under G.S. 105-147 for such casualty loss may not exceed the taxpayer's cost basis of the property so destroyed. *Ward v. Clayton, Comr. of Revenue*, 411.

TRIAL

§ 5. Course and Conduct of Trial in General

The practice of sequestration of witnesses is discretionary with the trial court, whose ruling thereon is not reviewable in the absence of abuse of discretion. *S. v. Barrow*, 381.

§ 15. Objections and Exceptions to Evidence

The rule that evidence is admissible over a general objection if it is competent for any purpose is held inapplicable where the challenged testimony violated the Dead Man's statute. *Whitley v. Redden*, 263.

§ 26. Nonsuit for Variance

Court cannot submit case to jury on a particular theory unless such theory is supported by both pleadings and evidence. *Dupree v. Batts*, 68.

Variances between pleading and proof do not require nonsuit where there is no indication that defendant was misled or otherwise prejudiced. *Hoyle v. Charlotte*, 292.

§ 40. Form and Sufficiency of Issues

An issue should not be submitted to the jury unless the pleadings unequivocally raise such issue and the issue is supported by the evidence. *Whitley v. Redden*, 263.

Failure to submit an issue on amount of indebtedness is not error when it appears that the amount is exclusively a matter of calculation. *Whitley v. Redden*, 263.

The issue, "How much, if anything, is plaintiff entitled to recover," is not sufficient when other issues of fact are raised. *Ibid.*

TRUSTS

§ 14. Creation of Constructive Trusts

Rules relating to constructive trusts. *Wilson v. Development Co.*, 198.

Allegations that insolvent defendant and his wife assigned to a newly-formed corporation their rights in certain savings certificates in exchange for the issuance to defendant of shares of stock in the corporation, which shares defendant then used to satisfy his own creditors, held insufficient to

TRUSTS — Continued

give rise to a constructive trust in the savings certificates on behalf of judgment creditors of defendant. *Ibid.*

UTILITIES COMMISSION

§ 7. Hearings and Orders — Services

In the assignment of rural territorial rights to electricity suppliers pursuant to G.S. 62-110.2, the Utilities Commission has authority to direct that an electric membership cooperative alone serve all users in a rural service area whose demand for power does not exceed 400 KW and that any users therein whose demand exceeds 400 KW be served either by the cooperative or by electric power companies, with the users to choose the supplier. *Utilities Comm. v. Electric Membership Corp.*, 108.

In assigning rural service areas to electric suppliers, the Utilities Commission may consider development of natural resources and employment opportunities, capital required for supplying electric power to large users, and the preference of potential users for one supplier over another. *Ibid.*

§ 9. Appeal and Review

Where the evidence before the Utilities Commission is not brought forward in the record on appeal, the Commission's findings of fact are deemed supported by competent and sufficient evidence, and the findings are binding upon the Supreme Court. *Utilities Comm. v. Electric Membership Corp.*, 108.

UNIFORM COMMERCIAL CODE

§ 1. Generally

The Uniform Commercial Code is not necessarily applicable to public regulations unless the court chooses to make it so. *Insurance Co. v. Hayes*, 620.

§ 6. Laws Not Repealed

The Uniform Commercial Code does not repeal portions of the Motor Vehicles Act by implication. *Insurance Co. v. Hayes*, 620.

§ 16. Title, Creditors; Good Faith Purchasers

For purposes of tort law and liability insurance coverage, the specific provisions of the Motor Vehicle Act relating to the transfer of ownership of motor vehicles must prevail over provisions of the Uniform Commercial Code relating to the passing to title to property. *Insurance Co. v. Hayes*, 620.

VENDOR AND PURCHASER

§ 3. Description and Amount of Land

Description in an option contract referring to the land to be conveyed as "a certain tract or parcel of land located in ..... Township, Guilford County, North Carolina, and described as follows: About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85" *is held* insufficient to comply with the statute of frauds, and consequently the option is unenforceable. *Carlton v. Anderson*, 564.

WILLS

§ 1. Nature and Requisites of Testamentary Disposition of Property

A joint will is in effect the separate will of each person signing as testator. *Olive v. Biggs*, 445.

WILLS — Continued

§ 2. Contracts to Devise or Bequeath

In an action by the husband seeking construction of a will executed jointly by himself and his wife pursuant to contract, the will is held a devise to the husband in fee simple of all of the wife's property, but the husband may not make inter vivos conveyance or testamentary disposition of the property contrary to the terms of the contract. *Olive v. Biggs*, 445.

§ 8. Revocation of Wills

Rules relating to the revocation of a joint will. *Olive v. Biggs*, 445.

§ 64. Whether Beneficiary is Put to His Election

The doctrine of election did not apply in this action by the husband to construe a joint will executed by himself and his wife. *Olive v. Biggs*, 445.

§ 73. Actions to Construe Wills

In an action by the husband seeking construction of a will executed jointly by himself and his wife pursuant to contract, the will is held a devise to the husband in fee simple of all the wife's property, but the husband may not make inter vivos conveyance or testamentary disposition of the property contrary to the terms of the contract. *Olive v. Biggs*, 445.

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§ 1. Competency of Witness

Trial court properly ruled that the State's material witness had sufficient mental capacity to be a competent witness notwithstanding the testimony of a psychiatrist that it was impossible for the witness to give reliable testimony. *S. v. Benton*, 641.

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