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OF
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1970

STATE OF NORTH CAROLINA v. ROY LEE FOX

No. 19

(Filed 31 July 1970)

1. **Homicide § 4— first degree murder — commission during felony — presumptions**

   Murder committed in the perpetration or attempted perpetration of any robbery, burglary or other felony is murder in the first degree; in these instances the law presumes premeditation and deliberation and the State is not put to further proof of either. G.S. 14-17.

2. **Homicide § 2— murder committed during perpetration of conspiracy — guilt of conspirators**

   When a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree.

3. **Homicide § 12; Indictment and Warrant § 9— murder and burglary prosecutions — indictment — names of conspirators**

   In indictments charging the defendant with first degree burglary and with first degree murder committed during an armed robbery, it was proper to allege the names of the four persons who had conspired with defendant to commit the robbery, even though no conspiracy was expressly averred.

4. **Indictment and Warrant § 7— retrial of defendant upon original indictment**

In a retrial of defendant for first degree murder and for burglary, it was proper to try the defendant upon the original indictment.

5. **Criminal Law § 92— consolidation of indictments for trial**

When two or more indictments are founded on one criminal transaction, it is contemplated that the court will consolidate them for trial. G.S. 15-152.

6. **Jury § 7— challenge for cause — jurors disavow outside influence**

Trial court properly overruled defendant's challenges for cause to three prospective jurors, where the jurors stated on the voir dire that they could decide the case on the evidence and on the law as enunciated by the court without being influenced by what they had read and heard or by any preconceived notions as to the law.

7. **Jury § 7— peremptory challenges— alternate jurors**

Ruling of the trial court which allowed defendant two peremptory challenges for each alternate juror was in conformity with the statute and was proper. G.S. 9-18.

8. **Jury § 7— challenge for cause — disallowance — preservation of exceptions**

In order to preserve an exception to the court's denial of a challenge for cause, the defendant must (1) exhaust his peremptory challenges and (2) thereafter assert his right to challenge peremptorily an additional juror.

9. **Criminal Law § 162— broadside objection to transcript — admissibility**

Where there was a broadside objection to the introduction of a transcript of testimony given at a previous trial, the transcript was properly admitted in evidence if any part of it was competent.

10. **Criminal Law § 40— transcript of testimony at former trial — admissibility — death of witness**

The official stenographic report of testimony given at a former trial by a witness who has since died may be introduced in evidence upon a subsequent trial of the cause upon proof of its authenticity and accuracy.

11. **Criminal Law § 40— transcript of former trial — reading by special prosecutor**

That the court permitted the special prosecutor, instead of the court reporter, to read the transcript of testimony given by an armed robbery victim at a former trial, *held* not prejudicial to defendant in his retrial for burglary and for first degree murder committed during the robbery.

12. **Criminal Law § 161— assignment of error — necessity for exceptions**

An assignment of error which is not supported by an exception

previously noted in the case on appeal presents no question of law for the Supreme Court to decide.

13. **Criminal Law § 162— appeal — evidentiary questions — assignment of error — prerequisites**

When the assignment of error is that the court erred in the admission or rejection of evidence, the evidence itself must be set out in the assignment; a mere reference to the record page where the asserted error may be discovered is not sufficient.

14. **Robbery § 3— wounds of robbery victim — evidence of description**

Testimony describing wounds received by victim of armed robbery was competent to corroborate the victim's testimony and to show the felonious purpose of the robbery.

15. **Criminal Law § 89— corroboration testimony — admissibility**

Testimony by police officers as to statements made to them by a robbery victim on the night the victim's wife was murdered was competent to corroborate the testimony of the victim.

16. **Homicide § 20; Criminal Law § 42— articles connected with crime — admissibility**

In a prosecution for burglary and for first degree murder committed during an armed robbery, a rubber mask, pistols, coats, a hat, a piece of cloth torn from one of the coats, a white handkerchief, and a rifle — articles which the investigating officers found either on the floor of the victim's kitchen or in the buried tow sack disclosed by one of the perpetrators — were competent to identify the perpetrators of the crime, as well as to show a design and plan.

17. **Criminal Law § 98— sequestration of witnesses**

Defendant's motion for the sequestration of the witnesses is addressed to the discretion of the court.

18. **Criminal Law §§ 33, 80— date of defendant's arrest — arrest sheet — testimony**

It was proper for a sheriff to testify that the arrest sheet in his office showed that defendant was arrested at a certain date and hour.

19. **Criminal Law § 76— confession — voir dire — consideration of testimony**

On voir dire to determine the admissibility of defendant's confession, the trial court was not bound by the defendant's testimony but he could consider the testimony of law enforcement officers.

20. **Criminal Law § 76— admissibility of confession — procedure — voir dire — findings of fact**

When the State offers a confession in a criminal trial and defendant objects, the competency of the confession must be determined by the trial judge in a preliminary inquiry in the absence of the jury; the trial judge hears the evidence, observes the demeanor of the witnesses, and resolves the question; his findings as to the voluntariness

of the confession, and any other facts which determine whether it meets the requirements for admissibility, are conclusive if they are supported by competent evidence in the record.

21. **Criminal Law § 75— confession — request for counsel**

Trial court properly admitted into evidence the defendant's confession to a sheriff, where the findings of fact established that the defendant made the confession and recorded it *prior* to his request for counsel.

22. **Criminal Law § 75— Miranda standards — applicability to retrial of cases originally tried before Miranda**

The Miranda standards for determining the admissibility of in-custody statements do not apply to post-Miranda retrials of cases originally tried prior to that decision.

23. **Criminal Law § 74— definition of confession**

A confession is generally defined as an acknowledgment in express words by the accused in a criminal case of his guilt charged or of some essential part of it.

24. **Criminal Law § 76— transcript of confession — corroborative evidence — admissibility**

A transcript of defendant's confession to the sheriff, which transcript was taken from a recording made by defendant in the sheriff's office after his first oral confession to the sheriff in his jail cell, *held* competent to corroborate the sheriff's statement of defendant's confession.

25. **Criminal Law § 81— best evidence rule — transcript of defendant's confession**

The best evidence rule did not preclude the admission of a transcript of defendant's confession to the sheriff, where the transcript was offered only as corroboration of the sheriff's testimony relating to his conversation with defendant.

26. **Criminal Law § 81— best evidence rule**

The best evidence rule applies only where the contents or terms of a document are in question.

27. **Criminal Law § 158— case on appeal — omission of the charge — presumptions**

Where the defendant has assigned no error to the charge of the court and the charge was not included in the case on appeal, it is presumed that the court correctly instructed the jury on every phase of the case, both with respect to the law and the evidence.

28. **Criminal Law § 157— appeal — essential parts of record — indictment — verdict**

The bill of indictment and the verdict are essential parts of the transcript record in a criminal appeal.

29. **Criminal Law § 154— case on appeal — transcript — duty of solicitor**

Although the primary duty of preparing and docketing a true and adequate transcript of the record and case on appeal in a criminal case rests upon defense counsel, G.S. 1-282, G.S. 15-180, it is the duty of the solicitor to scrutinize the copy which appellants serve upon him; if it contains omissions, errors, or misleading juxtapositions it is the solicitor's responsibility to file exceptions or a counter case within his allotted time.

30. **Criminal Law § 154— case on appeal — acceptance by solicitor — binding on appellate court**

When the solicitor accepts the defendant's case on appeal and it is certified to the Appellate Division, it imports verity and the appellate court is bound by the record as certified.

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

APPEAL by defendant from *Snepp, J.*, 31 March 1969 Criminal Session of BUNCOMBE, docketed and argued in the Supreme Court as Case No. 12 at the Fall Term 1969.

At the November 1964 Criminal Session of Buncombe two bills of indictment were returned in which Roy Lee Fox, Arrlie Fox, Donald Fox, and Carson McMahan were jointly charged with murder in the first degree and burglary in the first degree. Bill No. 64-854 charged that on 10 November 1964 the four men "did unlawfully, willfully, and feloniously and of their malice aforethought kill and murder Ovella Curry Lunsford while they . . . were committing the crime of robbery with firearms. . . ." Bill No. 64-856 alleged that about midnight on 10 November 1964 the same four men, with the intent to steal, take, and carry away the property of Charles and Ovella Curry Lunsford, did feloniously and burglariously break and enter their dwelling while it was actually occupied by them. The cases were first tried at the February 1965 Session. During the course of the trial Arrlie Fox pled guilty to burglary in the first degree and received a life sentence. The jury found the other three defendants guilty as charged in both bills of indictment and, in each case, recommended that the punishment be imprisonment for life in the State's prison. From the sentences imposed defendants did not then appeal.

In February 1968, in consequence of a petition for certiorari filed by one of the defendants, we ordered counsel for the three to prosecute a joint appeal. Donald Fox died in April 1968, and

his appeal abated. We heard the belated appeals of Roy Lee Fox and Carson McMahan at our Fall Term 1968 and, for errors committed in the 1965 trial, we ordered a new trial as to each. *State v. Fox*, 274 NC 277, 163 SE 2d 492. In consequence, defendant Roy Lee Fox was retried upon the same two bills of indictment, which were consolidated for trial.

The trial was begun on 3 March 1969 with the solicitor, the assistant solicitor, and a former solicitor, Robert S. Swain, Esquire, who appeared as special prosecutor, representing the State. Defendant was represented by privately employed counsel, Robert B. Willson and John H. Giezentanner, as well as court-appointed counsel, Thomas E. L. Lipsey II. Neither the record nor the transcript discloses why the court appointed counsel for a defendant then represented by two privately employed attorneys. Defendant's motion to quash the bills of indictment because defendant was jointly charged therein with three co-defendants was denied, and the judge allowed the solicitor's motion that the two indictments be consolidated for trial. Twelve jurors and three alternates were selected from a special venire brought from McDowell County, and the jury was impaneled at 10:30 p.m. on 3 April 1969.

On *voir dire*, in the absence of the jury, the State offered evidence which tended to show: At the 1965 trial, Charles Houston Lunsford, the husband of the deceased, Ovella Curry Lunsford, was duly sworn and examined as a witness for the State. He was cross-examined by Mr. Cecil G. Jackson, counsel for defendant Roy Fox; by Mr. Don C. Young, attorney for Arrlie Fox; by Mr. Robert E. Riddle, attorney for Carson McMahan; and by Mr. Shelby E. Horton, attorney for Donald Fox. Mr. Lunsford's oral testimony was taken down in shorthand by Mrs. Dorothy P. Hoover, the official court reporter for that session. Thereafter she transcribed her notes and checked the accuracy of the transcription against the mechanical recording of Lunsford's testimony. A duplicate original of this transcript was marked State's Exhibit S-33. Mrs. Hoover testified that S-33 was "a true and accurate transcript of the evidence given by Charles Houston Lunsford in February 1965." Lunsford died 15 November 1968; he was, therefore, unavailable to testify as a witness at the 1969 trial.

Judge Snepp found facts substantially in accordance with the foregoing statement and, subject to objections as to the competency, relevancy, and materiality of particular questions and answers, he ruled the transcript of Lunsford's testimony to be competent evidence. At the direction of the court, counsel for the State and defendant marked certain portions of it which were not to be read to the jury. The transcript was then introduced into evidence over the objection of defendant, who contended that no part of S-33 was competent. The special prosecutor, Mr. Swain, asked and received the court's permission to read the transcript to the jury. In brief summary, Lunsford's transcribed testimony tended to show:

In 1964 Lunsford and his wife, Ovella (55), lived on a farm on the Pisgah Highway in the Candler section of Buncombe County. Shortly after 11:00 p. m. on 10 November 1969 Mrs. Lunsford was in her upstairs bedroom; Mr. Lunsford was in the kitchen having a bedtime snack. Hearing a step, he turned to see a tall man standing about six feet from him in the door between the kitchen and a hallway, which led into his downstairs bedroom. The man had "a horrible looking mask on his face," and was wearing a three-quarters length coat, khaki or light green in color. He pointed a small pistol at Lunsford and said, "This is a holdup. We've come to get your money and we are going to get it."

Lunsford threw a bowl of applesauce at the intruder and "rushed him" into the bedroom. There Lunsford was hit from behind, and he and the first intruder fell on the bed. When Lunsford got up both the masked man and a second intruder had small pistols pointed at him. The latter, a stocky man with black hair, had a white cloth around his face and wore a dark coat. Lunsford called to his wife that "it was a holdup," and she came downstairs. One of the men threw her to one side and told Lunsford to give him his pocketbook or they would "get rough." Then the man with the handkerchief over his face fired at Lunsford. The bullet missed him and lodged in the wall. Lunsford "jumped the man," and the two scuffled into the kitchen where Lunsford succeeded in pulling the handkerchief from his face. The man was Donald Fox. During the scuffle, Mrs. Lunsford came in from the bedroom with a rifle. Lunsford told her to shoot but she had trouble with the safety. Two pistol shots were fired almost simultaneously, and blood gushed from his

wife's mouth. She said, "I have been shot, get me to a doctor, I am dying." At these words the two men fled, and Lunsford told her to get in the station wagon.

Lunsford, who still had on his person his billfold containing over $1,000.00, put the money in a drawer, locked the front door, and followed his wife to the car. Earlier in the evening all the tires had been inflated. Ignoring a flat tire he drove toward Asheville at such a speed that he was stopped by a police officer, who assisted him in getting to the hospital. There, while he was receiving emergency treatment, Lunsford was informed that his wife was dead.

Before that night Lunsford had seen Arrlie Fox at Treadway's farm, where he had negotiated a sale of hay. Thereafter Arrlie and a boy named "Hoot" had come to Lunsford's farm to get the hay. During the day the two had twice entered the house to use the telephone. Hoot paid Lunsford for the hay in cash, and Arrlie Fox saw him put the money in his billfold.

During his testimony Lunsford was shown a rubber mask, (S-10), which he identified as the one worn by the masked man who had entered his home on the night of November 10th. He testified that the two small pistols, (S-12 and S-13), looked like those the intruders had pointed at him. He was also shown a piece of blue cloth (S-16), a hat (S-15), a coat (S-11), and certain other articles of clothing which, he said, looked like items worn by the two men.

Other evidence for the State tended to show: About 11:30 p.m. on 10 November 1969 Police Officer McDevitt stopped Lunsford on Patton Avenue in Asheville at a point 12-15 miles from the Lunsford home. He was traveling at a high rate of speed in a station wagon from which the left rear tire was missing. Lunsford was covered with blood and driving with one hand while holding up his wife's head with the other. He told the officer what had occurred, and the officer led Lunsford to St. Joseph's Hospital. When the tireless wheel on the station wagon broke down, McDevitt pushed the vehicle into the hospital grounds.

After Mrs. Lunsford's death the coroner removed from her body a bullet (S-4), which had entered her chest, puncturing

both lungs and the supervena cava. She died from the resulting hemorrhages.

The Sheriff of Buncombe County, Harry P. Clay, went to the Lunsford home on 11 November 1964. He observed blood on the floors of the bedroom and kitchen; .22 shells, a dark cloth (S-16), and a felt hat (S-15) were on the kitchen floor. On 13 November 1964 Sheriff Clay and two of his deputies (Burleson and Mitchell) went with Arrlie Fox to a point beside an unpaved road off the Pisgah Highway about three miles from the Lunsford home. There Arrlie showed them a tow sack (S-39) which contained two trench coats (S-11 and S-38), two pistols (S-12 and S-13), the Lunsford rifle (S-14), a rubber mask (S-10), and a dirty white handkerchief (S-41).

A ballistics expert from the State Bureau of Investigation testified that the bullet (S-4) had been fired from a revolver of "the type displayed as State's Exhibit 13," the only kind which will cut ten grooves inclined to the right in a bullet. The revolver (S-13) was made of such poor steel that the riflings are irregular.

Robert Worley (whose nickname is "Hoot") testified as follows: On 9 November 1964, as an employee of Kenneth Treadway, he and Arrlie Fox went to the Lunsford farm to get four loads of hay, for which he paid Lunsford in cash. Twice during the day they went into the house to use the telephone. That night Arrlie stayed at Treadway's barn, and Hoot saw him with the small derringer pistol (S-12). On the next morning, November 10th, they unloaded the hay, and about noon Roy Lee Fox took Arrlie away in a truck.

Mrs. Joe Carter, a waitress-cook at Plemmons Truck Stop, testified that about 1:00 a.m. on 11 November 1964 defendant Roy Lee Fox, Donald Fox, Arrlie Fox, and Carson McMahan came to the Truck Stop and sat down at a table. Donald Fox had blood on his shirt. She gave him a bar of soap, and he and Arrlie disappeared into the rest room. Another waitress served the party, and Mrs. Carter paid them no further attention.

After the foregoing evidence had been introduced, counsel informed the court that the State would offer in evidence statements made by defendant to Sheriff Clay. Upon defendant's objection and motion to suppress this evidence, the court conducted a *voir dire* in the absence of the jury.

The State offered evidence which tended to show: Carson McMahan (aged 18) and Arrlie Fox (16) lived with defendant (28). On the basis of information given to officers by Arrlie and the articles in the sack found in the woods, Deputy Sheriff Brooks arrested Carson McMahan and defendant Roy Lee Fox about 4:30 p.m. on Friday, 13 November 1964. On the same information defendant's father and brother were also arrested. However, they were released as soon as investigation revealed they had no knowledge of the crime. About 9:30 that night defendant's wife was arrested. She was released the next morning and, about 11:00 a.m., defendant was advised of her release.

Defendant was informed by Deputy Sheriff Brooks, who talked to him for an hour shortly after his arrest, that he was being arrested in connection with the death of Mrs. Lunsford. Brooks also advised him of his right to counsel and told him that any statement he made could be used against him. Defendant said that he had done nothing, needed no lawyer, and wanted none. Thereafter, sometime before 6:00 p.m., Sheriff Clay talked to defendant for 10-15 minutes. He too told him that he did not have to make any statement; that if he did make one it could be used against him in court; that he was entitled to counsel and could call any attorney he wanted. Defendant again protested that, having done nothing, he neither needed nor wanted a lawyer. At that time the sheriff had in his possession the derringer pistol (S-12), the revolver (S-13), and the rubber mask (S-10). He showed these exhibits to defendant and asked him if he recognized any of them. Defendant looked at them and said nothing.

About 2:00 a.m. Clay again talked to defendant for about five minutes. Fox still maintained that he had done nothing. Sometime after daylight (Saturday, November 14th) defendant told the sheriff that he knew about the crime but had had nothing to do with it; that "they" had talked about it en route from his house to the truck stop; that he needed some money for groceries and had started to go with them but decided he just wouldn't do it; and that he had waited for "the others" at Plemmons Truck Stop.

On the morning of Saturday, November 14th, warrants charging defendant with first-degree murder and first-degree burglary were served upon him. Shortly after noon, the jailer, Deputy Sheriff Martin, informed the sheriff that defendant

wanted to see him. In consequence, the sheriff went to defendant's cell. Defendant, who appeared to have been crying, told him he wanted to make a statement and get the matter off his mind. Clay told him to think about it first. No promises of leniency or threats of any kind had been made to defendant before his confession. Nor was defendant told that reprisals would be taken against any member of his family if he did not confess. On Saturday morning defendant appeared to be worried, but he was not sick or under the influence of drugs or intoxicants. Defendant was silent for a short time and then related the following story:

On 10 November 1964, he and Carson McMahan had picked up Arrlie Fox at Treadway's stable. From there the three went to the home of Donald Fox. Arrlie told them about the money he had seen in Lunsford's billfold, and they decided to rob him; Donald thought it would be a "pushover." They then went to defendant's home where they put a mask, hat, and coats in a tow sack which they placed under the hood of Donald's truck. It was agreed that defendant would drive the truck and McMahan would stay with him; that Donald and Arrlie would go to the Lunsford house and get the money while defendant drove down the road; and that defendant would return for them. Arrlie had his little derringer (S-12), and defendant gave Donald his revolver (S-13). After letting the two out near the Lunsford home defendant made several trips by the house. On the last trip he heard a whistle and stopped. Donald and Arrlie jumped in the truck, and he drove away. The two were bloody and excited, and Donald told defendant he had shot Mrs. Lunsford. Arrlie said she was hurt bad because blood was running out of her mouth. Frightened by this news defendant drove to an embankment on a dirt road off the Pisgah Highway. There Donald and Arrlie buried the sack containing the weapons, mask, and green trench coat. Upon their return to the truck they discovered that one of the pistols had fallen out of the sack on the floorboard. Carrying the pistol and the rifle (S-14), which they had taken from the Lunsford home, they went back into the woods, put the weapons in the sack and reburied it. From there they went to Plemmons Truck Stop, where Donald and Arrlie washed themselves and threw away their socks. They then went home, and the next morning they read in the paper that Mrs. Lunsford was dead.

Defendant told the sheriff that the coats in the sack were those which Donald and Arrlie had worn in the Lunsford home. The green trench coat (S-11) still had on it applesauce from the bowl which Lunsford had thrown at Arrlie. Donald had worn the blue trench coat (S-38). In his scuffle with Donald, Lunsford had torn a piece of cloth out of it, the dark strip (S-16), which had been found on the kitchen floor.

Defendant made the foregoing statement to Sheriff Clay in his cell on the 14th floor of the jail. When he had finished, the sheriff had Deputy Burleson take defendant down to the sheriff's office where there was a "disc type recorder." There defendant repeated his statement, which was recorded as he spoke. From the recordings one of the official court reporters, Mrs. Annie Israel, later transcribed the statement (S-42) exactly as defendant made it.

After defendant had recorded his confession, Deputy Sheriff Burleson returned him to his cell. On the way back to the fourteenth floor he requested the deputy to call an attorney, Mr. Cecil Jackson. This was defendant's first request for an attorney. He had said nothing about an attorney on the way down to the sheriff's office. Burleson told the jailer of defendant's request, and he immediately called Jackson.

On Sunday afternoon, 15 November 1964, Sheriff Clay had defendant brought down to his office. He and Mrs. Israel asked defendant to go over the statement, which she had typed from the recording, to see if it was correct. His reply was that he would not sign anything unless his attorney, Mr. Cecil Jackson, was present. This was the sheriff's first knowledge that defendant had requested an attorney. He immediately called Mr. Jackson, who arrived about 3:00 p. m. The sheriff then played the recording in the presence of defendant, Mr. Jackson, and Mrs. Israel. After they had heard it, Clay asked defendant if the voice was his, and he replied, "Yes I guess it is."

Defendant's evidence on *voir dire* tended to show: About 1:00 p. m. on Saturday, 14 November 1964, the Buncombe County jailer called Mr. Cecil Jackson, Jr., an attorney, and told him that defendant wanted to see him. About 3:00 p. m. Jackson arrived at the jail and was told that defendant was with the sheriff. In a few minutes, however, Fox whom he had pre-

viously represented, came up from the sheriff's office. Jackson informed him of the seriousness of the charges against him, advised him of his constitutional rights, and inquired whether defendant's family could arrange to pay his fee. No financial arrangements were made with Jackson, and he was never privately retained to represent defendant. (Several weeks later Jackson was appointed by the court to represent him.) On the afternoon of 14 November 1964 defendant told Jackson that he had been questioned several times but had signed no statement; that he had told the sheriff "he was not along when the crime occurred." He did not mention having made another statement. Jackson next saw defendant about 3:00 p. m. on Sunday when Deputy Burleson called him to come to the sheriff's office. There he listened to the recording. Although he had not been employed he told defendant it was against his better judgment for him to sign a transcription of the recording. Defendant told Jackson that he had made a statement to the sheriff on Saturday before he had come to see him. He did not tell Jackson that he had been denied access to him or to any other attorney; nor did he make any complaint to him that he had been ill-treated, threatened, or promised any consideration in order to obtain the statement.

Defendant testified in his own behalf on *voir dire.* In summary he said: When he was arrested on 13 November 1964 he was not told why or where he was being taken. On the way "to where he was taking me," he asked the arresting officer, Mr. Brooks, to call an attorney and requested him to find out what he was charged with. Defendant was put in jail for about thirty minutes and then taken to the interrogation room, where he was told that he had been lying when he said he knew nothing about the Lunsford murder; that his wife had been arrested and she had sent him word to tell the truth because it would be lighter on him. Officers continued to interrogate him through the night, and every time anybody would move him or ask him a question he repeated his request for an attorney. On Saturday and Sunday he was suffering from a very bad cold and was in a "mentally disturbed" state. He has only a vague recollection of how many times he was interrogated or what he said; that he did not remember a record having been made of any conversation between him and Sheriff Clay and only vaguely remembered the playing of a transcription in Mr. Jackson's

presence on Sunday. Sheriff Clay did not threaten him, but he told him that he had his wife in jail and if he did not sign a statement he would see to it that she would be in Raleigh washing pots and pans. After reading the State's Exhibit 42, defendant denied that he made that statement to Sheriff Clay. He denied that he made any statement at all to him.

At the conclusion of the *voir dire,* Judge Snepp found facts, which are briefly summarized as follows:

Defendant was arrested by the Sheriff of Buncombe County about 4:30 p. m. on 13 November 1964 upon the basis of information given the sheriff by defendant's brother, Arrlie Fox. The information implicated defendant in the commission of the crimes for which he was then being tried and constituted probable cause for defendant's arrest. The information given by Arrlie Fox also tended to involve defendant's father, his brother, Leon, and defendant's wife, who were also taken into custody with probable cause. These three, however, were released as soon as investigation revealed they had no knowledge of the crimes.

After defendant's arrest, and before he was questioned, he was informed by the sheriff that he did not have to make any statements; that any statement he might make could be used against him; and that he could have a lawyer present if he so desired. Defendant said he had done nothing, did not need a lawyer, and did not want one. Defendant had made the same statement to Deputy Sheriff Brooks who had also warned him as the sheriff had done.

On the morning of 14 November 1964, warrants charging defendant with the crimes for which he stands indicted were served upon him. Shortly thereafter defendant told the sheriff that he had some knowledge of the crimes but had not participated in them. Sometime after noon on 14 November 1964 defendant sent for the sheriff and told him that he wanted to make a statement and get the matter off his chest. He then made a confession to the sheriff, which he later repeated in the sheriff's office so that it might be recorded.

After the recording was made, while on the way back to his jail cell, defendant requested Deputy Sheriff Burleson to call Mr. Cecil Jackson, an attorney. This was defendant's first

request for counsel. The jailer promptly called Mr. Jackson and that afternoon conferred with him at the jail. On the following day, 15 November 1964, during the early afternoon, defendant was taken to the sheriff's office for the purpose of verifying and signing a transcript of the recorded statement he had previously given the sheriff. At that time, defendant informed the sheriff that he was represented by Mr. Jackson. The sheriff suspended further activity until Mr. Jackson arrived. At that time the transcript was exhibited and the recording played in defendant's presence. Defendant was asked, in the presence of Mr. Jackson, whether the voice on the recording was his and he replied, in effect, that he reckoned it was. Defendant was not interrogated at any time after he requested the services of a lawyer except in the presence of the lawyer whom he had requested.

No threats or promises of any kind were made to defendant in order to secure the statement from him. He was not mistreated while confined in the Buncombe County jail, and there is "no credible evidence" that he was ill at the time he made the statements in question. Defendant was then 28 years of age. Although his formal education was limited he had worked in rodeos, on horse farms, and in similar activities. He had previously been charged with several criminal offenses and had retained lawyers to represent him. He had had experience in court. He had sufficient intelligence and knowledge to understand the nature of the charges made against him, his right to remain silent and to have counsel. He was advised of these rights, and he intelligently and understandingly waived his right to counsel until after he had made the statements to Sheriff Clay which were recorded and later transcribed as S-42. He had been fully informed from the time he was taken into custody of the nature of the charges being investigated and of the offenses with which he was charged.

Upon the foregoing findings of fact—all of which are supported by evidence appearing in the transcript—Judge Snepp concluded as a matter of law that the statements of defendant were competent evidence.

The jury was recalled and, in its presence, Sheriff Clay gave substantially the same evidence with reference to the statements made to him by defendant which he had given before

the judge on *voir dire*. Thereafter the transcribed copy of defendant's recorded statement (S-42) was received in evidence for the purpose of corroborating the sheriff's testimony. The mask (S-10), the green trench coat (S-11), the derringer pistol (S-12), defendant's revolver (S-13), the Lunsford rifle (S-14), the blue rag (S-16), the blue trench coat (S-38), the tow sack (S-39), and the dirty white handkerchief (S-41), were also introduced in evidence.

Defendant offered no evidence before the jury.

In the late afternoon of 9 April 1969 the jury returned its verdict. Defendant was found guilty of murder in the first degree with the recommendation that his punishment be imprisonment for life (Case No. 64-854) and guilty of burglary in the first degree with the recommendation that his punishment be imprisonment for life (Case No. 64-856). The court imposed the mandatory life sentences, adjudging that the sentence in Case No. 64-856 should begin at the expiration of the sentence imposed in Case No. 64-854. From these judgments defendant appealed to the Supreme Court, assigning errors which will be discussed in the opinion.

Robert Morgan, Attorney General; Andrew A. Vanore, Jr., and Burley B. Mitchell, Jr., Staff Attorneys for the State.

T. E. L. Lipsey for defendant appellant.

SHARP, J.

This case first came to us as a joint appeal by Roy Lee Fox and Carson McMahan, who had been tried with the other two defendants jointly indicted with them. Neither Roy Lee Fox nor Carson McMahan had testified, yet the confession of each, which implicated the other, had been admitted in evidence. This error necessitated a new trial and, in ordering it, we directed that defendants Roy Lee Fox and Carson McMahan be tried separately unless the State relinquished their confessions. *State v. Fox,* 274 N.C. 277, 291, 163 S.E. 2d 492, 502.

Upon the second trial, as in the first, all the evidence tended to show: Defendant and the three other persons named in each indictment had conspired to break and enter, during the night time, the dwelling occupied by Mr. and Mrs. Lunsford for the purpose of robbing Mr. Lunsford of his billfold. In furtherance of the conspiracy, defendant accoutered Donald and Arrlie for

the burglary, drove them to the locale, and gave Donald the pistol with which he thereafter shot Mrs. Lunsford during the attempt to rob Mr. Lunsford. While Donald and Arrlie went into the house to rob Lunsford, defendant drove around in the vicinity and returned to pick them up.

Defendant's first two assignments of error are that the trial judge erred (1) in "allowing" defendant to be retried upon the two original indictments in which he and three others were jointly charged with first-degree murder and burglary; and (2) in consolidating the two charges against defendant for trial. It is obvious, however, that the nature of the case dictated this procedure.

[1, 2] When a murder is "committed in the perpetration or attempt to perpetrate any . . . robbery, burglary or other felony," G.S. 14-17 declares it murder in the first degree. In those instances the law presumes premeditation and deliberation, and the State is not put to further proof of either. *State v. Bunton,* 247 N.C. 510, 101 S.E. 2d 454; *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494. Furthermore, when a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree. On this evidence Roy Lee Fox was not only a co-conspirator with Arrlie and Donald Fox; he was constructively present aiding and abetting in the two crimes charged and, therefore, a principal. *State v. Sellers,* 266 N.C. 734, 147 S.E. 2d 225; *State v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340; *State v. Green,* 207 N.C. 369, 177 S.E. 120; *Lindsey v. State,* 201 Ark. 87, 143 S. W. 2d 573; *Clernt v. State,* 109 Neb. 628, 192 N. W. 209; 77 C. J. S. *Robbery* § 32 (1952). See *State v. Bell,* 205 N.C. 225, 171 S.E. 50.

[3] In each of the two bills upon which defendant was tried it was entirely proper to name the four persons who had conspired to rob Mr. Lunsford even though no conspiracy was expressly averred. *State v. Maynard, supra.* However, since Roy Lee Fox himself did not enter the Lunsford home and was not *actually* present when Mrs. Lunsford was killed, the State was required to prove that he had conspired with Arrlie and Donald Fox who actually committed the burglary and murder.

[4, 5] Defendant's argument that it was error to retry defendant on the original indictment is that "by so doing the court

allowed evidence to be presented to the grand jury as to codefendants implicating the defendant thereby taking from him one of the legally required steps looking toward the second trial." The statement is puerile. Equally so is the statement that when the court consolidated the charges of murder and burglary, two offenses which grew out of one continuous criminal episode, the court "thereby compounded the original biased advantage that the State was allowed to take in the matter of the evidence that could be presented against the codefendants who were not on trial." When two or more indictments are founded on one criminal transaction G.S. 15-152 contemplates that the court will consolidate them for trial. *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506; *State v. White,* 256 N.C. 244, 123 S.E. 2d 483. In this case the facts required to convict defendant of murder would necessarily have convicted him of the burglary charged. For the judge to have put the State to two separate trials would have been unthinkable.

[6] The third assignment of error is that the court failed "to allow challenges for cause on jurors who were prejudiced as a result of knowledge admitted regarding adverse publicity about the defendant." This assignment of error, in complete disregard of our rules, does not specifically set out the jurors' "knowledge admitted" upon which the alleged error is predicated. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416. The assignment refers to pages 30-34 of the record, where a portion of the *voir dire* examination of three prospective jurors is set out. After the court denied defendant's challenges for cause his counsel challenged each peremptorily. The first two were prospects for the original panel of twelve; the third was a prospective alternate. At the conclusion of their examination each of the three stated, in effect, that he could decide the case on the evidence and the law as enunciated by the court without being influenced by what he had read and heard or by any preconceived notions as to the law. The court's ruling that the three were competent jurors is sustained by numerous decisions of this Court. *See State v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523 and the cases cited therein.

Defendant's case on appeal does not disclose whether, after he had exhausted his peremptory challenges, he unsuccessfully attempted to challenge an additional juror. Because of this inconclusiveness we read the 704-page transcript of the proceed-

ings incident to the selection of the jury. It revealed that when twelve jurors had been selected defendant had exhausted only ten of his fourteen peremptory challenges and that, in response to a direct question from the judge, defendant stated he was "satisfied with them (the jurors) to hear his case." Thereafter three alternates were selected. In the selection of the first, defendant used his four unexpended challenges and one other. Before the second was seated he had used his two peremptory challenges, but he did not challenge the juror who was finally sworn as the second alternate. In the selection of the third alternate, defendant used only one peremptory challenge.

[7] Defendant's fourth assignment of error is that the court failed "to allow additional peremptory challenges for the alternate jurors and the defendant did exhaust his challenges at the time of the trial." In his brief, defendant makes this statement: "The Court over the objection of the defendant (R. pp. 34) ruled that the defendant would be allowed two challenges for ALL alternate jurors selected not two EACH as the statute reads and intended." Both the record and the certified transcript belie this statement. After defendant had exercised his first peremptory challenge during the selection of the second alternate the court said to counsel: "So there will be no misunderstanding I am going to hold that there will be two challenges as to each alternate because I don't know now whether there will be two or three alternates." This ruling was in conformity with G.S. 9-18 which provides that in the selection of alternate jurors after the regular jury has been impaneled, "Each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to any unexpended challenges the party may have left after the selection of the regular trial panel." Clearly the court did not deprive defendant of any peremptory challenge to which he was entitled, nor was defendant forced to accept any juror whom he had challenged peremptorily or for cause.

[8] "Numerous decisions of this Court, *e.g.*, *State v. Dixon*, 215 N.C. 438, 440, 2 S.E. 2d 371, 372, hold that a defendant has not been prejudiced by the acceptance of a juror who is challenged for cause and the cause is disallowed unless he exhausts his peremptory challenges before the panel is completed. Other decisions, *e.g.*, *Carter v. King*, 174 N.C. 549, 94 S.E. 4, hold that a defendant, in order to preserve his exception to the court's denial of a challenge for cause, must (1) exhaust his peremptory challenges *and* (2) thereafter assert his right to

challenge peremptorily an additional juror. These rulings are plainly and succinctly summarized in the first headnote in *Carter v. King* (174 N.C. 549), which epitomizes the decision in that case, as follows: 'Where the court has refused to stand aside a juror challenged for cause, and the party has then peremptorily challenged him, in order to get the benefit of his exception he must exhaust his remaining peremptory challenges, and then challenge another juror peremptorily to show his dissatisfaction with the jury, and except to the refusal of the court to allow it.' " *State v. Allred,* 275 N.C. 554, 563, 169 S.E. 2d 833, 838.

We find nothing in the case on appeal or transcript which suggests that defendant was not tried by a fair and impartial jury. Of the twelve jurors selected on the regular panel six were opposed to capital punishment; one was not asked his views; four "believed in" capital punishment only in "some cases." Only one stated without equivocation that he "believed in" capital punishment. Of the two alternates who were substituted for regular jurors, one did not believe in capital punishment and the other believed in it only "in some cases."

[9, 10] Defendant's fifth, sixth, and seventh assignments are that the court erred in admitting in evidence the transcript of the testimony given by Mr. Lunsford at the first trial (S-33), and in allowing it to be read to the jury by the special prosecutor, Mr. Swain. Defendant's objection to this transcript was "to the introduction or reading of either all or part of it." This was a broadside objection to the entire transcript. Upon such an objection it was properly admitted if any part of it was competent. *Grandy v. Walker,* 234 N.C. 734, 68 S.E. 2d 807; *Wilson v. Williams,* 215 N.C. 407, 2 S.E. 2d 19; 1 Strong N.C. Index 2d *Appeal and Error* § 30 (1967). It is well settled that the official stenographic report of testimony given at a former trial by a witness who has since died may be introduced in evidence upon a subsequent trial of the same cause upon proof of its authenticity and accuracy. *State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897; *Settee v. Electric Railway,* 171 N.C. 440, 88 S.E. 734; *Cooper v. R. R.* 170 N.C. 490, 87 S.E. 322; Stansbury, N. C. Evidence § 145 (2d ed. 1963); Annot., 11 A. L. R. 2d 30, 58, 75.

[10] The transcript of Lunsford's testimony was properly received in evidence, and the judge specifically admitted it "subject to the competency, relevancy and materiality" of

specific questions and answers. Before it was read to the jury counsel for defendant and the State went through it and marked certain portions thereof which were not to be read. Presumably they agreed that these portions were either "irrelevant or incompetent." In any event, defendant interposed no objection to specific questions or answers in the transcript. This he was required to do if he would challenge their competency. *Grandy v. Walker, supra.* Nor did he object that specific questions and answers had been deleted. The entire transcript was offered and defendant, although reserving his right to object to the whole, concurred in the omissions. *Allen v. Allen,* 213 N.C. 264, 195 S.E. 801.

[11, 12] The assignment of error that the court permitted the special prosecutor to read the transcript instead of the court reporter is unsupported by any exception taken during the trial. The transcript reveals that when the judge asked who would read the stenographic report of Mr. Lunsfords' testimony to the jury Mr. Swain said, ". . . [P]erhaps the simplest way would be to have me to read it, read the whole thing." The court's reply was, "All right," and defendant made no objection. An assignment of error which is not supported by an exception previously noted in the case on appeal presents no question of law for this Court to decide. *Bulman v. Baptist Convention,* 248 N.C. 392, 103 S.E. 2d 487; *Darden v. Bone,* 254 N.C. 599, 119 S.E. 2d 634; *State v. Hudler,* 265 N.C. 382, 144 S.E. 2d 50. However, the record affirmatively shows that no prejudice resulted to the defendant from Mr. Swain's reading of the transcript. On his own copy the judge followed the prosecutor's reading of Lunsford's testimony very closely. If Mr. Swain omitted a single word or stumbled in his reading—as he did several times when (he said) his "eyes merged"—the court immediately admonished, "Watch your words here; read exactly what it says." In every such instance Mr. Swain reread the muffed line. Assignments of error 5, 6, and 7 are without merit.

[13] Assignment No. 8 is that the court erred "in allowing the testimony as to injuries to other than the deceased, Mrs. Ovella Lunsford." Assignment of error No. 9 is that the court erred "in failing to allow defendant's written motion to suppress identification of exhibits out of the presence of the jury prior to the preliminary investigation as to each exhibit's admissibility." Assignment No. 12 is that the court erred "in allowing statements made by Charles Houston Lunsford and others to

be received into evidence." These assignments of error are typical and characterize the work which went into the entire case on appeal. They manifest counsel's failure to inform himself of the rules of this Court and the numerous decisions calling attention to them. When the assignment is that the court erred in the admission or rejection of evidence the evidence itself must be set out in the assignment, and "a mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient." In Re Will of Adams, 268 N.C. 565, 566, 151 S.E. 2d 59, 61; Rule 19(3), Rules of Practice in the Supreme Court of North Carolina and the annotations appearing thereunder; *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416; *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793; *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412; *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597; *Darden v. Bone,* 254 N.C. 599, 119 S.E. 2d 634; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492.

[14-16] Although the foregoing three assignments present no question for our consideration, for the reasons hereinafter set out, we have deemed it appropriate to consider every assignment of error which counsel has attempted to make. The description of Mr. Lunsford's wounds given by Dr. John C. Young, who saw him at the hospital after his wife was shot, was competent not only to corroborate the testimony of Mr. Lunsford but also to show the felonious purpose of the two men who had inflicted them after invading the Lunsford home. *State v. Payne,* 213 N.C. 719, 197 S.E. 573. The testimony of Officer McDevitt and Sheriff Clay (the subject of Assignment 12) as to statements made to them by Mr. Lunsford on the night Mrs. Lunsford was murdered were likewise competent to corroborate the testimony of Mr. Lunsford, and the court specifically limited them to that purpose. The record-page reference in Assignment 9 gives us no more clue in our search for error than did the assignment itself. However, the rubber mask, the pistols, the coats, the hat, the piece of cloth torn from one of the coats, the white handkerchief, and the rifle—articles which the investigating officers found either on the floor on the Lunsford kitchen or in the buried tow sack to which Arrlie Fox led them—were competent to identify the perpetrators of the crime, as well as to show a design and plan. *State v. Payne,* 213 N.C. 719, 197 S.E. 573; *State v. Brown,* 204 N.C. 392, 168 S.E. 532. "The evidence tied these items into the offense charged and made them properly admissible." *State v. Stroud,* 254 N.C. 765, 767, 119 S.E.

2d 907, 909. *Accord,* Stansbury, N. C. Evidence § 118 (2d ed. 1963).

[17] Assignments 8, 9, and 12 are overruled. So also is Assignment 10, which charges that the court erred in failing to allow defendant's motion to sequester the State's witnesses. The motion of defendant for the sequestration of the witnesses was addressed to the discretion of the court, and no suggestion of abuse appears upon the record. *State v. Yoes* and *Hale v. State,* 271 N.C. 616, 157 S.E. 2d 386; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506.

[18] Assignment No. 21 is that the court erred in allowing Sheriff Clay to testify that the arrest sheet (a record of his office) showed that defendant was arrested at 4:30 p. m. on Friday, 13 November 1964. This evidence was elicited during the State's attempt to establish the time Sheriff Clay first talked to defendant. When he did not recall the exact time, Mr. Swain asked him if he knew "about what time" defendant was brought to the sheriff's office. The answer was, "Yes sir, the arrest sheet shows he was arrested at 4:30." Defendant objected but made no motion to strike the answer. That the quoted statement was not prejudicial to defendant, however, is so apparent that no discussion of this assignment is required. The sheriff could, of course, have used the arrest sheet to refresh his recollection. Stansbury, N. C. Evidence § 32 (2d ed. 1963).

In his brief defendant specifically abandons assignments of error 11, 13, 15, 19, 20, 22, and 23.

Assignments 14, 16, and 17 relate to defendant's confession. Assignments 14 and 16 are that its admission was error "in the light of the arrest of his family and other circumstances of his confinement" and because it "was unsigned and not verified by him in any way." Assignment 17 is that it was error to allow in evidence "a paper writing purporting to be the confession of Roy Lee Fox when the best evidence would have been an alleged recording which was not produced by the State."

[19, 20] In his brief defendant says, ". . . [T]he judge should not have made the findings of fact as he did at the time the confession was allowed in evidence." Apparently defendant attacks the admissibility of his confession upon the assumption that the judge was bound by his statements on *voir dire* and required to disregard any conflicting testimony given by law

enforcement officers or others. This, of course, is not the law. *State v. Clyburn,* 273 N.C. 284, 159 S.E. 2d 868; *State v. Logner,* 266 N.C. 238, 145 S.E. 2d 867. When the State offers a confession in a criminal trial and defendant objects, the competency of the confession must be determined by the trial judge in a preliminary inquiry in the absence of the jury. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481. The trial judge hears the evidence, observes the demeanor of the witnesses, and resolves the question. *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51. His findings as to the voluntariness of the confession, and any other facts which determine whether it meets the requirements for admissibility, are conclusive if they are supported by competent evidence in the record. *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841.

[21] On defendant's first trial the judge failed to make any finding with reference to the time defendant requested the jailer to call an attorney (Mr. Jackson) for him. In sending the case back for a retrial we said: "If Roy voluntarily made the statement (S-42), or the earlier one which was not transcribed, and *thereafter* requested counsel for the first time, he was not deprived of his Sixth Amendment right to counsel. If, however, *after* he had requested an attorney, and *before* he was given an opportunity to confer with him, officers continued to interrogate Roy, any incriminating statement thus elicited cannot be received in evidence against him. The ruling upon the admissibility of any statement which Roy may have made must await the findings of material facts to be made by the judge at the next trial." *State v. Fox, supra* at 295, 163 S.E. 2d at 505. These findings have now been made, and they establish that defendant first requested counsel after he had made a confession to Sheriff Clay on the fourteenth floor of the jail and after he had left the sheriff's office where he had made and recorded the same inculpatory statements. Other findings by the judge establish that, prior to making his confession, defendant was fully advised of his constitutional rights as they were then understood.

[22] Both defendant's confession and his first trial antedated the decision in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (13 June 1966). It was held in *Jenkins v. Delaware,* 395 U.S. 213, 23 L. Ed. 2d 253, 89 S. Ct. 1677 (2 June 1969), that Miranda's standards for determining the admissi-

bility of in-custody statements do not apply to post-Miranda retrials of cases originally tried prior to that decision. *See State v. Swann*, 275 N.C. 644, 170 S.E. 2d 611.

[23] A confession is generally defined as an acknowledgment in express words by the accused in a criminal case of his guilt of the crime charged or of some essential part of it. *State v. Hamer*, 240 N.C. 85, 81 S.E. 2d 193. "[I]t may be oral or written in whole or in part; and there is no requirement that an oral confession be reduced to writing or that the oral statement, after transcription by another, be signed by the accused." 23 C.J.S. *Criminal Law* § 816, p. 154 (1961). *Accord, State v. Clyburn, supra.*

[24] Defendant's confession, which was admitted in evidence, was the oral statement which he made to the sheriff in the jail and again in the sheriff's office. The transcription of the recording made during defendant's second statement to the sheriff (S-42)—which defendant never signed—was admitted in evidence solely for the purpose of corroborating the sheriff's testimony as to what defendant had said to him. The sheriff testified that this transcription, which had been transcribed by the court reporter, Mrs. Israel, was "an exact copy of the words which were spoken between (himself) and Roy Lee Fox on November 14, 1964 and as recorded."

The transcript was clearly competent to corroborate Sheriff Clay's statement of defendant's confession. In any event, however, its contents were merely repetitive of the sheriff's testimony, and no prejudice could have resulted to defendant from its admission. The case of *State v. Walker*, 269 N.C. 135, 152 S.E. 2d 133, upon which he relies "as the leading case in this State on the point," is not pertinent. In *Walker*, the State introduced a typewritten statement narrating an investigating officer's interpretation of his interview with the defendant. The statement recited that the defendant had read it before signing it. However, on *voir dire*, the officer himself testified that the defendant not only had not read it, but he had refused to read it and had no knowledge of its contents. In awarding a new trial for the error of its admission, this Court said: "There is a sharp difference between reading from a transcript which, according to sworn testimony, records the exact words used by an accused, and reading a memorandum that purports to be an interpretative narration of what the officer understood to be

the purport of statements made by the accused." *Id.* at 141, 152 S.E. 2d 138.

[25, 26] Defendant's contention that S-42 was inadmissible because "the best evidence would have been the alleged recording" is likewise without substance. "The best evidence rule applies only where the *contents* or *terms* of a document are in question." Stansbury, N.C. Evidence § 191 (2d ed. 1963). In *State v. Ray,* 209 N.C. 772, 184 S.E. 836, parol evidence was admitted to establish the contents of a freight car. The defendant objected to parol evidence because the records of the railroad company showed its contents. On appeal the Court said: "The making of a record did not prohibit a witness who loaded the car and saw what went into it, from testifying as to its contents." *Id.* at 777, 184 S.E. at 839. As previously noted, the transcript was not offered as defendant's confession but as corroboration of the sheriff's testimony as to his conversation with defendant. The fact that there was a recording of it did not prevent the sheriff from testifying as to what was said. The recording—upon proper authentication—would have been admissible. Had defendant requested its production undoubtedly the court would have required the State to produce it. However, defendant did not request the recording, nor did he base his objection to the admission of S-42 upon the ground he now asserts. Indeed, at the time he stated no reason for his objection. Assignments of error 14, 16, and 17 are overruled.

The final assignment (No. 18) is that "the Court erred in its comments, ruling, and procedures which resulted in the State being assisted in the prosecution of its case to the prejudice of the defense. Defendant's exceptions Nos. 23, 25, 26, 33, 34, 39, 40, 42 and 43 (R. pp. 66-83)." The assignment reveals its failure to point out the alleged errors relied upon. It therefore presents no question for our consideration. *State v. Kirby, supra.* Notwithstanding, we have examined each of the exception numbers to which it refers and find all to be wholly without merit. Indeed, only one (No. 34) is supported by an objection interposed during the trial. That objection was to a properly identified photograph, taken in the Lunsford home, which was offered to illustrate the testimony of Mr. Lunsford. Two of the exceptions which counsel inserted at the time of making up the case on appeal relate to recesses of the court—one taken for the convenience of defendant—which the court called on his own accord. Exception No. 40 is to the statement of Deputy Sheriff

Johnson that he had received the exhibits which had been offered in evidence at the first trial. His next statement revealed that he received them on 6 November 1967 for the purpose of delivering them to the Clerk of the Supreme Court. At the time this testimony was elicited defendant did not object to the question or move to strike the answer. However, his failure to do so is immaterial; the evidence was competent. Exceptions 23 and 42 were inserted in the case on appeal at two points in the trial where the court in its discretion permitted Mr. Swain to withdraw a witness for the purpose of qualifying an exhibit about which he wished to question the witness. Nos. 25 and 26 relate to statements made by the judge when the prosecution offered in evidence three photographs to which defendant made no objection. Notwithstanding, the court declined to receive them because one (S-21) had not been identified and two (S-8 and S-9) illustrated no evidence which had been introduced up to that time. Assignment No. 18 is overruled.

[27] We note that defendant has assigned no error to the charge of the court and that it was not included in the case on appeal. It is presumed, therefore, that the court correctly instructed the jury on every phase of the case, both with respect to the law and the evidence. *State v. Hines*, 266 N.C. 1, 145 S.E. 2d 363.

[28] Because this is defendant's second appeal from a conviction upon two indictments for capital crimes which occurred almost six years ago we have examined the record of the trial below with great care. Our task was hampered and made onerous by an inaccurate record and a carelessly prepared case on appeal. Appellant's counsel, whose responsibility it is to make certain that all essential parts of the record are filed in this Court, that the case on appeal is in compliance with our rules, and that it presents a clear and accurate account of the proceedings below, failed in this duty. Omitted from the record were the bill of indictment in case No. 24-856 and the verdicts in both cases Nos. 24-856 and 25-854, "essential parts of the transcript record in a criminal action brought to this Court." *State v. Stubbs*, 265 N.C. 420, 423, 144 S.E. 2d 262, 265. The written orders made throughout the trial and the judgments from which defendant appealed were not shown to have been signed by the judge. *Inter alia,* we could not tell from the case on appeal whether the *voir dire* held to determine the compet-

ency of defendant's confession was conducted out of the presence of the jury.

The Attorney General, in two addenda, supplied the omissions of the essential portions of the record so that we might review the case. He also secured a certified transcript of the stenographic report of the trial in order to determine the order in which proceedings were had and when they were out of the presence of the jury. At the instance of defendant's counsel and with the consent of the Attorney General, another addendum was filed to add assignments of error which counsel had omitted. These addenda, of course, increased the expense of a case which had already cost in excess of $21,000.00. Unwilling to impose the penalty of a new trial upon the State and county unless justice actually required it, we waived the failure to comply with our rules and did what was necessary to inform ourselves as to what actually happened at the trial. Having done so, we are satisfied that the case was well and fairly tried by the judge below and that, during the trial, defendant was adequately represented by counsel who fully protected his rights. On appeal we have seen to it that defendant's right to have his trial fully reviewed has not been prejudiced.

[29, 30] Although the primary duty of preparing and docketing a true and adequate transcript of the record and case on appeal in a criminal case rests upon defense counsel, G.S. 1-282, G.S. 15-180, it is the duty of the solicitor to scrutinize the copy which appellant serves upon him. If it contains omissions, errors, or misleading juxtapositions it is the solicitor's responsibility to file exceptions or a counter case within his allotted time. He tried the case before the jury, and he is the State's only representative who is in position to evaluate the appellant's statement of the case on appeal. The Attorney General, who must defend the case in the Appellate Division, is dependent upon the solicitor for a valid record of the trial below. When the solicitor accepts the defendant's case on appeal and it is certified to the Appellate Division, it imports verity and the appellate court is bound by the record as certified. *State v. Miller,* 214 N.C. 317, 199 S.E. 89; 1 N.C. Index 2d *Appeal and Error* § 42; 3 N.C. Index 2d *Criminal Law* § 160 (1967). It costs the State and profits a solicitor nothing if, after spending ten days in a trial such as this, we order a new trial for an error appearing in the transcript when none actually occurred. We again call the attention of defense counsel to our admonition in *State v.*

Benton, supra at 660, 174 S.E. 2d at 806. At the same time we remind the solicitors that their obligation to a case does not end when the judge pronounces sentence. Their duty includes policing the case on appeal. This, of course, necessitates the expenditure of the time and effort required to make a careful and painstaking examination of it and to file exceptions or counter case if either is necessary to provide a correct record and a case on appeal which truly and intelligibly sets out the proceedings as they occurred. Only upon such a record can the Attorney General and the Appellate Division do justice to the State and to the defendant. In the trial below we find

No error.

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

PERRY MARTIN ON BEHALF OF HIMSELF AND ALL OTHERS OF THE SAME OR LIKE CLASS v. NORTH CAROLINA HOUSING CORPORATION, A BODY POLITIC AND CORPORATE, AND WILLIAM L. TURNER, DIRECTOR OF THE DEPARTMENT OF ADMINISTRATION FOR THE STATE OF NORTH CAROLINA, G. ANDREW JONES, JR., STATE BUDGET OFFICER FOR THE STATE OF NORTH CAROLINA, AND GEORGE S. LAMBERT, STATE DISBURSING OFFICER FOR THE STATE OF NORTH CAROLINA

No. 10

(Filed 31 July 1970)

1. **Constitutional Law § 6— legislative powers of General Assembly — public policy**

   The General Assembly is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom; absent such constitutional restraint, questions as to public policy are for legislative determination.

2. **Statutes § 4— presumption of constitutionality**

   When the constitutionality of a statute is challenged, every presumption is to be indulged in favor of its validity.

3. **Appeal and Error § 3; Statutes § 4— constitutionality of statute — determination by Supreme Court — specific grounds of attack**

   Ordinarily, the Supreme Court will not undertake to determine whether a statute is unconstitutional except with reference to a ground on which it is attacked and definitely drawn into focus by the attacker's pleadings.

4. **Appeal and Error § 4; Constitutional Law §§ 6, 10— N. C. Housing Corporation Act — public policy — judicial review**

Whether the public policy and program established by the North Carolina Housing Corporation Act is wise or unwise is for determination by the General Assembly, it being the function of the Supreme Court in this appeal to determine whether any portion thereof which plaintiff, as a general taxpayer, may challenge is unconstitutional on any ground asserted by him.

5. **Taxation § 7— taxation and appropriation of tax monies for non-public purpose**

The power to appropriate money from the public treasury is subject to the limitation of Article V, § 3 of the North Carolina Constitution that the power of taxation may not be exercised for a non-public purpose.

6. **Constitutional Law § 4— N. C. Housing Corporation Act — taxpayer suit to enjoin use of money appropriated by legislature**

A taxpayer may maintain an action to restrain payment to the North Carolina Housing Corporation and the Corporation from using the amount appropriated out of the General Fund for its use on the ground that the North Carolina Housing Corporation Act is unconstitutional because the Corporation was not created for a public purpose.

7. **Taxation § 7; Constitutional Law § 6— N. C. Housing Corporation — public purpose — legislative powers**

If the North Carolina Housing Corporation was established for a public purpose, the means of executing the project are for the General Assembly to determine.

8. **Taxation § 7— public purpose**

The concept of public purpose expands with the population, economy, scientific knowledge and changing conditions.

9. **Taxation § 7— public purpose**

For a use to be public it must benefit the public in common and not particular persons, interests or estates.

10. **Taxation § 7— public purpose — legislative declaration**

A legislative declaration which asserts in general terms that the statute under consideration is enacted for a public purpose, although entitled to great weight, is not conclusive.

11. **Taxation § 7— public purpose — question of law**

When the facts are determined, what is a public purpose is a question of law for the court.

12. **Statutes § 4— presumption of facts necessary to constitutionality of statute**

If the constitutionality of a statute depends on the existence or nonexistence of certain facts and circumstances, the existence of such

facts and circumstances will generally be presumed for the purpose of giving validity to the statute unless the evidence is to the contrary or facts judicially known or proved compel otherwise.

13. **Constitutional Law § 11— police power**

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

14. **Taxation § 7— N. C. Housing Corporation Act — public purpose**

The North Carolina Housing Corporation Act was enacted for a public purpose and the Corporation's authorized activities in assisting in the planning, construction and financing of residences which would not otherwise be available to persons and families of lower income are for a public purpose; consequently, the appropriation of tax revenues for use by the Corporation does not violate Article V, § 3 or Article I, § 17 of the North Carolina Constitution or Section I of the Fourteenth Amendment to the United States Constitution.

15. **Taxation § 6— issuance of bonds and notes by N. C. Housing Corporation — necessity for vote**

Legislation creating the North Carolina Housing Corporation and authorizing the Corporation to issue bonds and notes does not violate Article VII, § 6 of the North Carolina Constitution, which requires the approval of a majority of the voters of a county, city, town or other municipality before such subdivision of the State may pledge its credit or levy a tax except for its necessary expenses, since that constitutional provision places no limitation upon the General Assembly or on an instrumentality of the State created by the General Assembly for a public purpose.

16. **Taxation § 4— constitutional limitation on increase of public debt — bonds and notes of N. C. Housing Corporation**

Bonds and notes authorized to be issued by the North Carolina Housing Corporation which, by statutory restriction, are payable solely from the revenues or assets of the Corporation will not create a debt within the meaning of the Constitution, and therefore the debt limitations of Article V, § 4 of the North Carolina Constitution are inapplicable thereto.

17. **Taxation § 4— fund available for payment of principal and interest of N. C. Housing Corporation obligations — pledge of faith or credit of State**

The fact that an amount of money heretofore appropriated for use by the North Carolina Housing Corporation and such further appropriations, if any, as the General Assembly may see fit to make, may be used for "the establishment of a reserve or contingency fund to be available for the payment of the principal of and the interest on any bonds or notes of the Corporation" does not constitute a pledge of the faith or credit of the State or of any political subdivision thereof for

the payment of the principal and interest on any bonds or notes of the Corporation.

18. **Constitutional Law § 7— delegation of legislative powers**

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, but 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.

19. **Constitutional Law § 7— N. C. Housing Corporation Act — delegation of legislative authority**

Although the North Carolina Housing Corporation must of necessity determine what persons and what families are to receive its assistance and must exercise its discretion and judgment with reference to the choice of sites and the identity of the sponsor, builder or developer with whom the Corporation will deal in connection with a particular project, the Housing Corporation Act does not delegate legislative authority to the Corporation in violation of Article I, § 8 of the North Carolina Constitution, since the Corporation determines factually, by application of the factors prescribed by the Act, what persons or families are "persons and families of lower income" and therefore entitled to the benefits of the Act, and the Act provides sufficient standards to guide the Corporation in the use of the proceeds from the sale of the Corporation's tax-exempt bonds and in the making of project development loans from the Housing Development Fund.

20. **Taxation § 21— bonds and notes of N. C. Housing Corporation — exemption from taxation — constitutionality**

Since the North Carolina Housing Corporation Act and the Corporation's activities are for a public purpose, provisions of the Act which exempt from taxation the property of the Corporation and bonds and notes issued by the Corporation to effectuate such public purpose do not violate Article V, § 5 of the North Carolina Constitution.

LAKE, J., dissenting.

HIGGINS, J., joins in the dissenting opinion.

APPEAL by defendants from *Bailey, J.*, December 22, 1969 Special 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 injunctive relief.

Plaintiff-taxpayer alleges that Chapter 1235, Session Laws of 1969, referred to hereafter as the 1969 Act, which provides for the creation of "a body politic and corporate to be known as the 'North Carolina Housing Corporation,'" and defines its authority, is unconstitutional and therefore void. He prays that

William L. Turner, Director of the Department of Administration, and G. Andrew Jones, Jr., State Budget Officer, and George S. Lambert, State Disbursing Officer, be enjoined "from doing any act or taking any steps constituting the expenditure of any funds from the general fund of the State of North Carolina for or on behalf of the North Carolina Housing Corporation or causing any funds to be expended by said Corporation for or on its behalf," and that the North Carolina Housing Corporation, hereafter referred to as Corporation, be enjoined "from accepting said funds and undertaking to carry out investments and programs in construction and development of residential housing to be financed in any degree with public funds or with tax exempt revenues."

Defendants assert the 1969 Act, which is now codified in the 1969 Cumulative Supplement to Volume 3B of the General Statutes of North Carolina as Chapter 122A, consisting of Sections 122A-1 through 122A-23, is in all respects constitutional and valid.

The pleadings establish these facts:

Plaintiff is a citizen and resident of Northampton County, North Carolina. He pays ad valorem taxes to one or more municipalities and also to one or more counties in northeastern North Carolina. He pays income, sales and intangible taxes to the State of North Carolina; and income and excise taxes to the United States of America.

The Corporation is composed of nine members, consisting of Edwin M. Gill, State Treasurer; William L. Turner, Director of the Department of Administration; Roy G. Sowers, Jr., Director of the Department of Conservation and Development; G. Irvin Aldridge, Director of the Department of Local Affairs; Jacob Koomen, State Health Officer; and the following four citizens and residents of North Carolina appointed by the Governor, to wit, R. Peyton Woodson III; John W. Winters; Roy A. Southerland; and Claude E. Pope. R. Peyton Woodson III, was designated by the Governor to serve as Chairman. (1969 Act, s. 4.)

The individual defendants are officials of the State of North Carolina in the capacities set forth in the caption.

The Corporation was created as a public agency, an instrumentality of the State of North Carolina, and empowered to act on behalf of the State of North Carolina for the purpose of providing residential housing "for sale or rental to persons and families of lower income." (1969 Act, s. 2.)

Defendants, under color of their respective offices, are about to transfer to the Corporation the $500,000.00 appropriated from the General Fund of the State by Chapter 1162, Session Laws of 1965, for the fiscal years 1969-1970 and 1970-1971, or a portion thereof, to enable the Corporation "to further organize and pay the expenses of its administration during the first two years of the Corporation's operation," and that these and such additional funds as may be appropriated will be used by the Corporation for purposes enumerated in the 1969 Act.

The Corporation is authorized "to provide for the issuance, at one time or from time to time, of not exceeding two hundred million dollars ($200,000,000) bonds of the Corporation to carry out and effectuate its corporate purposes; provided, however, that not more than fifty million dollars ($50,000,000) bonds shall be issued prior to June 30, 1971." (1969 Act, s. 8.)

The Corporation is authorized "to provide for the issuance, at one time or from time to time, of Housing Development Fund notes for the purpose of providing funds for such Fund: provided, however, that not more than five million dollars ($5,000,-000.00) fund notes shall be outstanding at any one time. The principal of and the interest on any such fund notes shall be payable solely from the Housing Development Fund." (1969 Act, s. 7.)

It was stipulated and agreed that the court, without a jury, should hear the evidence, make findings of fact and conclusions of law and enter judgment. Thereupon, the parties submitted a Stipulation of Facts, referred to hereafter as the Stipulation.

Additional facts established by the Stipulation are summarized or quoted below.

In Paragraph 8, the twenty-one specific powers which Section 5 of the 1969 Act purports to confer on the Corporation are quoted verbatim. It was stipulated that the Corporation proposed to exercise each and all of these powers.

In Paragraph 9, it was stipulated that the Corporation proposed to carry out the following program:

"(a) to issue self-liquidating tax exempt housing revenue bonds to be sold as tax exempt securities in the national bond market, with the approval of the Local Government Commission, up to a maximum of two hundred million dollars, and more if needed and if permitted by amendment to the statute;

"(b) to use the money obtained for the purchase of federal insured mortgage and construction loans, for establishing working agreements with private financial institutions such as banks, savings and loans, and mortgage brokers whereby the individual borrower would make application through the private lending institution and the private lending institution would service the mortgage for a fee in behalf of the Corporation. The private institution would receive a service fee in the range of one-half percent, and would forward monthly payments to the Corporation. The Corporation would pay the bondholders on its loans and would from time to time sell mortgages to investors;

"(c) to operate in this manner, the Corporation proposes to market its bonds at an interest rate lower than it receives, and thereby have a sufficient margin to pay for some of its expenses and losses;

"(d) to establish a special revolving fund known as the Housing Development Fund, administered as a separate trust fund funded from gifts, grants and loans from industries, foundations and government with a total capitalization of five million dollars, with the fund maintained on a business level with interest payable, when earned and with some agreement for the repayment of principal for said loans."

In Paragraph 10, it was stipulated that the Housing Development Fund, created and established by Section 7 of the 1969 Act would be used for the following three purposes:

"(a) Providing project development loans (seed money) to builders, sponsors and developers of residential housing for lower income families. These loans would cover such preconstruction activities as site engineering, preliminary architectural drawing, land options and legal fees, and this money would be repaid from construction loans or mortgage proceeds; these costs should not exceed five percent of the final cost of a dwelling unit;

"(b) providing (through loans) down-payment assistance to needy, but otherwise qualified families seeking to purchase a home. The down-payment assistance would help young wage earners, and others who lack the down-payment, where prudent business practices justify this assistance with a limit in the range of $300.00 per family.

"(c) providing uninsured loans in part with private lenders to builders and developers for land development and residential construction for lower income families. This program would assist small builders who cannot obtain funds at a reasonable interest rate in the market for subdivision development. The private lender would participate in this program to an extent of at least twenty (20%) percent of the total loan, on subdivisions that meet minimum design requirements, where housing would qualify for mortgage insurance programs."

In Paragraph 11, it was stipulated that "(t)he Corporation will use the $500,000.00 appropriation to cover administrative cost during the first two years, and to establish the bond contingency fund"; and that "(d)uring the first two years it will be necessary for the Corporation to establish a pattern and history of operation to assure that its bonds and other obligations meet a favorable reception in the market."

In Paragraph 12, it was stipulated that "(t)he Corporation proposes to help overcome the shortage of adequate housing by making financial assistance available where private funds are not available, in the range of lower income families, and using the existing framework of private financing and construction industries."

Paragraph 13 provides: "The interest rate charged for private loans for residential housing has increased substantially in recent years. A federally guaranteed loan for a single family dwelling was in the range of six (6%) percent in 1965, seven (7%) percent in 1967, and eight (8%) percent in 1969. Conventional loans for single family residential housing are not available for over eighty (80%) percent of the purchase price in most cases, and such loans are in the same general range of interest as those which are federally insured. At the same time, the Local Government Commission of North Carolina has experienced a substantial increase in interest rates for municipal bonds."

Paragraph 14 provides: "On the basis of the Municipal Bond Buyers' Index, which is similar in the field of municipal bonds to the Dow-Jones Average in the field of corporate stocks, the average national interest rate for revenue bonds, which is closely paralleled in the case of North Carolina revenue bonds, was 4.56% in 1965, 5.45% in 1967 and 7.88% in 1969. Because of interest rate ceilings by reason of either legislative restrictions or limitations imposed by certain municipal governing bodies, there are cases in which the North Carolina Local Government Commission has recently been unable to find a ready market for certain North Carolina Local Governmental revenue bonds."

Paragraph 15 provides: "The State of North Carolina has found a better market for its general obligation bonds, with an average interest rate of 3.56% in 1965, 4.45% in 1967 and 6.88% in 1969. It is readily observable that revenue bonds ordinarily command an interest rate which will be 1% per year higher than general obligation governmental bonds. Revenue bonds of the North Carolina Housing Corporation could not be marketed at as favorable an interest rate, from the State's point of view, as general obligation bonds of the State."

In Paragraph 16, it was stipulated that the Corporation had taken the following action:

"(a) That the Corporation held an organizational meeting in October, 1969, in the City of Raleigh, North Carolina, that the members of the Corporation have taken an oath of office, and that they are now acting and the Corporation has a Chairman, Vice Chairman, and acting Secretary.

"(b) That the Corporation has employed the Honorable Joe E. Eagles of Edgecombe County to serve as Executive Director and, in such capacity, he has established an office for the transaction of the business of the Corporation. The Corporation has employed necessary personnel and the Corporation is undertaking to carry out the program authorized by the General Assembly in the creation of the Corporation.

"(c) That in carrying out its function, the Corporation has already expended a very small portion of the $500,000.00 of the General Fund appropriation provided for it by Chapter 1162 of the Session Laws of 1969, to pay salaries of Corporation employees, purchase office equipment and supplies, defray necessary

travel expenses while engaged in the business of the Corporation and to take other preliminary steps in making preparation for issuing bonds pursuant to the provisions of the Act creating the Corporation."

Paragraph 17 refers to attached Exhibit A, a two-page document designated as "Table 9: INADEQUATE HOUSING IN NORTH CAROLINA COUNTIES, 1960," based on 1960 reports of the United States Census, indicating housing units in this State which are either structurally unsound or lacking adequate plumbing facilities. Quoting from Paragraph 17: "Table 9 (Column 3) shows that the percentage of such housing units ranges from a low of 20.6% (Dare) to a high of 72.8% (Northampton). In terms of absolute numbers, Dare has the fewest such units (835), Guilford the most (20,526). Besides Dare, seven other counties rate below 30%: Durham, Forsyth, Guilford, Mecklenburg, New Hanover, Onslow, and Wake. At the other extreme, 33 counties have over 60% of their housing units unsound or lacking in adequate plumbing facilities; some are in the mountain counties, but the largest concentration is in the eastern half of the State."

Paragraph 18 refers to attached Exhibit B, a one-page document which shows annual salary ranges of mortgagors in North Carolina with FHA secured mortgages, which figures were compiled by Harold Albright, Assistant Regional Administrator for FHA. Quoting from Paragraph 18: "These figures indicate, among other things, that 91.5% of the mortgagors with new homes earn an annual salary of $7,000.00 or more. Mortgagors who earn an average annual salary of less than $6,000.00 constitute only 2.6% of such mortgagors with new homes."

Paragraph 19 refers to attached Exhibit C, a seventeen-page pamphlet entitled, "North Carolina Housing Corporation," which has been issued by the Corporation and sets forth a description of the Corporation, its inception, its purposes, its method of operation, and other matters relating to the Act in question.

Paragraph 20 states that the United States Department of Housing and Urban Development has a program intended to enable lower income families to become home owners, and refers to attached Exhibit D, a document entitled, "Home Ownership for Low Income Families, October, 1968," indicating that some housing programs are available to citizens of low income, families

of marginal credit, and for families who need assistance payments and other forms of aid. Quoting from Paragraph 20: "Federal funds are also available through VA and FHA insured loans, Farmers Home Administration loans in rural areas in small communities, and through public housing programs. Federal funds afford citizens of low income an opportunity to rent apartments with rent subsidy, or other plans of aid, and federal funds also permit some projects in which citizens of low income can lease-purchase and eventually own single family houses of good quality as illustrated by Apollo Heights, Raleigh, North Carolina, in which about two hundred (200) homes were occupied during 1969."

In Paragraph 21, it was stipulated: "Housing needs are changing and housing techniques are changing. In 1969, about twenty (20%) percent of the single family units were mobile home types, being marketed in the range of $5,000.00 to $8,000.00, plus finance charges."

In Paragraph 22, it was stipulated: "Private construction has steadily increased year after year, and federal programs have expanded rapidly, but there is still a substantial need in North Carolina for improved housing, either public or private, for thousands of North Carolina families whose annual income is in the lower twenty-five (25%) percent. Many of the houses now being occupied lack suitable accommodations for the health of the occupant."

In Paragraph 23, it was stipulated that attached Exhibit E, a copy of the 1969 Act, was enacted by the General Assembly upon the strong urging of the Governor. Quoting from Paragraph 23: "North Carolina has not previously been active in this field, other than providing enabling legislation and regulations for local communities to establish public housing organizations. A few states have undertaken a similar program, but there is insufficient evidence to evaluate the success of such a program in other areas of the country."

The Stipulation, after setting forth these factual matters, states and presents for determination the following six questions of law, *viz.:*

I. "Does the Act authorize the use of public funds for other than a public purpose in violation of Section 3 of Article V or Section 17 of Article I of the North Carolina Constitution or

Section 1 of the Fourteenth Amendment to the United States Constitution?"

II. "Does the Act authorize the lending of the credit of the State in violation of Section 6 of Article VII or Section 4 of Article V of the North Carolina Constitution?"

III. "Does the Act provide for a delegation of legislative authority in violation of Section 8 of Article I of the North Carolina Constitution?"

IV. "Does the Act authorize the creation of a debt in violation of Section 6 of Article VII or Section 4 of Article V of the North Carolina Constitution?"

V. "Does the Act exempt property from taxation in violation of Section 5 of Article V of the North Carolina Constitution?"

VI. "Does the Act violate basic due process, and basic public purpose, in the broad constitutional sense, by permitting an agency of the State of North Carolina to engage in a function that is reserved to private enterprise under our system of government, and does said Act constitute a complete departure from the constitutional provisions for the government and taxation within the State of North Carolina?"

The court, after adopting as its Findings of Fact the facts set forth in the Stipulation, concluded as a matter of law that the 1969 Act is unconstitutional on each and all of the grounds on which it is challenged by plaintiff, and entered judgment as follows:

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

"1. That the North Carolina Housing Corporation is hereby restrained from issuing tax exempt revenue bonds, and it is hereby adjudged that Chapter 1235, Session Laws of 1969, is an unconstitutional Act of the General Assembly.

"2. That said Corporation may not lawfully receive any of the unexpended funds of the sum of $500,000.00 of public funds appropriated for fiscal year 1969-1971 by the General Assembly of North Carolina.

"3. That the individual defendants as officials of the State of North Carolina, and their successors in office, are hereby restrained from transmitting any of the unexpended funds of said $500,000.00 appropriation of public funds to said corporate defendant, North Carolina Housing Corporation.

"4. That the relief sought by the plaintiff be and it is in all respects allowed, and all of said defendants shall forever cease from said unlawful and unconstitutional action, as heretofore set forth in this judgment.

"5. That the cost of this action be taxed against the plaintiff."

Defendants excepted to each of the court's legal conclusions, and to the judgment, and appealed.

Johnson & Gamble for plaintiff appellee.

Attorney General Morgan, Deputy Attorney General McGalliard and Staff Attorney Blackburn for defendant appellants.

BOBBITT, C. J.

[1-3] "(U)nder our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom." Hoke, J. (later C. J.), in *Thomas v. Sanderlin,* 173 N.C. 329, 332, 91 S.E. 1028, 1029. Absent such constitutional restraint, questions as to public policy are for legislative determination. *Reid v. R. R.,* 162 N.C. 355, 358, 78 S.E. 306, 307. When the constitutionality of a statute is challenged, "every presumption is to be indulged in favor of its validity." Stacy, C. J., in *State v. Lueders,* 214 N.C. 558, 561, 200 S.E. 22, 24. And, ordinarily, this Court will not undertake to determine whether a statute is unconstitutional except with reference to a ground on which it is attacked and definitely drawn into focus by the attacker's pleadings. *Hudson v. R. R.,* 242 N.C. 650, 667, 89 S.E. 2d 441, 453; *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 211, 125 S.E. 2d 764, 768.

[4] Whether the public policy and program established by the 1969 Act is wise or unwise is for determination by the General Assembly. *Education Assistance Authority v. Bank,* 276 N.C. 576, 592, 174 S.E. 2d 551, 563. Our function is to determine whether any portion thereof which plaintiff, as a general tax-

payer, may challenge, is unconstitutional on any ground asserted by him. *Nicholson v. Education Assistance Authority,* 275 N.C. 439, 168 S.E. 2d 401.

Section 18 of the 1969 Act authorized the Corporation "to accept such moneys as may be appropriated from time to time by the General Assembly for effectuating its corporate purposes including, without limitation, the payment of the initial expenses of administration and operation and the establishment of a reserve or contingency fund to be available for the payment of the principal of and the interest on any bonds or notes of the Corporation." The General Assembly appropriated "out of the General Fund of the State" to the Corporation "the sum of five hundred thousand dollars ($500,000.00) for the biennium commencing July 1, 1969." Chapter 1162, Session Laws of 1969. Portions of this appropriation have been used and are being used for the payment of the initial expenses of administration and operation of the Corporation.

QUESTIONS I and VI

Questions I and VI present essentially the same question, namely, whether the 1969 Act and the Corporation's activities pursuant thereto are for a PUBLIC PURPOSE.

[5] Article V, § 3, of the Constitution of North Carolina provides: "This power of taxation shall be exercised in a just and equitable manner, *for public purposes only,* and shall never be surrendered, suspended, or contracted away." (Our italics.) "The power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury." *Mitchell v. Financing Authority,* 273 N.C. 137, 143, 159 S.E. 2d 745, 749-750.

[6, 14] Plaintiff asserts the 1969 Act is unconstitutional as violative of Article V, § 3, of the Constitution of North Carolina, and of Article I, § 17, of the Constitution of North Carolina, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and is void because the purpose for which the Corporation was created is not a public purpose. If so, plaintiff, as taxpayer, may maintain this action to restrain defendants from paying to the Corporation and the Corporation from using the $500,000.00 appropriated out of the General Fund for the biennium commencing July 1, 1969. *Mitchell v. Financing Au-*

thority, supra; McIntyre v. Clarkson, 254 N.C. 510, 513, 119 S.E. 2d 888, 890; *Dennis v. Raleigh,* 253 N.C. 400, 116 S.E. 2d 923.

[7] Was the Corporation established for a public purpose? If so, "the means of executing the project are for the General Assembly, and the General Assembly alone, to determine." *Redevolpment Commission v. Bank,* 252 N.C. 595, 606, 114 S.E. 2d 688, 696.

[8, 9] "A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, *Fawcett v. Mt. Airy,* 134 N.C. 125, 45 S.E. 1092, and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. *Keeter v. Lake Lure,* 264 N.C. 252, 141 S.E. 2d 634. Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity. *Briggs v. Raleigh,* 195 N.C. 223, 141 S.E. 597." Sharp, J., in *Mitchell v. Financing Authority, supra,* at 144, 159 S.E. 2d at 750.

[10, 11] A legislative declaration which asserts in general terms that the statute under consideration is enacted for a public purpose, although entitled to great weight, is not conclusive. When the facts are determined, what is a public purpose is a question of law for the court. *Redevelopment Commission v. Bank, supra,* at 603, 114 S.E. 2d 694.

In its enactment of the 1969 Act, the General Assembly went far beyond a mere declaration as to public purpose. It made and set forth in Section 2 thereof its factual findings as to the conditions upon which it based its declaration as to public purpose, *viz.:*

1. "(A)s a result of the spread of slum conditions and blight to formerly sound urban and rural neighborhoods and as a result of actions involving highways, public facilities and urban

renewal activities there exists in the State of North Carolina a serious shortage of decent, safe and sanitary residential housing available at low prices or rentals to persons and families of lower income. This shortage is severe in certain urban areas of the State, is especially critical in the rural areas, and is inimical to the health, safety, welfare and prosperity of all residents of the State and to the sound growth of North Carolina communities."

2. "(P)rivate enterprise and investment have not been able to produce, without assistance, the needed construction of decent, safe and sanitary residential housing at low prices or rentals which persons and families of lower income can afford, or to achieve the urgently needed rehabilitation of much of the present lower income housing. It is imperative that the supply of residential housing for persons and families of lower income affected by the spread of slum conditions and blight and for persons and families of lower income displaced by public actions or natural disaster be increased; and that private enterprise and investment be encouraged to sponsor, build and rehabilitate residential housing for such persons and families, to help prevent the recurrence of slum conditions and blight and assist in their permanent elimination throughout North Carolina."

3. "(I)n accomplishing this purpose, the North Carolina Housing Corporation, a public agency and an instrumentality of the State, is acting in all respects for the benefit of the people of the State in the performance of essential public functions and serves a public purpose in improving and otherwise promoting their health, welfare and prosperity, and that the North Carolina Housing Corporation is empowered to act on behalf of the State of North Carolina and its people in serving this public purpose for the benefit of the general public."

[12] "If the constitutionality of a statute . . . depends on the existence or nonexistence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, . . . if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court. This rule does not apply if the evidence is to the contrary, or if facts judicially known or proved, compel otherwise." 16 C.J.S. Constitutional Law § 100b, pp. 454-455. Accord: 16 Am. Jur. 2d Constitutional Law § 143.

In *Velishka v. Nashua,* 106 A.2d 571, 44 A.L.R. 2d 1406, the Supreme Court of New Hampshire sustained the constitutionality of the Urban Development Law of that State. After stating the legislative findings and declarations of necessity relating to the elimination of blighted areas and the advancement of redevelopment projects, Chief Justice Kenison states: "These legislative findings and declarations have no magical quality to make valid that which is invalid but they are entitled to weight in construing the statute and in determining whether the statute promotes a public purpose under the Constitution." Accord: *Redevelopment Commission v. Bank, supra,* at 611, 114 S.E. 2d at 700.

In *State ex rel. W. Va. Housing Dev. Fund v. Copenhaver,* 171 S.E. 2d 545 (1969), the Supreme Court of Appeals of West Virginia sustained the constitutionality of the legislation which created The West Virginia Housing Development Fund. The West Virginia Act is similar to our 1969 Act and similar constitutional questions were presented and decided. Legislative findings set forth in Section 6 of the West Virginia Act are in accord, verbatim or in substance, with the legislative findings quoted from Section 2 of our 1969 Act. With reference thereto, Calhoun, J., for the Court, said: 'Legislative findings of fact which are made the basis of a legislative act are not thereafter open to judicial investigation." In the present case, whether the legislative findings of fact are conclusive need not be determined. Suffice to say, the facts set forth in the Stipulation confirm the legislative findings. There are no facts of which we may take judicial notice which tend to negate the legislative findings. On the contrary, current widespread publicity indicates an acute shortage of residential housing for persons and families of lower income.

[13] The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people. Accordingly, this Court upheld the constitutionality of the Housing Authorities Law, Chapter 456, Public Laws of 1935, which, as amended, is codified as Article 1, Chapter 157, of the General Statutes, G.S. 157-1 through G.S. 157-39.8. *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693 (1938). It was held that a Housing Authority organized pursuant to the provisions of this 1935 Act was created for a public purpose and exercised an essential governmental function. Briefly stated, its public purpose was

the elimination or rehabilitation of unsafe and unsanitary dwelling units in crowded and congested areas and the construction of housing projects to provide safe and sanitary dwelling units for rental to persons of low income. In *Wells v. Housing Authority, supra,* Seawell, J., for the Court, said: "The State cannot enact laws, and cities and towns cannot pass effective ordinances, forbidding disease, vice, and crime to enter into the slums of overcrowded areas, there defeating every purpose for which civilized government exists, and spreading influences detrimental to law and order; but experience has shown that this result can be more effectively brought about by the removal of physical surroundings conducive to these conditions. This is the objective of the act, and these are the means by which it is intended to accomplish it." Our decision in *Wells v. Housing Authority* was approved and followed in *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252 (1940), and in *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281 (1942).

The 1935 Act conferred the power of eminent domain upon a Housing Authority created in accordance with its provisions and prescribed the procedural requirements incident to the exercise thereof. G.S. 157-11; G.S. 157-28. Later decisions based on the 1935 Act relate to such procedural requirements and to the selection of sites for housing projects. In *In re Housing Authority,* 233 N.C. 649, 65 S.E. 2d 761 (1951), and in *Housing Authority v. Wooten,* 257 N.C. 358, 126 S.E. 2d 101 (1962), it was held, *inter alia,* that a Housing Authority had wide discretion in the selection and location of a site for a housing project; that it was not required to select a site in a slum area as the site for a low-rent housing project; and that the fact that a few isolated properties in an area to be taken and dismantled were above the average standard of slum properties, or that some few desirable homes would be taken, did not affect the public character of the condemnation proceeding.

It is noted that statutory provisions relating to a Housing Authority created in accordance with the 1935 Act include the following: "The bonds and other obligations of an Authority (and such bonds and obligations shall so state on their face) shall not be a debt of any city or municipality and neither the State nor any such city or municipality shall be liable thereon, nor in any event shall such bonds or obligations be payable out of any funds or property other than those of said authority." G.S. 157-14. G.S. 157-26 provides that the property of such

Housing Authority shall be exempt from State and local taxes and fees; and that the "(b)onds, notes, debentures and other evidences of indebtedness" of such Housing Authority "shall be exempt from taxes."

In *Housing Authority v. Dockweiler*, 94 P. 2d 794 (1939), the Supreme Court of California considered California legislation which contained provisions substantially the same as those of our Housing Authorities Law. The opinion of Shenk, J., cites a decision from each of fifteen States, including our decision in *Wells v. Housing Authority, supra,* in which the constitutionality of similar statutes had been "fully sustained as against onslaughts similar in character to those here urged." Later cases in accord are cited in *Humphrey v. City of Phoenix*, 102 P. 2d 82, 86 (Ariz. 1940).

Housing Authority v. Dockweiler, supra at 803, decides a question which was not expressly raised and considered in *Wells v. Housing Authority, supra,* namely, that "(t)he tax exemption available to the property of housing authorities" included "bonds issued by them and the income therefrom." Decisions in accord from other jurisdictions are cited by Shenk, J.

In *Redevelopment Commission v. Bank, supra,* this Court upheld the constitutionality of the Urban Redevelopment Act, Chapter 1095, Session Laws of 1951, which, as amended, is now codified as Article 37, Chapter 160, of the General Statutes, G.S. 160-454 through G.S. 160-474.1. It was held that the condemnation of blighted and slum areas within a municipality and the sale or exchange thereof "to any redeveloper for residential, recreational, commercial, industrial or other uses or for public use in accordance with the redevelopment plan" (G.S. 160-464) under safeguards to prevent such areas from reverting to slum areas, was in the interest of the public health, safety, morals and welfare, and therefore such condemnation was for a public purpose. The opinion of Parker, J. (later C. J.), states: "It may be that the measure may prove eventually to be a disappointment, and is ill advised, but the wisdom of the enactment is a legislative and not a judicial question. The General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution." *Id.* at 612, 114 S.E. 2d at 700. Later cases which hold that lands acquired for the purposes and in the manner set

forth in the Urban Redevelopment Law meet the public purpose test include the following: *Redevelopment Commission v. Hagins*, 258 N.C. 220, 128 S.E. 2d 391 (1962); *Horton v. Redevelopment Commission*, 259 N.C. 605, 131 S.E. 2d 464 (1963). The constitutional questions raised in connection with statutes such as our Urban Redevelopment Law are discussed fully and clearly by Schaefer, J., in *People v. City of Chicago*, 111 N.E. 2d 626 (Ill. 1953), and cases cited therein.

The dwelling accommodations provided by a project of a Housing Authority created pursuant to G.S. Chapter 157 are available at the lowest possible rentals to persons of meager income. G.S. 157-29 provides: "It (Housing Authority) shall not accept any person as a tenant in any housing project if the person or persons who would occupy the dwelling accommodations have an annual net income in excess of five times the annual rental of the quarters to be furnished such person or persons, except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one . . . ." When the annual net income of the tenant(s) exceeds the prescribed limit, he (they) must move to other dwelling accommodations.

The evident function of the Corporation created by the 1969 Act is to assist "persons and families of lower income" who desire and seek residential housing elsewhere than as tenants in a low-cost housing project. Such persons would include those who were or are ineligible to be tenants in a housing project. The Corporation is not vested with the power of eminent domain. Unlike a Housing Authority, it does not seek to acquire real property for the purpose of providing low-rental dwelling accommodations. Rather, its function is to foster the planning, construction and financing of modest residences which would not otherwise be available to "persons and families of lower income."

The 1969 Act confers upon the Corporation all the powers necessary or convenient to carry out and effectuate its purposes and provisions, including the twenty-one specific powers set forth in Section 5 thereof. In the present context, it is sufficient to quote the first four of these powers, *viz.:*

"(1) To make or participate in the making of insured construction loans to sponsors of land development or residential housing; provided, however, *that such loans shall be made only*

upon the determination by the Corporation that construction loans are not otherwise available, wholly or in part, from private lenders upon reasonably equivalent terms and conditions;

"(2) To make or participate in the making of insured mortgage loans to sponsors of residential housing; *provided, however, that such loans shall be made only upon the determination by the Corporation that mortgage loans are not otherwise available, wholly or in part, from private lenders upon reasonably equivalent terms and conditions;*

"(3) To purchase or participate in the purchase of insured mortgage loans made to sponsors of residential housing or to persons of lower income for residential housing where the Corporation has given approval prior to the initial making of such loan; *provided, however, that any such purchase shall be made only upon the determination by the Corporation that mortgage loans were, at the time such approval was given, not otherwise available, wholly or in part, from private lenders upon reasonably equivalent terms and conditions;*

"(4) To make temporary loans from the housing development fund. . . ." (Our italics.)

The legislative findings and the Stipulation establish the existence of a serious shortage of decent, safe and sanitary housing available at low prices or rentals to persons and families of lower income and also the inability of private enterprise and investment, without assistance, to meet that need.

Unquestionably, when construction of residential housing is made possible by the Corporation's assistance, all persons in the building industry benefit from such construction. Such benefit is similar to that which results from the construction of any public project, *e.g.*, public buildings, school buildings, highways, etc. Too, the "persons and families of lower income" who will occupy such residential housing as owners or tenants will benefit from the existence and availability thereof. Although these benefits will flow from the Corporation's authorized activities, its *raison d'etre*, the reason and justification for its existence, is to make available decent, safe and sanitary housing to "persons and families of lower income" who cannot otherwise obtain such housing accommodations. The General Assembly, with good reason, was fully aware that the acquisition of homes by "persons and families of lower income" gives them a stake

in the preservation of our society. Nothing could contribute more to the stability of our institutions than the acquisition of homes by an ever-increasing proportion of our people.

Plaintiff relies upon *Mitchell v. Financing Authority, supra,* in which this Court held unconstitutional the North Carolina Industrial Development Financing Act, Chapter 535, Session Laws of 1967, codified as Chapter 123A of Volume 3B (1969 Cumulative Supplement) of the General Statutes, G.S. 123A-1 through 123A-27. In distinguishing the Industrial Development Financing Act from the Housing Authorities Act, Sharp, J., said: "The State does not engage in a private enterprise when it undertakes a project of slum clearance. *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693 (1938). Slums are a serious menace to society; they breed both disease and crime. As Seawell, J., pointed out in *Wells v. Housing Authority, supra,* the State can combat these two evils in overcrowded areas only by 'the removal of physical surroundings conducive to these conditions.' *Id.* at 748, 197 S.E. at 696. *The existence of a slum area proves the impotency or unwillingness of private enterprise to cope with the problem and 'where community initiative has failed and authority alone can prevail,' government must deal with the emergency created. Id.* at 748, 197 S.E. at 696." (Our italics.) *Mitchell v. Financing Authority, supra* at 157-158, 159 S.E. 2d at 759.

In these and other respects, the Industrial Development Financing Act is distinguishable from the 1969 Act now under consideration. There the State was undertaking to subsidize particular private industries which were in competition with other unsubsidized private industries. As pointed out by Sharp, J., in *Mitchell v. Financing Authority, supra* at 159, 159 S.E. 2d at 760, the Authority's primary function was "to acquire sites and to construct and equip facilities for private industries" and "to bait corporations which refuse to become industrial citizens of North Carolina unless the State gives them a subsidy."

[14] The Corporation's authorized activities respond to a serious need of deep public concern but do so *only* when the planning, construction and financing of residential housing is not otherwise available to "persons and families of lower income." We are of opinion and hold that the 1969 Act was enacted for a PUBLIC PURPOSE and that the Corporation's authorized activities pursuant thereto are for a PUBLIC PURPOSE.

The only decisions in other jurisdictions involving legislation similar to our 1969 Act which have come to our attention are the following:

(1) *State ex rel. W. V. Housing Dev. Fund v. Copenhaver, supra,* decided December 9, 1969, involved the West Virginia Housing Development Act, which consists of statutes enacted in 1968 and 1969 and is now codified in Volume 10 of the West Virginia Code, 1970 Cumulative Supplement, as Chapter 31, Article 18. This West Virginia statute contains substantially (often verbatim) the same provisions as our 1969 Act. Its constitutionality was fully sustained. In all respects, this West Virginia decision is in accord with our decision in the present case.

(2) *In re Advisory Opinion,* 158 N.W. 2d 416 (Mich. 1968), in which the Supreme Court of Michigan rendered an advisory opinion relating to the constitutionality of the Michigan statutes (Volume 8 of Michigan Compiled Laws, Sections 125.1401 *et seq.*, including 1969 Cumulative Pocket Part) which created the Michigan State Housing Development Authority. The Michigan legislation was approved in all respects except the following: The Michigan statutes provided for a Housing Development Fund similar to the Housing Development Fund created by our 1969 Act. The Michigan statutes also provided for a Capital Reserve Fund for use in discharging the obligations of the Development Authority. In the context of specific provisions of the Constitution of Michigan, the opinion expressed was that, although an *appropriation* to the Development Authority for the purpose of administration was for a proper public purpose, an appropriation to the Housing Development Fund or to the Capital Reserve Fund of the Development Authority was not for a proper public purpose. The only decision cited in support of this conclusion is *Opinion of the Justices to the House of Representatives,* 195 N.E. 897 (Mass. 1935), 98 A.L.R. 1364. The 1969 Massachusetts decision referred to below was decided subsequent to the advisory opinion in the Michigan case.

In the Michigan case, the Court, after expressing the opinion that *an appropriation* for the Housing Development Fund or for the Capital Reserve Fund was not for a proper public purpose, stated: "This does not mean, however, that the State can, under no circumstances, appropriate public money to such funds. Constitution 1963, art. 4, § 30, provides: 'The

assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes.' "

(3) *Massachusetts Hous. F. Ag. v. New England Mer. Nat. B.*, 249 N.E. 2d 599 (Mass. 1969), in which the Supreme Judicial Court of Massachusetts considered questions relating to the constitutionality of the Massachusetts statutes which created the Massachusetts Housing Finance Agency. Volume 2A of Massachusetts General Laws Annotated, Appendix to Chapter 23A, 1970 Cumulative Pocket Part. This decision revises substantially the views expressed in *Opinion of the Justices,* 219 N.E. 2d 18 (Mass. 1966), an advisory opinion. Generally, the 1969 Massachusetts decision is in accord with our decision in the present case.

(4) *Vermont Home Mtg. Cr. Ag. v. Montpelier Nat. Bank,* 262 A. 2d 445 (Vt. 1970), in which the Supreme Court of Vermont upheld as against attack on constitutional grounds the statute creating the Vermont Home Mortgage Credit Agency. Volume 3 of Vermont Statutes Annotated, Title 10, Chapter 11B, §§ 241-253a, 1969 Cumulative Pocket Supplement. Although this Vermont decision is in accord with our decision in the present case in several particulars, there are material differences between the Vermont statute there considered and our 1969 Act.

(5) *New Jersey Mortgage Finance Agency and James C. Brady, Jr., Commissioner of Banking, v. Joseph M. McCrane, Jr., Treasurer of the State of New Jersey,* decided July 6, 1970, in which the Supreme Court of New Jersey upheld as against attack on constitutional grounds the New Jersey Mortgage Finance Agency Law. *L.* 1970, *c.* 38, N.J.S.A. 17: 1B-4 *et seq.* New Jersey Session Law Service, 1970 Regular Session, pp. 84-95. Although there are differences between the provisions of the New Jersey Law and our 1969 Act, the main thrust of the New Jersey decision is in accord with our decision in the present case.

QUESTIONS II AND IV

Questions II and IV present essentially the same question, namely, whether the 1969 Act violated Article VII, § 6, or Article V, § 4, of the Constitution of North Carolina. Question

II refers to "the lending of the credit of the State" and Question IV refers to "the creation of a debt."

[15] Article VII, § 6, provides: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose." This constitutional provision is applicable to a "county, city, town, or other municipality." It requires the approval of a majority of the voters therein before such subdivision of the State may pledge its credit or levy a tax except for *its* necessary expenses. It places no limitation upon the General Assembly or on an instrumentality of the State created by the General Assembly for a public purpose.

Article V, § 4, in part, provides: "The General Assembly shall have the power *to contract debts* and *to pledge the faith and credit of the State* and to authorize counties and municipalities to contract debts and pledge their faith and credit for the following purposes: . . . ." (Our italics.)

The 1969 Act provides:

"Sec. 6. *Credit of State not pledged.* Obligations 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 or assets of the Corporation. Each obligation issued under this Act shall contain on the face thereof a statement to the effect that the Corporation shall not be obligated to pay the same nor the interest thereon except from the revenues or assets pledged therefor and that neither the faith and credit nor the taxing power of the State or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such obligation.

"Expenses incurred by the Corporation in carrying out the provisions of this Act may be made payable from funds provided pursuant to this Act and no liability shall be incurred by the Corporation hereunder beyond the extent to which moneys shall have been so provided."

[16] Decisions of this Court establish that this method of financing does not create a debt within the meaning of the Constitution and therefore the limitations of Article V, § 4, are inapplicable. *Turnpike Authority v. Pine Island,* 265 N.C. 109, 117, 143 S.E. 2d 319, 325 (1965), and cases there cited.

We hold that the 1969 Act does not violate either Article VII, § 6, or Article V, § 4, of the Constitution of North Carolina.

[17] Section 18 of the 1969 Act provides: "The Corporation is authorized to accept such moneys as may be appropriated from time to time by the General Assembly for effectuating its corporate purposes including, without limitation, the payment of the initial expenses of administration and operation and the establishment of a reserve or contingency fund to be available for the payment of the principal of and the interest on any bonds or notes of the Corporation." However, the fact that the $500,000.00 heretofore appropriated and such further appropriations, if any, as the General Assembly may see fit to make, may be used for "the establishment of a reserve or contingency fund to be available for the payment of the principal of and the interest on any bonds or notes of the Corporation," does not constitute a pledge of the faith and credit of the State or of any political subdivision thereof "for the payment of the principal of and the interest on any bonds or notes of the Corporation." The Corporation has no authority to incur any debt which would obligate the General Assembly to make appropriations. Moreover, the 1969 General Assembly, assuming it had authority to do so, did not purport to control actions of succeeding sessions of the General Assembly. *Massachusetts Hous. F. Ag. v. New England Mer. Nat. B., supra* at 608.

QUESTION III

[19] Question III presents the question whether the 1969 Act delegates legislative authority in violation of Article I, § 8, of the Constitution of North Carolina, which provides: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other."

[18] "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, supra* at 114, 143 S.E. 2d at 323, and cases cited.

The clear and declared purpose of the General Assembly is to provide "residential housing" for "persons and families of lower income." Necessarily the Corporation must determine what persons and what families are to receive its assistance.

The General Assembly, in Section 3(11) of the 1969 Act, provided: "'(P)ersons and families of lower income' means persons and families deemed by the Corporation to require such assistance as is made available by this Act on account of insufficient personal or family income, taking into consideration without limitation, such factors as (a) the amount of the total income of such persons and families available for housing needs, (b) the size of the family, (c) the cost and condition of housing facilities available, (d) the eligibility of such persons and families for federal housing assistance of any type predicated upon a lower income basis, and (e) the ability of such persons and families to compete successfully in the normal housing market and to pay the amounts at which private enterprise is providing decent, safe and sanitary housing, and deemed by the Corporation therefore to be eligible to occupy residential housing constructed and financed, wholly or in part, with insured construction loans or insured mortgages, or with other public or private assistance."

[19] We are of the opinion and hold that the Corporation does not legislate but determines factually, by application of the factors the General Assembly has prescribed, what persons or families are "persons and families of lower income" and therefore entitled to the benefits of the 1969 Act.

A loan which the Corporation is authorized to make or participate in making or to purchase or participate in purchasing is an "insured construction loan" or an "insured mortgage loan," which, as provided in Section 3(7) and (8) of the 1969 Act, means a loan secured by a federally insured mortgage or insured or guaranteed by the United States or an instrumentality thereof or for which there is a commitment by the United States or an instrumentality thereof to insure such loan or mortgage. This

provides sufficient standards for the use of the proceeds from the sale of the Corporation's tax-exempt bonds.

Standards for making the temporary loans from the Housing Development Fund are set forth in Section 7 of the 1969 Act. The purposes for which such loans may be made are specifically defined by the General Assembly.

The public purpose of the 1969 Act is to make *additional* residential housing available to persons and families of lower income by promoting the construction thereof. The function of the Housing Development Fund, "a trust fund separate and distinct from any other moneys or funds administered by the Corporation," is *to initiate* the Corporation's program. Temporary loans from the Housing Development Fund for "development costs" are the first step in an integrated program, the second step being a construction loan, and the third step being permanent financing. Obviously, the Corporation must exercise its discretion and judgment with reference to the choice of sites and the identity of the sponsor, builder or developer with whom the Corporation will deal in connection with a particular project. It is contemplated that such sponsor, builder or developer will continue until completion of the program. No doubt the General Assembly considered this preferable to efforts by the Corporation through its own personnel to undertake the work preparatory to the letting of contracts for the construction of residential housing.

The General Assembly has made no appropriation to the Housing Development Fund. The Housing Development Fund is to be constituted by grants from the federal government or other sources and by money borrowed in connection with the issuance and sale of its fund notes. Although we do not base decision on that ground, plaintiff, as taxpayer, has nothing to lose even if unwise or uncollectible temporary loans are made from the Housing Development Fund.

Plaintiff calls attention to provisions of the 1969 Act to the effect the Corporation may act without the prior approval of any other State agency and that no provision is made for an appeal from any of the Corporation's decisions. Suffice to say, should the factual considerations underlying the 1969 Act cease to exist or should the Corporation undertake any actions in excess of the authority conferred by the 1969 Act, a remedy

through judicial proceedings would be available. Too, presumably the General Assembly will continuously review and evaluate the specific programs of the Corporation; and, if the authorized activities of the Corporation should become unnecessary or prove ineffectual, will amend or repeal the 1969 Act to such extent as may be appropriate.

QUESTION V

[20] Question V presents the question whether the 1969 Act exempts property from taxation in violation of Article V, § 5, of the Constitution of North Carolina, which provides that "(p)roperty belonging to the State, counties and 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.

Section 19 of the 1969 Act provides:

"*Tax exemption.* The exercise of the powers granted by this Act will be in all respects for the benefit of the people of the State, for their well being and prosperity and for the improvement of their social and economic conditions, and the Corporation shall not be required to pay any tax or assessment on any property owned by the Corporation under the provisions of this Act or upon the income therefrom.

"Any obligations issued by the Corporation under the provisions of this Act, their transfer and the income therefrom (including any profit made on the sale thereof), 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."

[20] In *Education Assistance Authority v. Bank*, *supra* at 589, 174 S.E. 2d at 560, it was stated: "Since the tax-exempt feature makes possible the 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, we hold that, since the 1969 Act and the Corporation's activities pursuant thereto are

for a public purpose, it was permissible for the General Assembly to exempt from taxation the property of the Corporation and the obligations incurred by the Corporation to effectuate such public purpose. *Cf. Housing Authority v. Dockweiler, supra* at 803, and cases there cited.

On this appeal, we accept the legislative findings, which are supported by facts set forth in the Stipulation, that there exists in North Carolina "a serious shortage of decent, safe and sanitary residential housing available at low prices or rentals to persons and families of lower income" and "that private enterprise and investment have not been able to produce, without assistance," the needed residential housing.

The General Assembly has determined that the State of North Carolina should respond to this serious public need, without encroachment on private enterprise, by the bold and comparatively new course embodied in the 1969 Act. This course recognizes the responsibility and desire of this State, through a Corporation whose members are five highly-placed and responsible State officials and four non-officials appointed by the Governor of the State, to respond to this public need. True, the 1969 Act contemplates federal assistance under certain of the various provisions for federal mortgage insurance (12 U.S.C.A. §§ 1707-1715(z)) and perchance the purchase by some federal corporation or agency of the Corporation's tax-exempt bonds. However, the Corporation, as an instrumentality of the State, will manage the program and make the essential administrative decisions. If the serious shortage of residential housing is to be met, and the State fails to recognize any responsibility in the matter, the only alternative will be ever-increasing programs in which the federal government will deal directly with those in our local communities who desire to sponsor residential housing for persons and families of lower income. Presumably, the General Assembly considered that North Carolina should meet her own problems as far as possible through her own agencies and not turn them over to the exclusive attention of the federal government.

In this action, plaintiff attacks the 1969 Act *in its entirety* on specific constitutional grounds. We hold the 1969 Act is not unconstitutional on its face or when considered with reference to the facts set forth in the Stipulation on any of the grounds asserted by plaintiff. Whether any specific regulation

or activity of the Corporation is authorized by the 1969 Act or, if authorized, whether the 1969 Act is unconstitutional as applied to that precise factual situation, is not before us.

For the reasons stated, the injunction is vacated; the judgment is reversed; and plaintiff's action is dismissed.

Reversed.

LAKE, J., dissenting:

It is my view that the judgment of the superior court should be affirmed because the act under which the Housing Corporation purposes to operate is unconstitutional in that: (1) It appropriates tax revenues for a purpose other than a "public purpose," as that term is used in Article V, § 3, of the Constitution of North Carolina; and (2) it purports to exempt from taxation the bonds which the Housing Corporation proposes to issue, this being a violation of Article V, §§ 3 and 5 of the Constitution of the State.

Article V, § 3, of the Constitution provides: "The power of taxation shall be exercised * * * for public purposes only, and shall never be surrendered, suspended, or contracted away. * * *"

Article V, § 5, provides: "Property belonging to the State, counties and municipal corporations shall be exempt from taxation" and the General Assembly may exempt properties held for specified purposes not here applicable.

This Court has consistently held that Article V, § 3, forbids not only the levying and collecting of a tax for a non-public purpose, but also the appropriation to such purpose of revenues derived from taxes lawfully levied and collected. *Mitchell v. Financing Authority,* 273 N.C. 137, 159 S.E. 2d 745; *Horner v. Chamber of Commerce,* 231 N. C. 440, 57 S.E. 2d 789.

The act in question appropriates $500,000.00 of revenues derived from taxation for use by the Housing Corporation in paying its expenses of organization and in creating a reserve fund for payment of its bonds and notes. The question is whether the purposes of the General Assembly in creating the Housing Corporation, including those for which it may, under this act, borrow money, are a "public purpose" within the meaning of this constitutional limitation upon the authority of the General Assembly to impose taxes and to spend the revenues derived

therefrom. This Court has said the term "public purpose" as used in Article V, § 3, has a meaning which is not necessarily the same as is given the term in other contexts. In *Briggs v. Raleigh,* 195 N.C. 223, 141 S.E. 597, speaking through Stacy, C. J., a unanimous Court said, "Many objects may be public in the general sense that their attainment will confer a public benefit or promote a public convenience, but not be public in the sense that the taxing power of the State may be used to accomplish them."

In applying the term "public purpose" to fix the limits of the taxing and spending powers, the approach of this Court has been to say what is not, rather than what is within the limits. Thus, in *Briggs v. Raleigh, supra,* this Court said, "The use and benefit must be in common, and not for particular persons, interests or estates." Again, as recently as in *Mitchell v. Financing Authority, supra,* Sharp, J., speaking for the Court, said, "It is clear * * * that for a use to be public its benefits must be in common, and not for particular persons, interests or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity." To the same effect is *Horner v. Chamber of Commerce, supra.*

The purpose of the act in question is to assist individuals to acquire houses to be owned privately by them and occupied and used privately by them. The public will have no more right to use, occupy, control or dispose of the houses so acquired than it has to use, occupy, control or dispose of any other private home. To tax Jones, Smith, Black and Green to raise funds with which to assist Brown to buy and own a home is not to tax for a public purpose. It would not be contended otherwise if the purpose were to assist a single individual or family. The public or private nature of the assistance is not affected by the fact that it is to be repeated many times. Each home to be acquired will be a separate, private benefit to a single individual or family. A multiplicity of private benefits does not, *per se,* become a public benefit to be enjoyed by all in common like a public park, school or playground. If the person to be so assisted in acquiring a more desirable or more adequate home were in the upper or even the middle income bracket, the non-public nature of this use of tax revenues would be apparent. The fact that the person to be assisted is in the lower income bracket may

make this use of tax revenues more meritorious, but does not convert it into a "public use."

Wells v. Housing Authority, 213 N.C. 744, 197 S.E. 693, and other decisions relying thereon, are not controlling in this case. Those cases involved the Housing Authorities Act of 1935, the purpose of which, as was observed in the Wells Case, was "To accomplish 'slum clearance' — to rehabilitate crowded and congested areas in cities and towns where insanitary and other conditions exist conducive to disease and public disorder, menacing the safety and welfare of society." In *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281, the proposed housing was to be built in rural areas, but the owner of each farm on which a low-rent house was to be built had to contract that he would destroy one insanitary dwelling on his farm or convert it to non-residential use.

The constitutional authority of the State to take by eminent domain for destruction property, the existence and use of which is a substantial menace to the public health and safety, is unquestioned. Thus, slum properties may be acquired by eminent domain, or by negotiation, and the offensive property destroyed. This is a spending of tax revenues for a public purpose. Having removed the offensive condition, the State may, as an incident to this purpose, use the property so acquired or dispose of it subject to reasonable conditions calculated to prevent a recurrence of the menace to the public.

That is not the present case. No slum property is to be taken for destruction by the Housing Corporation. No house or area, now unsanitary or congested or blighted, is to be changed by it. Its purpose begins and ends with providing an individual financial assistance in purchasing or building a house to be owned and used by him as private property. He may or may not now live in a slum area or in an unsanitary house, but, if he does live in such area or house, neither he nor anyone else is required to destroy it. The availability to him of "adequate" housing perhaps tends to lighten the demand for "inadequate" housing, but the possibility that thereby "inadequate" housing will become unprofitable, so that it will eventually stand empty and possibly be destroyed, is too indirect and remote to convert this spending of tax revenues into a spending for a "public purpose."

In *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688, also relied upon by the majority in this case, the proceeding was one to condemn a slum area. It arose under the Urban Redevelopment Law. This Court, speaking through Parker, J., later C. J., observed: "The *primary purpose* of the taking is the eradication of 'blighted areas,' the reconstruction and rehabilitation of such areas and the adaptation of them for uses which will prevent a recurrence of the blighted condition. * * * The sale or transfer to the redeveloper is *merely incidental or collateral* to the primary purpose of the Urban Redevelopment Law." (Emphasis added.)

In re Housing Authority, 233 N.C. 649, 65 S.E. 2d 761, and *Housing Authority v. Wooten,* 257 N.C. 358, 126 S.E. 2d 101, also relied upon by the majority in this case, did not decide any question of constitutional law or authority. In the first of these cases, Denny, J., later C. J., speaking for the Court, said: "The respondents do not contend that the proposed project is not needed in the City of Charlotte or that the proposed construction * * * is not in the public interest and necessary for public use. * * * (I)n the hearing below, the respondents challenged the validity of the proceeding on the ground that the petitioner had failed to observe the *statutory requirements* governing such project or projects." (Emphasis added.) The holding of this Court was simply that the statute did not require the application to the Utilities Commission for a certificate of public convenience and necessity, for construction of low-rent dwellings, to describe the property on which the project was to be built.

The *Wooten Case, supra,* was one for condemnation of a site for a low-rent housing project and involved only a motion to strike portions of a further answer filed by the owner of land sought to be condemned. Speaking through Parker, J., later C. J., this Court said: "Respondents state in their brief: 'Respondents contend that by their further answer and defense they have alleged facts which show the Housing Authority of the City of Wilson *has acted in bad faith* in the selection of a site or sites for its housing projects." (Emphasis added.)

Thus the constitutional question which faces us was not raised in these two decisions and it is well established that this Court will not pass upon constitutional questions not raised by the litigants. *Carbide Corp. v. Davis,* 253 N.C. 324, 116 S.E. 2d

792; *State v. Blackwell,* 246 N.C. 642, 99 S.E. 2d 867; *Fox v. Commissioners of Durham,* 244 N.C. 497, 94 S.E. 2d 482. Consequently, these two decisions, sustaining the actions of the Housing Authorities involved therein against attacks on nonconstitutional grounds, are not authorities which control or guide us in the decision of the constitutional questions properly before us in the present matter.

The case closest in point is our very recent decision in *Mitchell v. Financing Authority, supra.* There, we held the General Assembly could not, consistently with Article V, § 3, of the Constitution of this State, appropriate tax revenues for the operating expenses of a corporation created by the statute and authorized thereby to build industrial properties for lease to corporations coming into the State to establish industrial plants here. Obviously, the attraction of desirable, new industry to North Carolina would provide benefits to many people, including the creation of new employment opportunities and better wages, as a result of which many persons in the low income bracket could more easily buy or build "adequate" homes of their own and have access to other benefits which accompany improved earnings. Nevertheless, in a carefully prepared, well documented opinion by Justice Sharp, we held the proposed expenditure was for a private, not a public purpose within the meaning of Article V, § 3, of the Constitution of this State. In this respect, I am unable to distinguish an appropriation of tax revenues to aid an individual to acquire a building to house a business which he will own and operate for his exclusive, private benefit from a use of such revenues to enable the same individual, or another less wealthy, to acquire a building which he will use as his own, private residence. The majority opinion seriously undermines, if it does not destroy, the Mitchell Case, which in my opinion was, and still is, a correct application of this provision in the Constitution.

It has been well said that, in considering the constitutionality of a statute, the wisdom of the legislative plan is not before us. It is equally true that the wisdom of a provision in the Constitution is not before us. If the people have written into their Constitution a prohibition upon certain actions by their Legislature, it is not for us or for the Legislature to disregard it because we believe it unwise or out of date, even if we do so regard it.

Spending policies of the Federal Government are not germane to the issue before us. In the first place, the United States Constitution does not contain a provision such as Article V, § 3, of the State Constitution, though such a limitation may be thought implicit in the Due Process Clause of the Fifth Amendment, or in Article I, § 8, Clause 1. In the second place, even if such a provision were expressed in the United States Constitution in the precise words used in Article V, § 3, of the North Carolina Constitution, neither Congressional appropriation nor approval thereof by the Supreme Court of the United States would compel us to give a like construction to the limitation placed by the North Carolina Constitution upon the Legislature of this State. For the same reason, decisions by the courts of other states, interpreting the provisions of their constitutions, do not have that effect, notwithstanding our great respect for those courts.

Even if the purpose for which the statute before us authorizes the Housing Corporation to act were a "public purpose," the provision purporting to exempt its bonds from taxation is, in my opinion, invalid by reason of Article V, §§ 3 and 5, of the Constitution of North Carolina.

When the proposed bonds are issued and sold to private investors they will not be property of the State, a county or a municipal corporation. They are not property of any type which Article V, § 5, authorizes the Legislature to exempt from taxation.

It is quite clear that when Article V, § 5, provides expressly that certain types of property *shall* be exempt from taxation and certain other types of property *may* be exempted, the necessary conclusion is that the Constitution means that no other type of property may be exempted. This is made even more certain by the express provision in Article V, § 3, that "the power of taxation shall never be surrendered, suspended, or contracted away." It is worthy of remembrance that these are not antiquated provisions in our State Constitution, relics of the horse and buggy age. Both § 3 and § 5 of Article V were before the Legislature for rewriting by amendment as recently as 1961 and the people ratified the rewritings in the election of 1962. The revision of the Constitution proposed by the General Assembly of 1969, which is to be voted upon by the people at

the next general election, leaves the pertinent parts of these provisions unchanged. Session Laws of 1969, c. 1258.

The exemption of State, county and municipal bonds from taxation has been held authorized by this Court. *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 rationalization of this result is far from convincing but in any event it does not support this statute. The reason for the holding in those cases was that such exemption reduces the interest the State, or its political subdivision, has to pay on its own obligations and so the effect is approximately the same as if the obligation were taxed and the higher interest rate paid. See, the dissenting opinion of Clark, C. J., in the Pullen Case. The statute before us expressly provides that neither the State nor any of its political subdivisions shall be liable for the payment of any bond issued by the Housing Corporation or for the payment of interest thereon.

HIGGINS, J., joins in the dissenting opinion.

STATE OF NORTH CAROLINA v. RICHARD WILLIAM ACCOR AND STATE OF NORTH CAROLINA v. WILLARD MOORE

No. 26

(Filed 31 July 1970)

1. **Criminal Law § 135; Burglary and Unlawful Breakings § 8— first degree burglary — capital punishment — validity — motion to quash**

   A motion to quash which purported to raise the question whether first degree burglary is punishable by death if the jury when rendering its verdict in open court fails to recommend that the punishment shall be imprisonment for life, *held* properly overruled in a prosecution for first degree burglary. G.S. 14-51; G.S. 14-52; G.S. 15-162.1.

2. **Burglary and Unlawful Breakings § 5— prosecution — sufficiency of evidence**

   In a prosecution charging two defendants with burglary in the first degree, the State's evidence was sufficient to support a jury finding that the defendants broke into and entered a home with the intent to take and carry away the personal property of the occupants, as alleged in the indictment, notwithstanding there was no evidence that defendants actually took or carried away any article of personal property from the home, since the evidence of defendants' breaking

and entering, together with evidence of their conduct in violently assaulting the occupants of the home, negated any suggestion that they had entered the home for a lawful purpose.

3. **Criminal Law § 176— appeal — review of nonsuit motion**

Admitted evidence, whether competent or incompetent, must be considered in passing upon defendants' motions under G.S. 15-173 for judgments as in case of nonsuit.

4. **Criminal Law § 66; Constitutional Law § 30— photographs — photographic identification of defendants — admissibility — violation of Fourth Amendment rights**

The photographs by which the defendants were identified as the perpetrators of first degree burglary, and the testimony of the circumstances surrounding the photographic identification of the defendants by the victims of the burglary, *are held* inadmissible on the ground that the photographs were taken in violation of the defendants' Fourth and Fourteenth Amendment rights, where (1) the defendants were picked up and brought to the police station without a warrant and without probable cause, (2) the evidence was silent as to the circumstances under which defendants were picked up and there was no evidence that either defendant voluntarily accompanied the officers, (3) the defendants were photographed prior to the issuance of warrants for their arrest, (4) at the time the photographs were taken there was no evidence to support a finding of probable cause of defendants' guilt, and (5) there was no evidence that one defendant consented to the taking of his photograph, and the evidence was insufficient to show that the other defendant voluntarily and understandingly consented to the taking of his photograph.

5. **Criminal Law § 66— taking of photographs of defendant — effect of statute**

G.S. 114-19 neither authorized nor prohibited police officers from taking fingerprints and photographs of defendants who had not been charged with a crime when the photographs were taken.

6. **Criminal Law § 66— photographs of defendant — statute — exclusionary rule**

The statute prohibiting law enforcement officers from taking photographs of persons charged with a misdemeanor, except in certain enumerated cases, does not create an exclusionary rule of evidence. G.S. 114-19.

7. **Criminal Law § 66— photographic identification of Negro defendants — suggestiveness in procedure — findings and evidence**

Evidence on *voir dire held* sufficient to support a finding that the procedure by which two Negro defendants were identified from photographs was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, where there was testimony that (1) the pictures of defendants were placed in an album containing pictures of other adult Negro males, (2) all of the photo-

graphs in the album were taken under identical conditions, and (3) the album was shown to the prosecuting witnesses singly.

8. **Criminal Law § 66— identification of defendant — voire dire**

When the State offers a witness whose testimony tends to identify the defendant as the person who committed the crime charged in the indictment, and the defendant interposes timely objection and requests a *voir dire* or asks for an opportunity to "qualify" the witness, such *voir dire* should be conducted in the absence of the jury and the competency of the evidence evaluated.

9. **Criminal Law § 66; Constitutional Law § 32— right to counsel — photographic identification of defendants**

The decisions in *U. S. v. Wade,* 388 U.S. 218, and in *Gilbert v. California,* 388 U.S. 263, which relate to right to counsel at a police identification lineup, will not be extended to out-of-court examinations of photographs including that of a suspect, whether the subject be at liberty or in custody.

10. **Criminal Law § 66; Constitutional Law § 37— photographs of defendant — waiver of Fourth Amendment rights — burden of proof**

Upon the *voir dire* to determine the voluntariness of defendant's consent to be photographed for identification purposes, the burden was on the State to establish that the defendant had waived his Fourth Amendment rights.

11. **Criminal Law § 66; Constitutional Law § 37— photographing of defendant for identification — voluntariness of defendant's consent**

Although a police officer read the Miranda warnings to defendant prior to the photographing of defendant for identification purposes, nonetheless the circumstances surrounding defendant's affirmative response to the officer's request for the taking of photographs cannot support an inference that the defendant's response was voluntarily and understandingly made, where the defendant had been picked up and brought to the police station without a warrant and without probable cause, and the defendant was not advised that he could leave the station without having to submit to the taking of the photographs.

12. **Criminal Law § 66— photographs of defendant — use for identification — assumption of illegality**

In the absence of evidence and findings that the defendants' photographs used for identification purposes were lawfully obtained, it will be assumed that the defendants were being unlawfully detained at the police station when their photographs were taken.

13. **Criminal Law § 66— unlawfully obtained photographs of defendants — validity of in-court identification of defendants — finding of fact**

Although unlawfully obtained photographs of defendants, and the evidence of defendants' identification from the photographs, were rendered inadmissible at trial when they were offered by the State and objected to by the defendants, it did not necessarily follow that the

in-court identifications were incompetent; the trial court had to determine the question of fact whether the State had offered clear and convincing evidence that the in-court identifications of defendants originated independently of the tainted photographs.

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 prosecuted 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 a.m. 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."

Upon arraignment thereon, each defendant pleaded not guilty. At arraignment and at trial, each defendant was represented by court-appointed counsel, Accor by Tim L. Harris, Esq., of the Gaston Bar, and Moore by Steve Dolley, Esq., of the Gaston Bar.

Narrated below is a brief summary of the State's evidence *as to what occurred* on the occasion of the alleged burglary.

The dwelling house at 1609 Jackson Road, Gastonia, N. C., in which Mrs. Elizabeth Martin Carson, aged 52, and her parents, Mr. and Mrs. Witt Martin, each aged 75, resided, was broken into and entered by two Negro men about 2:15 a.m., on Tuesday, March 4, 1969. At that time, James Martin, aged 47, Elizabeth's brother, was also an occupant of the house.

Elizabeth was awakened by a noise "like somebody was slitting a screen," and then heard glass falling in the kitchen, "just across" from her bedroom. Thereupon, she got out of bed, "jerked the door open," went into the hall and screamed loudly for her father. Witt Martin "came running out" into the hall and Elizabeth told him, "Someone's breaking in." From the hall, Witt Martin reached just inside the kitchen and switched on the kitchen light. In the bright light of the kitchen's 14-inch fluorescent light, father and daughter saw two Negro men in the kitchen.

The two men attacked Witt Martin and knocked him back through the hall and into Elizabeth's bedroom. When James Martin, who had been aroused by Elizabeth's screams, came into the hall or kitchen, the intruders grabbed him and one of them stabbed him "with a long switchblade knife." Witt Martin, armed with a vanity stool, emerged from his daughter's bedroom and attacked the man who was stabbing his son. The other (younger) man was attempting to hold James Martin, who had grabbed the arm of his assailant and was struggling to defend himself. Elizabeth, with a telephone, was pounding this younger man until he grabbed her and with her head under his arm dragged her across the kitchen and back porch and down the steps. The melee continued until a next-door neighbor turned on his flood light. When this occurred, the intruders fled.

The violent encounter took place in the kitchen and hall. Estimates as to how long it lasted varied from 3-4 minutes (Witt Martin) to 10 minutes (Mrs. Carson). The hall itself was lighted only by a night-light. However, when the kitchen light was on, there was plenty of light both in the kitchen and in the entrance of the hall.

Responding to a call, Officer Truelove of the Gastonia Police Department, went to the residence at 1609 Jackson Road.

On March 5, 1969, each defendant was photographed by Eugene Posey, Captain of the Detective Division, at the Gastonia Police Department. These photographs, together with those of eleven other adult Negro males, were placed in an album. The album was taken by Captain Posey to the Carson-Martin residence about 4:00 p.m. on Thursday, March 6, 1969, and shown separately to each member of the family. Witt Martin identified, as the photographs of the two Negro men who had broken into and entered the Carson-Martin residence about 2:15 a.m. on

March 4, 1969, the photographs of both Accor and Moore; James Martin also identified the photographs of both Accor and Moore; Mrs. Carson identified the photograph of Accor and no other; Mrs. Witt Martin (who did not testify at trial) identified the photograph of Moore and no other.

Based on the identifications of the photographs of defendants by the Martins and Mrs. Carson, warrants were issued and defendants were arrested for the alleged burglary.

Neither defendant had counsel when his photograph was taken on March 5th or when the identifications of photographs were made at the Carson-Martin residence on March 6th. Thereafter, on March 11, 1969, the court, having determined that each defendant was an indigent, appointed counsel for each defendant.

A preliminary hearing for each defendant was conducted on April 10, 1969. Posey testified: "To my knowledge, the first time they (Mrs. Carson and the Martins) saw them (defendants) in person was at the preliminary hearing."

Additional facts relating to the circumstances under which the photograph of each defendant was taken, and to the admission in evidence of the album and of testimony relating to the out-of-court identifications of the photographs of defendants, will be set forth in the opinion.

Witt Martin, James Martin and Mrs. Carson, as witnesses at trial, identified defendants as the two Negro men who broke into and entered the Carson-Martin residence about 2:15 a.m. on March 4th. In addition, the State offered in evidence, and the court admitted over defendants' objections, testimony of these witnesses and also of Captain Posey as to the above-stated identifications of photographs of defendants on March 6th. In addition, the State offered in evidence the album (State's Exhibit No. 15) "for the purpose of corroborating the evidence of Mrs. Carson, Mr. James Martin, Mr. Witt Martin, and Officer Posey." Overruling defendants' objections, the court admitted in evidence the album. In doing so, the court gave this instruction: "(T)he State seeks to offer into evidence the State's Exhibit No. 15 for the purpose of corroborating the testimony of the witnesses, Mrs. Elizabeth Martin Carson, Mr. Witt Martin, Mr. James Martin and Captain Posey, if you find in fact, that it does corroborate the testimony of these witnesses whom I

have named. You will not consider this document as substantive evidence, if you find, in fact, that it does corroborate one or more of these witnesses."

Each defendant testified and denied involvement in any incident at the Carson-Martin residence. The testimony of each defendant and of witnesses offered in his behalf tended to establish an alibi.

As to each defendant, the jury returned a verdict of guilty of burglary in the first degree with recommendation that the punishment be imprisonment for life in the State's prison. In accordance with the verdicts, the court, as to each defendant, pronounced judgment "that the defendant be imprisoned for the term of his natural life in the State's Prison in Raleigh, N. C." Each defendant excepted to the judgment and gave notice of appeal.

Thereafter, the court was advised that private counsel had been retained to represent defendants; and, in accordance with their motions, the court entered orders allowing Messrs. Dolley and Harris to withdraw as counsel for the respective defendants. On appeal, defendants are represented by privately retained counsel.

Attorney General Morgan, Deputy Attorney General Moody and Assistant Attorney General Harrell for the State.

Chambers, Stein, Ferguson and Lanning for defendant appellants.

BOBBITT, C. J.

On May 13, 1970, this case was remanded to the Superior Court for appropriate proceedings to correct patent errors appearing on the face of its minutes. *State v. Accor and State v. Moore,* 276 N.C. 567, 173 S.E. 2d 775. In accordance with our directions, such proceedings were conducted in Gaston Superior Court; and on June 25, 1970, based on findings of fact set forth therein, an order was entered by Ervin, J., correcting the patent errors which had appeared in the minutes of the May 26, 1969 Session. A certified copy of this order is incorporated in the record on appeal. The corrected record shows unequivocally that the pleas, verdicts, and judgments were as set forth in our preliminary statement and that the alternate jurors were excused before the jury, consisting of the original twelve, com-

menced deliberations as to their verdict. Indeed, the briefs filed by defendants and by the State prior to oral argument at our Fall Term 1969 are based on this premise and contain no reference to the now-corrected patent errors.

[1] Each defendant assigns as error the court's denial of his motion to quash the indictment. Defendants' contentions purporting to support these assignments bear upon whether the *death penalty* provisions of G.S. 14-51, G.S. 14-52 and G.S. 15-162.1, relating to burglary in the first degree, in force on March 4, 1969, were invalid. Unquestionably, the indictment charges burglary in the first degree as defined in G.S. 14-51. Whether burglary in the first degree is punishable by death if the jury when rendering its verdict in open court *fails to recommend* that the punishment shall be imprisonment for life in the State's prison, is not presented by the motions to quash. These motions were properly overruled.

[2] Each defendant assigns as error his motion(s) to dismiss as in case of nonsuit. The gist of defendants' contention is that the evidence is insufficient to support a finding that the two Negro men who broke into and entered the Carson-Martin residence at 1609 Jackson Road on March 4, 1969, about 2:15 a.m., did so feloniously and burglariously *with the intent* "to steal, take and carry away clothing, goods, and other personal property of Mr. and Mrs. Witt Martin, James Martin and Elizabeth Martin Carson . . . ."

There was plenary evidence the residence contained numerous articles of personal property of value owned by the occupants. There was no evidence either defendant actually took and carried away any such article of personal property. The breaking and entering were immediately detected; the intruders were confronted in the brightly lighted kitchen by Mrs. Carson and by Witt Martin; the intruders then attacked Witt Martin, James W. Martin and Mrs. Carson; and all were engaged in physical combat until M. B. Cloninger, the next-door neighbor, responded to pleas for help by turning on the flood light on the corner of his house, at which time the intruders fled.

In *State v. Allen*, 186 N.C. 302, 306, 119 S.E. 504, 506, Stacy, C. J., said: "(B)urglary in the first degree, under our statute, consists of the intent, which must be executed, of breaking and entering the presently occupied dwelling-house or

sleeping apartment of another, in the nighttime, with the further concurrent intent, *which may be executed or not,* then and there to commit therein some crime which is in law a felony. This particular, or ulterior, intent to commit therein some designated felony, as aforesaid, must be proved, in addition to the more general one, in order to make out the offense." (Our italics.)

In *State v. Thorpe,* 274 N.C. 457, 464, 164 S.E. 2d 171, 176, Higgins, J., for the Court, said: "The indictment having identified the intent necessary, the State was held to the proof of that intent. Of course, intent or absence of it may be inferred from the circumstances surrounding the occurrence, but the inference must be drawn by the jury."

According to uncontradicted evidence: When the intruders, then in the brightly lighted kitchen, were first confronted, Witt Martin asked: "What do you want?" The intruders made no reply but "just started hitting." The conduct of the intruders negates any suggestion that they entered the Carson-Martin residence for any lawful purpose. Moreover, their conduct discloses affirmatively that they were fully aware of and participated in events requiring mental quickness as well as physical dexterity.

In 13 Am. Jur. 2d Burglary § 52, entitled "Intent," the author says:

"Intent is a state of mind existing at the time a person commits an offense. If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent. The mind of an alleged offender, however, may be read from his acts, conduct, and inferences fairly deducible from all the circumstances.

"There is a lack of unanimity of opinion among the courts on the question whether the intent to commit larceny in connection with a burglary charge must be affirmatively shown to exist as distinct from some other offense which might have been intended. Numerous cases, however, hold that an unexplained breaking and entering into a dwelling house in the nighttime is in itself sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other felony. The fundamental theory,

in the absence of evidence of other intent or explanation for breaking and entering, is that the usual object or purpose of burglarizing a dwelling house at night is theft."

In *State v. McBryde,* 97 N.C. 393, 1 S.E. 925, the evidence failed to show that the intruder had disturbed any of the personal property within the residence. The evidence was held sufficient to withstand the defendant's motion to dismiss as in case of nonsuit. Davis, J., for the Court, said: "The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the nighttime, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. Here there was no larceny or other felony actually committed, and the guilt, if any, consisted in the *intent* to commit a felony, which was not consummated." Accord: *State v. Hargett,* 196 N.C. 692, 146 S.E. 801; *State v. Oakley,* 210 N.C. 206, 186 S.E. 244.

We hold the evidence was sufficient for submission to the jury upon the allegations contained in the indictment, and that it was for the jury to determine, under all the circumstances, whether the defendants or either of them had the ulterior criminal intent at the time of breaking and entering to commit the felony charged in the indictment.

[3] Since a new trial is awarded for error in the admission of evidence, it is here noted that *admitted* evidence, whether competent or incompetent, must be considered in passing on defendants' motions under G.S. 15-173 for judgments as in case of nonsuit. *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777, and cases cited; *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679.

[4] Decision on this appeal turns on whether the court committed prejudicial error by admitting, over defendants' objections, the testimony relating to the out-of-court identifications on March 6th of the photographs of defendants, the album con-

taining these photographs, and the in-court identifications of defendants by Witt Martin, James Martin and Mrs. Carson.

Mrs. Carson was asked on direct examination whether she could identify in court the two Negro men who had broken into and entered the Carson-Martin residence. Counsel for each defendant objected and requested an opportunity to "qualify" the witness. In the absence of the jury, a *voir dire* hearing was conducted. At the conclusion thereof, Judge May made and entered the following findings of fact and conclusions of law, *viz.*:

"FINDINGS OF FACT

"1. In the absence of the jury, evidence was introduced, at length, by the State and the witnesses offered by the State were examined and cross-examined, both by the Solicitor for the State and by counsel for the respective defendants, Willard Moore and Richard Accor, with respect to an album containing thirteen photographs.

"2. That the witness, Captain Eugene Posey, testified that eleven photographs were removed from the police identification files which had been made prior to March 4, 1969, and that on March 5th, pictures were made of the defendants, Moore and Accor; that these pictures were placed in the album in positions Nos. 5 and 11.

"3. That there were no numbers, code, or otherwise placed on said photographs to indicate who any particular person was in a specified photograph; that each photograph was taken in the identical location in the City of Gastonia Police Department and that each person so photographed was taken from a front view and a side view and furthermore that each person so photographed had a chain around the neck with a placard hanging down on the chest; that this chain and placard appeared in each photograph and that the information contained on the placard of all thirteen photographs was covered by tape and unavailable to be seen or identified.

"4. That no photograph of either defendant was contained in the album which was made on or prior to March 4, 1969, but, in fact, the pictures or photographs of both defendants contained in the album were made on the morning of March 5, 1969;

that there was no marking or identification of any kind to indicate what date any particular one of the thirteen photographs had been made.

"5. That Mr. James Martin examined the album first and did so alone and that no other member of the family or any other person was present at the time he looked at the album who might have influenced him in making or failing to make an identification of either one or both of the defendants.

"6. That this procedure was likewise followed when Mrs. Witt Martin examined the album, when Mr. Witt Martin examined the album, and Mrs. Elizabeth Martin Carson examined the album.

"7. That at the time the two defendants named above were photographed on March 5, 1969, neither of said defendants had counsel appointed by the Court or privately employed but that at the time the officer, Captain Eugene Posey, first approached the defendants, he read to them what he described as their rights from a card which he was carrying on his person which reads, as follows: 'You have a right to communicate with friends or relatives. You have a right to counsel and if you cannot afford counsel, the Court will appoint counsel for you. You do not have to make any statement in the absence of counsel. You are not compelled to answer any question and you may stop answering questions at any time. Any statement or admission made by you can be used against you.'

"8. That at the time they were photographed, neither defendant was charged with the commission of any crime and at the time they were advised of their rights, neither of the defendants was advised that he was a suspect in this case but rather the conversation with the police at the time concerned investigation of an offense of receiving stolen goods, said goods have (*sic*) been stolen as a result of a breaking and entering of a residence, of which neither defendant is at this time presently under indictment.

"9. At the time the photograph album was shown to the Martins and Mrs. Carson, neither of the defendants had been advised that the photographic album was being shown to the Martins nor were either of the defendants present when the photographic album was being shown to the Martins nor did

either of the defendants at the time the photographic album was being shown to the Martins have legal counsel, either appointed or privately employed, present or elsewhere.

"10. That Captain Eugene Posey is an officer of the City of Gastonia Police Department, particularly charged with the responsibility of being the head of the City Detectives, and, as such, is directly responsible to the Chief of Police of the City of Gastonia and works for him and under his direction and supervision.

"11. That the pictures of all the thirteen persons in the album were of adult male Negroes.

"12. That all of the photographs were identical in that they constituted a photograph of the individual from the waist to and above the top of his head, from the front view and the side view.

"13. That the warrants for the defendants which were issued in this case were issued based upon information and identification received from Mr. and Mrs. Martin, Mrs. Elizabeth Martin Carson, and Mr. James Martin, said identification having been made as a result of viewing the thirteen photographs in the album presented to them by Captain Posey and Sergeant Mark Carswell on March 7 (*sic*), 1969.

"14. That the original identification of both of the defendants, Moore and Accor, made by Mr. and Mrs. Witt Martin, Mr. James Martin, and Mrs. Elizabeth Martin Carson were made from the photographs contained in the album hereinabove mentioned.

"15. That there was no police lineup arranged for the identification of the defendants, Moore and Accor, in the sense that any living person or persons were physically exhibited for identification to Mr. and Mrs. Witt Martin, Mr. James Martin, and Mrs. Elizabeth Martin Carson.

"CONCLUSIONS OF LAW

"Upon the foregoing Findings of Fact, the Court concludes as a matter of law that the out-of-court identifications of the defendants, Moore and Accor, by Mr. and Mrs. Witt Martin, Mr. James Martin, and Mrs. Elizabeth Martin Carson were lawful."

Each defendant moved to suppress all evidence relating to the photographs and all in-court identifications by persons whose original identification was made on March 6th from the photographs. During the *voir dire* hearing, and at the conclusion thereof, defendants' counsel contended, *inter alia,* (1) that the photographs were taken in violation of G.S. 114-19; (2) that the photographic identifications were illegal because there was a "lineup in disguise" when counsel for defendants were not present; (3) that the in-court testimony was "tainted" by the March 6th identifications of the photographs; and (4) that there was no evidence the photographs were taken "constitutionally."

G.S. 114-19 in part provides: "Every chief of police and sheriff in the State of North Carolina is hereby authorized to take, or cause to be taken, the fingerprints and photographs of any person charged with the commission of a felony and of any person who has been committed to jail or prison upon conviction of a crime. No officer shall take the photograph of a person arrested and charged with a misdemeanor, unless such person is a fugitive from justice or unless such person shall, at the time of arrest, have in his possession property or goods reasonably believed by such officer to have been stolen, or unless the officer has reasonable grounds to believe that such person is wanted by the Federal Bureau of Investigation, the State Bureau of Investigation or some other law enforcement officer or agent."

[5, 6] In view of the express finding that, "at the time they were photographed, neither defendant was charged with the commission of any crime," G.S. 114-19 neither authorized nor prohibited the taking of the fingerprints and photographs of defendants. Moreover, we approve the holding in recent decisions of the Court of Appeals (*Chapman v. State,* 4 N.C. App. 438, 166 S.E. 2d 873; *State v. Strickland,* 5 N.C. App. 338, 168 S.E. 2d 697) that this statute did not create an exclusionary rule of evidence. *State v. McGee,* 214 N.C. 184, 198 S.E. 616, and cases cited; 29 Am. Jur. 2d Evidence § 408.

[7] Judge May concluded that the "out-of-court identifications of the defendants" from photographs *were lawful.* When considered with the court's findings of fact, we interpret this conclusion as a finding by the court that "the photographic identification procedure" was *not* "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Simmons v. United States, 390 U.S. 377, 384, 19 L.ed. 2d 1247, 1253, 88 S. Ct. 967, 971. Cf. *Stovall v. Denno,* 388 U.S. 293, 301-302, 18 L.ed. 2d 1199, 1206, 87 S. Ct. 1967, 1972. Although the album was not included in the record on appeal, seemingly the evidence on *voir dire* was sufficient to support this finding. However, the court's findings are not determinative of crucial factual questions discussed below.

[8] When the State offers a witness whose testimony tends to identify the defendant as the person who committed the crime charged in the indictment, and the defendant interposes timely objection and requests a *voir dire* or asks for an opportunity to "qualify" the witness, such *voir dire* should be conducted in the absence of the jury and the competency of the evidence evaluated. Upon such hearing, if the in-court identification by a witness is challenged on the ground it is tainted by an unlawful out-of-court photographic or corporeal identification, all relevant facts should be elicited and all factual questions determined, including those involving the defendant's constitutional rights, pertinent to the admissibility of the proffered evidence. Under the circumstances of this case, we think the objections interposed were sufficient to entitle defendants to an evaluation of the competency of the evidence to which they objected with reference to their Fourth Amendment and Sixth Amendment rights. See *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334, and cases cited; *State v. Catrett,* 276 N.C. 86, 171 S.E. 2d 398, and cases cited.

No factual determination was made and meager evidence was elicited with reference to whether either Accor or Moore was in custody at the time of the photographic identifications. The few fragments of evidence bearing thereon indicate Moore was released but leave in doubt whether Accor was released after they were fingerprinted and photographed on March 5th. However, defendants contend, based on *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, that the photographic identifications on March 6th constituted a "critical stage" in the prosecution and that, because defendants were not then represented by counsel, their Sixth Amendment rights to counsel were violated. Since the question will probably arise at the next trial, we deem it appropriate to consider this contention.

If either defendant was released without charge after his fingerprints and photographs were taken, and was at liberty on March 6th, there exists a unanimity of opinion to the effect that his Sixth Amendment rights were not violated by the absence of counsel when the photographic identifications were made. Moreover, in our view, if either defendant was in actual custody but with no charge against him related to the alleged burglary when the photographic identifications were made which led to the issuance of a warrant and his arrest on the burglary charge, his Sixth Amendment rights were not violated solely because he was not represented by counsel when such photographic identifications were made. Pertinent decisions include the following: *United States v. Conway,* 415 F. 2d 158 (3d Cir. 1969); *United States v. Marson,* 408 F. 2d 644, 649-650 (4th Cir. 1968); *United States v. Bennett,* 409 F. 2d 888 (2d Cir. 1969); *McGee v. United States,* 402 F. 2d 434, 436 (10th Cir. 1968); *United States v. Cunningham,* 423 F. 2d 1269 (4th Cir. 1970). In Conway, the defendants were in custody when the photographic identifications were made. In Marson, the defendant was in custody when the photographic identifications were made but it was held that, under *Stovall v. Denno, supra,* Wade and Gilbert did not apply because the photographic identifications were made prior to those decisions. In Bennett and McGee, it is unclear whether the defendant was in custody when the photographic identifications were made. In Cunningham, the defendant was not in custody when the photographic identifications were made. It is noted that in *Thompson v. State,* 451 P. 2d 704 (Nev. 1969), it was held in a split decision (three to two) that Wade and Gilbert were applicable in respect of photographic identifications when the defendant was in actual custody. (Note: The dissenting opinion of Winter, J., in Marson, is to the same effect.) However, in Thompson, the conviction was upheld on the ground there was evidence sufficient to support the finding of the trial judge, made immediately after a hearing held in the absence of the jury, that "the State had proven by clear and convincing evidence that the in-court identification was based on the prolonged and thorough observation of the robber at the holdup."

[9] In our view, the doctrine of Wade and Gilbert *should not be extended* to out-of-court examinations of photographs including that of *a suspect,* whether the suspect be at liberty or in custody. We shall adhere to this view unless and until the Supreme Court of the United States enunciates such an extension

of the Wade and Gilbert doctrine. Thus, the award of a new trial herein is not based on the ground that defendants were not represented by counsel on the occasion of the photographic identifications on March 6th.

[4] Each defendant contends his photograph was taken when he was being unlawfully detained by the police; and that, having been obtained in violation of his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States, the photograph was not admissible in evidence. He relies largely on *Davis v. Mississippi,* 394 U.S. 721, 22 L.ed. 2d 676, 89 S. Ct. 1394.

In Davis, the police were investigating the rape of an elderly woman by a young Negro. Davis, a 14-year-old youth, had worked for the victim as a yardboy. Police officers, without warrants, took twenty-four or more Negro youths, including Davis, to police headquarters where each was questioned briefly, fingerprinted, and then released without charge. As to Davis, this occurred on December 3rd, at which time there was no probable cause for his arrest. The State made no claim Davis "voluntarily accompanied the police officers to headquarters on December 3 *and* willingly submitted to fingerprinting." (Our italics.) Later, December 12th through December 14th, Davis was confined and fingerprinted again. It was found that Davis' fingerprints matched the latent prints taken from the window of the victim's home.

In Davis, the court held: (1) The taking of Davis' fingerprints during his illegal detention constituted an unreasonable seizure of his person in violation of the Fourth Amendment; and (2) that, notwithstanding its relevancy and trustworthiness as an item of proof, the illegally seized evidence was inadmissible at trial. The exclusionary rule, judicially declared by the Supreme Court of the United States, renders inadmissible evidence obtained in violation of a person's constitutional rights and applies equally to criminal prosecutions in State and Federal Courts. Mr. Justice Brennan states as the reason therefor the following: "The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes." *Id.* at 724, 22 L.ed. 2d at 679, 89 S. Ct. at 1396. Rejecting the argument "that the detention occurred during the investigatory rather than accusatory stage and thus was not a

seizure requiring probable cause," Mr. Justice Brennan said: "It is true that at the time of the December 3 detention the police had no intention of charging petitioner with the crime and were far from making him the primary focus of their investigation. But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" *Id.* at 726, 22 L.ed. 2d at 680, 89 S. Ct. at 1397.

In accord with Davis: *Bynum v. United States,* 262 F. 2d 465 (D.C. Cir. 1958), and *Mills v. Wainwright,* 415 F. 2d 787 (5th Cir. 1969), involving fingerprints; *Bradford v. United States,* 413 F. 2d 467 (5th Cir. 1969), involving exemplars of handwriting.

The evidence relating to the circumstances under which the photographs were taken discloses the following:

Captain Posey testified he first saw Accor on March 5th at his home on Middle Street; that he had opportunity to talk with Accor's mother and took her statement; that he read to Accor from a card the Miranda warnings when "we picked him up"; and that Accor's photograph was taken about 10:30 a.m. He testified he went to Moore's home; that Moore was not at home and that he talked with Moore's mother; that he did not pick up Moore but "left word"; that Moore was brought into his (Posey's) office by another officer "near dark on the 5th"; and that he advised Moore of his rights by reading the Miranda warnings from the same card.

When defendants were picked up, brought in, fingerprinted and photographed, no warrants had been issued for their arrest; there was no evidence sufficient to support a finding of probable cause of their guilt *of any crime;* and there was no evidence that either defendant *voluntarily* accompanied the officers to the police department.

Nothing in the record suggests that Accor consented at any time to the taking of his photograph.

[10, 11] Captain Posey testified he asked Moore if he had "any

objections for us fingerprinting and photographing him"; that Moore said, "he did not"; and "that's when I taken his picture." Whether this statement attributed to Moore was made voluntarily, understandingly and intelligently was for factual determination by the court in the light of all the circumstances. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53, and cases there cited. The court did not make such a factual determination. The burden was upon the State to establish a waiver by Moore of his Fourth Amendment rights. *State v. Little,* 270 N.C. 234, 154 S.E. 2d 61, and cases cited. He had been picked up and brought to the police station, without a warrant and without probable cause. Although the Miranda warnings were read to him, he was not advised he was free to leave police headquarters without submitting to the taking of his fingerprints and photographs. Nothing else appearing, it would seem unreasonable under these circumstances to infer that Moore's response "was sufficiently an act of free will to purge the primary taint" of the unlawful seizure. *Wong Sun v. United States,* 371 U.S. 471, 486, 9 L.ed. 2d 441, 454, 83 S. Ct. 407, 416-417.

Captain Posey testified that, when Accor's picture was taken, Accor was under arrest for the misdemeanor of receiving stolen goods. However, the record contains no warrant with reference to such a charge. Nor does it contain evidence relating to such a charge. Testimony that Accor was under arrest for receiving stolen property is in conflict with the court's finding that "neither defendant was charged with the commission of any crime and at the time they were advised of their rights, neither of the defendants was advised that he was a suspect in this case but rather the conversation with the police at the time concerned *investigation* of an offense of receiving stolen goods, said goods having been stolen as a result of a breaking and entering of a residence, of which neither defendant is at this time presently under indictment." (Our italics.)

Since each defendant was picked up and brought to police headquarters without a warrant and without probable cause, the burden was on the State to disclose fully and fairly all facts and circumstances surrounding their seizure and show compliance with defendants' Fourth Amendment rights. *State v. Little, supra; Beck v. Ohio,* 379 U.S. 89, 13 L.ed. 2d 142, 85 S. Ct. 223; *State v. Morales,* 176 N.W. 2d 104 (Minn. 1970).

[12] The evidence is silent as to the circumstances under which

defendants were picked up and brought to police headquarters. The court made no finding that photographs of defendants were lawfully obtained. Nor was there evidence sufficient to support such a finding. In the absence of such evidence and findings, it must be assumed that each defendant was being unlawfully detained when his photograph was taken. Thus, the photographs and evidence relating thereto, *when offered by the State and objected to by defendants,* were inadmissible at trial. The probative impact of the album *and* the testimony relating to the identifications of the photographs of defendants was more prejudicial to defendants than the testimony alone would have been. The jury could see that the men on trial were the men whose photographs were identified on March 6th by Witt Martin, James Martin and Mrs. Carson. This very fact would tend to divert attention from the crucial question, that is, whether defendants or either of them was in the Carson-Martin residence during the early hours of March 4th.

[13] On this record, we must assume that the photographs were taken in violation of defendants' Fourth Amendment rights. While this rendered these photographs and the evidence relating thereto inadmissible at trial *when offered by the State and objected to by defendants,* it did not necessarily follow that the in-court identifications were incompetent. Defendants challenged the in-court identification testimony on the ground it was tainted by the out-of-court photographic identifications. This raised a question of fact for determination *by the court* at the conclusion of the *voir dire* hearing. *Bradford v. United States, supra,* at 472. The court made no finding of fact purporting to resolve this question. The admissibility of the in-court identifications depended upon whether the State was able to satisfy the court "by clear and convincing evidence," *United States v. Wade, supra* at 239, 18 L.ed. 2d at 1164, 87 S. Ct. at 1939, that the in-court identifications were of independent origin, that is, based on observations made at the scene of the burglary and untainted by any illegality underlying the photographic identifications.

In *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534, the prosecutrix identified the photograph of the defendant as that of one of three persons who had raped her. There was no evidence as to when and under what circumstances the photographs were taken. The photograph was picked out by the prosecutrix from a number of pictures exhibited to her. At trial, the defendant interposed no objection when the State offered

the in-court identification of the defendant by the prosecutrix. The evidence relating to the out-of-court and apparently pre-arrest identification of the defendant's photograph by the prosecutrix was elicited on cross-examination by the defendant's counsel. Branch, J., for this Court, calling attention to the Wade and Gilbert decisions, noted: "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 the present case, each defendant consistently objected to the in-court identification testimony of Witt Martin, James Martin and Mrs. Carson; objected to all testimony relating to the out-of-court identification of the photographs of defendants by these witnesses; and objected to the introduction of the album. For error in the admission thereof, each defendant must be awarded a new trial. *Adams v. United States*, 399 F. 2d 579 (D.C. Cir. 1968).

At such new trial, when the State offers the testimony of Witt Martin, James Martin and Mrs. Carson, or any one or more of them, to identify defendants as the persons who burglarized their residence on March 4th, and defendants object to such in-court identifications and request a *voir dire* hearing, the court must determine *de novo* whether defendants or either of them were unlawfully detained at the Gastonia Police Station when their fingerprints and photographs were taken. In making this determination, the court will consider any evidence that may be offered by the State tending to show defendants or either of them waived their Fourth Amendment rights and voluntarily, understandingly and intelligently consented to their being photographed at the Gastonia Police Station. Irrespective of its determination as to whether defendants or either of them were unlawfully detained when the photographs were taken, the court must determine upon the evidence *then* before it whether "the photographic identification procedure" was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States, supra.* Whatever the indicated prior determinations may be with reference to the out-of-court photographic identifications, the court must make an additional factual determination as to whether the State has established by clear and convincing proof that the

in-court identifications were of independent origin and were untainted by the illegality, if any, underlying the photographic identifications.

Upon the present record, we are unable to say that the State has shown "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S. 18, 24, 17 L.ed. 2d 705, 710, 87 S. Ct. 824, 828. The testimony of the eyewitnesses is the only evidence offered by the State that tends in any way to identify defendants or either of them as the persons who committed the burglary charged in the bill of indictment.

Since a new trial is awarded on the grounds stated above, we do not discuss defendants' contention, based on numerous exceptions, that the comments and conduct of the State throughout the trial were calculated to and had the effect of depriving defendants of a fair and impartial trial. We express the hope that the manner in which the next trial is conducted will afford no basis for such a contention.

New trial.

IN RE: WILL OF WILLIAM FARR

No. 51

(Filed 31 July 1970)

1. **Wills §§ 22, 23, 29— caveat proceeding — legal effect of revoked codicil — mental capacity of testator — instructions**

   In a caveat proceeding brought by testator's wife to challenge on grounds of mental incapacity and undue influence a codicil which revoked two articles of testator's will bequeathing property to the wife, the statute providing that a subsequent codicil executed by testator, which codicil revoked the codicil challenged by testator, did not have the legal effect of reinstating the revoked articles of the will, G.S. 31-5.8, *held* irrelevant to the issue of testator's mental capacity, the testator's failure to reinstate the revoked articles merely indicating an ignorance of the law; consequently, the trial court properly refused (1) to instruct the jury on the statute and (2) to permit caveator to argue the statute to the jury.

2. **Wills §§ 8, 29— reinstatement of bequest revoked by codicil**

   Where testator's codicil No. 5 revoked Articles Four and Thirteen of the original will, the Articles Four and Thirteen were not reinstated by codicil No. 6 which revoked codicil No. 5; the Articles could be

reinstated only by a reexecution of the will or by incorporating the previously revoked Articles by reference in codicil No. 6.

3. **Wills § 22—testamentary capacity — ignorance of technical statute**

Mere ignorance of a technical statute relating to wills does not evidence a lack of testamentary capacity.

4. **Wills § 19— validity of will — testator's ignorance of law**

In the absence of fraud, a testator's misunderstanding of the legal effect of a will or codicil does not ordinarily affect its validity.

5. **Wills § 28— construction of will — admissibility of evidence**

Evidence cannot be heard to explain, add to, take from, modify, or contradict a will when its terms plainly indicate the testator's purpose as to persons or things mentioned in it.

6. **Wills § 24— caveat proceeding — instructions to jury on effect of their verdict**

The jury in a caveat proceeding could not properly base its findings upon the legal consequences of its verdict, since the legal consequences could not be known prior to the jury's determination of the true facts.

7. **Wills § 24— caveat proceedings — speculative issues — instructions to jury**

In a caveat to a will, the jurors should not be deflected from their functions of ascertaining the facts from the evidence by speculations as to whether the decedent's estate would be distributed more equitably under the instrument propounded or according to the laws of intestate succession.

8. **Trial § 11— unwarranted remarks of counsel**

When the remarks of counsel are not warranted by either the evidence or the law, or are calculated to mislead or prejudice the jury, it is the duty of the judge to interfere. G.S. 84-14.

ON *certiorari* to review the decision of the Court of Appeals reported in 7 N.C. App. 250.

This proceeding is a caveat to an instrument, executed on 22 February 1966, which was probated as the fifth codicil to the will of William Farr (Farr), who died 15 May 1966, two months before his ninety-first birthday. Seven documents, which purported to be his will and six codicils thereto, were probated in common form on 24 May 1966. Caveator is Farr's widow, Alice M. Farr, whom he married 27 November 1947. Propounders are Wachovia Bank and Trust Company (the executor named in the will) and the children of Farr by his first marriage.

In the will, executed 17 August 1961, Farr made specific bequests to his wife and to each of his eight children. By Article

Four he bequeathed to his wife the sum of $10,000.00, one-half of his books, and all his household furniture and personal effects not otherwise specifically devised. He also directed his executor to pay any indebtedness against property held by him and his wife as tenants by the entireties. By Article Thirteen he bequeathed and devised 40% of his residuary estate to his wife, 20% to his son, William, and 10% to each of his four daughters.

On the day he executed his will, Farr also executed the first codicil to it in order to include an omitted legacy. Thereafter, on 21 November 1963, 28 September 1964, and 18 March 1965, he executed codicils in which he altered, revoked, or made additional bequests to children or grandchildren. On 22 February 1966, while a patient in the hospital, Farr formally executed the instrument in question, which was prepared by his attorney and entitled "Codicil." It purported to revoke Articles Four and Thirteen of the will made 17 August 1961 and to substitute new articles therefor. In new Article Four, Farr omitted the $10,000.00 legacy to Alice Farr and bequeathed his books, household furniture, and personal effects to his son, William, who was directed to divide and deliver one-third of the property to Alice Farr and the balance to four named daughters. By new Article Thirteen, Farr bequeathed and devised 20% of his residuary estate to Alice Farr, 16% to his son, William, and 16% to each of four named daughters.

On 15 March 1966, approximately three weeks after he went home from the hospital, Farr sent for his former secretary and dictated to her the sixth (and last) codicil to his will. In his presence and using his typewriter, she typed the dictation at the bottom of the page on which the fifth codicil had been written. The following evening she and two others witnessed Farr's execution of the instrument. In it Farr recited that he found errors in the codicil of 22 February 1966 "that would cause much trouble and loss to correct"; that he had in mind his promise to his son, William, to make no changes in that codicil but, considering the best interest of his wife and eight children, he did "revoke and cancel the attached codicil dated February 22, 1966."

On 7 August 1968, Alice M. Farr filed a caveat to the fifth codicil. She alleged that Farr lacked testamentary capacity when he executed the instrument and that its execution was procured by the undue influence of two of his children, William Farr II,

and Frances Farr Plunkett. The action was tried at the 20 January 1969 Civil Session of the Superior Court of Buncombe County by Snepp, J., and a jury. Propounders and caveator offered evidence tending to establish their respective contentions.

In apt time caveator requested the court to instruct the jury as follows: "G.S. 31-5.8 provides: 'No will or any part thereof, which shall be in any manner revoked can be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference.' Therefore the court instructs you that the execution of the last paper writing dated March 16, 1966, did not have the legal effect of reviving paragraphs Four and Thirteen of the paper writing dated August 17, 1961." This requested instruction was refused and caveator excepted.

During his argument to the jury, counsel for caveator proposed to read the provisions of G.S. 31-5.8 and to argue in connection therewith that Farr's failure to revive Articles Four and Thirteen of his original will by incorporating them in the codicil of 16 March 1966 was a circumstance bearing upon his mental capacity on 22 February 1966. Propounder objected to any reference by caveator's attorney to G.S. 31-5.8. The objection was sustained, and the court instructed the jurors that the legal effect of their verdict upon the distribution of Farr's estate was no concern of theirs. Caveator again excepted.

The verdict established (1) that the will and the six codicils propounded were executed in accordance with legal formalities; (2) that Farr had testamentary capacity when he executed the codicil dated 22 February 1966 and its execution was not procured by undue influence; and (3) that the seven documents propounded for probate constituted Farr's last will and testament.

From the judgment entered on the verdict caveator appealed to the Court of Appeals. She assigned as error, *inter alia,* the refusal of the trial judge (1) to instruct the jury as requested and (2) to permit her counsel, in his argument to the jury, to discuss the legal effect of G.S. 31-5.8 upon the distribution of Farr's estate and to argue that his failure to take into account the provisions of this statute was indicative of a lack of testamentary capacity on February 22, 1966.

The Court of Appeals held that G.S. 31-5.8 was not relevant to the issues which "related only to the formal execution of the will and to the physical and mental condition of Mr. Farr and to the influences which might have been exerted upon him to make the codicil dated 22 February 1966"; that "[i]t was not necessary for the jury to be instructed as to the legal effect of the codicil dated 16 March 1966; and that Judge Snepp had correctly refused to instruct the jury that the codicil dated 16 March 1966 did not revive Articles Four and Thirteen of the original will. Then, after noting caveator's argument that Farr was ignorant of the provisions of G.S. 31-5.8 when he executed the codicil dated 16 March 1966 and that his ignorance "was some evidence of a lack of mental capacity to execute the codicil dated 22 February 1966," the Court of Appeals held: ". . . [I]t was error for the trial judge to prevent counsel for the appellant from arguing G.S. 31-5.8 to the jury. . . . [T]he caveator may present to the jury evidence of events which have a bearing on the mental capacity of the testator, both before and after the instrument is executed as long as it tends to shed light upon the mental capacity of the testator at the time he made the instrument."

The decision of the Court of Appeals was that caveator was entitled to a new trial. Propounders petitioned this Court for certiorari, and the petition was allowed.

Bennett, Kelly & Long and Hendon & Carson for caveator-appellee.

Landon Roberts; Van Winkle, Buck, Wall, Starnes and Hyde; and Williams, Morris and Golding for propounder-appellants.

SHARP, J.

[1] The question presented is whether the application of G.S. 31-5.8 to instruments constituting the will of Farr, and its effect upon the distribution of his estate, were relevant to the issue of his mental capacity at the time he executed the fifth codicil. The Court of Appeals held that G.S. 31-5.8 was "not relevant to the theory of the trial" and that Judge Snepp was correct when he instructed the jurors that they were not concerned with the legal effect of their verdict and refused to instruct that the sixth codicil did not revive Articles Four and Thirteen of the original will. Yet, at the same time, the Court of Appeals held that the trial judge committed error entitling

caveator to a new trial when he prevented her counsel from arguing G.S. 31-5.8 to the jury. As counsel for propounders and caveator all agree, these two rulings are fundamentally inconsistent. Either the legal effect of the statute was a matter for the jury's consideration under proper instructions from the court or caveator's attorney was not entitled to argue its effect to the jury.

[2] The consequence of Farr's fifth codicil, executed 22 February 1966, was to revoke Articles Four and Thirteen of the original will and to substitute different provisions for them. The effect of the sixth codicil was to revoke the fifth. However, Articles Four and Thirteen of the will were not reinstated by the revocation of codicil No. 5 which had nullified them. Under G.S. 31-5.8, Farr could have revived Articles Four and Thirteen only by a reexecution of the will or by incorporating the previously revoked articles by reference or restatement in the sixth codicil. 1 Wiggins, Wills and Administration of Estates in North Carolina § 94 (1964); 31 N.C.L. Rev. 448 (1953). "Under statutes making reexecution essential to revival, the mere revocation of a subsequent will does not revive a prior will, even though the testator so intended. . . ." 95 C.J.S. *Wills* § 301(3) (1957). *Accord, Osborn v. Rochester Trust and Safe Deposit Company,* 209 N.Y. 54, 102 N.E. 571; *In Re* Levin's Will, 208 N.Y.S. 2d 731; *In Re* Moffat's Estate, 158 N.Y.S. 2d 975. *See* Estate of Eberhardt, 1 Wis. 2d 439, 85 N.W. 2d 483; *Poindexter v. Jones,* 200 Va. 372, 106 S.E. 2d 144; Annot., 162 A.L.R. 1076, 28 A.L.R. 921.

The result of codicils five and six is that Farr's widow takes nothing under his will and he died intestate as to his residuary estate, of which she is entitled to receive one-third. G.S. 29-14(2). Had the jury invalidated codicil No. 5 upon either of the grounds alleged caveator would have taken under Articles Four and Thirteen of the will. She contends that G.S. 84-14 authorized her counsel to argue to the jury "the whole case as well of law as of fact," and that the jurors should have been informed of the consequences of their verdict to her if it validated the fifth codicil. Specifically, she asserts that her counsel should have been allowed to argue (1) that Farr's will and codicils show that he did not intend to die intestate as to any of his property and that he had intended to make a specific provision for her; and (2) that his "lack of capacity to do what

he obviously intended to do on March 16, 1966" was relevant upon the question of his mental capacity on 22 February 1966, the day he executed the fifth codicil. These contentions cannot be sustained.

[3] It would be an astonishing assertion—fraught with danger to members of the legal profession as well as the laity—were we to hold that mere ignorance of a technical statute relating to wills evidenced a lack of testamentary capacity. We do not so hold.

[1, 4] There is in the transcript no evidence tending to establish Farr's knowledge or lack of knowledge of the existence or effect of G.S. 31-5.8 at the time he executed his last two codicils. However, he was not a lawyer and, from the circumstances attendant, it is reasonable to infer that when he executed the sixth codicil he intended to reinstate original Articles Four and Thirteen of his will, and that he thought he had done so. The will and all previous codicils to it had been prepared by Farr's attorney; the sixth he dictated himself. A layman, ignorant of G.S. 31-5.8, might be expected to assume that if he revoked codicil No. 5 (which had canceled two specific provisions of his will) the revocation would revive those previously revoked provisions. *See Marsh v. Marsh,* 48 N.C. 77; *Wiggins, supra,* § 94 at p. 260. Farr's failure to accomplish this purpose by the means he employed (the sixth codicil) indicates not a lack of mental capacity but ignorance of the law and a mistaken belief as to the legal consequences of his act. However, in the absence of fraud, a testator's misunderstanding of the legal effect of a will or codicil will not ordinarily affect its validity. *In Re* Will of Cobb, 271 N.C. 307, 156 S.E. 2d 285. "To recognize the testator's misunderstanding of the legal provisions of his will as a sufficient basis for contest would be to subject a majority of wills to the possibility of attack by disgruntled and disappointed heirs." 1 *Wiggins, supra,* § 67. *Accord,* 1 Bowe-Parker: Page on Wills § 13.6 (1960).

The words which Farr used in his last two codicils are clear, concise, and create no ambiguity. They leave "no doubt as to what he meant, looking to the plain legal import of the terms he employed to express his purpose in the will. . . .

[5] "Evidence cannot be heard to explain, add to, take from, modify, or contradict a will when its terms plainly indicate the

testator's purpose as to persons or things mentioned in it. . . . Any other rule would place it practically within the power of interested persons to *make* a testator's will, so as to meet the convenience and wishes of those who might claim to take under it." *McDaniel v. King,* 90 N.C. 597, 602.

[6, 7] Whether the instruments propounded — particularly codicil No. 5—constituted the will of Farr depended upon the jury's answers to the specific questions posed by the issues. The jury could not properly base its findings upon the legal consequences of its verdict, for the legal consequences of the verdict could not be known prior to the jury's determination of the true facts. We have held that the jury in a criminal case is not entitled to know the possible punishment for the various crimes included in the bill of indictment upon which a defendant is being tried. *State v. Rhodes,* 275 N.C. 584, 169 S.E. 2d 846. The quantum of punishment which a guilty verdict will authorize the judge to impose is totally irrelevant to the issue of a defendant's guilt, and the minds of the jurors should not be diverted from the question of guilt or influenced by speculation as to the amount of punishment a defendant could or should receive. Similarly, in a caveat to a will, the jurors should not be deflected from their function of ascertaining the facts from the evidence by speculations as to whether the decedent's estate would be distributed more equitably under the instrument propounded or according to the laws of intestate succession.

[8] G.S. 84-14, which provides that "[i]n jury trials the whole case as well of law as of fact may be argued to the jury," does not authorize counsel to argue law which is not applicable to the issues, for such arguments "could only lead to confusion in the minds of the jury." *State v. Crisp,* 244 N.C. 407, 412, 94 S.E. 2d 402, 406. When the remarks of counsel are not warranted by either the evidence or the law, or are calculated to mislead or prejudice the jury, it is the duty of the judge to interfere. *Jenkins v. Hines Co.,* 264 N.C. 83, 141 S.E. 2d 1; *State v. Howley,* 220 N.C. 113, 16 S.E. 2d 705.

We hold that Judge Snepp ruled correctly, both when he declined to instruct the jury as to the provisions of G.S. 31-5.8 and when he refused to permit counsel for caveator to argue the statute to the jury. The decision of the Court of Appeals that caveator is entitled to a new trial is

Reversed.

JIMMY RAY SUTTON v. MARVIN DUKE, KINSTON FERTILIZER COMPANY, AND SEABOARD COAST LINE RAILROAD COMPANY

No. 40

(Filed 28 August 1970)

1. **Pleadings § 19; Rules of Civil Procedure § 12— abolishment of demurrer — failure to state a claim — motion to dismiss**

   The demurrer has been abolished by Rule 7(c) of the new Rules of Civil Procedure; when, however, a pleader has failed "to state a claim upon which relief can be granted," his adversary is now permitted by Rule 12(b)(6) to assert that defense either in a responsive pleading or by motion to dismiss.

2. **Pleadings § 26; Rules of Civil Procedure § 12— demurrer under former statute — treatment as motion to dismiss**

   A demurrer interposed under [former] G.S. 1-127(6) on the ground that the alleged acts and omissions of defendants, if they constituted negligence, were not a proximate cause of plaintiff's injuries will be treated as a motion to dismiss under Rule 12 (b)(6) in this appeal heard after the effective date of the new Rules of Civil Procedure.

3. **Rules of Civil Procedure § 8— adoption of "notice pleading"**

   By repealing G.S. 1-122, which required a complaint to state "the facts constituting a cause of action," and substituting in lieu thereof the requirement of Rule 8(a)(1) that a "claim for relief" shall be stated with sufficient particularity to give *notice* of the events intended to be proved showing that the pleader is entitled to relief, the legislature intended to relax somewhat the strict requirements of detailed fact pleading and to adopt the concept of "notice pleading."

4. **Rules of Civil Procedure § 8— specificity of complaint — corresponding federal rule**

   North Carolina Rule of Civil Procedure 8(a)(1) requires the complaint to contain a more specific statement, or notice in more detail, than that required by corresponding Federal Rule 8(a)(2).

5. **Rules of Civil Procedure §§ 8, 86— sufficiency of pleadings — federal and New York decisions**

   While the variant language in the North Carolina, New York and federal rules as to pleadings prevents the assumption that the legislature adopted Rule 8(a)(1) with the judicial construction which had been placed upon either the New York or the federal counterpart, since the federal and New York rules are the source of the North Carolina Rules the Supreme Court will look to the decisions of those jurisdictions for guidance in developing the philosophy of the new rules.

6. **Rules of Civil Procedure § 8— notice theory of pleading — sufficiency of complaint**

   Under the "notice theory of pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable

the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought.

7. **Rules of Civil Procedure § 12— motion to dismiss — motion for more definite statement**

Mere vagueness or lack of detail is not ground for a motion to dismiss, but such a deficiency should be attacked by a motion for a more definite statement.

8. **Rules of Civil Procedure § 8— dismissal for failure to state a claim**

A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of his claim.

9. **Rules of Civil Procedure § 8— dismissal of complaint — disclosure of affirmative defense or facts denying right to relief**

If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed.

10. **Rules of Civil Procedure § 8— sufficiency of complaint — Rule 8 (a)(1)**

Under the "notice theory" of pleading contemplated by Rule 8(a)(1), detailed fact-pleading is no longer necessary, and a pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and — by using the rules provided for obtaining pretrial discovery — to get any additional information he may need to prepare for trial.

11. **Rules of Civil Procedure § 12— motion to dismiss — when allowed**

The motion to dismiss, while performing the function of the demurrer under the former practice, will only be allowed when, under the former practice, a demurrer would have been sustained because the complaint affirmatively disclosed that plaintiff had no cause of action against the defendant.

12. **Rules of Civil Procedure § 12— motion to dismiss — statement of defective claim vs. defective statement**

The motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action but not to one which was formerly labeled a "defective statement of a good cause of action."

13. **Animals § 3— failure to close gate to pony enclosure — foreseeable consequences**

One who fails to close the gate which provides ingress and egress to an enclosure in which he knows a pony is kept can reasonably anticipate that it will escape and run at large and can reasonably foresee the probability that the animal will go upon a nearby highway and cause injury to travelers and vehicles thereon.

14. **Negligence § 8— proximate cause**

In this jurisdiction, to warrant a finding that negligence, not amounting to a wilful or wanton wrong, was a proximate cause of an injury, it must appear that the tort-feasor should have reasonably foreseen that injurious consequences were likely to follow from his negligent conduct.

15. **Negligence § 9— proximate cause — foreseeability**

It is not necessary that a defendant anticipate the particular consequences which ultimately result from his negligence, it being required only that a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.

16. **Animals § 3; Rules of Civil Procedure § 8— pony roaming at large — escape by mules from enclosure — collision by motorist with mule — sufficiency of complaint under new Rules of Civil Procedure**

Allegations that defendants negligently left open the gate to an enclosure wherein a pony was customarily retained, enabling the pony to escape and run at large, that the pony went some 500 yards to a lot where some mules were enclosed, that the mules became so excited by the pony outside their enclosure that they broke out, and that one of the mules wandered onto the highway three-fourths of a mile away and caused the collision in which plantiff was injured, *held* sufficient to withstand defendants' motion to dismiss pursuant to Rule of Civil Procedure 12(b)(6), notwithstanding on the basis of the facts alleged it would seem that the "mule delivery" was a consequence of the pony's escape which could not reasonably have been foreseen, since it cannot be said on the basis of the pleadings alone that plaintiff cannot prove otherwise or that he can prove no facts which would entitle him to recover from defendants, or some of them, for the damages resulting from the collision.

ON *certiorari* to review the decision of the Court of Appeals reported in 7 N.C. App. 100.

At the October 1969 Session of Greene, defendants demurred to plaintiff's complaint (filed 27 June 1969) upon the ground that it failed to state a cause of action. Hubbard, J., sustained the demurrers and dismissed the action. In an opinion filed 31 December 1969 the Court of Appeals reversed; upon defendants' petition we allowed certiorari.

In summary the complaint alleges: About 9:20 p.m. on 22 April 1967 plaintiff's automobile, which he was operating at 50 MPH on Rural Paved Road 1745 in Greene County, collided with a mule which belonged to W. I. Herring. The mule was at large in consequence of the following series of events. Defendant Marvin Duke, the president of defendant Kinston Fertilizer

Company, owned a white pony. On 22 April 1967, and for sometime prior thereto, the pony was kept about 100 feet from Road No. 1745 within a one-acre enclosure on the premises of defendant Fertilizer Company. Inside the fenced area were storage and other facilities used by Fertilizer Company for business purposes. The tracks of defendant Seaboard Coast Line Railroad ran beside the enclosure, and a spur track extended into the stockade through a gate. From time to time defendant Railroad delivered fertilizer and other supplies over the spur track to Fertilizer Company's storehouse in the enclosure.

All defendants and their agents knew that the pony was kept within the fenced area and that it would likely run at large if the gate was left open. On 22 April 1967 defendant Railroad delivered a carload of materials and supplies to Fertilizer Company, and "the defendants jointly and severally through their respective servants and agents and the said Marvin Duke, individually, said agents and servants then and there acting within the scope of and pursuant to their employment, did negligently and carelessly and unlawfully leave the gate to the enclosure wherein said pony was customarily retained, open, enabling said pony to escape and run at large."

On the opposite side of Road No. 1745, about 500 yards from the enclosure where the white pony was kept, Mr. Herring maintained an enclosure in which he kept four mules. Just before 8:00 p.m. on 22 April 1967, the pony, which was "being negligently permitted to run at large," came to the vicinity of the mule lot. There the pony "did agitate, excite, and attract said mules . . . in such a way that the said mules were caused to break down and break out of the Herring enclosure." Thereafter three of the mules ran at large, and plaintiff struck one of them at a point about three-fourths of a mile from the place where the animals were customarily retained and about 300 feet south of the intersection of N. C. Highway No. 91 with Rural Paved Road No. 1745. Plaintiff, traveling north, met and passed an automobile with its headlights burning. As the two cars came abreast, plaintiff saw a mule standing in his lane of traffic. Despite his efforts to avoid striking the mule, he collided with it. The collision wrecked his car and caused him serious and permanent personal injuries. He was damaged in the sum of $150,000.00.

Defendants demurred to the complaint upon the ground that their alleged acts and omissions, if they constituted negligence, were not a proximate cause of plaintiff's injuries.

Lewis and Rouse for plaintiff appellant.

Barden, Stith, McCotter & Sugg and Aycock, LaRoque, Allen, Cheek & Hines for Marvin Duke and Kinston Fertilizer Company, defendant appellants.

Spruill, Trotter & Lane by John R. Jolly, Jr., for Seaboard Coast Line Railroad Company, defendant appellant.

SHARP, J.

[1] The demurrer in this case was interposed under G.S. 1-127(6). This section was repealed by N. C. Sess. L. ch. 954, § 4 (1967), which enacted the new North Carolina Rules of Civil Procedure (NCRCP). These rules became effective 1 January 1970 and were made applicable "to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date." N.C. Sess. L. ch. 803 (1969). The decision of the Court of Appeals, which reversed the trial court's judgment sustaining the demurrer and dismissing the action, was filed 31 December 1969. Thus, this appeal was caught *in limine* by Rule 7(c) which says, "Demurrers, pleas and exceptions for insufficiency shall not be used."

When, however, a pleader has failed "to state a claim upon which relief can be granted," his adversary is now permitted by Rule 12(b)(6) to assert that defense either in a responsive pleading or by motion to dismiss.

N.C.R. Civ. P. 12(b) is essentially a verbatim copy of Rule 12(b) of the Federal Rules of Civil Procedure (FRCP). In 2A Moore's Federal Practice § 12.08 (2d ed. 1968) (hereinafter referred to as Moore) it is said: "The motion to dismiss under Rule 12(b)(6) performs substantially the same function as the old common law general demurrer. A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint. For the purpose of the motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." The question as to what should be done with demurrers arose immediately after the federal rules went into effect, and the cases dealing with the problem generally treated the

demurrer as a motion to dismiss under Federal Rule 12(b) (6). 2 Moore § 7.06. "A motion to dismiss 'for failure to state a claim upon which relief can be granted' is the modern equivalent of a demurrer. Rule 12(b), Federal Rules of Civil Procedure as amended and the Note thereto." *United Transport Serv. v. National Mediation Board,* 179 F. 2d 446 (D.C. Cir. 1948).

[2] Accordingly we treat the demurrer in this case as a motion to dismiss under our Rule 12(b) (6) and consider whether plaintiff has stated in his complaint "a claim upon which relief can be granted." Our general directive is Rule 8(a) (1), which requires that any "pleading which sets forth a claim for relief . . . shall contain (1) A short and plain statement of the claim *sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved* showing that the pleader is entitled to relief, and (2) A demand for judgment for the relief to which he deems himself entitled. . . ." (Emphasis added) This rule replaces G.S. 1-122 (repealed 1 January 1970), which provided that "the complaint must contain . . . a plain and concise statement of the facts constituting a cause of action. . . ."

The North Carolina Rules of Civil Procedure are modeled after the federal rules. 48 N.C.L. Rev. 636 (1970). In most instances they are verbatim copies with the same enumerations. Sizemore, 5 Wake Forest Intra. L. Rev. 1 (1969). However, our Rule 8(a) (1) differs from corresponding Federal Rule 8(a) (2) in that the latter requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." To the federal rule the legislature added the italicized portion of the preceding quotation of our Rule 8(a), and those words constitute the difference in the two rules. There are also material differences between illustrative Federal Forms 9 and 10 and North Carolina illustrative Forms 3 and 4. These forms each state a claim for damages for personal injuries resulting from a collision between an automobile and a pedestrian. North Carolina Forms 3 and 4 contain allegations of the specific acts constituting defendant's negligence. Federal Forms 9 and 10 contain no such specificity; they merely allege that at a designated time and place "defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." N.C.R. Civ. P. 84 declares that Forms 3 and 4 and all the other forms of complaint incorporated therein are "sufficient under these rules and are

intended to indicate the simplicity and brevity of statement which the rules contemplate." This language is identical to that of Federal Rule 84.

The italicized portion of our Rule 8(a) (1) (not included in Federal Rule 8 (a) (2)) was probably taken from the New York's Civil Practice Law and Rules § 3013 (CPLR) (McKinney's Consolidated Laws of N. Y., Book 7B § 3013). *See* 48 N.C.L. Rev. 636, 638, n. 15. Section 3013 says: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and *the material elements of each cause of action or defense.*" (Italics ours.) The preceding words in italics were omitted from our Rule 8(a) (1) and constitute the difference between it and New York Rule 3013.

[3, 4] By repealing G.S. 1-122, which required a complaint to state "the facts constituting a cause of action," and substituting in lieu thereof the requirement that a "claim for relief" shall be stated with sufficient particularity to give *notice* of the events intended to be proved showing that the pleader is entitled to relief, the legislature obviously intended to change our prior law. We do not assume its choice of "new semantics" was either accidental or casual. Considering the inspiration, origin, and legislative history of the NCRCP and the absence from it of the words "facts" and the phrase "facts constituting a cause of action" we conclude that the legislature intended to relax somewhat the strict requirements of detailed *fact* pleading and to adopt the concept of "notice pleading." However, the additional requirements in our Rule 8(a) (1) manifest the legislative intent to require a more specific statement, or notice in more detail, than Federal Rule 8(a) (2) requires.

In 5 Wake Forest Intra. L. Rev. 1, 15, Professor James E. Sizemore says that "[t]he North Carolina requirement was the result of compromise between the drafting committee and practicing lawyers on the General Statutes Commission who wanted more specificity, especially in automobile cases, than Federal Form 9 requires. The result is that under the directive of our Rule 8(a) (1) a complaint need not be as specific as under the former practice, but it must be "to some degree more specific than the federal complaint. The added degree of specificity is

not readily determinable from the language of the rule itself." 48 N.C.L. Rev. 636, 637.

As previously noted, the only appreciable difference between our Rule 8(a)(1) and New York's CPLR § 3013 is the latter's additional requirement that the statement of claim shall also give notice of "the material elements of each cause of action or defense." The addition provides no basis for an argument that our rule requires *greater* specificity in pleading than CPLR § 3013. 48 N.C.L. Rev. 636, 639. No doubt the draftsmen omitted the "material elements" requirement from our rule in an effort to discourage a judicial construction of Rule 8(a)(1) which would retain the former rule that the cause of action consists of *facts* alleged. *Skipper v. Cheatham,* 249 N.C. 706, 709, 107 S.E. 2d 625, 628. In contrast to § 3013 neither the North Carolina nor federal rules incorporate the phrase "cause of action." However, in the manner of their use, we can perceive no substantial difference in the meaning of "cause of action" and "claim for relief." We agree with Siegel, the author of Practice Commentary, CPLR, § 3013 that "the use of the 'claim for relief' phrase in the federal rules was not a rejection of 'cause of action' as such," but rather a rejection of pleading technicalities identified with "cause of action" (technicalities such as "evidence" *or* "ultimate facts," "conclusions" *or* "facts sufficient to constitute a cause of action"). N.Y. Civ. Prac. Law § 3013 (McKinney, 1969-70 Supplement, Book 7B).

[5] The variant language in the North Carolina, New York, and federal rules prevents the assumption that the legislature adopted our Rule 8(a)(1) with the judicial construction which had been placed upon either the New York or the federal counterpart. All changes in words and phrasing in a statute adopted from another state or country will be presumed deliberately made with the purpose to limit, qualify, or enlarge the adopted rule. 82 C.J.S. *Statutes* § 371, (1953). This is not to say, however, that the "sizable body of case law" which the FRCP and New York's CPLR have produced should be ignored. On the contrary, since the federal and, presumably, the New York rules are the source of NCRCP, we will look to the decisions of those jurisdictions for enlightenment and guidance as we develop "the philosophy of the new rules."

The attempts of the federal court to state the scope and philosophy of their rules was summarized by Mr. Justice

Black in *Conley v. Gibson,* 355 U.S. 41, 2 L. Ed. 2d 80, 78, S. Ct. 99, the case most frequently cited and quoted on the point we consider here. Speaking for a unanimous Court, he said: ". . . [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* at 47-48. Thus, under the federal rules "a case consists not in the pleadings, but in the evidence, for which the pleadings furnish the basis." *DeLoach v. Crowley, Inc.*, 128 F. 2d 378 (5th Cir. 1941).

[6, 7] Under the "notice theory of pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted "to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata,* and to show the type of case brought. . . ." Moore § 8.13. "Mere vagueness or lack of detail is not ground for a motion to dismiss." Such a deficiency "should be attacked by a motion for a more definite statement." Moore § 12.08 and cases cited therein.

[8, 9] In further appraising the sufficiency of a complaint Mr. Justice Black said, in *Conley v. Gibson, supra* at 45-46, "[W]e follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." "This rule," said the Court in *American Dairy Queen Corporation v. Augustyn,* 278 F. Supp. 717, "generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed. Moore § 12.08 summarizes the federal decisions as follows: " 'A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a

claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.' But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*"

Since the sufficiency of a statement will vary with the circumstances of each case, generalizations by the court are of little more help to a pleader than the rules themselves. As usual, enlightenment comes from observing and understanding what the courts do. The following cases are illustrative of the circumstances in which the federal courts have allowed the motion to dismiss: *Day v. Walker*, 206 F. Supp. 32 (W.D.N.C. 1962) (complaint revealed action barred by statute of limitations); *Wallingford v. Zenith Radio Corp.*, 310 F. 2d 693 (7th Cir. 1962) (absolute privilege in defamation); *Leggett v. Montgomery Ward & Co.*, 178 F. 2d 436 (10th Cir. 1949) (probable cause shown in malicious prosecution complaint); *Tenopir v. State Farm Mut. Co.*, 403 F. 2d 533 (9th Cir. 1968) (insurance policy attached to complaint showed noncoverage); *L. Singer & Sons v. Union Pac. R. Co.*, 109 F. 2d 493 (8th Cir. 1940) (plaintiff without capacity to maintain the suit); *Case v. State Farm Mut. Auto. Ins. Co.*, 294 F. 2d 676 (5th Cir. 1961) (in action for wrongful termination, attached contract showed absolute right to terminate). Compare *Shull v. Pilot Life Insurance Company* (5th Cir. 1963) 313 F. 2d 445 (motion to dismiss denied and a dismissal with prejudice on the "basis of bare bones pleading" is called "a tortious thing").

The New York CPLR became effective *1 September 1963*. Very soon thereafter it was held that § 3013 had eliminated the old requirement that a pleading *state* "material facts." In *Hewitt v. Maass*, 246 N.Y.S. 2d 670, 41 Misc. 2d 894 (1964), it was said: "Now, if *notice*, or literally *comprehension* can be had from a pleading the method of attaining the communicable pattern becomes secondary." *Id.* at 672. The decision in *Foley v. D'Agostino*, 248 N.Y.S. 2d 121 (1964), which immediately followed *Hewitt* "has become the standard of measuring sufficiency of pleadings in New York." 48 N.C.L. Rev. 636, 640. From these and subsequent decisions we conclude that under New York's CPLR (1) the primary function of pleadings now is to apprise the court and parties of the subject matter of the controversy

and the theory of recovery with sufficient precision to enable the court to control the case and the opponent to prepare; (2) by the elimination of the former requirement of § 241 of the Civil Practice Act that pleadings state material facts it was intended "that the considerable judicial effort formerly expended in distinguishing 'evidence' or 'conclusion' from 'fact' be directed to more useful purposes . . . but it is clear that, under CPLR, the statements in pleadings are still required to be factual, that is, the essential facts required to give 'notice' must be stated." *Foley v. D'Agostino, supra* at 125; (3) if a statement is so vague or ambiguous that a party cannot reasonably be required to frame a response he may move for a more definite statement; (4) if irregularity, defect, or omission represents an inherent deficiency which the adverse party knows will bar the pleader's right to recover or defend, the adverse party should proceed by way of a motion for summary judgment with supporting affidavits and thus secure an immediate determination on the merits; and (5) "[m]otions to dismiss should not be granted unless it is very clear that there can be no relief under any of the facts alleged in the pleading for the relief requested or for other relief." *Richardson v. Coy,* 280 N.Y.S. 2d 623, 624.

[10] The difference in the degree of specificity required by the NCRCP, CPLR, and the Federal Rules cannot be formularized. It is best realized by a comparison of the various forms of complaint illustrating the respective rules. Compare N. C. Forms 3 and 4 with Federal Forms 9 and 10. Under the "notice theory" of pleading contemplated by Rule 8(a)(1), detailed fact-pleading is no longer required. A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

As pointed out in *Shull v. Pilot Life Insurance Company,* 313 F. 2d 445 (5th Cir. 1963), the notice theory of pleading does not necessarily mean that there must be a full-blown trial. Utilizing the "facility of pretrial discovery, the real facts can be ascertained and by motion for summary judgment (or other suitable device) the trial court can determine whether as a matter of law there is any right of recovery on those facts." *Id.* at 447.

However, notwithstanding the new liberality, the warning of Myers and Humphreys, stated in 5 Wake Forest Intra. L. Rev. 70, 73, should not be ignored: "As the pleadings retain the traditional objects of formulating issues and giving notice, the claim for relief and the basis for defense must still satisfy the requirements of the substantive law which give rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim or of his defense."

At this juncture we call attention to the Comment of Professor Sizemore in his article, General Scope and Philosophy of the New Rules, 5 Wake Forest Intra, L. Rev. 1, 15: "[T]here is nothing in the rules to prevent detailed pleading if the pleader deems it desirable. . . . He may plead enough facts to prevent the invocation of discovery devices or the use of motions for more definite statement. Such a complaint could clearly identify the issues since Rule 10(b) requires the claim or claims to be averred in numbered paragraphs. In other words, there is nothing to prevent skillful and candid pleaders from meeting head on in the pleadings." *Id.* at 15.

To the same effect is Comment (a) (3) upon N.C.R. Civ. P. 8(a) in N.C. Gen. Stats. Vol. 1-A at p. 599: "By specifically requiring a degree of particularity the Commission sought to put at rest any notion that the mere assertion of a grievance will be sufficient under these rules. . . . The Commission's prescription suggests that not only is it permissible under these rules for a pleader to so plead as to obviate the need for a pre-trial conference or resort to the discovery procedures but that it will frequently be his duty to do so."

The substance of the preceding observations was also stated by Dean Dickson Phillips in his comments upon § 970.35 in the 1970 Pocket Supplement to McIntosh, N. C. Practice and Procedure (2d ed.): "Under this approach (notice pleading) the means are of course still left to pleaders to give such notice of legal and factual theories and so adequately to isolate issues that trial may be had in a given case on the basis of the unsupervised pleading exchange alone. But it is not intended that when this does not transpire, any time should ordinarily be spent in attempting to force the pleadings into this condition."

[11] At the beginning of this opinion we noted that the

motion to dismiss, which tested "the legal sufficiency of the complaint," performed a function of the demurrer under the former practice. The motion to dismiss, however, will be allowed *only* when, under the former practice, a demurrer would have been sustained because the complaint affirmatively disclosed that the plaintiff had no cause of action against the defendant. *Bagwell v. Brevard,* 256 N.C. 465, 124 S.E. 2d 129; *Gillikin v. Springle,* 254 N.C. 240, 118 S.E. 2d 611; *Turner v. Board of Education,* 250 N.C. 456, 109 S.E. 2d 211. If the complaint disclosed "a defective cause of action" no amendment could supply the deficiency, and the action was dismissed. *Skipper v. Cheatham, supra; Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860. If, on the contrary, the complaint contained "a defective statement of a good cause of action," that is, if it was deficient in factual allegations which presumably could be supplied, the demurrer was sustained but plaintiff was allowed to amend. *Murray v. Aircraft Corporation,* 259 N.C. 638, 131 S.E. 2d 367.

[**12**] When Rule 7(c) abolished demurrers and decreed that pleas "for insufficiency shall not be used," it also abolished the concept of "a defective statement of a good cause of action." Thus, generally speaking, the motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action but not to one which was formerly labeled a "defective statement of a good cause of action." For such complaint, as we have already noted, other provisions of Rule 12, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint. *See* the paper delivered by Dean Dickson Phillips, *The Sufficiency of a Pleading as Tested by the Motion to Dismiss for Failure to State a Claim upon Which Relief Can be Granted,* reported in the proceedings at the North Carolina Bar Association's Institute on the New Rules of Civil Procedure, October 1968, VI 16-19. *See also* Comment upon Rule 12, Vol. 1A, N.C. Gen. Stats., § 1A-1, p. 610.

[**13**] We come now to the specific question in the instant case, do the facts alleged absolutely absolve defendants of legal responsibility for plaintiff's collision with the Herring mule? Had the pony suddenly appeared on the highway in front of plaintiff's automobile, it is clear that all those whose negligence was responsible for permitting it to escape would be liable to plaintiff for

the injuries resulting from his collision with it. One who fails to close the gate which provides ingress and egress to an enclosure in which he knows a pony is kept can reasonably anticipate that it will escape and run at large. He can also reasonably foresee the probability that the animal will go upon a nearby highway and cause injury to travelers and vehicles thereon. *Wells v. Johnson,* 269 N.C. 622, 153 S.E. 2d 2; *Shaw v. Joyce,* 249 N.C. 415, 106 S.E. 2d 459. However, it was not the pony with which plaintiff collided; it was a mule which—along with three others—became so excited by the presence of the pony at large outside the mule enclosure that it broke out, wandered onto the highway three-fourths of a mile away, and caused the collision in which plaintiff was injured.

On the facts alleged, we can assume that "but for" defendants' negligence in permitting the pony to escape the mules would not have broken out and that plaintiff would not have collided with one of them. The question remains, however, whether defendants' negligence was a proximate, or legal, cause of the collision, that is, whether the law extends their responsibility to such a consequence.

[14, 15] In this jurisdiction, to warrant a finding that negligence, not amounting to a wilful or wanton wrong, was a proximate cause of an injury, it must appear that the tort-feasor should have reasonably foreseen that injurious consequences were likely to follow from his negligent conduct. *Ratliff v. Power Co.,* 268 N.C. 605, 151 S.E. 2d 641; *Shepard v. Manufacturing Co.,* 251 N.C. 751, 112 S.E. 2d 380; *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673; *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63. It is not necessary that a defendant anticipate the particular consequences which ultimately result from his negligence. It is required only "that a person of ordinary prudence could have reasonably foreseen that such a result, *or some similar injurious result,* was probable under the facts as they existed." (Italics ours) *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854; 3 Strong, N. C. Index *Negligence* § 7 (1960). However, we have also said that a defendant is liable for the consequences of his negligence if he "might have foreseen that some injury would result from his act or omission or that *consequences of a generally injurious nature* might have been expected." (Emphasis added) *Williams v. Boulerice,* 268 N.C. 62, 149 S.E. 2d 590; *Insurance Co. v. Gas Co.,* 247 N.C. 471, 101

S.E. 2d 389. Some of our decisions are difficult to reconcile. See the comments in 39 N.C.L. Rev. 323, 395 (1961) and 37 N.C.L. Rev. 371, 459. Compare *Insurance Co. v. Gas Co., supra; Hall v. Coble Dairies, supra;* and *Ramsey v. Power Co.*, 195 N.C. 788, 143 S.E. 861, with *Roberson v. Taxi Service, Inc.*, 214 N.C. 624, 200 S.E. 363; *Ellis v. Refining Co.*, 214 N.C. 388, 199 S.E. 403; and *Davis v. Light Co.*, 238 N.C. 106, 76 S.E. 2d 378.

Definitions and general statements made with reference to specific situations are of little help in those cases in which the defendant's negligence is followed, not by reasonably foreseeable consequences but by events which, prima facie, he could not have anticipated. Prosser, in his Law of Torts § 50 (3d Ed. 1964) at p. 288, says: " 'Proximate cause' cannot be reduced to absolute rules. No better statement ever has been made concerning the problem than that of Street: 'It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. . . .' " The policy argument over whether the loss should be borne by an innocent plaintiff or a defendant whose negligence caused harmful events not reasonably foreseeable will continue. However, since it is "inconceivable that any defendant should be held liable to infinity for all the consequences which flow from his act," some boundary must be set. *Id.* at p. 303. The concept of the foreseeable risk, especially in cases involving an intervening cause, seems to offer the most elastic and practical solution. *See* Prosser at pp. 306, 310-311. *See also* Morris, 34 Minn. L. Rev. 185 (1950).

[16] On the basis of the facts which plaintiff has alleged it would seem that the "mule delivery" was a consequence of the pony's escape which could not reasonably have been foreseen. However, we cannot say on the basis of the "bare bones pleadings" that plaintiff cannot prove otherwise, or that he can prove no facts which would entitle him to recover from defendants (or some of them) for the damages resulting from the collision. To dismiss the action now would be "to go too fast too soon." *Barber v. Motor Vessel "Blue Cat,"* 372 F. 2d 626, 629 (5th Cir. 1967). This case is not yet ripe for a determination that there can be no liability as a matter of law. *See Shull v. Pilot Life Insurance Co., supra. Inter alia,* these questions arise: Had the pony ever escaped and agitated the Herring mules prior to 22 April 1967? If so, did defendants, or any of them,

know of the incident? Did defendants have any reason to believe that the Herring fence was inadequate to confine the mules? Had the mules, to the knowledge of defendants, ever escaped before?

We hold that the face of the complaint shows no insurmountable bar to recovery on the claim alleged and that it gives defendants sufficient notice of the nature and basis of plaintiff's claim to enable them to answer and to prepare for trial. Indeed, defendants Duke and Fertilizer Company have not only filed answers; each has filed a third-party complaint against W. I. Herring. By utilizing the discovery rules defendants may ascertain more precisely the details of plaintiff's claim and whether he can prove facts which will entitle him to have a jury decide the merits of his claim.

Affirmed.

APARTMENTS, INC. v. HANES

No. 126 PC.

Case below: 8 N.C. App. 394.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

BANK v. BANK

No. 97 PC.

Case below: 8 N.C. App. 333.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 14 July 1970.

CONGLETON v. CITY OF ASHEBORO

No. 117 PC.

Case below: 8 N.C. App. 571.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 July 1970.

EASON v. INSURANCE CO.

No. 93 PC.

Case below: 8 N.C. App. 293.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

EVERETT v. TOWN OF ROBERSONVILLE

No. 90 PC.

Case below: 8 N.C. App. 219.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

IN RE DAVIS

No. 72 PC.

Case below: 7 N.C. App. 697.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 14 July 1970.

LASSITER v. JONES

No. 115 PC.

Case below: 8 N.C. App. 506.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

MILLIKAN v. HAMMOND

No. 125 PC.

Case below: 8 N.C. App. 429.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

MILLS, INC. v. FOUNDRY, INC.

No. 116 PC.

Case below: 8 N.C. App. 521.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

MULLEN v. SAWYER

No. 114 PC.

Case below: 8 N.C. App. 458.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 1 September 1970.

PENCE v. PENCE

No. 123 PC.

Case below: 8 N.C. App. 484.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

REDEVELOPMENT COMM. v. GRIMES

No. 113 PC.

Case below: 8 N.C. App. 376.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 28 August 1970.

ROBERTS CO. v. MILLS, INC.

No. 135 PC.

Case below: 8 N.C. App. 612.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 1 September 1970.

ROOKS v. CEMENT CO.

No. 128 PC.

Case below: 9 N.C. App. 57.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

SAWYER v. SHACKLEFORD

No. 134 PC.

Case below: 8 N.C. App. 631.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 1 September 1970.

SNEAD v. MILLS, INC.

No. 124 PC.

Case below: 8 N.C. App. 447.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

STARR v. PAPER CO.

No. 133 PC.

Case below: 8 N.C. App. 604.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

STATE v. BARKER

No. 92 PC.

Case below: 8 N.C. App. 311.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 July 1970.

STATE v. BARNETTE

No. 99 PC.

Case below: 8 N.C. App. 198.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied and motion to stay execution denied 14 July 1970.

STATE v. BENFIELD

No. 71 PC.

Case below: 8 N.C. App. 103.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

STATE v. BINES

No. 75 PC.

Case below: 8 N.C. App. 1.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

STATE v. BLALOCK

No. 138 PC.

Case below: 9 N.C. App. 94.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

STATE v. BOLDER

No. 85 PC.

Case below: 8 N.C. App. 343.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

STATE v. BRITT

No. 110 PC.

Case below: 8 N.C. App. 262.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 July 1970.

STATE v. CARROLL

No. 94 PC.

Case below: 8 N.C. App. 336.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

STATE v. DAUGHTRY

No. 89 PC.

Case below: 8 N.C. App. 318.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

STATE v. DAVIS

No. 58 PC.

Case below: 8 N.C. App. 99.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 July 1970.

STATE v. DRAKE

No. 88 PC.

Case below: 8 N.C. App. 214.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

STATE v. ELLIOTT

No. 129 PC.

Case below: 9 N.C. App. 1.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

STATE v. EVANS and STATE v. JOHNSON

No. 120 PC.

Case below: 8 N.C. App. 469.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 July 1970.

STATE v. FLYNT

No. 98 PC.

Case below: 8 N.C. App. 323.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

STATE v. GURKIN

No. 87 PC.

Case below: 8 N.C. App. 304.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

STATE v. HICKMAN

No. 112 PC.

Case below: 8 N.C. App. 583.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

STATE v. ISLEY

No. 105 PC.

Case below: 8 N.C. App. 599.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 July 1970.

STATE v. JACKSON

No. 74 PC.

Case below: 8 N.C. App. 346.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

STATE v. KEYES

No. 136 PC.

Case below: 8 N.C. App. 677.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

STATE v. McGILVERY

No. 131 PC.

Case below: 9 N.C. App. 15.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

STATE v. NORMAN

No. 91 PC.

Case below: 8 N.C. App. 239.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

STATE v. PRESTON

No. 137 PC.

Case below: 9 N.C. App. 71.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

STATE v. SCOTT

No. 96 PC.

Case below: 8 N.C. App. 281.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

STATE v. SMITH

No. 111 PC.

Case below: 8 N.C. App. 442.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

STATE v. WALKER AND FLEEMAN

No. 69 PC.

Case below: 6 N.C. App. 447.

Petition for writ of *certiorari* to North Carolina Court of Appeals on behalf of defendant Fleeman only denied 14 July 1970.

TURPIN v. GALLIMORE

No. 118 PC.

Case below: 8 N.C. App. 553.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

UTILITIES COMM. v. AMERICAN COURIER CORP.

No. 122 PC.

Case below: 8 N.C. App. 358.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

UTILITIES COMM. v. AMERICAN COURIER CORP.

No. 121 PC.

Case below: 8 N.C. App. 367.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 28 August 1970.

WAKE COUNTY HOSPITAL v. INDUSTRIAL COMM.

No. 95 PC.

Case below: 8 N.C. App. 259.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 July 1970.

WRENN v. WATERS

No. 132 PC.

Case below: 9 N.C. App. 39.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 28 August 1970.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1970

DANIEL A. VOGEL, JR., AND C. WHID POWELL, JR., PARTNERS, T/D/B DA POW DEVELOPERS COMPANY, A PARTNERSHIP, PLAINTIFFS v. REED SUPPLY COMPANY, A CORPORATION, DEFENDANT, AND JUNE B. VOGEL AND MARILYN M. POWELL, PARTNERS, IN DA POW DEVELOPERS COMPANY, A PARTNERSHIP; DA POW DEVELOPERS, INC.; PROVIDENT MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, AND NORTHWESTERN BANK, ADDITIONAL DEFENDANTS

(CASE No. 1)

(No. 69-CVS-41)

* * * * * * *

REED SUPPLY COMPANY, A CORPORATION, PLAINTIFF v. DA POW DEVELOPERS, INC., DANIEL A. VOGEL, JR., JUNE B. VOGEL, C. WHID POWELL AND MARILYN M. POWELL, T/D/B DA POW DEVELOPERS COMPANY, A PARTNERSHIP, PROVIDENT MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA AND NORTHWESTERN BANK, DEFENDANTS

(CASE NO. 2)

(No. 69-CVS-46)

No. 8

(Filed 14 October 1970)

1. **Contracts § 14— third-party beneficiary — action on subcontract — incidental benefits**

A landowner was not entitled to maintain an action, as a third-party beneficiary, against a subcontractor for the subcontractor's breach of a subcontract with a general contractor to furnish materials

for the construction of an apartment house on the land, since any benefit received by the landowner from the subcontractor's performance would be merely incidental to the subcontractor's discharge of his contractual obligations to the general contractor.

2. **Contracts § 14— third-party beneficiary — intention of the contracting parties**

In determining whether a landowner was a creditor beneficiary or merely an incidental beneficiary of a subcontract between a general contractor and a subcontractor for the furnishing of materials to build an apartment house, the intention of the parties to the subcontract is of paramount importance; it is not sufficient that the subcontract does benefit the landowner if in fact it was not intended for his direct benefit.

3. **Contracts § 6— unlicensed subcontractor — right to maintain action on construction contract**

A subcontractor who undertook to furnish materials to a general contractor for the construction of an apartment house was not a "general contractor" within the meaning of the contractors' licensing statute and was therefore not required to be licensed; consequently, the unlicensed subcontractor could maintain an action against the general contractor for the breach of the contract. G.S. 87-1 *et seq.*

4. **Statutes § 5— statutory construction — legislative definition of word**

Where the legislature defines a word used in a statute, that definition is controlling even though the meaning may be contrary to its ordinary and accepted definition.

5. **Statutes § 5— construction of words and phrases**

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.

6. **Statutes § 10— construction of criminal statutes**

Criminal statutes must be strictly construed; this 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.

7. **Statutes § 10— construction of criminal statutes — legislative intent**

The rule requiring statutes to be construed to effectuate the legislative intent applies also to criminal statutes.

8. **Contracts § 6— contractors' licensing statute — applicability to subcontractor**

The words "building," "improvement," and "structure," as they are used in the statute setting forth the criteria of a general contractor for licensing purposes, will not be construed so as to require the licensing of a subcontractor who undertook to furnish labor and materials in excess of $20,000 for the construction of the integral parts of a large building complex. G.S. 87-1.

9. **Contracts § 6— *construction contract* — counterclaim by unlicensed contractor against subcontractor**

An unlicensed general contractor is not prevented by the contractors' licensing statute from maintaining a counterclaim against an unlicensed subcontractor in the latter's action for breach of the subcontract, since there is no apparent injury to the public from the enforcement of the subcontract between the parties.

10. **Contracts § 6—contracts in contravention of public policy — enforceability**

The rule that contracts in contravention of public policy are not enforceable is based on the premise that no one can rightfully do that which tends to injure the public or is detrimental to the public good.

APPEAL by Reed Supply Company, Inc., from Judgment of *Braswell, J.*, at the January 1970 Civil Session, ORANGE Superior Court.

Two cases consolidated by consent for the purpose of hearing and determining the various motions pending in said actions.

The facts in the following numbered paragraphs appear of record from the pleadings in each case, the motions filed in each case, and the stipulations and admissions of the parties:

1. The plaintiff in the first case (69-CVS-41) is the owner of land upon which a 168-unit apartment complex, called Chateau-Villa Apartments, was to be constructed for the landowner by Da Pow Developers, Inc., and the *original* defendant is a subcontractor who entered into a subcontract with Da Pow Developers, Inc., the general contractor, to furnish materials and labor for the construction of certain parts of each of the 168 units. (Those named as *additional* defendants on motion of the original defendant are not germane to decision of the first case.)

Reed Supply Company, the plaintiff in the second case (69-CVS-46), is a North Carolina corporation and is the same subcontractor who was sued by the landowner in the first case. Defendants are the landowner and the general contractor. (The wives of the partners-landowners have been dismissed as parties defendant. The Northwestern Bank and Provident Mutual Life Insurance Company of Philadelphia are not germane to the questions now ripe for decision.)

Plaintiff in each case seeks damages for breach of the subcontract dated May 1, 1968, between the contractor and the subcontractor.

2. On January 29, 1968, the land on which the apartments were to be built was owned by Charlotte Properties, Inc., a North Carolina corporation, all of the capital stock of which has at all times been owned by Daniel A. Vogel, Jr., individually.

3. On or about April 16, 1968, a contract was entered into by Charlotte Properties, Inc., Da Pow Developers, Inc., and Daniel A. Vogel, Jr., and C. Whid Powell, Jr., partners, t/a Da Pow Developers Company, a partnership. Pursuant to the terms and provisions of said contract and as of the date of the execution of same, Da Pow Developers Company, a partnership, became the equitable owner of the land upon which the subject apartments were to be constructed. This contract was executed on behalf of Da Pow Developers, Inc., by Daniel A. Vogel, Jr., President, and attested by C. Whid Powell, Jr., Secretary. Said contract was executed on behalf of Charlotte Properties, Inc., by Daniel A. Vogel, Jr., President, and attested by C. Whid Powell, Jr., Assistant Secretary; and it was executed on behalf of Da Pow Developers Company by Daniel A. Vogel, Jr., General Partner, and C. Whid Powell, Jr., General Partner.

4. Da Pow Developers, Inc., is a corporation organized under the laws of the State of North Carolina with one hundred percent of its capital stock owned at all times by Daniel A. Vogel, Jr., individually.

5. Da Pow Developers Company, a partnership, is a general partnership composed of Daniel A. Vogel, Jr., and C. Whid Powell, Jr., partners, with each partner having a fifty percent interest in all of the assets and properties of the partnership.

6. On April 15, 1968, Da Pow Developers, Inc., as contractor, and Daniel A. Vogel, Jr., and C. Whid Powell, Jr., partners, t/a Da Pow Developers Company, as owner, entered into a general construction contract for the erection by Da Pow Developers, Inc., of a 168-unit apartment complex on the land then equitably owned by Da Pow Developers Company.

7. On May 1, 1968, Da Pow Developers, Inc., as contractor, and Reed Supply Company, as subcontractor, entered into a subcontract by the terms and provisions of which Reed Supply Company was to furnish certain materials and perform certain labor in the construction of the entire 168-unit apartment proj-

ect, and pursuant to the terms of said subcontract Reed Supply Company was to furnish and erect the following: (a) exterior and interior wall panels; (b) wood floor system subfloor; (c) roof sheathing, bridging, trusses; (d) furnish and install windows, doors, base, shoe, soffit trim, plywood closures, masonite siding and louvers; (e) furnish only roofing and felt; (f) furnish and install shelving, door locks and door knockers; (g) furnish and complete painting except on interior ceilings; and (h) furnish only entrance door frame.

8. On May 14, 1968, legal title to the land on which the apartments were to be erected was conveyed by Charlotte Properties, Inc., to Da Pow Developers, Inc., and said deed was recorded May 29, 1968.

9. On May 14, 1968, the land on which the apartments were to be erected was conveyed by Da Pow Developers, Inc., to a trustee for the Northwestern Bank as security for a construction loan. Provident Mutual Life Insurance Company of Philadelphia agreed with the Northwestern Bank to make the permanent loan for the erection of the Chateau Villa Apartments, and the security papers were to be assigned to it by the Northwestern Bank.

10. Subsequently, on May 14, 1968, legal title to the land on which the apartments were to be erected was conveyed by Da Pow Developers, Inc., to Daniel A. Vogel, Jr., and C. Whid Powell, Jr., partners, t/a Da Pow Developers Company, a partnership, subject to the Northwestern Bank deed of trust.

11. On or about July 31, 1968, Da Pow Developers, Inc., as contractor, and Reed Supply Company, as subcontractor, entered into a supplemental agreement by the terms and provisions of which a portion of the labor to be performed by Reed Supply Company was deleted from the subcontract and the contract price for the materials and labor to be furnished by Reed Supply Company was reduced from $245,318.00 to $208,889.37.

12. Da Pow Developers, Inc., was not licensed as a general contractor pursuant to G.S. 87-1 *et seq.* at any time from April 15, 1968, to the present time.

13. Reed Supply Company was not licensed as a general contractor pursuant to G.S. 87-1 *et seq.* at any time from May 1, 1968, to the present time.

14. Neither June B. Vogel nor Marilyn M. Powell are partners in the partnership known as Da Pow Developers Company.

15. The cost of the Chateau Villa Apartments to be erected pursuant to the contract dated April 15, 1968, between Da Pow Developers, Inc., as contractor, and Daniel A. Vogel, Jr., and C. Whid Powell, Jr., partners, t/a Da Pow Developers Company, as owner, was $918,962.63. The cost of the materials and labor to be furnished by Reed Supply Company under the subcontract dated May 1, 1968, between Da Pow Developers, Inc., as contractor, and Reed Supply Company, as subcontractor, was $245,318.00, reduced to $208,889.37 by the supplemental agreement of the parties dated July 31, 1968.

The trial judge concluded as a matter of law:

(1) That Daniel A. Vogel, Jr., and C. Whid Powell, Jr., partners, t/a Da Pow Developers Company, and Da Pow Developers, Inc., are separate and distinct legal entities;

(2) That on April 15, 1968, Da Pow Developers Company, a partnership, became the equitable owner of the land on which the apartments were to be constructed and on May 14, 1968, became the owner of both legal and equitable title to said land;

(3) That Reed Supply Company was a general contractor within the meaning of G.S. 87-1 *et seq.* and was required by law to obtain a license;

(4) That Da Pow Developers, Inc., was a general contractor within the meaning of G.S. 87-1 *et seq.* and was required by law to secure a license for the erection of the Chateau Apartment project as described in the general construction contract;

(5) That both Da Pow Developers, Inc., and Reed Supply Company were and are required by law to be licensed as a general contractor to perform work on and/or furnish materials to the Chateau Apartment project described in the contracts; that neither was licensed for such purposes and that as between such corporations neither can enforce the obligations, terms and conditions of the subcontract entered into by and between them;

(6) That Daniel A. Vogel, Jr., and C. Whid Powell, Jr., partners, t/a Da Pow Developers Company, are third-party beneficiaries of the subcontract dated May 1, 1968, between Da Pow Developers, Inc., and Reed Supply Company and of the

supplemental agreement between the same parties dated July 31, 1968; that it was the intention of both Da Pow Developers, Inc., and Reed Supply Company that said subcontract and supplemental agreement be for the benefit of Da Pow Developers Company;

(7) That the cause of action of Da Pow Developers Company is not derivative from the rights of either Da Pow Developers, Inc., or Reed Supply Company in that Da Pow Developers Company was and is the owner of the subject land and is, therefore, among that class of persons and entities to be protected by the licensing provisions of G.S. 87-1, *et seq.;*

(8) That Da Pow Developers Company is not in *pari delicto* with any of the unlicensed parties to the contracts and is entitled to maintain its action against Reed Supply Company by virtue of its status as a third party beneficiary of the subcontract and supplemental agreement between the general contractor and the subcontractor.

Based upon the findings of fact and conclusions of law, it was ordered and adjudged, *inter alia:*

1. That the motions of Da Pow Developers, Inc., joined in by the partnership Da Pow Developers Company, for summary judgments against Reed Supply Company be allowed and the claims of Reed Supply Company in both actions be dismissed and the notices of liens filed or served by Reed Supply Company be discharged and ordered cancelled of record;

2. That the motions of Reed Supply Company for summary judgments against Da Pow Developers, Inc., be allowed and the claims of Da Pow Developers, Inc., in both actions be dismissed;

3. That the motions of Reed Supply Company for summary judgments against Da Pow Developers Company be denied;

4. That any and all remaining claims asserted in 69-CVS-46 be dismissed as being identical to those claims remaining in 69-CVS-41, and that Da Pow Developers Company be allowed to proceed with the prosecution of its claim against Reed Supply Company in 69-CVS-41.

Reed Supply Company appealed to the Court of Appeals assigning errors noted in the opinion. We allowed motion to bypass, and the cases are here for review by the Supreme Court in the first instance.

Morgan, Byerly, Post & Keziah by William L. Johnson, Jr., Attorneys for Reed Supply Company, appellant.

Fairley, Hamrick, Monteith & Cobb by James D. Monteith and Newsom, Graham, Strayhorn & Hedrick by Josiah S. Murray III, Attorneys for Daniel A. Vogel, Jr. and C. Whid Powell, Jr., t/a Da Pow Developers Company, a partnership, appellee.

Nye & Mitchell by R. Roy Mitchell, Attorneys for Da Pow Developers, Inc., Appellee.

HUSKINS, Justice.

FIRST CASE (69-CVS-41)

[1] Unless the landowner (Da Pow Developers Company) is a third-party beneficiary of the subcontract between the general contractor (Da Pow Developers, Inc.) and the subcontractor (Reed Supply Company), an action by the landowner against the subcontractor for breach of the subcontract cannot be maintained, and Reed's motion for summary judgment in the first case (69-CVS-41) must be allowed. Rule 56, Rules of Civil Procedure. "If the contract was not made for the benefit of the third party, he has no cause of action upon the contract to enforce it, or sue for its breach. *Land Co. v. Realty Co.*, 207 N.C. 453, 177 S.E. 335." *Trust Co. v. Processing Co.*, 242 N.C. 370, 379, 88 S.E. 2d 233, 239 (1955).

The practice of allowing third-party beneficiaries not in privity of contract to bring an action in their own name to enforce the contract made for their benefit was recognized in North Carolina as early as 1842. *Cox v. Skeen,* 24 N.C. 220 (2 Ired. L.), 38 Am. Dec. 691. The leading case, however, is *Lawrence v. Fox,* 20 N.Y. 268 (1859), where it is stated that "the law operating on the act of the parties creates a duty, establishes a privity, and implies the promise and obligation on which the action is founded."

The fiction of an implied privity has been abandoned in more recent times, but there has been no substantial agreement on the precise theoretical basis with which privity is replaced. See Note, Third Party Beneficiaries and the Intention Standard: A Search For Rational Contract Decision-Making, 54 Va. L. Rev. 1166 (1968); Note, The Third Party Beneficiary Concept: A Proposal, 57 Colum. L. Rev. 406 (1957). Nevertheless, there

is general agreement that a third party may enforce a contract to which he was not privy but which was made for his benefit. See Annotation, Right of Third Person to Enforce Contract Between Others For His Benefit, 81 A.L.R. 1271.

The American Law Institute's Restatement of Contracts provides a convenient framework for analysis. Third party beneficiaries are divided into three groups: *donee* beneficiaries, where it appears that the "purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary"; *creditor* beneficiaries, where "no purpose to make a gift appears" and "performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary"; and *incidental* beneficiaries, where the facts do not appear to support inclusion in either of the above categories. Restatement of Contracts § 133 (1932). While duties owed to donee beneficiaries and creditor beneficiaries are enforceable by them, Restatement of Contracts §§ 135, 136, a promise of incidental benefit does not have the same effect. "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee." Restatement of Contracts § 147.

The commentators have adopted the analytical framework of the Restatement, and many courts have followed suit. 4 Corbin on Contracts § 774; Simpson on Contracts § 116; 2 Williston on Contracts (Jaeger, 3rd Edition) § 356; *Fidelity and Casualty Co. v. Plumbing Department Store,* 117 Fla. 119, 157 So. 506 (1934); *La Mourea v. Rhude,* 209 Minn. 53, 295 N.W. 304 (1941); *Borough of Brooklawn v. Brooklawn Housing Corp.,* 124 N.J.L. 73, 11 A. 2d 83 (1940); *Kelly v. Richards,* 95 Utah 560, 83 P. 2d 731, 129 A.L.R. 164 (1938); *Mackubin v. Curtiss-Wright Corp.,* 190 Md. 52, 57 A. 2d 318 (1948); *Pettus v. Olga Coal Co.,* 137 W. Va. 492, 72 S.E. 2d 881 (1952); *Ridder v. Blethen,* 24 Wash. 2d 552, 166 P. 2d 834 (1946).

While North Carolina has never explicitly adopted the analytical framework of the Restatement, the principles applicable to incidental beneficiaries were noted in *Chipley v. Morrell,* 228 N.C. 240, 45 S.E. 2d 129 (1947), and *Trust Co. v. Processing Co., supra* (242 N.C. 370, 88 S.E. 2d 233). Even so, the law in this State as to *direct* third party beneficiaries is synonymous with the Restatement categories of donee and creditor beneficiaries. *Trust Co. v. Processing Co., supra.* Restatement § 133

correctly states the law of this State and we therefore expressly approve the Restatement formula.

Plaintiff landowner relies on *Brown v. Construction Co.*, 236 N.C. 462, 73 S.E. 2d 147 (1952); *Gaither Corp. v. Skinner*, 238 N.C. 254, 77 S.E. 2d 659 (1953); and *Quenby Corp. v. Conner Co.*, 272 N.C. 208, 158 S.E. 2d 18 (1967). The *Gaither* and *Quenby* decisions were based on the law as to joinder of parties, and therefore are not authoritative for the proposition for which they are cited. Any support for plaintiff's position contained therein is merely *obiter dictum*. The *Brown* case, moreover, concerned a non-delegable duty assumed by contract and imposed by operation of law which defendant Construction Company sought unsuccessfully to escape by assignment to a subcontractor. That case is not authoritative on the question before us.

Defendant Reed Supply Company, on the other hand, relies on *Trust Co. v. Processing Co., supra* (242 N.C. 370, 88 S.E. 2d 233) and *Board of Education v. Deitrick*, 221 N.C. 38, 18 S.E. 2d 704 (1942), as well as the Restatement of Contracts. The *Trust Company* case supports the proposition that a third person may sue to enforce a binding contract made for his direct benefit but not where the benefit to him is only incidental. In *Deitrick*, the general contractor attempted to join the materialman as codefendant in a suit by the landowner against the contractor for breach of contract. Since there was no privity between plaintiff landowner and the materialman, the motion for joinder was properly denied. All cases from other jurisdictions cited by Reed concern privity, and privity is not relevant to the determination of third party beneficiary problems in North Carolina. *Trust Co. v. Processing Co., supra.*

[2] We must therefore analyze the facts to determine whether plaintiff landowner is a creditor beneficiary or merely an incidental beneficiary. The intention of the parties to the subcontract is of paramount importance. "As a general proposition, the determining factor as to the rights of a third party beneficiary is the intention of the parties who actually made the contract. The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." 17 Am. Jur. 2d, Contracts § 304. It is not sufficient that the contract does benefit him if in fact it was not intended for his direct benefit. *Robins Drydock*

and Repair Co. v. Flint, 275 U.S. 303, 72 L. ed 290, 48 S. Ct. 134 (1927).

[1] In our view the subcontract here was not intended for the benefit of the plaintiff landowner. Plaintiff benefits only incidentally or indirectly because performance of the subcontract was rendered in fulfillment of Reed's obligation to the general contractor. Hence, any benefit derived from the subcontract by the landowner would necessarily accrue indirectly, *i.e.,* through the general contractor.

The Restatement itself contemplates that an owner in a construction contract be classified as a mere incidental beneficiary of the contract between the general contractor and the subcontractor; thus it provides that an owner would acquire "no right against the promisor or the promisee" in consequence thereof. Restatement of Contracts § 147, Illustration 1. The performance of the subcontractor is not given or received in discharge of the obligation of the general contractor to the owner, but rather in discharge of the subcontractor's own obligations to the general contractor.

Moreover, the text writers support this view. "A subcontractor, bound to the principal contractor to install the plumbing in C's proposed building, is not liable for breach to C, the owner. The promised performance is here to be rendered to the principal contractor." Simpson on Contracts § 116 at page 246. Accord, 4 Corbin on Contracts § 779D.

We therefore hold that plaintiff landowner in Case No. 69-CVS-41 is a mere incidental beneficiary of the construction subcontract between Reed and the general contractor. As such he cannot maintain against Reed a claim for damages for breach of the subcontract. It therefore follows as a matter of law that Reed's motion for summary judgment in Case No. 69-CVS-41 should have been allowed. Rule 56, Rules of Civil Procedure.

SECOND CASE (69-CVS-46)

[3] It is conceded that neither the general contractor (Da Pow Developers, Inc.) nor the subcontractor (Reed Supply Company) were licensed as a general contractor pursuant to G.S. 87-1 *et seq.* The second case now under consideration presents for decision the following question: Was Reed Supply Company a "general contractor" under the definition contained in G.S. 87-1 and thus required to be licensed? If the answer to this question

is yes, then Reed Supply Company cannot maintain an action either for enforcement or for breach of the subcontract between it and Da Pow Developers, Inc. "The purpose of Article 1 of Chapter 87 of the General Statutes, which prohibits any contractor who has not passed an examination and secured a license as therein provided from undertaking to construct a building costing $20,000.00 or more, is to protect the public from incompetent builders. When, in disregard of such a protective statute, an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. This is true even though the statute does not expressly forbid such suits. 53 C.J.S., Licenses § 59 (1948); 33 Am. Jur., Licenses §§ 68-72 (1941); Annot., Failure of artisan or construction contractor to procure occupational or business license or permit as affecting validity or enforcement of contract, 82 A.L.R. 2d 1429 (1962); 5 Williston Contracts (Revised Edition 1937) § 1630; 6 Williston Contracts, *Ibid.* § 1766; 6A Corbin Contracts §§ 1510-1513." *Builders Supply v. Midyette,* 274 N.C. 264, 162 S.E. 2d 507 (1968).

G.S. 87-1 reads in pertinent part as follows: "For the purpose of this article, a 'general contractor' is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building, highway, sewer main, grading or any improvement or structure where the cost of the undertaking is twenty thousand dollars ($20,000.00) or more and anyone who shall bid upon or engage in constructing any undertakings or improvements above mentioned in the State of North Carolina costing twenty thousand dollars ($20,000.00) or more shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina."

G.S. 87-13 provides that any unlicensed person, firm or corporation who shall contract for or bid upon the construction of any of the projects or works enumerated in § 87-1, without first having obtained a license, or who shall attempt to practice general contracting in this State without a license "shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars or imprisonment of three months, or both fine and imprisonment in the discretion of the court."

[4-6] Where the Legislature defines a word used in a statute, that definition is controlling even though the meaning may be

contrary to its ordinary and accepted definition. *Carter v. Carter,* 232 N.C. 614, 61 S.E. 2d 711 (1950). 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; *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970) ; *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2 (1968) ; *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505 (1952). Criminal statutes, and statutes in derogation of the common law, must be strictly construed. *State v. Ross,* 272 N.C. 67, 157 S.E. 2d 712 (1967) ; *State v. Brown,* 264 N.C. 191, 141 S.E. 2d 311 (1965) ; *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925 (1955). This 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. Spencer, supra; State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329 (1967).

[7] The rule requiring statutes to be construed to effectuate the legislative intent applies also to criminal statutes. *State v. Humphries,* 210 N.C. 406, 186 S.E. 473 (1936) ; *State v. Brown,* 221 N.C. 301, 20 S.E. 2d 286 (1942). This Court, construing a criminal statute requiring the licensing of real estate brokers and salesmen, noted the criminal character of the statute and said: "For this reason, and for the further reason that it is a statute restricting to a special class of persons the right to engage in a lawful occupation, the act must be strictly construed so as not to extend it to activities and transactions not intended by the Legislature to be included." *McArver v. Gerukos,* 265 N.C. 413, 144 S.E. 2d 277 (1965).

[8] Under the foregoing principles of statutory construction, the common law definition of "general contractor" is irrelevant in face of the explicit statutory language. Decision here must therefore turn on the meaning of the specific words contained in the statutory definition. These words must be construed strictly in favor of the plaintiff because the statute carries criminal penalties and is in derogation of "the right to engage in a lawful occupation." Did the Legislature, by the use of the words "building," "improvement," and "structure," intend to require subcontractors who undertake to furnish labor and materials in excess of $20,000.00 to construct integral parts of a

large building complex to be licensed as general contractors? The answer is no.

Under the subcontract in this case Reed Supply Company was required to "furnish and erect exterior and interior wall panels, wood floor system subfloor, roof sheathing, bridging, trusses. Furnish and install windows, doors, base, shoe, soffit trim, plywood closures, masonite siding and louvers. Furnish only roofing and felt. Furnish and install shelving, door locks, door knockers. Furnish and complete painting. Furnish only entrance door frame." A few minor items, including painting of the interior ceilings, were specifically excluded from the subcontract. It is apparent, and we think significant, that Reed did not undertake to construct a *building* or *structure*. Completion of the above items leaves much to be done before a *building* or a *structure* results. The words *building* and *structure* are synonymous. "They agree in meaning but differ slightly in application. 'Structure' retains more frequently than the other the sense of something constructed, often in a particular way." *Watson Industries v. Shaw, Comr. of Revenue, supra* (235 N.C. 203, 69 S.E. 2d 505). A *building* is defined as "an edifice . . . a structure"; and a *structure* is defined as "that which is built or constructed; an edifice or building of any kind." Black's Law Dictionary, 4th Ed. Rev. 1968; *Brown v. Sikes,* 188 S.C. 288, 198 S.E. 854 (1938). So when the words *building* and *structure* are strictly construed, in context with the remainder of G.S. 87-1, they do not embrace parts or segments of a building or structure. They exclude any meaning the Legislature could have conveyed simply by adding the words "or any part thereof" following the word "structure" in line four of G.S. 87-1.

The term "improvement" does not have a definite and fixed meaning. *Cities Service Gas Co. v. Christian,* 340 P. 2d 929 (Okl. 1959). "The word 'improvement' is a relative and very comprehensive term, whose meaning must be ascertained from the context and the subject matter of the instrument in which it is used." 42 C.J.S., Improvement, p. 416. The word is sometimes used to refer to any enhancement in value, particularly in relation to non-structural changes to land. *Mazel v. Bain,* 272 Ala. 640, 133 So. 2d 44 (1961). But where, as here, it is used in context with the words *building* and *structure,* its meaning is otherwise. As used here it connotes the performance of construction work and presupposes the prior existence of some structure to be improved. As used with reference to land, the word *im-*

provement presupposes the prior existence of the land itself. The construction in this case "started from scratch." There was no existing building or structure to be improved, and in our view the term "improvement" as used in G.S. 87-1 has no application to the facts in this case. Black's Law Dictionary, *supra;* 42 C.J.S., Improvement, *supra; Masterson v. Atherton,* 149 Conn. 302, 179 A. 2d 592 (1962) ; *Douglaston Realty Co. v. Hess,* 124 App. Div. 508, 108 N.Y.S. 1036 (1908).

[3] So, examining the statute in light of its purpose, we hold that Reed Supply Company was not a "general contractor" within the purview of G.S. 87-1 *et seq.* and was therefore not required to be licensed. The protection of the public is not involved because the general contractor stands between the owner and the subcontractor. If the owner is damaged he has his remedy against the general contractor. After all, the general contractor and not the owner selects the subcontractors. It would serve no public policy intended by Chapter 87 of the General Statutes to hold a subcontractor to be a general contractor within the purview of G.S. 87-1. Furthermore, if the Legislature had intended to include subcontractors in the class required to be licensed, it would have specifically so provided.

[9] What, then, is the status of the unlicensed general contractor with reference to the counterclaim against Reed Supply Company which it sets up in its answer?

[10] While Da Pow Developers, Inc., cannot enforce its contract against the owner by reason of its unlicensed status, it is not precluded on that account from enforcing the subcontract, or recovering damages for breach thereof, against Reed Supply Company. This is true because Reed Supply Company is not among the class of persons the Legislature intended to protect by enactment of G.S. 87-1 *et seq.* The purpose of that enactment, as declared by Sharp, J., for the Court, in *Builders Supply v. Midyette, supra,* is "to protect the public from incompetent builders." The licensing statutes have no application to the rights and liabilities of contractors and subcontractors *inter se* where the public interest is not involved. The rule that contracts in contravention of public policy are not enforceable is based on the premise that no one can rightfully do "that which tends to injure the public or is detrimental to the public good." *A. C. Frost & Co. v. Coeur D'Alene Mines Corp.,* 312 U.S. 38, 85 L. ed 500, 61 S.Ct. 414 (1940). Even so, "if it definitely appears that enforcement of a contract will not be followed by injurious re-

sults, then, generally at least, what the parties have agreed to ought not to be struck down on the ground of public policy." 17 Am. Jur. 2d, Contracts § 174. Here, no injury to the public is apparent from enforcement of the subcontract between the parties to it.

[9] We therefore hold that Da Pow Developers, Inc., may not only defend against plaintiff's demands but may also assert all lawful counterclaims properly pleaded in its answer in this case (69-CVS-46).

The rights, if any, of Reed Supply Company against Da Pow Developers Company are not ripe for appellate review. Allegations of a fraudulent conveyance, which are denied, have not been passed upon in the trial court. The issue of priority of liens as between Reed Supply Company on the one hand and the Northwestern Bank and Provident Mutual Life Insurance Company of Philadelphia on the other has not been considered below. Since this case must be tried on its merits upon all issues properly raised by the pleadings, we refrain from further expression of opinion on these and other questions posed by this appeal.

These cases are remanded to the Superior Court of Orange County for further proceedings in accordance with this opinion.

Error and remanded.

IN THE MATTER OF THE ESTATE OF NANCY S. DAVIS, DECEASED

No. 29

(Filed 14 October 1970)

1. **Wills § 9— probate of will — subsequent offer of another document for probate — collateral attack upon probate of first document**

   Where a document has been admitted to probate as the last will and testament of a decedent, the subsequent offer to the same or another court of another document for probate as a later and, therefore, the last will and testament of the decedent is a collateral attack upon the probate of the first document.

2. **Wills § 9— collateral or direct attack on probate**

   A judgment or decree admitting a will to probate, when made by a court having jurisdiction thereof, may be attacked only in such direct

proceedings as are authorized by statute and may not be attacked or impeached in a collateral proceeding; conversely, if the record of the probate proceeding shows affirmatively upon its face that the court had no jurisdiction to enter the order of probate and issue letters testamentary, its order so doing is void and may be attacked collaterally.

3. **Clerks of Court § 3; Wills § 9— probate jurisdiction of clerk**

A clerk of the superior court has jurisdiction to probate a will only in accordance with the applicable statute.

4. **Wills § 9— irregularities in probate proceeding — showing by evidence outside record — insufficiency for collateral attack on probate**

A showing, by evidence outside the record of the probate proceeding, of irregularities in the proceeding and of errors by the clerk in his findings of fact or in his failure to follow the probate procedure prescribed by statute, will not subject the order of probate and the issuance of letters testamentary to collateral attack.

5. **Wills § 9— probate of will — failure of record to show jurisdiction in clerk — presumption of jurisdiction — collateral attack on probate**

Mere failure of the record of the probate proceeding to show jurisdiction in the clerk is not sufficient to subject his order to collateral attack since, in the silence of the record, it is presumed that the jurisdictional facts were present and found.

6. **Wills § 9— probate jurisdiction of clerk — domicile and residence in different counties**

If testatrix, at death, was domiciled in one county and also had a place of residence in another county, her will could lawfully be probated in either of those counties, nothing else appearing. G.S. 28-2.

7. **Wills § 9— probate of will — resident of this State — necessity for domicile or residence in county of probate**

Where testatrix was domiciled in and resided in this State at the time of her death, it is an essential to the jurisdiction of a clerk who undertakes to admit a document to probate as her will and to issue letters testamentary that she was either domiciled in or had a place of residence in the county of such clerk at the time of her death.

8. **Wills § 9— probate of will — exclusive jurisdiction of clerk over the estate — effect of subsequent presentation of later will**

If the clerk of court of a particular county had authority to admit a document to probate as decedent's will, his jurisdiction over decedent's estate became exclusive through the exercise of that authority and the subsequent discovery and presentation of another document, executed later, as the last will of the decedent would not deprive such clerk of the exclusive jurisdiction previously acquired.

9. **Wills § 9— will as part of record of probate proceeding**

The document probated as the will of decedent is part of the record of the probate proceeding.

10. **Wills § 9—collateral attack on probate of will — failure of clerk to make finding as to domicile or residence of decedent — failure of record to show lack of jurisdiction in clerk because of such domicile or residence**

The record of a probate proceeding in Iredell County, consisting of the will, the order of probate and the letters of administration, does not show upon its face that the Clerk of Superior Court of Iredell County had no jurisdiction because of the residence or domicile of the decedent, where the order of probate contained no finding or statement as to the residence of decedent, the will recites that decedent was of Iredell County, and the letters of administration referred to decedent as "late of said County."

11. **Wills § 9— testatrix predeceased by only person named as executor — application for probate — person interested in the estate**

Where the only executor named in a will has died before the testator, G.S. 31-13 does not require another person "interested in the estate" to wait sixty days before applying to the clerk for the probate of the will.

12. **Wills § 9— collateral attack on probate of will — failure of record to show that document was presented for probate by unauthorized person**

Order of probate reciting that the document probated was exhibited for probate by "Dr. J. S. Holbrook, Chairman Board, James W. Davis Foundation, one of the executors therein named," whereas the document probated names as executor only decedent's late husband, Dr. James W. Davis, does not affirmatively show that Dr. J. S. Holbrook was not a "person interested in the estate," and therefore, does not show affirmatively that the document was presented for probate by a person not authorized by G.S. 31-13 to do so.

13. **Wills § 9— probate of will — jurisdiction of clerk — lapse or invalidity of dispositions in the will**

The fact that a devise and bequest of all of the property of the testatrix has lapsed, due to the death of the devisee-legatee, and that a gift over cannot be given effect does not make the document and the order admitting it to probate void upon the face thereof.

14. **Wills § 9— collateral attack on probate of will — offer of subsequent will for probate in another county — jurisdiction to determine domicile and residence of decedent**

Where it does not affirmatively appear upon the face of the record of a probate proceeding in Iredell County that the clerk of that county did not have jurisdiction to probate a document as the will of decedent, the clerk's order admitting the will to probate and his issuance of letters of administration cannot be collaterally attacked by the offer for probate in Buncombe County of a later will, and the Clerk of Superior Court of Iredell County is the only court which can determine whether or not decedent was domiciled in or had a place of residence in Iredell County at the time of her death.

15. Wills § 9— lack of jurisdictional requirements for probate — revocation of probate

When jurisdictional requirements for probate are shown to be lacking, the clerk may revoke his order admitting a document to probate.

Justices HIGGINS and HUSKINS took no part in the consideration or decision of this case.

CERTIORARI to review decision of the Court of Appeals reported in 7 N.C. App. 697.

On 8 July 1969, a document purporting to be the holograph will of Nancy S. Davis was admitted to probate in Iredell County by order of the Clerk of the Superior Court. This paper, hereinafter called the Iredell will, dated 30 May 1948, recites that Nancy S. Davis was of Iredell County. The order admitting it to probate contains no finding or statement as to the residence of Mrs. Davis.

On 17 July 1969, a document purporting to be the attested will of Nancy S. Davis was admitted to probate in Buncombe County by the order of the Assistant Clerk of the Superior Court. This document, hereinafter called the Buncombe will, dated 26 April 1965, states that Mrs. Davis was "of Buncombe County." The petition for its probate states that she was "late of said county" and died on or about 4 July 1969. The order admitting it to probate states that the order was entered upon due consideration of recited proofs and examinations of subscribing witnesses "to a paper writing, purporting to be the Last Will and Testament of Nancy S. Davis, deceased, late of Buncombe County."

On 17 July 1969, letters testamentary were issued by the Assistant Clerk of the Superior Court of Buncombe County to the Northwestern Bank, the executor named in the Buncombe will. These letters testamentary recite that it had been "satisfactorily proven to the undersigned, clerk of the Superior Court for Buncombe County, that Nancy S. Davis late of said County, is dead, having made her last Will and Testament, which has been admitted to Probate * * *."

On 21 August 1969, letters of administration with the will annexed were issued by the Clerk of the Superior Court of Iredell County to the North Carolina National Bank. These letters recited that it had been satisfactorily proven to the Clerk of the Superior Court of Iredell County that "Nancy Smith Davis late

of said County is dead, having made and published a last will and testament * * *."

The Iredell will devises and bequeaths to Dr. James W. Davis all the property of the testatrix and then provides that if he should not be living at her death all of her property "shall go to the James W. Davis Trust Fund in the American Trust Company Charlotte North Carolina under the terms and conditions of this trust fund."

At the time of the death of Mrs. Davis, there was in existence a trust fund held by the North Carolina National Bank, Trustee, successor to American Trust Company. This trust was established by an agreement, dated 15 February 1945, between Dr. James W. Davis and the American Trust Company. This trust agreement retained in the settlor the power to revoke, alter or amend it at any time during his life, which he did twice, neither the agreement nor either amending document being in the handwriting of Nancy S. Davis. Dr. James W. Davis, husband of Nancy S. Davis, died in 1955.

On 22 February 1961, Nancy S. Davis was adjudged by the Clerk of the Superior Court of Iredell County to be "a mentally disordered person and incompetent from want of understanding to manage her own affairs by reason of such mental disorder" and a guardian was appointed for her.

On 25 February 1965, the Clerk of the Superior Court of Iredell County adjudged Nancy S. Davis to be restored to her normal mental faculties and capable of understanding and managing her affairs. The petition of Nancy S. Davis, pursuant to which this order of restoration of sanity was entered, stated, "She has at all times maintained a residence in Iredell County, North Carolina, but at the present time, she is temporarily living at Appalachian Hall in Buncombe County, North Carolina."

On 19 March 1965, Nancy S. Davis executed a trust agreement with the Northwestern Bank in which she was designated as "Mrs. Nancy Smith Davis, of Iredell County, North Carolina."

On 24 September 1965, Nancy S. Davis executed a deed conveying land in Iredell County, which deed designates her as "Nancy S. Davis, a widow, of Iredell County, North Carolina." This deed was acknowledged by her before a notary public in Buncombe County.

On or about 11 September 1969, North Carolina National Bank, Administrator, c.t.a., appointed to execute the Iredell will, filed with the Clerk of the Superior Court of Buncombe County its motion to vacate, annul and set aside the issuance by such clerk of the letters testamentary to the Northwestern Bank, as executor of the Buncombe will, and to vacate and set aside the order admitting the Buncombe will to probate.

The motion alleges Nancy S. Davis died 4 July 1969 while a patient at Appalachian Hall in Asheville, Buncombe County, North Carolina. It alleges the issuance of the orders admitting the above documents to probate and the issuance of letters as above shown, the several orders being attached to the motion as exhibits. It alleges the creation and amendment of the James W. Davis Trust Fund, the above mentioned documents with reference thereto being attached to the motion as exhibits. It alleges the filing and entry of the above mentioned petitions and orders with reference to the mental competency of Nancy S. Davis, the documents with reference thereto being attached to the motion as exhibits. It alleges that from 5 October 1960 until her death on 4 July 1969, Nancy S. Davis was at no time in possession of her normal mental faculties or capable of understanding and managing her own affairs. The motion further alleges that Nancy S. Davis "was at all times from her marriage in 1930 until her death on July 4, 1969, solely domiciled in Iredell County, and that she never acquired or had any domicile in Buncombe County or in any other state or county, and that her presence in Buncombe County was at all times a temporary presence in her status as a mental patient in Appalachian Hall * * *." By reason of these facts, the motion alleged that the above mentioned order of 17 July 1969 by the Assistant Clerk of Buncombe County granting letters testamentary to the Northwestern Bank as executor of the Buncombe will was void.

On 13 November 1969, the Clerk of the Superior Court of Buncombe County heard the motion and entered his order denying and dismissing it. In the order he made numerous findings of fact, including the entry of the above mentioned orders admitting to probate the Iredell will and the Buncombe will and issuing letters testamentary and letters of administration, c.t.a., with reference thereto. He found Nancy S. Davis to have been mentally competent to select a domicile of her choice and to be free from disability to do so from 25 February 1965 to 4 July 1969, and that from 25 February 1965 to the date of her death she resided at Appalachian Hall, Buncombe County. He further

found various facts with reference to her actions, including the execution of the above mentioned deed, dated 24 September 1965, by which she conveyed her dwelling house in Statesville, Iredell County, and her movement of personal furniture and belongings to the room occupied by her at Appalachian Hall in Buncombe County. Upon the facts so found, he concluded that Nancy S. Davis was "at the time of her death domiciled solely and only in Buncombe County, North Carolina, and was a resident solely and only of Buncombe County, North Carolina," and that he, the Clerk of the Superior Court of Buncombe County, acquired "sole and exclusive jurisdiction over the estate of Nancy S. Davis, deceased, with the issuance of Testamentary Letters to Northwestern Bank on July 17, 1969 * * *."

North Carolina National Bank, Administrator, c.t.a., under the Iredell will, appealed to the Superior Court of Buncombe County. The matter came on for hearing before Judge Grist. He found as facts that the entry, on 8 July 1969, of the above mentioned order of the Clerk of the Superior Court of Iredell County, admitting to probate the Iredell will, has remained in full force and effect, "no motion having heretofore been made to set aside said order and no appeal having been taken therefrom," and that, by reason of such order, the Clerk of the Superior Court of Iredell County first gained and exercised jurisdiction over the estate of Nancy S. Davis. Upon these findings of fact, Judge Grist concluded, as a matter of law, that the Clerk of the Superior Court of Iredell County acquired sole and exclusive jurisdiction over the estate of Nancy Smith Davis, the Clerk of the Superior Court of Buncombe County had no jurisdiction to enter his order of probate, dated 17 July 1969, or the letters issued to the Northwestern Bank, as executor. Upon these findings and conclusions, Judge Grist reversed the order of the Clerk and vacated and annulled the order entered 17 July 1969 admitting the Buncombe will to probate and the issuance of letters testamentary to the Northwestern Bank.

The Northwestern Bank, Executor under the Buncombe will, and Dr. Mark A. Griffin, Jr., principal beneficiary thereof, appealed to the Court of Appeals, which affirmed the judgment of the Superior Court.

Van Winkle, Buck, Wall, Starnes & Hyde by: Herbert L. Hyde and Larry McDevitt for appellant Northwestern Bank, Executor of Nancy Smith Davis.

Shuford, Frue & Sluder for appellant Dr. Mark A. Griffin.

Jordan, Wright, Nichols, Caffrey & Hill and McElwee & Hall, by: Welch Jordan and Edward L. Murrelle for appellees.

LAKE, Justice.

Upon this appeal, we do not reach and we express no opinion upon any of the following questions:

(1) Is the Iredell will the last will and testament of Nancy S. Davis?

(2) If so, does it incorporate by reference the trust agreement executed by Dr. James W. Davis, and the amendments thereto?

(3) What is the effect of the Iredell will?

(4) Is the Buncombe will the last will and testament of Nancy S. Davis?

(5) What is its effect?

(6) Was Nancy S. Davis, at the time of her death, domiciled in or a resident of Iredell County?

(7) Was Nancy S. Davis, at the time of her death, domiciled in or a resident of Buncombe County?

The sole question for our determination at this time is, Did the Clerk of the Superior Court of Buncombe County have, on 17 July 1969, jurisdiction to order the Buncombe will admitted to probate and to issue letters testamentary to the Northwestern Bank?

[1, 2] A document having been admitted to probate as the last will and testament of a decedent, the subsequent offer to the same or another court of another document for probate as a later and, therefore, the last will and testament of the decedent is a collateral attack upon the probate of the first document. *In Re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488; Wiggins, Wills & Administration of Estates in North Carolina, § 113. "It is well settled that a judgment or decree admitting a will to probate, when made by a court having jurisdiction thereof, may be attacked only in such direct proceedings as are authorized by statute, and that it is not open to attack or impeachment in a collateral proceeding." *Edwards v. White,* 180 N.C. 55, 103 S.E. 901. Accord: *Tyer v. Lumber Co.,* 188 N.C. 274, 124 S.E. 306;

Starnes v. Thompson, 173 N.C. 466, 92 S.E. 259; *Batchelor v. Overton,* 158 N.C. 395, 74 S.E. 20; *Fann v. R. R.,* 155 N.C. 136, 71 S.E. 81. Conversely, if the record of the probate proceeding shows affirmatively, upon its face, that the court had no jurisdiction to enter the order of probate and issue the letters testamentary, its order so doing is void and may be attacked collaterally. *Jones v. Warren,* 274 N.C. 166, 161 S.E. 2d 467; *Morris v. Morris,* 245 N.C. 30, 95 S.E. 2d 110.

[3-5] A clerk of the Superior Court has jurisdiction to probate a will only in accordance with the applicable statute. *Jones v. Warren, supra; In Re Will of Puett, supra.* However, a showing, by evidence outside the record of the probate proceeding, of irregularities in the proceeding and of errors by the clerk in his findings of fact, or in his failure to follow the probate procedure prescribed by statute, will not subject the order of probate and the issuance of letters testamentary to collateral attack. *Edwards v. White, supra,* at p. 57; *Starnes v. Thompson, supra,* at p. 470; *Fann v. R. R., supra.* It is only when the record of the probate proceeding shows affirmatively, on its face, that the clerk has no jurisdiction to enter his order that the order can be attacked in another proceeding in another court. Mere failure of the record of the probate proceeding to show jurisdiction in the clerk is not sufficient to subject his order to collateral attack since, in the silence of the record, it is presumed that the jurisdictional facts were present and found. *Edwards v. White, supra; Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240; *Starnes v. Thompson, supra,* at p. 468. "Every court, where the subject matter is within its jurisdiction, is presumed to have done all that is necessary to give force and effect to its proceedings, unless there is something on the face of the proceedings to show the contrary." *Marshall v. Fisher,* 46 N.C. 111. In the Marshall case, the minute of the probate entered by the clerk was: "The will of Roger Bratcher, proved by Henry Sykes. Executor Thomas Bratcher qualified; ordered, that letters issue." This Court said, "This entry is very informal, but we think it is sufficient, by the aid of the rule *omnia praesumuntur rite esse acta,* to show that the will was duly proven."

G.S. 28-1 provides:

"The clerk of the superior court of each county has jurisdiction, within his county, to take proof of wills and to grant letters testamentary * * * in the following cases:

"(1) Where the decedent at, or immediately previous to, his death was domiciled in the county of such clerk, in whatever place such death may have happened.

"(2) Where the decedent at his death had places of residence in more than one county, the clerk of any such county has jurisdiction. * * *"

[6] Obviously, it is possible that Nancy S. Davis, at death, could have been domiciled in Iredell County and also had a place of residence in Buncombe County or vice versa, in which event her will might have been lawfully probated in either county, nothing else appearing. Provision is made for such a situation in G.S. 28-2 which provides, "The clerk who first gains and exercises jurisdiction under this chapter thereby acquires sole and exclusive jurisdiction over the decedent's estate."

[7, 8] It is not questioned that Nancy S. Davis, at the time of her death, was domiciled in and resided in the State of North Carolina. That being true, it is well settled that her domicile or residence, at the time of her death, in the county of the clerk who undertakes to admit a document to probate as her will, and to issue letters testamentary, is essential to the jurisdiction of that clerk so to do. *In Re Estate of Cullinan*, 259 N.C. 626, 131 S.E. 2d 316; *Reynolds v. Cotton Mills, supra; Johnson v. Corpenning*, 39 N.C. 216; *Collins v. Turner*, 4 N.C. 541. Thus, if, at the time of her death, Nancy S. Davis was not domiciled in or a resident of Iredell County, the orders of the clerk of that county, admitting the Iredell will to probate and issuing letters to the administrator, c.t.a., were void and should be vacated by a court competent to do so. Conversely, if, at her death, Nancy S. Davis was either domiciled in or had a place of residence in Iredell County, the clerk of that county had authority, upon proper application and proof, to admit a document to probate as her will and, through the exercise of such authority by the admission of the documents to probate, his jurisdiction over the estate became exclusive. The subsequent discovery and presentation for probate of another document, executed later, as the last will of the decedent, would not deprive the Clerk of Iredell County of the exclusive jurisdiction previously so acquired.

[14] The question for decision upon this appeal, therefore, narrows to this: Which court is now the proper court to determine whether Nancy S. Davis, at the time of her death, was domiciled in or had a place of residence in Iredell County? The above mentioned presumption compels the conclusion that the Clerk of the

Superior Court of Iredell County is the only court which can now determine this question, unless it affirmatively appears upon the face of the record of the probate proceeding before him that he did not have jurisdiction to probate the Iredell will as the will of Nancy S. Davis.

The record before us does not contain all of the evidence introduced before the Clerk of the Superior Court of Buncombe County at the hearing of the motion to vacate the order probating the Buncombe will. The order of the Clerk of the Superior Court of Buncombe County denying that motion recites that the movant presented "certain documentary evidence" and that the Northwestern Bank, in opposition to the motion, presented "certain documentary evidence and the testimony of numerous witnesses."

In his order denying the motion, the Clerk found as a fact:

> "3. On the 21st day of August, 1969, the Clerk of the Superior Court of Iredell County issued Letters of Administration, c.t.a.d.b.n., to North Carolina National Bank as Administrator, c.t.a.d.b.n., of Nancy Smith Davis, and although no certified copies of the Order of Probate were introduced into evidence, the undersigned finds that on the 8th day of July, 1969, Clerk of the Superior Court of Iredell County admitted to probate a paper writing without subscribing witnesses purporting to be the Last Will and Testament of Nancy S. Davis."

In this order the Clerk made no other finding of fact with reference to the record of the probate proceeding in Iredell. The evidence before him not being set out in full in the record before us, we presume that the above quoted finding of fact was supported by evidence admitted properly, or without objection. The parties, throughout this proceeding, have treated the finding above quoted as correct.

If we assume, as seems reasonable, that the "documentary evidence" offered before the Clerk of the Superior Court of Buncombe County by the North Carolina National Bank, Administrator, c.t.a., in support of its motion, included the exhibits attached to its motion, such evidence included the Iredell will, the order of probate thereof in Iredell County and the letters of administration, c.t.a., issued by Iredell County, which documents, so far as appears from the record before us, constituted the entire record of the probate proceeding in Iredell County.

[9, 10] It does not appear on the face of these papers that Nancy S. Davis was not domiciled in or a resident of Iredell County at the time of her death. On the contrary, the Iredell will contains the heading "North Carolina Iredell County," and its introductory paragraph states, "I, Nancy Smith Davis, of the aforesaid county and State * * * do make and declare this my Last Will and Testament." The document probated as the will of Mrs. Davis is part of the record of the probate proceeding. *Marshall v. Fisher, supra.* In *Reynolds v. Cotton Mills, supra,* the record contained the application for letters which recited that "James Scism, late of said county of Lincoln is dead, intestate, etc." This Court said: "We must take this to mean that he was domiciled in Lincoln County, and thus construed, it shows the proper domicile. The language used was not very apt, but is sufficient by fair construction to show a domicile, at least *prima facie.* * * * It results, therefore, that the direct proceeding to recall the letters was the proper one." See also, Wiggins, op. cit., *supra,* § 114. The Iredell order of probate, itself, states nothing as to the residence or domicile of Nancy S. Davis. The letters of administration, c.t.a., issued by the Clerk of the Superior Court of Iredell County, referred to Nancy S. Davis as "late of said County." Thus, there is nothing whatever upon the face of the record of the probate proceeding in Iredell County to suggest that the Clerk of the Superior Court of that county did not have jurisdiction because of the residence or domicile of the decedent.

[11] The appellants contend that a fatal defect appears on the face of the probate proceeding in Iredell County in that the order of probate recites that the document probated was exhibited for probate by "Dr. J. S. Holbrook, Chairman Board, James W. Davis Foundation, one of the executors therein named," whereas the document probated names as executor only the decedent's husband, Dr. James W. Davis. G.S. 31-12 provides that an executor named in a will may, at any time after the death of the testator, apply to the clerk having jurisdiction to have the document admitted to probate. G.S. 31-13 provides that if no executor so applies within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application upon ten days' notice to the executor. In the motion to vacate the probate order issued by the Superior Court of Buncombe County, it is alleged that Dr. James W. Davis died on 31 May 1955. Nothing in the record before us controverts this allegation. Northwestern Bank,

in its brief, states the death of Dr. Davis on that date is a matter of public record in Iredell County. Where the only executor named in the will has died before the testator, G.S. 31-13 does not require another person "interested in the estate" to wait sixty days before applying to the clerk for the probate of the will.

[12] It does not affirmatively appear upon the order of probate issued by the Clerk of the Superior Court of Iredell County that Dr. J. S. Holbrook was not a person interested in the will. It is obvious from G.S. 31-13 that this classification includes persons who are neither devisees nor legatees. It is broad enough to include even a person whose interest in the estate is in opposition to the will. *Brissie v. Craig*, 232 N.C. 701, 62 S.E. 2d 330. The designation of the person who exhibited the document for probate as "one of the executors therein named," though inaccurate, is not an affirmative showing that he was not a "person interested in the estate" and, therefore, does not show affirmatively that the document was presented for probate by a person not authorized by the statute to do so.

[13] Finally, the appellants contend that the document probated in Iredell County was, itself, invalid as a will and, therefore, the order admitting it to probate is void on its face. The Iredell will devised and bequeathed all of the testatrix' property to her husband, Dr. James W. Davis, and then provided that if he should predecease the testatrix all of the property "shall go to the James W. Davis Trust Fund * * * under the terms and conditions of this trust fund." The appellants contend that Dr. Davis having predeceased the testatrix, the only dispositive provision in the will is the gift to the James W. Davis Trust Fund, which the appellants contend cannot take effect because that trust fund was created by an instrument not in the handwriting of the testatrix and so incapable of being incorporated by reference into the document probated as a holograph will. As above stated, we do not reach upon this appeal the question of whether the Iredell will incorporates by reference the trust agreement as amended. The fact that a devise and bequest of all of the property of the testatrix has lapsed, due to the death of the devisee-legatee, and that a gift over cannot be given effect (assuming, without deciding, that this is true in this instance), does not make the document and the order admitting it to probate void upon the face thereof.

[14] Consequently, the order of the Clerk of the Superior Court of Iredell County admitting the Iredell will to probate and his

issuance of letters of administration, c.t.a., cannot be attacked collaterally but may be attacked only in a proceeding brought for that purpose before the Clerk of the Superior Court of Iredell County. By the entry of his order admitting the Iredell will to probate, he acquired full and exclusive jurisdiction not merely over the carrying out of that document but over the estate of Nancy S. Davis. G.S. 28-2. This jurisdiction continues until vacated by a direct attack thereon.

[15] The appellants, if so advised, may file their motion with the Clerk of the Superior Court of Iredell County to vacate his order admitting the Iredell will to probate on the ground that he was without such jurisdiction to enter such order because Nancy Smith Davis was, at the time of her death, domiciled in and a resident of Buncombe County only or by reason of any other circumstances which, in the opinion of the appellants, prevented the Clerk of the Superior Court of Iredell County from having jurisdiction to enter his order admitting the Iredell will to probate. When jurisdictional requirements for probate are shown to be lacking, the clerk may revoke his order admitting the document to probate. *Ravenel v. Shipman*, 271 N.C. 193, 155 S.E. 2d 484.

If the appellants succeed in this endeavor, the way is then clear for them (or those relying upon the Iredell will) to offer for probate in Buncombe County the document they assert to be the last will and testament of Nancy Smith Davis. If the appellants fail in such attack upon the jurisdiction of the Clerk of the Superior Court of Iredell County they may, if so advised, file, within the time allowed therefor, a caveat to the Iredell will upon the ground that it was revoked by the Buncombe will or upon any other ground which they deem applicable, and, if successful therein, then file the Buncombe will for probate in Iredell County.

The judgment of the Court of Appeals is affirmed.

Affirmed.

Justices HIGGINS and HUSKINS took no part in the consideration or decision of this case.

THE NORTHWESTERN BANK, EXECUTOR OF THE ESTATE OF NANCY SMITH DAVIS, DECEASED, PETITIONER v. NORTH CAROLINA NATIONAL BANK, RESPONDENT

No. 30

(Filed 14 October 1970)

Appeal and Error § 9— dismissal of moot appeal

Appeal by plaintiff executor in an action seeking an injunction until an order of the clerk of superior court "becomes final for lack of appeal, or until the same is modified, affirmed or reversed on appeal" is dismissed as moot where the Supreme Court, in another case, reversed the clerk's order and vacated the letters testamentary issued to plaintiff.

Justices HIGGINS and HUSKINS took no part in the consideration or decision of this case.

CERTIORARI to review the decision of the Court of Appeals reported in 8 N.C. App. 333, 174, S.E. 2d 22.

The Northwestern Bank brought this action in the Superior Court of Buncombe County to enjoin the North Carolina National Bank "from prosecuting or causing execution to issue upon the Order of the Clerk of Superior Court of Iredell County with respect to the possession of the property of the Estate of Nancy Smith Davis, deceased, until such time as the Order of the Clerk of Superior Court of Buncombe County becomes final for lack of appeal, or until the same is modified, affirmed or reversed upon the appeal."

The complaint alleges that Nancy Smith Davis died a resident of and domiciled in Buncombe County, leaving a will which was probated before the Clerk of the Superior Court of Buncombe County, who issued letters testamentary to the plaintiff; the plaintiff took possession of the assets of the estate as executor; the Clerk of the Superior Court of Iredell County admitted a different document to probate as the will of Nancy Smith Davis and issued letters of administration, c.t.a.d.b.n., to the defendant; the defendant filed a motion before the Clerk of the Superior Court of Buncombe County to vacate the letters testamentary issued to the plaintiff and to vacate the order admitting to probate the document first above mentioned; pending the determination by the Clerk of the Superior Court of Buncombe County of such motion to vacate the Buncombe probate and letters, the defendant obtained from the Clerk of the Superior

Court of Iredell County an order directing the plaintiff to deliver to the defendant all of the properties of Nancy Smith Davis; the Clerk of the Superior Court of Buncombe County thereafter entered his order upon the above mentioned motion of the defendant to vacate the Buncombe probate and letters, finding that Nancy Smith Davis was a resident and domiciled in Buncombe County at her death and was not a resident of or domiciled in Iredell County; the Clerk of the Superior Court of Buncombe County has sole and exclusive jurisdiction over the estate of Nancy Smith Davis; the plaintiff is presently faced with conflicting orders of the respective clerks of the Superior Courts, is subject to an order of execution which may be entered by the Clerk of the Superior Court of Iredell County and has no adequate remedy at law with respect to the possession of the property of the said estate.

A temporary restraining order was entered upon the verified complaint. The defendant demurred to the complaint on the ground that the Court had no jurisdiction over the subject of the action and upon the further ground that the complaint does not state facts sufficient to constitute a cause of action, it appearing upon the face of the complaint that this action constitutes an impermissible collateral attack upon the orders of the Clerk of the Superior Court of Iredell County.

The Superior Court sustained the demurrer upon the ground that the complaint does not state facts sufficient to constitute a valid cause of action, and dissolved the temporary restraining order. The plaintiff appealed to the Court of Appeals, which dismissed the appeal as moot.

Van Winkle, Buck, Wall, Starnes and Hyde by: Herbert L. Hyde and Larry McDevitt for plaintiff.

Jordan, Wright, Nichols, Caffrey & Hill and McElwee and Hall, by: Welch Jordan and Edward L. Murrelle for defendant.

LAKE, Justice.

This action arises out of the controversy involved in the case of *In Re Estate of Nancy S. Davis*, 277 N.C. 134, 176 S.E. 2d 825, decided this day, to which reference is made for a more complete statement of the facts of the controversy. In that case, we affirmed the judgment of the Superior Court of Buncombe County, which reversed the order of the Clerk of that Court

referred to in the complaint in this action. The judgment there affirmed vacated the order of the Clerk admitting to probate the document alleged by the plaintiff to be the will of Nancy Smith Davis and vacated the letters testamentary issued to the plaintiff herein. In the present action, the prayer of the complaint is for the issuance of an injunction until the said order of the Clerk of the Superior Court of Buncombe County "becomes final for lack of appeal, or until the same is modified, affirmed or reversed upon appeal." The said order having been now reversed and the letters issued to the plaintiff vacated, this appeal is moot.

Appeal dismissed.

Justices HIGGINS and HUSKINS took no part in the consideration or decision of this case.

STATE v. TED JACOBS

No. 28

(Filed 14 October 1970)

1. **Arrest and Bail § 3— arrest without warrant — rape suspect — probable cause**

   Police officers had probable cause to arrest defendant without a warrant on a charge of rape, where (1) the prosecuting witness had furnished to the officers the numbers 15339 and 13559 as being the possible city tag numbers on the car driven by her assailant, (2) by tracing the number 13559 the officers were led to the address where defendant was found, (3) defendant admitted to officers that he owned the car and the city tag, (4) defendant admitted that he kissed and felt of the prosecuting witness, and (5) the very nature of the crime was sufficient to support a reasonable belief that defendant would evade arrest if not immediately taken into custody. G.S. 15-41(2).

2. **Arrest and Bail § 3— arrest without warrant**

   An arrest without a warrant, except as authorized by statute, is illegal.

3. **Arrest and Bail § 3— detention of defendant — reasonable grounds — description of person or car**

   A description of either a person or an automobile may furnish reasonable grounds for arresting and detaining a criminal suspect.

4. **Criminal Law § 76— admission of incriminating statements — in-custody interrogation**

   Where there was ample evidence that the police officers had probable cause to arrest defendant without a warrant on a charge of rape, and that the officers advised defendant of his constitutional rights under *Miranda v. Arizona,* the trial court properly found that the defendant's in-custody statements to the arresting officers were voluntarily made.

5. **Criminal Law § 66— photographic identification of defendant**

   In a rape prosecution, the trial court properly found that the victim's identification of defendant, an Indian, from a group of photographs of white males supplied by the police "was made without intimidation, suggestion or coercion on the part of anyone, and was made independent of and free from outside influences"; consequently, it was unnecessary for the court to make an additional factual determination whether the victim's in-court identification of defendant was of independent origin of the photographic identification.

6. **Criminal Law § 66; Constitutional Law § 32— right to counsel — photographic identification of defendant**

   Defendant did not have a constitutional right to counsel during the out-of-court identification of defendant from police photographs.

7. **Criminal Law § 115— instructions on lesser included offense**

Absent evidence which will support a verdict, the trial judge is not required to charge on the lesser included crime.

8. **Criminal Law § 169— admission of testimony over objection — harmless error**

The admission of testimony over objection is harmless when the facts sought to be established are admitted by the defendant.

APPEAL by defendant from *Seay, J.*, 16 March 1970 Mixed Session of DAVIDSON Superior Court.

This is a criminal prosecution on an indictment charging defendant with the capital crime of rape. Defendant entered a plea of not guilty. The jury returned a verdict of guilty and recommended that the punishment be imprisonment for life. Sentence was imposed accordingly, and defendant appealed to this Court.

The State offered the evidence of Miss Christina Block, which tended to show that on Sunday night, 28 September, 1969, she was en route from Chapel Hill to Charlotte on Interstate Highway 85. She stopped in High Point at about 10:30 to get a soft drink. When she returned to the highway an automobile pulled up behind her and its lights blinked on and off until Miss Block reached a well-lighted portion of the highway and stopped. The car behind her stopped, and a man came over and told her something was wrong with her rear tire and offered to fix it for her. She thereupon opened the trunk of her car to get the tools and stood near the vicinity of the open trunk for about twenty minutes while the man worked on the tire. During this time the light in the trunk furnished sufficient illumination for her to see his face. The man put the tools back into the car and then said that he had dropped a tool on the ground, and when Miss Block walked over to look for it, he pushed her off a steep embankment and there forcibly, against her will, had sexual intercourse with her. When he stood back from her, she ran up the hill, entered her car and drove to a service station located about one-half mile down the road. She there asked the people in the service station to call the police. She was in defendant's presence at the scene for about one and one-half hours. Miss Block identified the defendant as the man who raped her and upon defendant's objection to the in-court identification, the jury was excused and a *voir dire* hearing was held on the question of the in-court identification. At the close of the *voir*

dire hearing, the trial judge overruled defendant's objection and the in-court identification was admitted. The prosecuting witness also testified that the car operated by the defendant was dark, either black or blue, with a High Point city tag on the front. She told the people at the service station the license number on the city tag and later gave numbers to the Sheriff's Department. She described the man who attacked her to the police as being very tall, having a hollow looking face and hair which was long on top and short around the back. She testified that her assailant had a strange voice and talked very slowly. She also described his clothing.

Clifton Freedle testified, in substance, that he was in the service station between 11:00 and 11:30 o'clock on September 28 when the prosecuting witness came into the station and said that she had been raped. He said she was crying and "very upset." He picked briars out of her fingers and ankles.

Dr. Crawford W. Lewis testified that he examined Miss Christina Block at about one o'clock A.M. on September 29 and determined that there was male sperm in her vagina.

Mark Stabler, of the High Point Sheriff's Department, in part testified that he had two High Point city tag numbers furnished him and he had a check run on the numbers. One of the numbers, 13559, "came back to Mr. Ted Jacobs." After obtaining this information, defendant Ted Jacobs was located at 1201 English Street, High Point, N. C., by Officer Stabler and Detective White of the High Point Police Department. Stabler testified that defendant was advised of his constitutional rights and that they had some conversation with defendant. At this point defendant's counsel objected and a *voir dire* hearing was held, and at the conclusion of the *voir dire* statements made by defendant were admitted into evidence. (The admission of defendant's alleged statements and the testimony concerning identification of defendant by the prosecuting witness will be more fully considered in the opinion.)

The State offered other testimony which tended to corroborate the witness Christina Block.

Defendant offered no evidence.

Attorney General Morgan and Staff Attorney Denson for the State.

Fred M. Upchurch for Defendant.

BRANCH, Justice

[1] Defendant contends that the admission of his alleged confession violated his constitutional rights because it was the product of illegal custodial interrogation. He contends that he was arrested and detained without probable cause.

[2] An arrest without a warrant, except as authorized by statute, is illegal. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100; *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53.

G.S. 15-41, in part, provides: "A peace officer may without a warrant arrest a person . . . . (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."

[3] It is well recognized that a description of either a person or an automobile may furnish reasonable ground for arresting and detaining a criminal suspect. Holmgren, What are Reasonable Grounds for an Arrest, 42 Chi-Kent L. Rev. 101 (1965).

This Court has held that reasonable grounds existed in a case where the arresting officer had information that a robbery had been committed by a person who fled and the officer was furnished a description of the assailant and the clothing which he wore. The officer was also advised that the assailant had a cut on his leg and that he could probably be found at a certain address. Upon arriving at the given address, he found defendant, whose appearance coincided with the description furnished, and arrest was made without warrant. *State v. Grier,* 268 N.C. 296, 150 S.E. 2d 443.

In the case of *State v. Pearson* and *State v. Belk,* 269 N.C. 725, 153 S.E. 2d 494, the victim of a robbery gave officers a description of the men who robbed him and the vehicle in which they were riding. On the same night men fitting the description given the officers and riding in a vehicle similar to the one described to the officers were apprehended and arrested by the officers. This Court held that the officers had ample evidence of probable cause to authorize the making of the arrest. See also

State v. Tippett, 270 N.C. 588, 155 S.E. 2d 269; *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *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; *McCray v. Illinois,* 386 U.S. 300, 18 L. ed. 2d 62, 87 S. Ct. 1056, for other cases which hold arrests without warrant are proper because the officers had reasonable ground to believe that the person arrested had committed a felony.

[1] In instant case police officers had been furnished a description of defendant. The prosecuting witness had furnished them two numbers of a High Point city tag as being the possible numbers on the car driven by the man who raped her. The numbers were 15339 and 13559. By tracing the number 13559, the officers were led to the address where defendant was found. Upon objection by defendant's counsel to the offering in evidence of statements made by defendant at the place where he was found, the trial judge, in accord with our decisions, excused the jury and conducted a *voir dire* hearing to determine the admissibility of defendant's statements or confession.

On *voir dire,* Officer Stabler testified that when they located defendant he was warned of his constitutional rights by Detective White, who advised defendant that he had a right to remain silent, and that anything he said could be used against him in court; that he had a right to talk to a lawyer for advice before we asked him any questions, and that he had a right to have a lawyer with him during questioning; he also advised him that if he could not afford a lawyer, one would be appointed for him before any questioning if he wished; he was also advised that if he decided to answer questions at that time, he still had a right to stop answering any time until he talked to a lawyer. He was asked if he understood these rights, and he said that he did and he would be glad to talk to the officers.

The officers observed a 1965 dark blue Buick bearing High Point city tag No. 13559 on its front, sitting by the house in which defendant was located. They then asked defendant if he owned the car and if tags on the front were his. Defendant replied in the affirmative to both questions. Defendant was then asked if he would mind going to the Sheriff's office in Thomasville to talk to the officers. He said he would go. In Thomasville, Officer Stabler again warned defendant of his constitutional rights, and defendant said that he understood his rights. Officer Stabler further testified:

"He told us he was the owner of (here objection overruled) a blue 1965 Buick; told us that he worked at Clarendon Industries, English Road, High Point, and that he worked part time at Triad service station on English Street. He stated that last night—this was previous night on September 28—that he had gotten off work approximately 8:15 p. m. and that sometime after 10:00 p. m. he wasn't sure what time, he stopped a woman in a small foreign car. He thought the car was burgundy in color. He said he noticed one of the back wheels and was sure that it was the right one that was wobbling. He said, 'I stopped the car by flashing the lights on my car. I saw a Volkswagen flash their lights too, I told the blond-headed lady about it and told her I would fix it. I used her tools. I had to take the tire loose in the trunk but didn't take it out of the car.'

" 'She was wearing pants, I think, and we went down the bank. She took her pants loose. She had her belt in her hand, and she put her car keys on her belt. Then I took my pants loose and took it out. I think she changed her mind.'

"I asked him at that point, 'Did you feel of her?' He said 'yes.' I asked him, 'Did you kiss her?' He said 'Yes.' He further stated that he did not have intercourse or sexual intercourse with the woman. He did say that they had tussled and rolled on the ground at the bottom of the bank. He said he was on top of her and that he tried to have relations with her but didn't.

"That was the extent of his statement. We placed him under arrest and charged him with rape. Those are the only two statements we took from him."

At the conclusion of the *voir dire,* the court found that both statements made by defendant were "made freely, understandingly, intelligently, and voluntarily after having been warned of his constitutional rights and having been given the Miranda warning." The court thereupon overruled defendant's objection and Officer Stabler testified before the jury as to the statements made by defendant.

The court's findings that the statements made by defendant were voluntary is supported by ample competent evidence, and this Court is bound by the findings of the trial judge. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, *cert.* den. 386 U.S. 911, 17 L. ed.

2d 784, 87 S. Ct. 860; *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581, *cert.* den. 396 U.S. 934, 24 L. ed. 2d 232, 90 S. Ct. 275.

The facts and circumstances surrounding defendant's arrest furnished plenary evidence to support a reasonable belief on the part of the officers that defendant had committed a felony. The very nature of the crime suffices to support a reasonable belief that defendant would evade arrest if not immediately taken into custody.

Defendant relies heavily upon *Davis v. Mississippi,* 394 U.S. 721, 22 L. ed. 2d 676, 89 S. Ct. 1394, and *Morales v. New York,* 396 U.S. 102, 24 L. ed. 2d 299, 90 S. Ct. 291, for support of this assignment of error. In *Davis v. Mississippi,* an aged lady was raped by an assailant who could only be described as a Negro youth. The police procured hand and fingerprints left on a windowsill of the victim's house. Defendant, along with some twenty-four other Negro youths, was fingerprinted at a time when the police had no reasonable cause to believe he was guilty. Fingerprints on the windowsill were later found to be defendant's fingerprints. At defendant's trial, the fingerprints were introduced into evidence over objection. The United States Supreme Court held the fingerprints were erroneously admitted.

In *Morales v. New York, supra,* defendant was arrested without a warrant, and while he was in custody made a confession. The confession was found to be voluntary by the trial court and was admitted into evidence. His conviction was affirmed by the appellate division. On appeal to the New York Court of Appeals, defendant, for the first time, contended that his confession was an inadmissible fruit of illegal detention. On *certiorari,* the U. S. Supreme Court vacated the judgment and remanded the case for further proceedings to determine whether the confession was inadmissible as being fruit of an illegal detention. In remanding, the Court said that by developing the evidence the State might show "that there was probable cause for an arrest or that Morales' confrontation with the police was voluntarily undertaken by him or that the confessions were not the product of illegal detention."

Instant case is easily distinguished from *Davis* and *Morales* for several causes, the most apparent and compelling distinction being that in the cases relied upon by defendant there is total failure by the prosecution to show probable cause for the arrest.

In the case before us there is ample evidence of probable cause for arrest.

[4] We hold that defendant's statements were properly admitted into evidence.

[5] Defendant asserts that his constitutional rights were violated by the admission of in-court identification testimony because prior photographic identification procedures were constitutionally impermissible.

After the prosecuting witness testified that she recognized defendant as her assailant, defendant's counsel objected to the in-court identification. The trial judge thereupon excused the jury and heard the testimony of the prosecuting witness and Officer Mark Stabler. The record does not show that defendant offered evidence on the *voir dire.*

The prosecuting witness testified that after September 28th she had seen defendant three times, including the present trial. The other two times were when preliminary hearings were scheduled. She identified defendant as the man who had raped her. She further testified that on the morning of the 30th of November she, her parents, Officer Stabler and another police officer were present at the Sheriff's Department in Thomasville and at that time Officer Stabler gave her twelve photographs to examine. She looked at them, one at the time, and identified two of the photographs as being photographs of the defendant. She did not remember the race or hair color of the other ten. She did not know at that time that defendant was a member of the Indian race. She had excluded consideration of the Negro race by telling the officers that her assailant was a white person. She saw defendant at the scene for about an hour and a half, and when he was working on her automobile tire a light from her trunk was on his face for about fifteen or twenty minutes. She testified:

> "I did not see the defendant at all from the time I saw him at the scene until I identified him at the preliminary hearing. I never attended any 'lineup.' When I identified the defendant here today in court, it was the result of having seen him at the scene and not any kind of prompting."

She did not see any information on the back of the pictures.

Officer Mark Stabler testified that he exhibited the twelve photographs to the prosecuting witness on 30 September. The

photographs of the defendant were color photographs, made on the night of 29 September 1969. He stated that in selecting the pictures from the files of the Davidson County Sheriff's Department he tried to find a dark headed man with a hollow cheeked face. The pictures had dates showing when they were made on the front, and some of them showed age and height. The warrant was prepared and served on defendant on 30 September 1969, after the pictures were exhibited. At the conclusion of the *voir dire* hearing, the trial judge made and entered the following finding:

> COURT: The jury having been removed from the courtroom upon objection of counsel for the defendant of the in-court identification of the defendant, the defendant thereupon being afforded the opportunity to present evidence in the case; the prosecuting witness, Miss Christina Block, having testified that she identified a photograph of the defendant on September 30, 1969, in Thomasville on or about 11:15 a.m.; that she made identification from a group of twelve photographs; that she identified two of the photographs as being the defendant; that she had no recollection concerning the details and characteristics of the other ten photographs; that at the time identification was made nothing was said to her concerning the identities of any of the parties; that the photograph of the defendant had been taken on September 29, 1969 in Lexington, N. C. by deputy Sheriff Stabler; that of the twelve photographs the Deputy Sheriff Stabler testified that ten of the photographs were black and white; that two were in color; that two of the photographs were of the defendant; that the remaining ten were of other individuals.
>
> The Court finds as a fact that the identification of the defendant from the group of photographs presented to Miss Block by Miss Block was made without intimidation, suggestion, or coercion on the part of anyone; that her identification was made independent of and free from outside influences and the objection of the defendant to the in-court identification of the defendant is overruled."

The questions presented by this assignment of error have been exhaustively considered by the Court in the case of *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583, where Bobbitt, Chief Justice, speaking for the Court, stated:

> "(D)efendants contend, based on *United States v. Wade,* 388 U.S. 218, 19 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, that the photographic identifications on March 6th constituted a 'critical stage' in the prosecution and that, because defendants were not then represented by counsel, their Sixth Amendment rights to counsel were violated. . . .
>
> . . . .
>
> "In our view, the doctrine of Wade and Gilbert *should not be extended* to out-of-court examinations of photographs including that of *a suspect,* whether the suspect be at liberty or in custody. We shall adhere to this view unless and until the Supreme Court of the United States enunciates such an extension of the Wade and Gilbert doctrine."

Chief Justice Bobbitt also set forth definite rules which ordinarily govern the procedure to be followed by a trial judge when defendant objects to an in-court identification on the ground that the in-court identification has been tainted by a prior photographic identification. He stated, *inter alia,* that upon objection and request for *voir dire* hearing

> ". . . (T)he court must determine upon the evidence *then* before it whether 'the photographic identification procedure' was 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' *Simmons v. United States, supra.* Whatever the indicated prior determinations may be with reference to the out-of-court photographic identifications, the court must make an additional factual determination as to whether the State has established by clear and convincing proof that the in-court identifications were of independent origin and were untainted by the illegality, if any, underlying the photographic identifications."

[6] Clearly, the case of *State v. Accor and Moore, supra,* is ample authority to dismiss defendant's contention that he had a constitutional right to counsel at the photographic identification procedures.

The findings by the trial judge that the identification from the group of photographs "was made without intimidation, suggestion or coercion on the part of anyone, and was made independent of and free from outside influences" substantially com-

plies with the requirement that "The court must determine upon the evidence *then* before it whether 'the photographic identification procedure' was 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' *Simmons v. United States, supra.*" *State v. Accor and Moore, supra.* Since defendant in instant case was not illegally in custody, and under this assignment of error his sole contention, which we have found to be without merit, is that the in-court identification was tainted by the photographic procedures, it became unnecessary for the court "to make an additional factual determination as to whether the State has established by clear and convincing proof that the in-court identifications were of independent origin and were untainted by the illegality, if any, underlying the photographic identifications." *State v. Accor and Moore, supra.*"

Assuming, *arguendo*, that there was error in the finding of facts on the *voir dire* and in overruling defendant's objection to the in-court identification, we think this record shows that no prejudicial error could have resulted. The record reveals that the prosecuting witness had opportunity to observe defendant for a period of about an hour and a half in a lighted area, and that for about fifteen or twenty minutes of that time she observed defendant while her trunk light was on his face. The record reveals no discrepancy between any previous description given by the prosecuting witness and defendant's actual description. Further, only a short time elapsed between the criminal act and the photographic identification, and the prosecuting witness had never identified any other person as her assailant. *United States v. Wade*, 388 U.S. 218, 18 L. ed. 2d 1149, 87 S. Ct. 1926. When defendant's photographs were made, he was in legal custody. Moreover, more compelling than any other single fact is that prior to the photographic identification defendant had made a voluntary statement which unquestionably identified him as the prosecuting witness' assailant.

Thus, had we found error in finding facts, making and entering conclusions of law and ruling on the admissibility of the identification testimony challenged by this assignment, this record discloses that the State has shown beyond a reasonable doubt that such error did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 17 L. ed. 2d 705, 710-711, 87 S. Ct. 824, 828. This assignment of error is overruled.

Defendant assigns as error the failure of the trial judge to charge the jury on the lesser included offense of assault on a female.

[7] There is no merit in this assignment of error because the evidence does not warrant a verdict of guilty of simple assault on a female. Absent evidence which will support a verdict, the trial judge is not required to charge on the lesser included crime. *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194; *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738. Further, an examination of this record shows that the trial judge adequately charged on the lesser included offense of assault on a female.

Neither do we find merit in defendant's contention that the trial court committed prejudicial error by admitting hearsay testimony. Officer Mark Stabler testified: "I had the High Point city tag, the two numbers they gave me; at that time I called High Point Police department and had a check run on the license number; one of the numbers, 13559, came back to Mr. Ted Jacobs."

[8] The admission of testimony over objection is harmless when the facts sought to be established are admitted by the defendant. *State v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804.

Defendant admitted ownership of the vehicle bearing High Point city tag No. 13559. The only possible prejudice to defendant by admission of the challenged evidence would be to establish ownership of the motor vehicle bearing High Point city tag No. 13559.

In the trial of the case below we find

No error.

STATE OF NORTH CAROLINA v. ERNEST McNEIL

No. 4

(Filed 14 October 1970)

1. Rape § 7— sufficiency of jury verdict

In this rape prosecution, there was no error in the jury verdict finding defendant "guilty as charged with a recommendation of life imprisonment" and judgment of life imprisonment pronounced thereon as certified by the clerk of superior court as a second addendum to the record.

2. **Jury § 5— capital offense — method of jury selection — 12 veniremen placed in jury box for examination**

In this rape prosecution, there was no error in the method of jury selection whereby 12 veniremen were placed in the jury box and examined by the State, the State made its challenges for cause and peremptory challenges prior to defendant's examination of any of the veniremen, the defendant then examined the 12 veniremen passed by the State and made challenges for cause and peremptory challenges, and the State was permitted to examine and challenge replacements for veniremen excused because of challenge by defendant before defendant was permitted to examine and challenge such veniremen, defendant having had full opportunity to confront, examine and challenge or pass each individual juror.

3. **Rape § 5 — sufficiency of evidence for jury**

In this rape prosecution, the State's evidence, including the victim's identification of defendant as her assailant and testimony by two witnesses that they saw defendant run from the crime scene, *held* sufficient for the jury.

4. **Rape § 4— medical testimony of presence of male sperm — admissibility**

In this rape prosecution, the trial court did not err in the admission of medical testimony that tests made disclosed the presence of male sperm in the victim's vagina within a short time after the assault, where a physician testified that he examined the victim, obtained the specimen, made the smear, placed the identifying mark on the slide, and placed the slide in the hospital records, and a pathologist testified that two days later he examined and evaluated the smear and that he found the presence of male sperm, the evidence tending to show penetration, one of the elements of rape.

5. **Rape § 4— evidence that rape victim became pregnant**

In this rape prosecution, the trial court did not err in allowing the prosecutrix to testify that as a result of the unlawful act of intercourse she became pregnant and gave birth to a baby, since such evidence tended to prove penetration, one of the essential elements of rape.

6. **Criminal Law § 66— admissibility of in-court identification of defendant by rape victim — prior identification at school house**

In this rape prosecution, the trial court properly concluded that the victim's in-court identification of defendant was not tainted or rendered inadmissible by reason of her having seen defendant in the presence of officers at a school house.

7. Rape § 6— failure to submit lesser included offenses

In this rape prosecution, the trial court did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape and assault on a female by a male person, there being no evidence of such lesser included offenses.

APPEAL by defendant from *McKinnon, J.*, January 5, 1970 Regular Criminal Session, CUMBERLAND Superior Court.

In this criminal prosecution, the defendant, Ernest McNeil, was tried on a bill of indictment, proper in form, charging the capital felony of rape. When arraigned, the defendant pleaded not guilty. After the plea, the court entered the following order:

"The court directed that the selection of the jury be in accordance with the following written instructions:

State of North Carolina vs. Ernest McNeill, 69 CR 5423.

The Clerk shall read over the names of the entire jury panel in the presence and hearing of the defendant and his counsel.

The Clerk shall call from the panel twelve to have seats in the jury box. The State shall then conduct its *voir dire* examination of those twelve and shall make any and all challenges for cause against any of the 12, and then it may make its peremptory challenges. If the court shall allow a challenge for cause, or if the State shall excuse a juror peremptorily, the Clerk shall call a replacement into the box before the solicitor completes his examination or challenge of any other of the 12. When the State is satisfied with the 12 in the box, the Clerk shall then tender the 12 in the box to the defendant. The defendant shall then conduct his *voir dire* examination of those 12. The defendant shall then make any challenges for cause against any of the 12 and shall then make any peremptory challenges against any of the 12.

If by reason of cause of peremptorily a juror shall leave the box during the course of the defense counsel's examination of the jurors, the clerk shall not immediately recall a replacement to the box, but shall wait until the defendant shall state to the court that he is satisfied with those of

> the 12 which remain after they have once been tendered him by the State.
>
> If there have been no members of the 12 removed, the clerk shall proceed to empanel the jury. If anyone for cause or peremptorily shall have been removed by the defendant, then after remaining ones have been stated by the defendant to be satisfactory with him, he shall have replacements called for the vacant seats by the clerk from the panel at large.
>
> Then the State must by virtue of G.S. 9-21(b) be allowed first to examine any and all replacement jurors in the box and make challenges both for cause and peremptorily before the defendant shall be allowed to question any replacement. At all times the State is the party to be first satisfied with any given juror before he shall be ever tendered to the defendant. Those jurors which shall have been tendered to a defendant by the State and not challenged for cause or peremptorily by the defendant, may not thereafter be challenged by the defendant. The defendant may not stand any at the foot of the list or make any reservation of any challenge to await and see whom the replacement shall be. Once the defendant has passed, he has passed for all purposes.
>
> The jury as finally passed shall be empaneled according to the traditional procedure.
>
> The defendant objected to this procedure, the objection was overruled by the court, and the defendant excepted. This constitutes defendant's EXCEPTION NO. 1."

After the selection of the jury in accordance with the court's directive, the defendant excepted to the manner of selection. He did not interpose any objection to any individual juror who was selected. He did not exhaust his peremptory challenges. After the jury was empaneled, the State introduced evidence as herein summarized or quoted.

On February 26, 1969, the victim of the alleged assault, Theresa Miles, was 15 years of age. She was a student at Washington Drive Junior High School in the City of Fayetteville. On the morning of each school day, she rode to the school in a

relative's automobile. However, she walked home at the end of the school day.

After school on February 26, 1969, Theresa Miles and two school companions started to their respective homes on foot. Their paths home pass to the rear of Fayetteville College, through a park, along the railroad track, either side of which was covered with trees, bushes and undergrowth. The area was described in the evidence as a park. Theresa and her two companions, who lived near each other, separated in the park. Theresa continued on alone towards home. At a point near a clay pit in the park, a young man whom she did not know passed her, then turned and grabbed her from behind, pulled her into the bushes, struck her in the face with his fist, threatened her with an open knife, and raped her.

It so happened that two young boys, Lynwood Thomas, aged 13 and Elijah Morrison, aged 11, came to the park with a shovel and bucket to gather dirt from the clay pit. They heard a girl's voice cry "stop." They heard a commotion and saw movement in the bushes. Morrison threw a stick in the direction of the movement. Immediately the defendant arose from the ground and fled. The boys were well acquainted with Ernest McNeil and identified him as the man they saw run from the scene.

Theresa immediately emerged from the same place, crying, part of her clothes were off, she was barefooted, and had mud and pine needles in her hair and on her clothing. She told them she had been raped and asked them to go home with her. This they refused to do. When she got home, she reported what had happened. The officers were notified and the victim was taken to the hospital. The alarm went out and the search began. Soon thereafter, the officers interviewed Lynwood Thomas and Elijah Morrison. Both told the officers that Ernest McNeil ran away from the scene.

At the hospital, Theresa was examined by Dr. Hugh Equez, who testified that she had bruises on her hip, about her head, scratches on her legs; that she was agitated and upset. He made a vaginal examination which disclosed fresh lacerations and fresh blood. The doctor expressed the opinion that prior to the recent injury, Theresa had not had intercourse. He made a smear, swabbed from the victim's vagina, marked the slide, and placed it in the hospital files for examination by a Pathologist. Dr.

Steffe, admitted to be an expert, examined the slide on February 28, 1969 and testified he found the presence of male sperm. The defendant's objection to the testimony was overruled.

After talking with Lynwood Thomas and Elijah Morrison on the day of the assault, the officers began searching for Ernest McNeil. At the time of their first call, he was not at home. They left a message that they wanted to see him at police headquarters. He did not report. On the following morning, they found him at home. At the time, he was a prime suspect though the officers refrained from arresting him until Theresa had an opportunity to see him. He willingly went with them to the school. When Theresa saw him through a window, she said, "That is him." Thereafter, they took him to police headquarters, obtained and served a warrant charging him with rape.

Lynwood Thomas and Elijah Morrison saw the defendant leave the scene and testified that Theresa was crying and asked them to go home with her. The officers went to the clay pit in the park where they found Theresa's shoes, her pocketbook and two school books.

Theresa testified that as a result of the unlawful act of intercourse, she became pregnant and gave birth to a baby, which at the time of the trial was two months old. In the opinion of the doctor, the child was born within the normal period of gestation after the date of the assault. The evidence as to the birth of the child was admitted over defendant's objection.

The defendant's counsel announced that the defendant would object to Theresa Miles' evidence tending to identify the defendant as her assailant. The attorneys agreed, however, that the admissibility of her evidence would be determined after the State had completed its case. When the State's evidence was concluded, the court conducted a *voir dire* in the absence of the jury. The court took into account the evidence already introduced and the additional evidence of the defendant who testified that the officers never advised him that he had the right to counsel at the time they took him to the school for the confrontation. The court made findings of fact, and adjudged that Theresa's in-court identification of the defendant was admissible.

At the conclusion of the findings, the defendant made a motion to exclude all of the testimony of identification given by Theresa Miles. The court offered to instruct the jury not to consider the testimony of Theresa Miles concerning the identifica-

tion at the school. The defendant objected unless the court excluded her in-court identification. Defense counsel stated, "I am asking that you not give them that instruction (to disregard the identification at the school). My motion was to strike all in-court identification. I feel that it would be prejudicial to strike a portion and to leave the rest in."

At the conclusion of the State's evidence, the defendant elected not to offer testimony. The judge charged the jury to return one of three verdicts: (1) guilty of rape; (2) guilty of rape with a recommendation that the punishment be imprisonment for life in the State's prison; (3) not guilty. The jury returned a verdict which the court has finally certified as follows:

> "FOREMAN: We find the defendant guilty as charged, with the recommendation of life imprisonment."

The jury was polled at the request of the defendant's counsel and each juror answered that he found the defendant Ernest McNeil guilty of rape with a recommendation of imprisonment for life in the State's prison. From the judgment of life imprisonment, the defendant appealed.

Robert Morgan, Attorney General, Sidney S. Eagles, Jr., Assistant Attorney General for the State.

Downing, Downing and David by Ray C. Vallery for the defendant.

HIGGINS, Justice.

At first this Court had difficulty in ascertaining the precise verdict rendered by the jury in this case. The original record filed here cites: "The jury return as its verdict that the defendant, Ernest McNeil, is guilty of the charge." The record further recites: "The jury returned a verdict of guilty with a recommendation of life imprisonment." Subsequent to the filing of the original record, but before the oral argument, an addendum to the record was filed. The addendum contained the following: "The jury, for its verdict, returned into open court and announced that they had found the defendant guilty of rape with a recommendation of mercy. Upon the coming in of the verdict of guilty of rape, counsel for the defendant moved that the jury be polled. Whereupon the jury was duly polled, each juror entered for his verdict that he found the defendant guilty of rape." Both the original record and the first addendum were

certified by the clerk as correct. It appears the original record of the case on appeal was served on the solicitor by defense counsel. There being no exception or counter-case, the clerk certified the record which defense counsel had prepared and filed.

[1] In view of the gravity of the case, this Court requested the clerk of Cumberland Superior Court to certify a correct record, according to the minutes, approved by the presiding judge. That record, as certified in a second addendum, discloses the following verdict returned by the jury: "We find the defendant guilty as charged with a recommendation of life imprisonment." The jury was polled and the record shows each juror assented to the verdict. We discover no error in the verdict and judgment thereon as certified in the second addendum.

[2] The defendant's exception to the selection of the trial jury in the manner required by the court's directive is not sustained. The defendant had full opportunity to confront, to examine and to challenge or pass each individual juror. The record does not disclose any objections by the defendant to any member of the trial jury or that he had exhausted his peremptory challenges. This Court, in *State v. Perry* filed this day, has passed on a similar objection to the method of jury selection. The authorities supporting the method of selection are cited in the Perry case.

[3] The defendant's challenge to the sufficiency of the evidence to go to the jury and to support the verdict are utterly without merit. The victim's testimony at the trial made out a strong case. She was making outcry at the time the two boys arrived at the clay pit where the offense occurred. When Elijah Morrison heard the outcry and saw movement in the bushes, he threw a stick in the direction of the movement. The defendant immediately raised up from the ground and ran. Theresa Miles, the victim, came out crying, with mud and pine needles on her clothing and in her hair, and without her shoes. She told how her assailant had grabbed her and dragged her through the clay pit and into the bushes, where she struggled and lost her shoes. Her story and her identification were corroborated by many circumstances and contradicted by none. The officers found the place in the bushes where the weeds and pine needles were mashed down.

This case is unusual in that two boys, Lynwood Thomas and Elijah Morrison, happened to appear upon the scene during the assault. They knew Ernest McNeil. Both identified him as the man who ran from the scene. They reported to the officers what

they had observed. The identity of the defendant was well established by the information in the hands of the officers.

[4, 5] The defendant contends the court committed error in overruling his objection and permitting Drs. Equez and Steffe to testify that the tests made disclosed the presence of male sperm in the victim's vagina within a short time after the assault. Dr. Equez made the examination, obtained the specimen, made the smear, placed the identifying mark on the slide, and then placed the slide in the hospital records. Two days later, Dr. Steffe, a Pathologist, examined and evaluated the smear, and testified as to what the examination disclosed. The evidence tended to show penetration, one of the elements of rape. To like effect was the evidence of pregnancy which was admitted over defendant's objection. The defendant's plea of not guilty placed upon the State the burden of proving beyond a reasonable doubt all essential elements of the offense charged. Evidence tending to prove any essential element of that offense was properly admitted. *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839; 62 A.L.R. 2d 1080, and cases cited.

[6] The defendant denies the admissibility of the victim's evidence identifying him as her assailant. Specifically, he contends his constitutional right to a lawyer was violated by the officers in that they took him to the school house where one officer stood by him on the steps near the school and another officer took Theresa to a window, where she observed him and said, "That is him." Admittedly he was not represented by counsel and had not waived his right to counsel at that time. He was a suspect, but not under arrest. He consented to accompany the officers. He contends further that his in-court identification by Theresa was tainted by the prior identification at the school house and the in-court identification should have been excluded.

In passing on the admissibility of the victim's evidence of identification, defense counsel and the solicitor seem to have agreed that the victim should be permitted to give her identifying evidence before the jury. Then after the State had closed its evidence, the court, in the absence of the jury, should conduct a further hearing on the admissibility of the identification and determine whether the evidence should remain in or be excluded. (The court does not recommend this procedure because evidence later ruled incompetent had been heard by the jury.) However, the defendant does not contend he was prejudiced by the agreement and the procedure followed.

At the conclusion of the *voir dire* in the absence of the jury, the court expressed doubt as to the admissibility of Theresa's identification at the school house (which the jury had already heard) on the ground the defendant was not represented by counsel and had not waived his right to counsel. However, the court offered to withdraw from the jury the evidence that she identified him at the school house. The defendant permitted the evidence to be introduced but moved that all of Theresa's evidence of identification be withdrawn from the jury. Defense counsel objected to the withdrawal of the identification made at the school house unless the court would also withdraw the in-court identification. This the court declined to do. At the conclusion of the *voir dire*, the court found the facts and properly concluded the in-court identification was not tainted or rendered inadmissible by the procedure at the school house.

[6] We hold the trial court did not commit error in admitting the in-court identification. The officers took the defendant to the school for Theresa to see him before he was arrested and before a warrant was issued. At the time, the officers had Theresa's description of her assailant, though she had never seen him before and did not know his name. They also had the statements of Lynwood Thomas and Elijah Morrison that they knew the defendant and that when they came to the clay pit in the park they heard a feminine voice crying out "stop" and saw movement in the bushes. Elijah threw a stick in the direction of the movement, whereupon the defendant came out running and Theresa came out crying. Pine needles were in her hair, mud was on her clothing, and she had lost her shoes.

On the day following the assault, the officers took the defendant to the school house for Theresa to see him. At that time, it would seem the officers had abundant evidence to make out a case of rape against the defendant. However, to guard against charging one whom the victim might exonerate, they requested Theresa to look at the defendant before the warrant was sworn out. The confrontation at the school was to guard against a case of mistaken identity by the two boys, Lynwood Thomas and Elijah Morrison. Theresa's identification was in corroboration of the evidence the officers already had from the two boys. Her identification was not necessary to warrant holding the defendant, but if she failed to identify him, the failure could be beneficial to him. Theresa's identification at the school house was only a part of the identifying evidence. She did not know the

defendant. She had not seen him before. However, the two boys lived near him. They knew him well, and positively identified him. The identifying evidence, in its totality, more than met the test laid down in *Stovall v. Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967. All the evidence of identification (none of which is contradicted) does not even suggest a case of mistaken identity.

General suspicion of identification by the victim if the suspect is in the custody of officers, or if he is in jail, or even if his picture is taken from a rogue's gallery is not altogether warranted. Officers are under oath to discharge their duties honestly and according to law. It is their duty to discover and to apprehend the guilty. It is equally their duty to shield the innocent. The seizure of a suspect without probable cause and merely for the sake of having someone in custody is out of bounds and will react to the discredit of the officers. There is both credit and satisfaction, however, in getting "the right man." The opposite is true if they bring in the wrong one. In the absence of evidence to the contrary, may the appellate courts not assume the officers acted with reasonable caution and with good intentions? Likewise, may they not assume the victim of an atrocious crime is interested in the apprehension and punishment of the "right man"? If the victim once identifies the wrong man, the later identification of the right man will be tarnished. Why should the appellate courts indulge the presumption that the victim's in-court identification is not reliable and should be excluded in cases where the witness had made a prior identification, even if the suspect was in custody? What difference does it make if the identification was made while he was in custody, in a line up, or in a rogue's gallery picture?

In this case the confrontation at the school was for the purpose of confirming the identification made by the two boys. *Stovall v. Denno, supra.* The main issue is the guilt or innocence of the suspect. To exclude the evidence of the victim identifying him because she had previously seen him in the presence of officers is a case of the tail wagging the dog.

The trial court, out of an abundance of caution, offered to strike the evidence that Theresa saw and identified the defendant at the school house. Although the court offered to strike this evidence, however, in deference to defense counsel's request, the court left it in the case. The defendant requested the court not to strike the evidence of identification at the school house

unless the in-court identification was also stricken. The court properly denied the motion to exclude the in-court identification. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581.

[7] As a final objection to the trial, the defendant contends he should be permitted to have another go at the jury because the trial judge failed to submit the lesser included offenses: assault with intent to commit rape, and assault on a female by a male person. The uncontradicted evidence made out a case of rape. The court charged the jury to return a verdict: (1) guilty of rape; (2) guilty of rape with a recommendation that punishment be imprisonment for life in the State's prison; or (3) not guilty. Failure to find the defendant guilty of (1) or (2) required a verdict of not guilty. The defendant was not prejudiced by the charge which required the jury to acquit of all included lesser offenses. There was no evidence of the lesser included offenses, and the court was correct in refusing to permit the jury to consider them. 6 Strong's N. C. Index 2d, Rape, Sec. 6, p. 578; *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *State v. Brown,* 227 N.C. 383, 42 S.E. 2d 402.

After careful review of the trial and all objections thereto presented by exceptions and assignments of error, we find

No error.

STATE OF NORTH CAROLINA v. MILFORD PERRY

No. 7

(Filed 14 October 1970)

1. **Jury § 5; Constitutional Law § 29— right to examine and challenge prospective jurors**

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him.

2. **Jury § 5—capital offenses — method of jury selection — 12 veniremen placed in jury box for examination**

In this prosecution for the capital crimes of first degree burglary and rape, defendant was not prejudiced by the method of jury selection whereby 12 veniremen were placed in the jury box and examined by the State, the State made its challenges for cause and peremptory challenges prior to defendant's examination of any of the veniremen, the defendant then examined the 12 veniremen passed by the State and made challenges for cause and peremptory challenges, and the State was then permitted to examine and challenge replacements for veniremen excused because of challenge by defendant before defendant was permitted to examine and challenge such veniremen, it not being required in any criminal case, capital or otherwise, that each prospective juror be separately sworn and separately examined, and defendant having had full opportunity to confront, examine and challenge or pass each individual juror.

APPEAL by defendant from *Copeland, S.J.*, February, 1970 Session, PASQUOTANK Superior Court.

In these criminal prosecutions, the defendant, Milford Perry, was indicted, arraigned, tried and convicted of two capital felony charges. The cases were consolidated and tried together. The indictment in No. 1422A charged that on the night of September 24, 1969, the defendant, in the nighttime, feloniously and burglariously entered the dwelling house occupied by Emily J. White; that his breaking and entering was for the purpose of committing the felony of rape. In No. 1422B, the bill charged the defendant with the rape of Emily J. White.

The officers, on September 25, the day following the commission of the offenses, arrested the defendant on a warrant charging the two capital felonies. Upon a showing of indigency, the court appointed Frank B. Aycock, Jr. attorney for the accused. The defendant waived preliminary hearing and was ordered held without bail for the action of the Grand Jury.

After arraignment and pleas of not guilty, the court ordered a special venire consisting of 100 jurors drawn from the regular jury box. Upon the return of the writ of venire, the court entered the following order:

> "BY THE COURT: Let the record show that the jurors will be chosen in the manner as I show you here (addressing the Court Reporter), and make this a part of the record.
>
> * * *
>
> 'The Clerk shall call from the panel twelve to have seats in the jury box. The State shall then conduct its *voir dire* examination of those twelve and shall make any and all challenges for cause against any of the 12, and then it may make its peremptory challenges. If the Court shall allow a challenge for cause, or if the State shall excuse a juror peremptorily, the Clerk shall call a replacement into the box before the Solicitor completes his examination or challenge of any other of the 12. When the State is satisfied with the 12 in the box, the Clerk shall then tender the 12 in the box to the defendant. The defendant shall then conduct his *voir dire* examination of those 12. The defendant shall then make any challenge for cause against any of the 12, and shall then make any peremptory challenges against any of the 12. If by reason of cause or peremptorily a juror shall leave the box during the course of the defense counsel's examination of the jurors, the Clerk shall not immediately recall a replacement to the box but shall wait until the defendant shall state to the Court that he is satisfied with those of the 12 which remain after they have once been tendered him by the State. If there have been no members of the 12 removed, the Clerk shall proceed to empanel the jury. If anyone for cause or peremptorily shall have been removed by the defendant, then after remaining ones have been stated by the defendant to be satisfactory with him, he shall have replacements called for the vacant seats by the Clerk from the panel at large. Then the State must by virtue of G.S. 9-21(b) be allowed first to examine any and all replacement jurors in the box and make challenges both for cause and peremptorily before the defendant shall be allowed to question any replacement. At all times, the State is the party to be first satisfied with any given juror before he shall be ever tendered to the defendant. Those jurors which shall have been tendered to a defendant by the State

and not challenged for cause or peremptorily by the defendant, may not thereafter be challenged by the defendant. The defendant may not stand any at the foot of the list or make any reservation of any challenge to await and see whom the replacement shall be. Once the defendant has passed, he has passed for all purposes.'

OBJECTION by the defendant.

OBJECTION OVERRULED.

EXCEPTION by the defendant. This was defendant's Exception #4."

After the order of consolidation was entered in the trial court, the jury was selected in accordance with the court's directive. The defendant excepted and upon the exception based his Assignment of Error No. 3.

The State's evidence made out a case for the jury on both charges. The victim positively identified the defendant as the person who broke into her dwelling house in the nighttime and forcibly and against her will committed upon her the crime of rape. During her resistance, she clawed and scratched the defendant about the face and body. This she reported to the officers whom she called immediately and gave a description of her assailant. The next day the defendant was arrested. He was fully identified by the victim and upon arrest was found with fresh scratches on his face and body. The examining officers found his identifying palm print on the door which had been forced open and by which the assailant entered the victim's bedroom.

At the close of the State's evidence, the defendant called his wife and another who lived in an adjoining apartment whose evidence tended to indicate the defendant might have returned to the defendants apartment at a time prior to that fixed by the victim during which the offenses charged were committed. The defendant himself did not testify.

After hearing all the evidence, the argument of counsel and charge of the court, the jury returned in each case a verdict of guilty with a recommendation that the defendant's punishment be imprisonment for life in the State's prison. From the judgments of life imprisonment, the defendant appealed. After first giving notice of appeal, the defendant undertook to with-

draw the plea. Thereafter, he filed with this Court a petition that his appeal be heard. The petition was allowed.

Attorney General Robert Morgan, Assistant Attorney General Millard R. Rich, Jr., for the State.

Frank B. Aycock, Jr. for the defendant.

HIGGINS, Justice:

The defendant's able trial counsel requests this Court to review the record of the trial and to give the defendant the benefit of any error disclosed in the record. However, by brief and by oral argument, the defendant relies for a new trial on his Assignment of Error No. 3, which presents this question: "Did the trial judge commit prejudicial error in denying the defendant the right to the selection of the trial jury according to North Carolina custom and practice?"

[1, 2] Counsel for the defendant argued here the defendant was prejudiced in the jury selection by the failure of the court to require that each prospective juror be separately sworn and separately examined, touching his fitness to serve on the trial panel. He cites as authority this Court's opinion in *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886. Admittedly the practice usually, but not always, followed in selecting the trial jury in a capital case is correctly stated in *Roseboro.* The practice was alluded to in that case for the purpose of disclosing the wide range of inquiry allowed the parties before requiring them to pass on the acceptability of each juror. In *Roseboro* the jury selection covered 416 pages of the trial record. This Court's discussion was not intended as fixing any rule for jury selection and it must be noted that in general practice the method followed in *Roseboro* is frequently criticized as being unduly wasteful of the court's time and fails to accomplish any useful purpose. Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. The actual conduct of the trial must be left largely to the sound discretion of the trial judge so long as the defendant's rights are scrupulously afforded him.

[2] Under the trial court order, the method of selection offered the defendant full opportunity to exercise all his constitutional

rights. The panel selected did not contain any juror to which he had objection. He fails to allege that he had exhausted his peremptory challenges.

We do not know of any rule or authority which requires the North Carolina trial court in any criminal case, capital or otherwise, to follow the *voir dire* procedure in jury selection which the Court has described in *Roseboro.* The federal rule with respect to jury selection in criminal cases provides:

> "(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper." Citing *Pointer v. United States,* 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894) ; *Hanson v. United States,* 271, F. 2d 791 (9th Cir., 1959).

The following is quoted from Matthews 1 "How to Try A Federal Criminal Case," Section 399, page 550:

> "The fundamental rules governing the selection of trial jurors appear in the following oft-quoted language of Mr. Justice Harlan, in *Connors v. United States* (158 U.S. 408, 39 L. ed. 1033, 15 S. Ct. 951) : 'It is quite true, as suggested by the accused, that he was entitled to be tried by an impartial jury, that is, by jurors who had no bias or prejudice that would prevent them from returning a verdict according to the law and evidence. It is equally true that a suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion . . . . "

Apparently, the purpose of Judge Copeland's order was to reduce the time consuming procedure so apparent in *Roseboro.* Assignment of Error No. 3 is not sustained. *State v. Peele,* 274

N.C. 106, 161 S.E. 2d 568; *Pointer v. United States, supra; State v. Munch,* 57 Mo. App. 207.

In the trial, verdicts and judgment, we find

No error.

THOMAS SULLIVAN ATKINS v. EDDIE LEE MOYE AND BARNEY BURKE TRANSFER COMPANY, INC., A CORPORATION

No. 16

(Filed 14 October 1970)

1. Automboiles § 88— automobile accident — contributory negligence — issue of plaintiff's intoxication

Issue of plaintiff's contributory negligence in driving under the influence of intoxicating liquor at the time when plaintiff's automobile collided into the rear of defendant's truck which had stopped on the highway, *held* properly submitted to the jury, where (1) defendant testified that plaintiff had the odor of alcohol on his breath; (2) a highway patrolman testified that he detected the odor of alcohol in plaintiff's car and found under the front seat a pint bottle containing a small amount of whiskey; and (3) there was evidence that plaintiff, traveling at 30 mph, failed to see the truck until he was ten feet away, notwithstanding the presence of lights and reflectors on the truck.

2. Negligence § 26— contributory negligence — burden of proof

A defendant who asserts plaintiff's contributory negligence as a defense has the burden of proving it, and his contention that certain acts or conduct of the plaintiff constituted contributory negligence should not be submitted to the jury unless there is evidence from which such conduct might reasonably be inferred.

3. Negligence § 34— contributory negligence — submission to jury — sufficiency of evidence

A defendant is entitled to have any evidence tending to establish contributory negligence considered in the light most favorable to him and, if diverse inferences can reasonably be drawn from it, the evidence must be submitted to the jury with appropriate instructions as to its bearing upon the issue.

4. Automobiles §§ 50.5, 127— driving under the influence — evidence of intoxication

An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking; however, an odor, standing alone, is no evidence that he is under the influence of an intoxicant, and the mere fact that one has had a drink will not support such a finding.

5. **Automobiles § 127— driving under the influence — prima facie case**

The fact that a motorist has been drinking, when considered in connection with faulty driving or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138.

6. **Automobiles § 90— automobile accident case — instruction on plaintiff's intoxication**

In a personal injury action arising out of a collision between plaintiff's automobile and defendant's truck, the trial court erred in failing to instruct the jury what effect a finding of plaintiff's intoxication at the time of the collision would have upon the issue of plaintiff's contributory negligence. G.S. 1-180.

7. **Automobiles § 50.5— automobile accident — effect of motorist's intoxication**

Mere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision; his condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was a proximate cause of the collision.

8. **Automobiles § 50.5— intoxication and negligence — consideration of evidence**

Evidence tending to show that the operator of a motor vehicle was under the influence of liquor at the time of the accident is a pertinent circumstance for the jury to consider, not as conclusively establishing his negligence as a proximate cause of the collision if he was under the influence, but in determining whether he was capable of keeping a proper lookout, of maintaining proper control over his automobile, and of coping with highway and weather conditions in the manner of the reasonably prudent person.

Justice HIGGINS concurring in result.

Defendants appeal under G.S. 7A-30(2) from the decision of the Court of Appeals which awarded plaintiff a new trial for errors assigned in the trial conducted by *Snepp, J.*, at the 16 June 1969 Session of BUNCOMBE. The decision is reported in 8 N.C. App. 126.

This action is for damages resulting from a collision of motor vehicles. About 10:00 p.m. on 11 December 1964, plaintiff (aged 51) was driving his Pontiac automobile between Canton and Asheville. He was traveling easterly in the southernmost lane of U. S. Highway 19-23, a three-lane, blacktop highway. Rain was falling, and there were patches of fog on the highway. Visibility was poor. At a point about 208 feet east of the intersection of No. 19-23 with Interstate 40, and about 400 feet west of the driveway into his home, plaintiff collided with the rear end of a tractor-trailer owned by defendant Transfer Company

and operated by its employee, defendant Moye. The 38-foot trailer, loaded with lumber, was stopped in plaintiff's lane of travel.

In the collision plaintiff sustained serious personal injuries and property damage which, he alleges, were proximately caused by defendants' negligence in that (1) the tractor-trailer was parked on the paved portion of the highway in the nighttime without warning flares or lanterns in violation of G.S. 20-161; and (2) defendants failed to display on the unit the lights and reflectors required by G.S. 20-129.1 and G.S. 20-134. Answering the complaint, defendants denied the allegations of their negligence and alleged that the collision was caused solely by plaintiff's negligence in that (1) he was driving at an excessive speed considering the darkness and weather conditions; (2) he was operating his automobile at a time when his faculties were appreciably impaired by the consumption of intoxicating beverages; and (3) he failed to keep a proper lookout and to have his car under proper control. Defendants also pled these specifications as contributory negligence.

Plaintiff's testimony tended to show: At the time of the collision he was traveling on a straight road, slightly upgrade, at a speed of about 30 MPH. His lights were on dim. He was temporarily blinded by the bright headlights of a car going west. Just as the car passed him, he saw a dark mass about ten feet away. It was the back end of defendants' trailer standing in his lane of travel with no lights, reflectors, or flares of any kind on it or back of it. The trailer was heavily loaded with lumber. The collision rendered plaintiff unconscious. He remained semiconscious during four of his fourteen days in the hospital.

Defendant Moye's testimony tended to show: On the day of the collision he left Atlanta, Georgia, about 3:00 p.m., en route to Hickory, North Carolina, with a load of lumber. He was driving defendant Transfer Company's International tractor and 38-foot, flatbed trailer. Moye (aged 43) had driven about 200 miles when he passed the intersection of highways 19-23 and I-40. As he started upgrade just west of plaintiff's driveway, the tractor-trailer brakes "froze" as a result of the dampness. He pulled to the right until the front end of the tractor began to lean. Then, fearing that the load of lumber would turn over, he stopped with about one-half of the trailer still on the traveled portion of the highway. He turned on the two "trouble

lights," which began blinking behind the trailer. In addition to these, there were four or five other lights burning on the back of the trailer. He then placed two reflectors behind the trailer, one at the rear end and the other 25 feet behind it. He had no fusees, lanterns, or flares of any kind. As he prepared to get under the trailer to adjust the brakes he saw plaintiff's car approaching about 400 feet away. He "dialed" with his flashlight and, when the car did not break its speed, Moye ran across the highway to the north just before plaintiff's Pontiac "rammed into the back of the trailer." No westbound cars had passed before Moye saw plaintiff's automobile. After the collision a passing motorist summoned Patrolman Kincaid. Moye said, "When the patrolman came, I noticed a whiskey bottle in Mr. Atkins' car. By me getting up to him I could easily smell the odor on his breath, the odor of whiskey."

Patrolman Kincaid, who investigated the accident, testified: He arrived at the scene of the collision about 10:15 p.m. and found both plaintiff's Pontiac and defendants' tractor-trailer on highway No. 19-23. Plaintiff was unconscious in his automobile. The trailer was entirely within the eastbound lane; no part of it was off the traveled portion of the highway. The tractor "was partially angled toward the right shoulder." Kincaid saw seven burning lights on the rear of the tractor-trailer unit, but there were no flares or reflectors on the highway. Moye told Kincaid that his brakes "froze" and that he had just alighted from the tractor when plaintiff hit the trailer. At the point of impact, visibility was unobstructed for several hundred feet to the west. Kincaid, who was "in close proximity" to plaintiff, "did not observe any odor whatever of an alcoholic nature on his person." He did observe such an odor in the car, and he found "a small portion of a pint" on the floorboard under the front seat. The cap was on the bottle. It was possible that some portion of the liquor had leaked out; Kincaid could not tell about that. On his accident report he noted that plaintiff had been drinking, but whether he "had evidence to substantiate this (he) wouldn't possibly say." After the patrolman had completed his investigation at the scene and an ambulance had taken plaintiff to the hospital, he directed Moye to follow him in the tractor-trailer to a filling station a short distance away. There Moye parked his unit and went with the patrolman to the hospital. As soon as he got into the patrol car Moye fell asleep and slept until they arrived at the hospital.

The ambulance attendent who removed plaintiff from his car testified that he detected no odor of alcohol upon him. Plaintiff's wife, who kissed him when she arrived at the hospital about 11:00 p.m., also said she detected no odor of alcohol upon him. Plaintiff testified that he had drunk no intoxicating beverages of any kind that day. Approximately three minutes before the collision he had left the Owl Drive-in where he had had a cup of coffee and visited for thirty minutes with Ernest Scaggs, the proprietor. Scaggs testified that he did not sell beer; that plaintiff was perfectly sober and normal when he left his place; and that he detected no odor of alcohol about him. According to plaintiff, the bottle containing the small amount of whiskey which the patrolman found in his car had been under the front seat for ten days prior to the accident. The bottle, with that amount of whiskey in it, had been given to him. He had forgotten about it and had never drunk any part of its contents.

The court submitted to the jury the usual issues of negligence, contributory negligence, and damages. The jury answered both the issue of defendants' negligence and plaintiff's contributory negligence in the affirmative. From the judgment dismissing the action plaintiff appealed to the Court of Appeals, assigning errors in the charge. Judges Morris and Vaughn ordered a new trial upon grounds which will be hereinafter discussed in the opinion. Chief Judge Mallard dissented, and defendants appealed.

Bennett, Kelly and Long for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes and Hyde for defendant appellant.

SHARP, Justice.

The trial judge instructed the jury that by statute, G.S. 20-138, it is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle upon the highways within this State and that a violation of this statute is negligence *per se. Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1. He explained that a person is under the influence of intoxicating liquor within the meaning of the statute when he has drunk a sufficient quantity of intoxicating beverage to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. *State v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688.

Cf. State v. Painter, 261 N.C. 332, 134 S.E. 2d 638. After reciting defendants' contention that plaintiff was operating his vehicle while under the influence of intoxicating liquor at the time of the collision, and after referring to the evidence upon which defendants based this contention, the judge charged: ". . . [I]f the defendant has satisfied you by the greater weight of the evidence that on this occasion the plaintiff was operating his motor vehicle on this highway while he was under the influence of some intoxicating liquor, as I have defined that term to you, then that would be negligence on the part of the plaintiff. If you are further so satisfied that this contributed to the plaintiff's own injuries, then this would be contributory negligence upon the part of the plaintiff."

Plaintiff excepted to the foregoing charge on the grounds that (1) there was no evidence he was operating his automobile while under the influence of intoxicants; and (2) conceding, *arguendo,* there was such evidence, the judge did not, as then required by G.S. 1-180, explain the application of G.S. 20-138 to the evidence in the case. (G.S. 1-180 is now applicable only to criminal cases. Civil cases are governed by N. C. R. Civ. P. 51 (a), which incorporates the substance of the section.)

[1] The Court of Appeals held that the evidence was not sufficient to warrant a finding by the jury that plaintiff was driving under the influence of an intoxicant. A new trial was ordered because it could not be known "whether the jury's answer to the second issue (contributory negligence) was based upon a finding, under the instructions of the court, that plaintiff was driving under the influence at the time of the accident." Defendants' appeal requires us to consider *de novo* plaintiff's assignments of error to the charge.

[2, 3] A defendant who asserts plaintiff's contributory negligence as a defense has the burden of proving it, and a contention that certain acts or conduct of the plaintiff constituted contributory negligence should not be submitted to the jury unless there is evidence from which such conduct might reasonably be inferred. A defendant, however, is entitled to have any evidence tending to establish contributory negligence considered in the light most favorable to him and, if diverse inferences can reasonably be drawn from it, the evidence must be submitted to the jury with appropriate instructions as to its bearing upon the issue. *Jones v. Holt,* 268 N.C. 381, 150 S.E. 2d 759; *Moore v.*

Hales, 266 N.C. 482, 146 S.E. 2d 385; 6 N. C. Index 2d *Negligence* § 34 (1968).

The evidence upon which defendants base their contention that plaintiff was under the influence of an intoxicant at the time of the collision, taken as true and considered in the light most favorable to defendants, may be stated as follows: Plaintiff, traveling at 30 MPH upon a straight road, failed to see a tractor-trailer stopped in his lane of travel until he was ten feet from it although seven lights—two of them blinking "trouble lights"—were burning on the rear of the unit. He failed to see the two reflectors which Moye had placed in the highway, one at the rear of the trailer and the other twenty-five feet from it. He failed to see the "dialed" signal from Moye's flashlight, which he began to wave when he saw plaintiff's car approaching 400 feet away and continued to wave until he ran across the highway to avoid the collision. No westbound car passed. Plaintiff did not "break his speed" until he "rammed into the back of the trailer." Finally, Moye smelled the odor of alcohol on plaintiff's breath. Kincaid detected the odor of alcohol in plaintiff's automobile and on the floorboard under the front seat, there was a pint bottle containing a small amount of whiskey. The cap was on the bottle.

[4, 5] An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking. *Boehm v. St. Louis Public Service Co.,* 368 S.W. 2d 361 (Mo.). However, an odor, *standing alone,* is no evidence that he is under the influence of an intoxicant, *Baldwin v. Schipper,* 155 Colo. 197, 393 P. 2d 363, and the *mere* fact that one has had a drink will not support such a finding. *McCarty v. Purser,* 373 S.W. 2d 293 (Tex. Civ. App.). Notwithstanding, the "[f]act that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138." *State v. Hewitt,* 263 N.C. 759, 140 S.E. 2d 241.

[1] We hold that the evidence of the "broken pint" and the odor of alcohol on plaintiff's breath and in his automobile, when taken in conjunction with his failure to take any action to avoid a collision with the truck, was sufficient to support a finding that plaintiff's faculties had been appreciably impaired by the consumption of an alcoholic beverage. It is quite true, as pointed out in the majority opinion of the Court of Appeals, that the

only testimony of any odor of alcohol on plaintiff's breath came from defendant Moye. We also note that plaintiff testified he had consumed no alcoholic beverages all day and that he failed to see the truck because the lights of an approaching car, reflected on the wet, blacktop pavement, blinded him. The credibility of the witnesses and conflicts in the evidence, however, are for the jury, not the court. G.S. 1-180, N. C. R. Civ. P. 51(a).

[6] The vice of the instruction of which plaintiff complained in his appeal to the Court of Appeals is not that it permitted the jury to consider the question whether plaintiff was under the influence of alcohol at the time of the collision but that it failed to explain, as required by G.S. 1-180, what bearing such a finding, if made, would have upon the issue of plaintiff's contributory negligence.

[7] Unquestionably a motorist is guilty of negligence if he operates a motor vehicle on the highway while under the influence of intoxicating liquor. Such conduct, however, will not constitute either actionable negligence or contributory negligence unless—like any other negligence—it is causally related to the accident. *Shaw v. Phillips,* 193 So. 2d 717 (Miss.) ; *Lynn v. Stinnette,* 147 Ore. 105, 31 P. 2d 764. Mere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision. His condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was a proximate cause of the collision. *State v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638. In *Anderson v. Morgan,* 73 Ariz. 344, 241 P. 2d 786, a truck, being operated in its proper lane by a defendant, who was under the influence of liquor, was struck by an automobile which crossed the center line of the highway to collide with it. In dismissing a wrongful death action against the defendant the court said: "[A]lthough appellant was found to be intoxicated, there is no substantial evidence in the record to support the finding that his operation of his truck at the time and place of the accident proximately caused the injury or death of appellee's intestate." *Id.* at 789. In other words, the cause of the collision was totally unrelated to the defendant's intoxication.

Here, in resolving the issue of plaintiff's contributory negligence, the crucial question is not whether he was under the influence of an intoxicant but whether he was exercising due care in the operation of his automobile. The rationale of *Hoke*

v. Greyhound Corp., 227 N.C. 412, 422, 42 S.E. 2d 593, 600, is applicable. In that case the operator of a defendant's car was a child under 16. The court said: "The question is not as to her competency to drive, but whether she was operating the car at the time in accordance with the duty imposed by law upon operators of automobiles, that is, whether she was exercising the degree of care which an ordinarily prudent person would exercise under similar circumstances." *See also Watters v. Parrish, supra.*

[8] Evidence tending to show that the operator of a motor vehicle was under the influence of liquor is a pertinent circumstance for the jury to consider, not as conclusively establishing his negligence as a proximate cause of the collision if he was under the influence, but in determining whether he was capable of keeping a proper lookout, of maintaining proper control over his automobile, and of coping with highway and weather conditions in the manner of the reasonably prudent person. *Boehm v. St. Louis Public Service Co., supra; Lynn v. Stinnette, supra; Bohlmann v. Booth,* 196 So. 2d 507 (Fla. App.); *Rhoades v. Atchison, T. & S. F. Ry. Co.,* 121 Kan. 324, 246 P. 994; *Kirby v. Turner Day & Woolworth Handle Co.,* 50 F. Supp. 469; *see* Annot., 26 A.L.R. 2d 359, 364; 8 Am. Jur. 2d *Automobiles and Highway Traffic* § 939 (1963).

In *Rick v. Murphy,* 251 N.C. 162, 110 S.E. 2d 815, plaintiff sued for personal injuries sustained in a collision between his automobile and a vehicle operated by the defendant Froneberger. Although plaintiff had not alleged a violation of G.S. 20-138, the court held evidence of Froneberger's intoxication to be competent: "A physical condition which may cause a person to act in a given manner is merely evidentiary, not the ultimate fact on which liability must rest." *Id.* at 164, 110 S.E. 2d at 817.

We hold that plaintiff is entitled to a new trial, but not because the judge submitted to the jury the question whether plaintiff was operating his automobile while under the influence of an intoxicant. The prejudicial error was the judge's failure to instruct that if the jury found plaintiff to have been under the influence such condition would merely be evidence to be considered along with all the other evidence in determining whether he was chargeable with contributory negligence; that for a finding that plaintiff was under the influence to be conclusive of the issue it must be accompanied by the further find-

ing that such condition caused him to operate his automobile in a manner which constituted a proximate cause of the collision. Thus, we approve the decision of the Court of Appeals ordering a new trial but not the reasoning upon which it was based.

Affirmed.

Justice HIGGINS concurring in result:

In my opinion the plaintiff is entitled to a new trial. However, I am unable to agree that there is sufficient evidence in the record to warrant the court in permitting the jury to infer the plaintiff was driving under the influence of liquor, and upon that inference to draw the further inference he was guilty of contributory negligence. I concur in the result.

STATE OF NORTH CAROLINA v. JAMES EDWARD GREEN

No. 22

(Filed 14 October 1970)

1. **Criminal Law § 180— writ of coram nobis**

   Although the writ of *coram nobis* has been supplanted by statute with reference to any person imprisoned, the writ remains as at common law and is available under our procedure to challenge the validity of a conviction by reason of matters extraneous to the record. G.S. 15-217 *et seq.;* G.S. 4-1; N. C. Constitution, Art. IV, § 10.

2. **Criminal Law § 180— coram nobis — application to Supreme Court**

   Since authority for issuance of the writ of *coram nobis* derives from the supervisory power of the Supreme Court as conferred by the Constitution, it is necessary that an application be made to the Supreme Court for permission to apply for the writ to the court in which the case was tried.

3. **Criminal Law § 180— coram nobis — prima facie showing of substantiality**

   Application for writ of *coram nobis* will be granted by the Supreme Court only upon a *prima facie* showing of substantiality.

4. **Criminal Law § 180— coram nobis is no substitute for appeal**

   Coram nobis is not a substitute for an appeal.

5. **Criminal Law § 180— coram nobis — address to trial court**

   The writ of *coram nobis* must be addressed to the court in which the defendant was tried.

6. **Constitutional Law § 32; Bastards § 1— willful failure to support illegitimate child — right to counsel**

The offense of willful failure to support an illegitimate child is not a serious misdemeanor requiring the appointment of counsel or an intelligent waiver thereof. U. S. Constitution, Amendments VI and XIV; G.S. 49-2; G.S. 49-8.

7. **Bastards § 1; Constitutional Law § 32; Criminal Law § 142— willful failure to support illegitimate children — right to counsel — effect of support payments and subsequent prosecutions**

In a prosecution for willful failure to support an illegitimate child, the support payments that a convicted defendant may be required to make to his illegitimate children are not a part of the punishment and are therefore irrelevant to the question of defendant's right to counsel; the fact that defendant may be prosecuted more than once for the offense and sentenced to successive terms of six months' imprisonment is also irrelevant to the question of right to counsel.

8. **Bastards § 9— willful failure to support bastard — punishment**

The authorized punishment for the willful failure or neglect to support an illegitimate child is limited at most to six months in prison. G.S. 49-8.

9. **Criminal Law § 4; Constitutional Law § 32— determination of serious offense — punishment**

Whether an offense is petty or serious is measured, in both state and federal courts, by the punishment authorized by law for the particular offense in question. G.S. 7A-451.

10. **Constitutional Law §§ 29, 32— right to counsel — right to jury — petty misdemeanor**

Any crime whose maximum authorized punishment does not exceed six months in prison is a petty offense for which the offender may be tried without a jury and without the assistance of counsel.

Justice SHARP dissenting.

Chief Justice BOBBITT and Justice HIGGINS join in dissenting opinion.

APPEAL by defendant from decision of the Court of Appeals upholding judgment of *Godwin, S.J.*, at the November 1969 Session of ROCKINGHAM.

On 7 November 1966 defendant was tried in the Reidsville Recorder's Court upon a warrant charging him with willful neglect and refusal to support two named illegitimate children begotten by him upon the body of Zeena Lane. Defendant entered a plea of not guilty but was convicted. The court pronounced judgment that defendant be confined in the common jail of Rockingham County for a term of six months, suspended for two years on condition defendant be of good behavior, pay the costs, and pay into court the sum of $10.00 per week, commencing 12

November 1966, for the support of his two minor illegitimate children. The cause was retained for further orders. Defendant did not appeal.

Thereafter, upon a finding that defendant had failed to comply with the judgment in that he had failed to make the support payments as ordered, the judge of the Reidsville Recorder's Court ordered the suspended sentence into effect. Defendant appealed from that order to the Superior Court of Rockingham County.

On 3 April 1969, while his appeal from the order invoking the suspended sentence was still pending, defendant applied to the Superior Court of Rockingham County for issuance of a writ of error *coram nobis,* alleging: (1) that on 7 November 1966 he was tried, convicted and sentenced in the Reidsville Recorder's Court for the offense of willful nonsupport of two illegitimate children; that active sentence was suspended and defendant is not now confined to any penal institution specified in G.S. 15-217 so as to come within the purview of the Post-Conviction Hearing Act, but he is prejudiced nevertheless by the sentence imposed in the Reidsville Recorder's Court and his rights under the Constitution of the United States were violated in his original trial; (2) that the terms of the suspension of sentence prejudiced defendant in that they require the payment of money on a continuing basis for support of two children; (3) that at the original trial in Reidsville Recorder's Court defendant was without counsel, was indigent and unable to afford counsel, and the trial judge made no inquiry into his indigency and did not offer to afford him counsel; that he did not intelligently waive his right to counsel; that his trial without the benefit of counsel is a violation of the rights secured to him by the Sixth and Fourteenth Amendments to the United States Constitution; (4) that "the above is an error of fact not appearing in the record of said recorder's court"; (5) that this cause is pending in the superior court by reason of an appeal by defendant from an order of the recorder's court invoking the suspended sentence for alleged noncompliance with the terms thereof; and (6) that defendant has a defense to the crime charged; that, particularly as to the oldest child named in the warrant, said warrant shows on its face that the statute of limitations, G.S. 49-4, has barred the action. Based on the foregoing allegations defendant prayed that the writ of error *coram nobis* issue "to the end that defendant be afforded a new trial, free from constitutional error."

The presiding judge found facts substantially in accord with the foregoing recitals and concluded as a matter of law that since the maximum punishment provided by law under G.S. 49-8 for willful failure to support illegitimate children was a jail sentence of six months—a petty misdemeanor—defendant was not entitled to counsel as a matter of right. The application for writ of error *coram nobis* was thereupon denied. Defendant excepted and appealed to the Court of Appeals which affirmed, 8 N.C. App. 234, 174 S.E. 2d 8 (1970). Defendant thereupon appealed to this Court under G.S. 7A-30 alleging involvement of a substantial constitutional question which was passed upon erroneously by the court below.

Alston, Pell, Pell & Weston, attorneys for defendant appellant.

Attorney General Robert Morgan, Deputy Attorney General Jean A. Benoy, Assistant Attorney General Henry T. Rosser and Assistant Attorney General R. S. Weathers for the State.

HUSKINS, Justice

[1] The writ of error *coram nobis* is an established common law writ available under our procedure to challenge the validity of a conviction by reason of matters extraneous to the record. *In Re Taylor,* 230 N.C. 566, 53 S.E. 2d 857 (1949). It has been supplanted by G.S. 15-217, *et seq.,* with reference to "any person imprisoned." Otherwise the writ remains as at common law and is available under our procedure. Its availability in this State stems from G.S. 4-1 which adopts the common law as the law of this State (with exceptions not pertinent here), and authority for the writ stems from Article IV, Section 8 (now Section 10) of the Constitution of North Carolina which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. *State v. Daniels,* 231 N.C. 17, 56 S.E. 2d 2 (1949).

[2, 3] Since authority for issuance of the writ derives from the supervisory power of the Supreme Court conferred by the Constitution, "it is necessary that an application be made to this Court for permission to apply for the writ to the Superior Court in which the case was tried. *In Re Taylor (supra),* 230 N.C. 566, 569. It is granted here only upon a '*prima facie* showing of substantiality,' and it is observed in the *Taylor* case last cited, 'the ultimate merits of petitioner's claim are not for us

but for the trial court,' " *State v. Daniels, supra* (231 N.C. 17 at 25) ; *State v. Daniels,* 231 N.C. 341, 56 S.E. 2d 646 (1949).

[4] *Coram nobis* is not a substitute for an appeal. "Under our practice permission to petition the Superior Court in which the petitioning defendant was tried is given only when the matter on which the petition is based is 'extraneous to the record.' " *State v. Daniels,* 232 N.C. 196, 59 S.E. 2d 430 (1950).

[5] Defendant has neither sought nor obtained permission of this Court to apply for the writ. Moreover, his unauthorized application was addressed to the wrong court. "The writ of error *coram nobis* 'is brought for an alleged error of fact, not appearing upon the record, and *lies to the same court,* in order that it may correct the error, which it is presumed would not have been committed had the fact in the first instance been brought to its notice.' " *State v. Merritt,* 264 N.C. 716, 142 S.E. 2d 687 (1965). A writ of error *coram nobis* "will lie to any court of record, and as our county courts are courts of record we cannot conceive of a reason why one of them may not correct an error of fact in its judgment, upon a writ of error brought before itself." *Roughton v. Brown,* 53 N.C. 393, 394 (1861). The Reidsville Recorder's Court is a court of record, Chapter 104, Public Laws of North Carolina, Session 1909, and therefore defendant's petition for writ of error *coram nobis* should in all events have been addressed to the court in which he was tried. For these reasons the decision of the Court of Appeals, although based on other grounds, affirming the order of the superior court denying defendant's application was correct. Even so, to the end that the question defendant seeks to present may be discussed sufficiently to dispose of this appeal on its merits, we treat the appeal itself as an application to this Court for permission to petition the Reidsville Recorder's Court for the issuance of a writ of error *coram nobis.*

[6] Defendant poses the following question for decision: Is a conviction of willful failure to support illegitimate children a "serious misdemeanor" so as to require appointment of counsel or intelligent waiver thereof under the Sixth and Fourteenth Amendments to the United States Constitution? The answer is no.

Defendant was charged with and convicted of the willful neglect and refusal to support and maintain his illegitimate children, a violation of G.S. 49-2. The maximum punishment

provided by law for this offense is six months in prison. G.S. 49-8. The court is authorized to fix by order a specific sum of money to be paid by defendant for the support and maintenance of the child or children in question and to suspend the prison sentence on condition the periodic payments are made as ordered. G.S. 49-7.

[7] Defendant argues that in addition to the maximum punishment of six months other serious consequences are involved, in that, once the issue of paternity is established it cannot again be contested and defendant may then be tried again and again for willful failure to support and may receive successive sentences of six months until all children involved reach eighteen years of age. To avoid those consequences, defendant says he must pay in excess of $9300 under the judgment pronounced in this case. He contends these are serious consequences by any reasonable standard and compel the conclusion that one charged with a violation of G.S. 49-2 is charged with a "serious offense" requiring appointment of counsel for indigent defendants or intelligent waiver thereof.

[7, 8] Defendant's position is unsound. The only prosecution authorized by Chapter 49 of the General Statutes is grounded on the willful neglect or refusal of *any* parent to support and maintain his or her illegitimate child—the paternity itself is no crime. *State v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126 (1956); *State v. Ellis,* 262 N.C. 446, 137 S.E. 2d 840 (1964). The question of paternity is merely incidental to the prosecution for nonsupport and involves no punishment. The fact that defendant may be prosecuted for a second or third willful failure to support his illegitimate children and receive successive sentences of six months has no logical relevance to the question posed. Every man is subject to prosecution for repeated violations of any criminal statute. Furthermore, the support payments are not part of the punishment. All men have a moral duty to support their children—legitimate or illegitimate—and G.S. 49-2 makes this moral obligation legal and enforceable with respect to illegitimate children. *State v. Tickle,* 238 N.C. 206, 77 S.E. 2d 632 (1953). All these "consequences" are merely side effects that may or may not materialize. They have no relevance on the question of punishment. The only *punishment* authorized by law for the willful failure or neglect to support an illegitimate child is found in G.S. 49-8 and is limited at most to six months in prison.

[9, 10] Whether an offense is *petty* or *serious* is measured, in both state and federal courts, by the punishment authorized by law for the particular offense in question. 18 U.S.C. § 1; G.S. 7A-451. Under these statutory yardsticks any crime the maximum authorized punishment for which does not exceed six months in prison is a petty offense for which the offender may be tried without a jury and without the assistance of counsel. *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1969); *Blue Jeans Corp. v. Clothing Workers,* 275 N.C. 503, 169 S.E. 2d 867 (1969); *Cheff v. Schnackenberg,* 384 U.S. 373, 16 L.Ed. 2d 629, 86 S.Ct. 1523 (1966); *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 20 L.Ed. 2d 538, 88 S.Ct. 1472 (1968); *Duncan v. Louisiana,* 391 U.S. 145, 20 L.Ed. 2d 491, 88 S.Ct. 1444 (1968); *Bloom v. Illinois,* 391 U.S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477 (1968).

We hold that defendant was charged with a petty offense and his trial without counsel did not violate his constitutional right to counsel under the Sixth and Fourteenth Amendments.

Defendant's appeal, treated as a petition to this court for leave to file a petition in the Recorder's Court of Reidsville for a writ of error *coram nobis,* is denied. The decision of the Court of Appeals affirming the denial order of Godwin, S.J., is

AFFIRMED.

Justice SHARP dissenting:

Defendant, an indigent, was convicted in the Reidsville Recorder's Court of a violation of G.S. 49-2. At the trial he was not afforded counsel. The majority of the court deny him permission to petition the Recorder's Court for writ of error *coram nobis* upon the premise that a man charged for the first time with the willful failure to support his illegitimate child is not charged with a "serious offense" and, therefore, has no constitutional right to the assistance of counsel. The offense is labeled "petty" under the rule enunciated in *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245. A serious offense is therein defined as "one for which the authorized punishment exceeds six months' imprisonment and a $500 fine." All other offenses are declared to be "petty." *Id.* at 59, 165 S.E. 2d at 251. For the reasons hereinafter stated it is my view that this rule is inapplicable to the *first* prosecution of a defendant for the willful failure to support his illegitimate child.

Proceedings to compel a parent to support his illegitimate child were once regarded as being civil in nature. The legislature of 1933, however, changed the approach to the problem. "Now the proceeding is criminal." *State v. Robinson,* 245 N.C. 10, 14, 95 S.E. 2d 126, 129; P. L. 1933, Ch. 228; G.S. 49-2; *State v. Ellis,* 262 N.C. 446, 137 S.E. 2d 840.

In order to convict a man of violating G.S. 49-2, the State must prove beyond a reasonable doubt that (1) he is the father of the illegitimate child named in the warrant; and (2) he has willfully, that is, intentionally and without justification, failed to support and maintain the child after notice and request for support. *State v. Mason,* 268 N.C. 423, 150 S.E. 2d 753; *State v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9; *State v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728.

In such a prosecution, the issue which must first be determined is "whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted." G.S. 49-7; *State v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126; *State v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857. It is frequently said that being the father of an illegitimate child, without more, is not a crime, for a man does not violate G.S. 49-2 until he willfully refuses to support the child. The issue of paternity, however, cannot be separated from the issue of guilt or innocence of the offense of willful failure to support an illegitimate child. The establishment of defendant's fatherhood is an indispensable prerequisite to conviction, paternity being the first essential element of the crime. To characterize that issue as "merely incidental to the prosecution" is totally unrealistic.

G.S. 49-2 creates a continuing offense. In *State v. Johnson,* 212 N.C. 566, 194 S.E. 319, the defendant was tried in the Superior Court of Guilford County in 1936 upon the charge of willful failure to support his illegitimate child. Upon separate issues the jury found (1) that he was the father of the child named in the warrant; (2) that he had willfully failed to support it; and (3) that defendant was guilty as charged. The court imposed a six-months sentence, which defendant served. In 1937, when he was again charged with willfully failing to support the child, he entered a plea of former jeopardy. The trial court rejected the plea and, upon appeal, this Court affirmed the defendant's second conviction. The decision was that G.S. 49-2 created a continuing offense, and defendant's

prior conviction under it was no bar to successive prosecutions when, after release from imprisonment previously imposed, he willfully failed to support the child. *Accord, State v. Ellis, supra; State v. Womack,* 251 N.C. 342, 111 S.E. 2d 332; *State v. Smith,* 246 N.C. 118, 97 S.E. 2d 442; *State v. Ferguson,* 243 N.C. 766, 92 S.E. 2d 197; *State v. Wilson,* 234 N.C. 552, 67 S.E. 2d 748.

Once it has been judicially determined in a prosecution under G.S. 49-2 that the defendant is the father of the illegitimate child in question, either by a verdict of guilty or by an affirmative answer to the issue of paternity, that issue is *res judicata. State v. Ellis, supra; State v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126; *State v. Clonch,* 242 N.C. 760, 89 S.E. 2d 469. From a verdict finding the issue of paternity against a defendant he has the same right to appeal as though he had been found guilty of the crime of willful failure to support his illegitimate child. G.S. 49-7; *State v. Clement,* 230 N.C. 614, 54 S.E. 2d 919. However, as long as the finding remains unreversed, it is conclusive upon the issue of paternity; evidence bearing upon that issue is precluded in any subsequent prosecution.

After a defendant's first conviction under G.S. 49-2 the only issue in any subsequent prosecution under that statute is whether he has willfully failed to support the child. His obligation will continue until the child becomes 18 years old, and successive convictions will subject him to successive six-months prison terms. G.S. 49-8 makes no provision for a fine but authorizes the court to suspend the prison sentence upon conditions calculated to make the defendant support his child. Thus, by any realistic standard, it would seem that the *first* prosecution under G.S. 49-2 is a prosecution for "a serious offense." In such a prosecution, when the defendant is once convicted, or the issue of paternity found against him, the State has cleared its chief hurdle (one almost never encountered in prosecutions for the benefit of legitimate children). *Subsequent* prosecutions for willful nonsupport come under the head of routine business and will be controlled by the rule of *State v. Morris, supra.*

In Morris, the Court formulated an arbitrary, mechanical rule which will fairly accomplish its purpose in the vast majority of prosecutions for misdemeanors for which the punishment does not exceed imprisonment for six months and a fine of $500. Ordinarily these are "single-shot" prosecutions and, as applied to them, I approve the rule. However, the *Morris* rule does not fit this case. It cannot be applied fairly to a first prosecution

under a statute creating a continuing offense when the trial finally adjudicates the essential issue which will determine the State's right to institute subsequent prosecutions. Such is the case here. The issue of paternity, answered against defendant, provides the indispensable basis for any subsequent prosecution under G.S. 49-2 and is *res judicata* as to one of the two essential elements of the crime. In common parlance, "It's at that first trial a man needs a lawyer." If the defendant has the assistance of counsel at the trial in which his paternity is established, thereafter he can reasonably be expected to fend for himself in the event he is again charged with the willful failure to support his child.

For the reasons stated, I vote to grant defendant leave to petition the Reidsville Recorder's Court for a writ of error *coram nobis.*

Chief Justice BOBBITT and Justice HIGGINS join in dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIE LEE MURRY

No. 5

(Filed 14 October 1970)

1. **Rape § 8— carnal knowledge of female under age of 12 — elements of offense**

   The act of carnally knowing and abusing any female child under the age of 12 years is rape; neither force nor intent is an element of this offense. G.S. 14-21.

2. **Rape § 8— carnal knowledge defined**

   The terms "carnal knowledge" and "sexual intercourse" are synonymous; there is carnal knowledge or sexual intercourse in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male.

3. **Rape § 11— rape of 11-year-old girl — sufficiency of evidence**

   In a prosecution charging defendant with the carnal knowledge of an 11-year-old girl, the State's evidence was positive as to each and every element of the crime.

4. **Criminal Law § 75— confession by 16-year-old boy — presence of officers**

In a prosecution charging a 16-year-old defendant with the rape of an 11-year-old girl, defendant's incriminating statements were not rendered inadmissible because of his youthful age; also, the mere fact that defendant made the statements in the presence of several police officers does not render the statements inadmissible, there being no evidence of mistreatment or coercion by the officers.

5. **Rape § 16— rape of 11-year-old girl — instructions**

In a prosecution charging a 16-year-old defendant with the rape of an 11-year-old girl, the fact that the trial court submitted to the jury an issue of defendant's guilt of an assault upon a female by a male person *over the age of eighteen years, held* not prejudicial to the defendant, where all of the evidence tended to show the completed crime of rape and there was no evidence warranting a guilty verdict of assault upon a female by a male person.

6. **Criminal Law § 115— instructions on lesser included offenses**

The statutes requiring the submission of defendant's guilt of a lesser included offense of the crime charged are applicable only when there is evidence tending to show that the defendant might be guilty of a lesser offense. G.S. 15-169, G.S. 15-170.

Justice LAKE did not participate in the consideration or decision of this case.

APPEAL by defendant from *Brewer J.*, January 5, 1970 Session of ROBESON Superior Court.

Defendant was indicted, arraigned and tried on a bill of indictment which charged that, on September 15, 1969, he "did unlawfully, willfully and feloniously ravish and carnally know Linda McMillan, a female, under the age of twelve years, to wit: eleven years of age, by force and against her will . . . . " At his arraignment and trial, defendant was represented by his court-appointed counsel, J. H. Barrington, Jr.

The only evidence was that offered by the State. A summary thereof is set forth below.

On September 15, 1969, Linda McMillan, an eleven-year-old girl, after school and after a visit to a doctor's office, went to Vardell Hall, Red Springs, N. C., where her mother, Mrs. J. P. McMillan, Jr., taught piano. Upon her arrival about 5:00 p.m., Linda went to the Music Conservatory portion of the Administration Building and there spoke to her mother. Linda and her mother were to go home together as soon as Mrs. McMillan completed her duties. While waiting for her mother, Linda

walked in the nearby gardens at Vardell Hall, an acreage containing trees, large and small bushes, flowers, and a creek and a bridge over the creek. Along the main path, which was five or six feet wide, the distance from the bridge to the Administration Building was approximately 150 yards. There were smaller, secluded paths, covered with bushes, leading from the main path.

Linda testified in substance: When she entered the gardens, she saw and spoke with four girls from Vardell Hall. When they left, Linda stayed in the gardens. She saw defendant. He passed her and seemed to be leaving. When she went to the bridge, defendant came back and "struck up a conversation." Defendant asked Linda if she went to Vardell Hall. She told him she did not, that she was eleven years old and was in the sixth grade in school. Telling defendant she had "better go," Linda started walking along the main path towards the Administration Building. Defendant, stating he would walk with her, took hold of Linda's left arm, pulled her off the main path, dragged her down a smaller secluded path, drew a knife from his pocket, exhibited the open blade, cursed her and threatened to kill her, and threatened if she told he would come later and kill her and her mother. Under these circumstances, he laid her on the ground, pulled up her dress and slip, pulled down her panties, got on top of her, and "put his private parts into (her) private parts." When defendant allowed her to get up, Linda ran to the Administration Building where, trembling and crying, she found her mother and told her what happened. When these events occurred, it was "still light," about 7:00 o'clock.

Mrs. McMillan called the police. Officers Murchison and Bounds arrived immediately and talked with Linda. Shortly thereafter, the Chief of Police (Hagens) arrived and talked with Murchison and Bounds. A search for defendant was begun.

After Linda had talked with the officers, a doctor gave her a hypodermic to calm her. Soon thereafter, she was given a complete physical examination at the Southeastern General Hospital in Lumberton, N. C., by Dr. Brown, an expert gynecologist. Dr. Brown's testimony is explicit and unequivocal that Linda had been penetrated and that semen was deposited within her vagina.

Around 11:00 p.m., officers found defendant on the top of the roof of his house. He was arrested and taken to Lumberton,

N. C., where, in the sheriff's office, he talked with F. D. Johnson, Special Agent of the State Bureau of Investigation. A warrant had been served on defendant. Johnson advised defendant that he was an officer and was investigating the charge of rape against him. Johnson made notes of defendant's statements. The next morning, about 10:30, a deputy sheriff and Johnson brought defendant from the jail to the solicitor's room in the courthouse in Lumberton. There, defendant, holding the microphone, made statements to a tape recorder and answered questions by Johnson. Defendant's statements, together with the questions and answers, were transcribed.

When defendant's counsel objected to Johnson's testimony as to statements made to him on the two occasions referred to above, Judge Brewer, in the absence of the jury, conducted a *voir dire* hearing. At the hearing, Johnson testified in detail as to the circumstances under which the statements by defendant were made and was cross-examined by defendant's counsel. In response to the court's inquiry, defendant indicated he did not wish to offer evidence. The motion by defendant's counsel that the tape recording be produced was allowed. Although produced, it was not offered either at the *voir dire* hearing or at the trial.

At the conclusion of the *voir dire* hearing, Judge Brewer made and set forth in detail his findings of fact, *viz.*:

"The court on *voir dire* finds as a fact that on 15 September, 1969, the defendant, Willie Lee Murry, was arrested and brought to the sheriff's department of Lumberton, North Carolina, having been taken into custody in connection with the alleged crime of rape; that the defendant was advised of the alleged crime of rape and that before questioning the defendant, Officer F. D. Johnson, Special Agent with the State Bureau of Investigation, warned the defendant he had a right to remain silent; that anything he said could be used against him in a court of law; that he had the right to an attorney or lawyer, if he wanted one, and if he did not have sufficient funds to employ an attorney or lawyer to represent him, that one would be appointed for him prior to questioning, if he desired; that he could refuse to answer any questions, or stop making any statement at any time he so desired. That opportunity to exercise these rights was afforded the defendant at all times during interrogation; that the defendant requested no attorney and answered questions proposed to the defendant and by doing so,

knowingly, intelligently and understandingly waived the rights afforded him under the Miranda decision, as to an attorney and to remain silent and other rights offered defendant, under the Miranda and other Supreme Court decisions.

"That upon the evidence and finding of these facts, the court concludes that defendant freely, voluntarily and understandingly answered questions and made statements to Officer F. D. Johnson, Special Agent with (the) State Bureau of Investigation, without undue influence, compulsion or duress and without promise of any kind, and, therefore, it is adjudged that statements made by defendant and his answers to certain questions proposed to him by Officer F. D. Johnson, Special Agent of the State Bureau of Investigation, are competent and admissible evidence and that the officer will be permitted to testify accordingly, that the interrogation commenced at approximately 11:30 p.m., September 15, 1969, in the office of the Sheriff of Robeson County, at the courthouse in Lumberton, North Carolina, and that said interrogation was stopped at approximately 12:40 a.m., on the morning of September 16, 1969, when defendant was taken back to his cell in jail; on the morning of September 16, 1969, the defendant was brought to the office of the Solicitor of Superior Court of Robeson County; that the defendant was advised of his constitutional right, that is the right to remain silent; that anything he said could be used against him in a court of law; that he had the right of presence of an attorney and if he couldn't afford an attorney, one would be appointed by the court prior to his being questioned; that he could stop answering questions at any time he so desired; that the opportunity to exercise these rights was afforded the defendant during the entire interrogation; that defendant requested no attorney and did not want an attorney and agreed to answer questions and make statements relative to the alleged crime of rape of one, Linda McMillan, and by doing so, knowingly, intelligently and understandingly waived these rights as to remaining silent and appointment of counsel to represent him during his interrogation.

"Upon these events, the court finds that the defendant freely, voluntarily, and understandingly answered questions and made statements to F. D. Johnson, Special Agent of (the) State Bureau of Investigation, without fear, compulsion or duress, or promise of any kind, and after being advised of his constitutional rights, and offer to furnish defendant an attorney, if he so desired: . . . "

Thereupon, the court, over defendant's objection, permitted Johnson to testify as to statements made by defendant on the occasions referred to above. Defendant's statements, according to Johnson's testimony, substantially corroborated Linda's testimony. To refresh his recollection, Johnson referred to notes made by him on September 15th and to the transcript made from the tape recording on September 16th.

At trial, Linda identified defendant positively and unequivocally as the person who assaulted her. She had not known or seen him before that occasion. She did not see him again until he was placed on trial. She described him as wearing "black pants," a "purple sweater, kind of jacket," and "a necklace that hung down around his neck with a cross on it, hanging in front." Her description, with minor variations, corresponded to that of officers who observed the clothing worn by defendant when arrested. A photograph of defendant when taken into custody was identified and offered in evidence. Too, the clothes worn by defendant when taken into custody were identified and offered in evidence. The photograph and the clothes were offered and admitted only as corroborative evidence.

The jury was instructed it might return any one of five verdicts, *viz:* (1) guilty of rape; (2) guilty of rape with recommendation that the punishment be imprisonment for life in the State's prison; (3) guilty of an assault with intent to commit rape; (4) guilty of an assault on a female, he being a male person over the age of eighteen years; and (5) not guilty.

The jury returned a verdict of guilty of rape as charged in the bill of indictment "with a recommendation of life imprisonment." Upon this verdict, the court, as required by G.S. 14-21, pronounced judgment that defendent be imprisoned for life in the State's prison. Defendant excepted and appealed. On account of defendant's indigency, an order was entered that his appeal be perfected by his court-appointed counsel and that all costs incident to his perfecting the appeal be paid by the State of North Carolina.

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

J. H. Barrington, Jr., for defendant appellant.

BOBBITT, Chief Justice.

[1] The act of "carnally knowing and abusing any female child under the age of twelve years" is rape. G.S. 14-21; *State v. Monds,* 130 N.C. 697, 41 S.E. 789; *State v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113. Neither force, *State v. Johnson,* 226 N.C. 266, 37 S.E. 2d 678, nor intent, *State v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51, are elements of this offense.

[2] "The terms 'carnal knowledge' and 'sexual intercourse' are synonymous. There is 'carnal knowledge' or 'sexual intercourse' in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. G.S. 14-23; *State v. Monds,* 130 N.C. 697, 41 S.E. 789; *State v. Hargrave,* 65 N.C. 466; *State v. Storkey,* 63 N.C. 7; Burdick: Law of Crime, section 477; 44 Am. Jur., Rape, section 3; 52 C.J., Rape, sections 23, 24." *State v. Bowman,* 232 N.C. 374, 61 S.E. 2d 107; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513.

[3] The State's evidence was positive as to each and every element of the crime charged in the bill of indictment.

Defendant presents two questions: (1) Was the admission of Johnson's testimony as to defendant's in-custody statements erroneous and prejudicial? (2) Did the court err in instructing the jury with reference to the lesser included offense of assault on a female?

[4] There was ample evidence to support Judge Brewer's findings of fact. It is not contended that Johnson did not carefully and fully advise defendant as to his constitutional rights. Defendant contends the incriminating statements attributed to him by Johnson should have been excluded because (1) defendant was sixteen years old, and (2) several officers were present when the statements were made.

With reference to defendant's age, the record shows: Johnson testified on *voir dire* he knew defendant was "a sixteen-year-old boy." He testified at trial that defendant stated "that he completed the eighth grade in school." In the annotation, 87 A.L.R. 2d at 626, it is stated: "A confession is not inadmissible, in the absence of a statutory provision to the contrary, merely because the person making it is a minor." This rule obtains in this jurisdiction. *State v. Hill,* 276 N.C. 1, 14, 170 S.E. 2d 885, 894.

With reference to the presence of other officers, the record shows: The interrogation of defendant on both occasions was by F. D. Johnson, Special Agent of the State Bureau of Investigation. Their first conversation took place in the sheriff's office in the courthouse in Lumberton. During portions of the interview, Luther W. Hagens, Chief of Police of Red Springs, and Leroy Freeman and Carl Herring, Deputy Sheriffs, were in the office. Other (unidentified) officers stayed "in the outside office." The following morning, when the tape recording was made, the only officer present, except Johnson, was the deputy sheriff (Freeman) who had custody of defendant.

"[T]he mere fact that a confession was made while the defendant was in custody of police officers, after his arrest by them upon the charge in question and before employment of counsel to represent him, does not, of itself, render it incompetent." *State v. Gray,* 268 N.C. 69, 78, 150 S.E. 2d 1, 8, and cases cited.

Nothing in the evidence indicates that any officer mistreated, deceived or otherwise coerced defendant. Obviously, by getting on the roof of his house, defendant was seeking to conceal himself from the officers. After his arrest, according to Johnson's testimony and the statements attributed by Johnson to defendant, defendant was not intimidated or frightened. Upon the uncontroverted evidence and factual findings, the court properly admitted Johnson's testimony as to incriminating statements made by defendant.

[5] As indicated, defendant assigns as error the court's instruction that the jury might return a verdict of guilty of an assault upon a female by a male person *over the age of eighteen years.* It is contended that this instruction is erroneous because the only evidence as to defendant's age (Johnson's testimony on *voir dire)* tends to show that he was sixteen years of age. In so instructing the jury, seemingly the court had in mind the provisions of G.S. 14-33 (G.S. 1B, Recompiled 1953) prior to the rewriting thereof by Chapter 618, Session Laws of 1969, now codified as G.S. 14-33 (G.S. 1B, Replacement 1969). Presently, under G.S. 14-33, a person who "[a]ssaults a female person, he being a male person," is guilty of "an aggravated assault."

The inadvertent error in the court's said instruction was not prejudicial to defendant. All of the evidence tended to show

the completed crime of rape. Apparently, the court considered certain of the statements attributed to defendant indicated his act of intercourse with Linda was not in all respects complete, and that this warranted the submission for jury consideration of the lesser included offense of assault with intent to commit rape.

[6] Nothing in the evidence warranted a verdict of guilty of a mere simple assault upon a female person by a male person. G.S. 15-169 and G.S. 15-170 are applicable *only when there is evidence* tending to show that the defendant may be guilty of a lesser offense. *State v. Jones,* 249 N.C. 134, 139, 105 S.E. 2d 513, 516, and cases cited. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547; *State v. Williams,* 275 N.C. 77, 88, 165 S.E. 2d 481, 488. The error in the instruction was not prejudicial to defendant but definitely in his favor.

The evidence depicts a twofold tragedy: An eleven-year-old girl, referred to in defendant's confession as the "smaller girl," as the victim of rape, has experienced an unforgettable ordeal. A sixteen-year-old boy, by his lustful and uninhibited conduct, has forfeited his liberty.

No error.

Justice LAKE did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JIMMY LEE

No. 17

(Filed 14 October 1970)

1. Criminal Law § 102— joint trial — evidence offered by one defendant — closing jury argument

Where one of two defendants in a joint trial offered evidence, the trial court did not err in denying the defendant who offered no evidence the closing argument to the jury and in granting the closing argument to the State.

2. **Constitutional Law § 30; Criminal Law §§ 135, 138— first degree murder prosecution — constitutionality of single verdict procedure**

G.S. 14-17 is not unconstitutional in requiring the trial court to submit to the jury the question of defendant's guilt or innocence of first degree murder and, at the same time, the question of punishment — whether he should live or die.

3. **Homicide § 4— homicide during felonious escape — first degree murder**

A murder committed in the perpetration or attempt to perpetrate a felonious escape is murder in the first degree. G.S. 148-45, G.S. 14-17.

4. **Homicide § 12— indictment in statutory language — proof of felony murder**

A felony murder may be proven by the State although the bill of indictment charges murder in the statutory language of G.S. 15-144.

5. **Homicide §§ 12, 15— first degree murder — proof of conspiracy to escape from prison and homicide during escape**

In this joint trial of two defendants for first degree murder of a prison guard, it was permissible for the State to prove, if it could, a conspiracy to escape while defendants were serving felony sentences and that the murder was committed in the escape attempt.

6. **Conspiracy § 5— acts and declarations of conspirator — consideration against co-conspirator**

When evidence of a *prima facie* case of conspiracy has been introduced, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members.

7. **Conspiracy § 5— acts and declarations of conspirator — consideration against co-conspirator**

Consideration of the acts or declarations of one conspirator as evidence against the co-conspirators should be conditioned upon a finding that (1) a conspiracy existed, (2) the acts were done or declarations were made by a party to the conspiracy and in pursuance of its objectives, and (3) the acts or declarations occurred while the conspiracy was active, that is, after it was formed and before it ended; prior or subsequent acts or declarations are admissible only against the one who committed the acts or made the declarations.

8. **Homicide § 25— conspiracy to escape — killing of guard by co-conspirator — instructions — defendant's guilt of first degree murder**

In this prosecution for murder of a prison guard during an escape, the court's instructions, when considered in the light of the evidence, could not have been understood by the jury to mean that defendant could be found guilty of first degree murder on the theory of conspiracy if he joined the codefendant in an escape scheme after the codefendant had already murdered the guard, because (1) there was no conspiracy until defendant became a party to the scheme, and (2) the evidence is overwhelming that defendant was an active participant in the escape plot long before the guard was killed.

9. **Criminal Law §§ 113, 168— violation of G.S. 1-180 — prejudicial error**

The statute requiring the trial judge to explain the law but give no opinion on the facts, G.S. 1-180, is mandatory and a violation of it is prejudicial error.

10. **Criminal Law § 168— charge read as a whole and construed contextually**

The charge of the court must be read as a whole and construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct.

11. **Criminal Law § 168— instructions — erroneous expression — harmless error**

If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

12. **Homicide § 23; Criminal Law § 168— first degree murder prosecution — instruction on conspiracy — harmless effect of statement by court**

In this prosecution for first degree murder of a prison guard during an escape, statement by the court in its instructions that "he who hunts with the pack is responsible for the kill," intended as an illustrative statement of the law of conspiracy, had no prejudicial effect on the result of the trial when considered in context and was therefore harmless.

13. **Criminal Law § 118— charge on contentions of defendant who offered no evidence — failure of defendant to object**

In this first degree murder prosecution, the trial court's instruction that defendant who offered no evidence contended by his plea of not guilty that the testimony of the State's witnesses should not be believed and that the State had failed to prove his guilt beyond a reasonable doubt, *held* not to constitute a fundamental misconstruction of defendant's contentions; consequently, the general rule applies that objections to the charge in stating contentions of the parties must be called to the court's attention in apt time to afford an opportunity for correction or an exception thereto will not be considered on appeal.

APPEAL by defendant from *Clark, J.*, November 1969 Criminal Session of ROBESON.

Defendant was charged in separate bills of indictment with felonious escape, kidnapping, and first degree murder. A codefendant, Ricardo Zimmerle Resendez, similarly charged in separate indictments, was tried jointly with Lee but did not appeal.

The State's evidence tends to show that Jimmy Lee and Ricardo Resendez were serving sentences for felony convictions at the Robeson County Prison Unit. On the morning of June 2, 1969, during the cleanup detail when there was only one armed guard immediately present, Resendez called to an unarmed

guard named Boyd Strickland who walked from his position on the front walk to the door of the prison dormitory. When he entered the doorway, Resendez held a .22 caliber pistol on him and demanded that he call the superintendent. Boyd Strickland refused. Resendez then demanded that he summon a guard named Earl C. Strickland (Earl) who was outside the dormitory at the time, and Boyd complied. As Earl C. Strickland, who was armed, neared the doorway of the dormitory Resendez shoved Boyd out of his way and told defendant Jimmy Lee to get him. Jimmy Lee, who had been present throughout the foregoing hiatus, grabbed Boyd, putting a knife to his throat and locking Boyd's arm behind his back. Resendez jumped out the door and tried to disarm Officer Earl C. Strickland before he reached the door to the dormitory. Both Earl C. Strickland and Resendez were trying to get Earl's gun which was still in its holster. They scuffled and during the ensuing struggle Resendez fired the .22 caliber pistol into Earl C. Strickland's chest resulting in his death. During the struggle defendant Jimmy Lee was inside the dormitory holding a knife to the throat of Boyd Strickland.

After herding several guards into the dormitory and changing into non-prison attire, Resendez and Lee took Sergeant Ebert Locklear hostage, commandeered a car from the parking lot, and forced Locklear to drive them away. They were armed with Resendez' .22 caliber pistol, a .38 caliber revolver taken from the slain guard Earl C. Strickland, and Sergeant Locklear's 30-30 rifle. Sergeant Locklear made various turns at the direction of Resendez and later drove the car into the woods. There defendant Lee held a gun on Sergeant Locklear while Resendez bound him. Leaving the bound hostage in the car, the two men camouflaged the car and proceeded on foot to a nearby house occupied by the Isley Wilcox family. They entered the house and held the family hostage for almost twenty-four hours before voluntarily surrendering. No member of the Wilcox family was harmed.

At the trial Jimmy Lee offered no evidence. Ricardo Resendez, testifying in his own behalf, stated that he had acquired the .22 caliber pistol several days before he made his break but refused to reveal where he got it. He said he did not know where Lee got the knife that he used and that he had never seen it before; that he did not know Lee was coming with him; that at one time he told Lee to stay out of it but "[h]e just decided at the last minute to come along . . . Jimmy hardly said anything. He acted more like a spectator."

The jury found both Lee and Resendez guilty of murder in the first degree with a recommendation of life imprisonment, and guilty of felonious escape. Both men were acquitted on the kidnapping charge. Defendant Lee appealed from a sentence of life imprisonment pronounced on the murder charge and a consecutive sentence of two years pronounced on the escape charge, assigning errors noted in the opinion.

W. Earl Britt, Attorney for Defendant Appellant.

Robert Morgan, Attorney General; Donald M. Jacobs, Staff Attorney, for the State.

HUSKINS, Justice.

[1] Defendant Lee demanded and was denied the right to make the closing argument to the jury. This is his first assignment of error.

Rule 3, Rules of Practice in the Superior Courts of North Carolina, provides that "[i]n all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel." See G.S. 4-A, Appendix 1(2), page 201.

Construing this rule in *State v. Robinson,* 124 N.C. 801, 32 S.E. 494 (1899), the Court held that where there are several defendants, and one of them introduces evidence, "that gives the right to begin and conclude the argument to the State, and we adopt that view as the better rule." That holding has been followed without exception for more than seventy years. *State v. Raper,* 203 N.C. 489, 166 S.E. 314 (1932); *State v. Smith,* 237 N.C. 1, 74 S.E. 2d 291 (1952); *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967). Federal decisions are in accord. See *Hale v. United States,* 410 F. 2d 147 (1969); *Hardie v. United States,* 22 F. 2d 803 (1927); *United States v. El Rancho Adolphus Products,* 140 F. Supp. 645 (1956). Since Lee's codefendant Resendez offered evidence, the closing argument belonged to the State. This assignment is without merit and is overruled.

We note in passing that the Supreme Court recently adopted "General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure." These General Rules became effective on 1 July 1970. Rule 10 thereof provides, *inter alia,* that "[i]n a criminal case, where there are multiple defendants, if any defendant introduces evidence the closing

argument shall belong to the solicitor." See Appendix to Volume 276 of the North Carolina Reports where these rules are printed.

[2] Defendant contends the trial court erred in submitting to the jury the question of his guilt or innocence of murder in the first degree and, at the same time, the question of punishment—whether he should live or die. Defendant argues that G.S. 14-17, insofar as it requires such procedure, is unconstitutional.

We have consistently held in capital cases that the single verdict procedure is valid and does not violate defendant's constitutional rights. *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886 (1970); *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593 (1968); *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968). Federal courts have held that such procedure does not violate due process nor infringe upon defendant's constitutional right to remain silent. *Segura v. Patterson* (10th Cir.) 402 F. 2d 249 (1968); *Sims v. Eyman* (9th Cir.) 405 F. 2d 439 (1969). "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." *Spencer v. Texas,* 385 U.S. 554, 17 L. ed 2d 606, 87 S. Ct. 648 (1967). We adhere to our former decisions and regard this question as settled unless and until the Supreme Court of the United States holds otherwise. Cases now pending before it which seek to present the question are: *North Carolina v. Alford,* 39 L.W. 3015; *McGautha v. California,* 39 L.W. 3022; and *Crampton v. Ohio,* 39 L.W. 3022.

[8] Defendant contends the court erred in instructing the jury that defendant Lee could be found guilty of first degree murder on the theory of conspiracy if he joined in the conspiracy *at any time before or while the escape was being executed.* In this connection the court charged the jury as follows:

> "There is no evidence in this case that the defendant, Lee, himself actually shot and killed the deceased, Earl C. Strickland. But, I instruct you that if the defendants, Lee and Resendez, conspired together, that is agreed and planned to escape from the Department of Corrections of Robeson County camp and that murder was committed by the defendant, Resendez, in the escape or attempt to escape, then each is guilty of murder in the first degree, both the defendant, Resendez, and the defendant, Lee.

"It is not necessary that the defendant, Lee, and the defendant, Resendez, together originated or conceived and planned the escape. The defendant, Lee, could be [a] conspirator, at any time before or while the escape is being executed. If he concurred, no proof of agreement to concur is necessary. As soon as the union of wills for the unlawful purpose, that is felonious escape, is perfected, the conspiracy is complete. The joint assent of the minds, like all other facts of a criminal case may be established as inference to the jury from the facts proved, in other words, by circumstantial evidence.

"Now this, members of the jury, the law in this regard is, those who entered into a conspiracy to violate the criminal law, thereby forfeited their independence and jeopardized their liberty, for by agreeing with each other or others, to engage in unlawful enterprise, they thereby place their safety and freedom in the hands of each and every member of the conspiracy. He who hunts with the pack is responsible for the killing.

"In view of this theory of this case and contention of the State as to the defendant, Lee, that the defendant, Resendez, was the principal actor, you should first consider and reach your verdict on this charge against him, the defendant, Resendez. If the defendant, Resendez, is not guilty of murder, then the defendant, Lee, could not be guilty of murder, under this theory of the case as contended by the State."

After deliberating for a while the jury returned to the courtroom and requested further instructions on the law pertaining to murder occurring in an escape. The court thereupon instructed the jury as follows:

"As to this further, it is not necessary that the defendant, Lee, and defendant, Resendez, together originated or conceived and planned the escape. The defendant, Lee, could become a conspirator any time before or while the escape is being executed. If he concurred, no proof of an agreement to concur is necessary. As soon as the union of the wills for the unlawful purpose is effected, the conspiracy is complete. The joint assent of the minds like all other facts in criminal cases may be established as an inference by the jury from the facts proved; that is by circumstantial evidence.

> "Under the law those who enter into a conspiracy to violate the criminal laws thereby forfeit their independence and jeopardize their liberty; they thereby place their safety and freedom in the hands of each and every member of the conspiracy. He who hunts with the pack is responsible for the kill."

[3-5] Both Resendez and Lee were serving felony sentences, and G.S. 148-45 provides that any prisoner serving a felony sentence "who escapes or attempts to escape from the State prison system shall . . . be guilty of a felony . . . . " G.S. 14-17 provides that murder 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. Furthermore, a felony murder may be proven by the State although the bill of indictment, as here, charges murder in the statutory language of G.S. 15-144. *State v. Fogleman,* 204 N.C. 401, 168 S.E. 536 (1933); *State v. Smith,* 223 N.C. 457, 27 S.E. 2d 114 (1943); *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494 (1945); *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916 (1955). Hence it was permissible in this case for the State to prove, if it could, a conspiracy to escape and that the murder of Earl C. Strickland was committed in the escape attempt. "A conspiracy, though not charged as a crime, may be shown by the prosecution as an evidentiary fact to prove participation in a substantive crime." 16 Am. Jur. 2d, Conspiracy § 37; see Annot.—Instruction or evidence as to conspiracy where there is no charge of conspiracy in indictment or information, 66 A.L.R. 1311.

In light of the foregoing principles, was it error to charge the jury as above set out? We think not.

The State's evidence in this case makes out a *prima facie* case of conspiracy between Resendez and Lee to escape. This unlawful agreement was entered into prior to June 2, 1969. Resendez had possessed the .22 caliber pistol for "around eight days." On the morning of June 2 when Boyd Strickland, in response to the call from Resendez, approached the door to the prison dormitory, Lee was standing about twenty feet from the door with his hand in his pocket. When Resendez put the pistol on Boyd Strickland, Lee immediately came closer—within three to four feet of Boyd Strickland. After Earl C. Strickland was summoned by Boyd Strickland and as he approached the door, Resendez pushed Boyd Strickland toward Lee and said "you keep him." Lee then put a knife to Boyd Strickland's throat and

kept it there until Resendez struggled with and killed Earl Strickland. The evidence further discloses that some time prior to the murder of Earl Strickland, Resendez had filled a pillowcase with undisclosed items of personalty. At the time he and Lee were leaving with Sergeant Locklear as their hostage, after the killing and after locking the other officers in the dormitory, Resendez said to Lee "go get the sheet." Lee thereupon went to another dormitory and returned with the pillowcase containing Resendez' property. Whether or not it also contained items belonging to Lee is unclear. Be that as it may, this evidence points unerringly to the conclusion that Resendez and Lee had a meeting of the minds prior to the murder.

[6, 7] "The general rule is that when evidence of a *prima facie* case of conspiracy has been introduced, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *State v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; 16 Am. Jur. 2d, Conspiracy, §§ 35, 36, 37, 38, pp. 146, 147 (citing authorities). Consideration of the acts or declarations of one as evidence against the co-conspirators should be conditioned upon a finding: (1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended. *State v. Dale,* 218 N.C. 625, 12 S.E. 2d 556; *State v. Lea,* 203 N.C. 13, 164 S.E. 737; 11 Am. Jur. 571. Of course a different rule applies to acts and declarations made before the conspiracy was formed or after it terminated. Prior or subsequent acts or declarations are admissible only against him who committed the acts or made the declarations." *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969).

[8] When the foregoing charge is considered in light of the evidence it is free from reversible error. The charge does not mean, and could not have been understood by the jury to mean, that if Lee joined Resendez in an escape scheme *after Resendez had already murdered the guard,* Lee also would be guilty of the murder. That is not the law in North Carolina and the charge here had no such connotation because (1) there was no conspiracy until Lee became a party to the scheme, and (2) the evidence is overwhelming that Lee was an active participant in the escape plot long before Earl Strickland was killed. Defendant's third assignment of error is overruled.

For his fourth assignment of error defendant contends that in the portion of the charge quoted above the court expressed an opinion on the evidence when it used the language "[h]e who hunts with the pack is responsible for the kill."

[9] G.S. 1-180 requires the judge to explain the law but give no opinion on the facts. The purpose of the section is to secure the right of every litigant to have his cause considered by an impartial judge and an unbiased jury. *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173 (1954). The statute is mandatory and a violation of it is prejudicial error. *Therrell v. Freeman,* 256 N.C. 552, 124 S.E. 2d 522 (1962).

[10, 11] This Court has consistently endeavored to maintain the integrity of G.S. 1-180 by requiring strict observance of its provisions. Even so, our interpretation of the charge here complained of refutes defendant's conclusion. We perceive nothing in the instructions which should prejudice a mind of ordinary firmness and intelligence. "The charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it . . . . " *State v. Wilson,* 176 N.C. 751, 97 S.E. 496 (1918). It will be construed contextually, and isolated portions will not be held prejudicial when the charge as whole is correct. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965); *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1963); *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169 (1962). If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966). "It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. *State v. Jones,* 67 N.C. 285." *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969).

[12] The isolated phraseology "[h]e who hunts with the pack is responsible for the kill," objected to by defendant, was intended as an illustrative statement of the law of conspiracy. It is highly unlikely that the statement was considered by the jury as anything other than an illustration of the law. When considered in the context in which it was used it had no prejudicial effect on the result of the trial and was therefore harmless. *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950). This assignment is overruled.

[13] Defendant Lee offered no evidence. After stating the contentions of the State and of the other defendant Resendez, the Court charged with respect to Lee's contentions as follows: "The defendant Lee says and contends by his plea of not guilty that the witnesses for the State, their testimony deserves no weight or credit, should not be believed, that the State has failed to carry the burden cast upon it and failed to prove his guilt beyond a reasonable doubt of any charge; that you should give him the benefit of that doubt and find him not guilty."

Lee assigns this portion of the charge as error, contending that it made him look ridiculous in the eyes of the jury and amounted to a fundamental misconstruction of his contentions. He cites *State v. Dooley,* 232 N.C. 311, 59 S.E. 2d 808 (1950), in support of his position.

Upon his plea of not guilty Lee could hardly contend otherwise than that the testimony of the State's witnesses should not be believed. He could not very well contend that their testimony represented the truth of the matter. For the judge to so charge is no distortion of defendant's position. While the able and patient judge in this instance might well have stated no contentions at all on Lee's behalf and rested on a simple explanation of the effect of Lee's plea of not guilty, his attempt to give a logical contention for Lee in face of the overwhelming evidence of guilt will not be held for error. This case is quite different from the factual misconception by the trial court in *State v. Dooley, supra,* and the obvious intent to ridicule defendant's plea of not guilty in *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412 (1966).

We hold that the charge here does not constitute a fundamental misconstruction of Lee's contentions. Hence the general rule applies that objections to the charge in stating the contentions of the parties must be called to the court's attention in apt time to afford opportunity for correction. Otherwise an exception thereto will not be considered on appeal. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Butler,* 269 N. C. 733, 153 S.E. 2d 477 (1967).

Evidence of Lee's guilt is amply sufficient to carry the case to the jury and to support the verdict. In the trial below we find

No error.

JAMESTOWN MUTUAL INSURANCE COMPANY v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 21

(Filed 14 October 1970)

1. **Appeal and Error § 57— findings of fact — review**

Findings of fact which are supported by competent evidence, even though there is evidence *contra*, are conclusive on appeal.

2. **Appeal and Error § 28— exception to the failure to find certain facts**

Exceptions to the refusal of the trial judge to find certain facts will not be sustained when some of the findings requested are immaterial and the evidence in regard to others is conflicting, or appellant fails to introduce evidence in the record that would sustain such findings.

3. **Insurance §§ 100, 112— refusal of insurer to defend — defense by another insurer — subrogation rights**

Where an automobile liability insurer wrongfully refused to defend its insured against claims arising out of an automobile accident, a garage liability insurer that undertook the insured's defense is entitled to recover from the automobile insurer the sums paid out in the defense and settlement of the claims.

4. **Insurance § 112; Subrogation— refusal of insurer to defend — defense by another insurer — subrogation rights — volunteer**

A garage liability insurer that undertook the defense of a motorist whose own automobile liability insurer had wrongfully refused to defend him was not such a pure volunteer as to be deprived of the right of subrogation against the automobile liability insurer, where the garage liability insurer had defended in good faith on the ground that it would have been liable had there been an adjudication that the motorist's own policy did not provide coverage.

5. **Subrogation— equitable subrogation**

Generally, the doctrine of equitable subrogation may be invoked if the obligation of another is paid by the plaintiff for the purpose of protecting some real or supposed right or interest of his own.

6. **Limitation of Actions § 4; Insurance § 108— subrogation action — statute of limitations**

In an action by a garage liability insurer to recover sums expended in the defense of a motorist whose own liability insurer had wrongfully refused to defend him, the garage liability insurer, who was under no disability, was barred from recovering those sums that were paid more than three years prior to the institution of the action.

APPEAL by both plaintiff and defendant from *Judge Clarkson* at the March 9, 1970 Civil Session of the Superior Court of MECKLENBURG County, Session "D," the motion of plaintiff and

defendant to docket the appeal in this Court prior to determination in the Court of Appeals having been allowed.

Plaintiff, Jamestown Mutual Insurance Company (Jamestown) seeks to recover approximately $4,000 spent by it for adjustment services, settlement of claims, and defense of claims made against William Clark Hamrick (William), which amounts Jamestown contends defendant, Nationwide Mutual Insurance Company (Nationwide), should have paid. In addition, Jamestown seeks to recover approximately $3,000 expended by it in prosecution of a declaratory judgment action against Nationwide whereby it was determined that Nationwide had the obligation to provide automobile liability insurance coverage to William.

At the trial before Judge Clarkson, without a jury, judgment was entered that Jamestown recover the sum of $2,731.46 for defenses provided to Nationwide's insured William by Jamestown, and the sum of $1,363 for settlements made with Richard Splown and John Compton, and that Jamestown not recover the sum of $2,984.22 expended for a declaratory judgment action. Both Jamestown and Nationwide appealed. Jamestown elects not to perfect its appeal, and the case is now before this Court only on Nationwide's appeal.

Haynes & Baucom by A. Myles Haynes for defendant appellant.

Craighill, Rendleman & Clarkson by Hugh B. Campbell, Jr., for plaintiff appellee.

MOORE, Justice.

The facts briefly stated are as follows: On 8 February 1963 William Clark Hamrick was driving an automobile owned by Tedder Motor Company, with the view of purchasing it, when he was involved in an accident. As a result of the accident, Richard Wiseman Splown, John P. Compton, Mrs. Willie Bowles Lovelace, and Frances Sisk Holland made claims against William for personal injuries and property damages sustained in the accident. Nationwide, at the time, had in force a family automobile liability policy which it had issued to W. F. Hamrick, the father of William. Jamestown had in force a garage liability policy which it had issued to Thomas N. Tedder, d/b/a Tedder Motor Company. Both Jamestown and Nationwide investigated the

accident, and Nationwide erroneously, as it later developed, denied coverage to William on the ground that he was not a "relative" within the meaning of his father's policy and, further, because he was operating the automobile in the "automobile business" at the time of the accident. Jamestown's policy provided coverage to William "only if no other valid and collectible automobile liability insurance, either primary or excess, . . . is available to such person." Jamestown contends that had Nationwide admitted coverage, Jamestown would not have been liable under the terms of its policy. However, since Nationwide denied coverage, Jamestown notified Nationwide that it would process the claims arising out of the accident but would reserve all of its rights and all of its insured's rights under the law and under the terms of its poliicy to make later claims against Nationwide for indemnity, adjustment and legal expenses incurred in defense of litigation or in any suit to determine coverage as between the respective companies, and based upon its apparent duty to defend William, Jamestown did settle the claims made by Splown and Compton, and provided defenses to the suits brought by Mrs. Lovelace and Frances Holland.

On 14 February 1964 Jamestown filed a declaratory judgment action against Nationwide in the Superior Court of Mecklenburg County, seeking a determination of the rights, duties and liabilities as between the companies under the terms of their respective policies. Judgment was entered in favor of Jamestown. Nationwide appealed, and the judgment was affirmed by an opinion of this Court reported in **266 N.C. 430, 146 S.E. 2d** 410. This decision established: (1) That Nationwide's policy affords coverage to William with respect to claims arising out of the collision, and (2) that Jamestown's policy does not afford coverage to William and that no claims by any of the injured parties arising out of this collision are valid against Jamestown. Under this decision Nationwide took over the defense of the Holland case, settled it, and paid to the limits of its policy the judgment in the Lovelace case.

Jamestown contends that in view of the decision in the declaratory judgment action, the trial court in this case properly found Jamestown was entitled to reimbursement from Nationwide for its expenses involved in this matter for investigation, settlement, and defense of the claims against Nationwide's insured William.

Nationwide contends (1) the lower court erred in making certain findings of fact in its judgment based upon the evidence introduced at the trial, and (2) the lower court erred as a matter of law in failing to dismiss Jamestown's action, in failing to adopt the findings of fact and conclusions of law and judgment tendered by Nationwide, in signing the judgment as it appears of record, and in failing to set aside the judgment as appears of record.

[1] A careful examination of the record discloses that the material findings of fact by the trial judge are amply supported by the evidence. Findings of fact which are supported by competent evidence, even though there is evidence *contra,* are conclusive on appeal. *Jamestown Mutual Ins. Co. v. Nationwide Mutual Ins. Co.,* 266 N.C. 430, 146 S.E. 2d 410; *Mitchell v. Barfield,* 232 N.C. 325, 59 S.E. 2d 810; *Distributing Corp. v. Seawell,* 205 N.C. 359, 171 S.E. 354. The assignments of error to the court's findings of fact are overruled.

[2] Nationwide further assigns as error the failure of the trial court to find the facts as tendered by Nationwide. Exceptions to the refusal of the trial judge to find certain facts will not be sustained when some of the findings requested are immaterial and the evidence in regard to others is conflicting, or appellant fails to introduce evidence in the record that would sustain such findings. *Jamestown Mutual Ins. Co. v. Nationwide Mutual Ins. Co., supra; Pittman v. Snedeker,* 264 N.C. 55, 140 S.E. 2d 740; 1 Strong's N. C. Index 2d, Appeal and Error § 28, p. 160. Applying these rules, the record discloses no error in the court's failing to adopt the findings of fact tendered by Nationwide.

Nationwide further contends the trial court erred as a matter of law in allowing Jamestown to recover under the subrogation provisions of Jamestown's policy or under subrogation by operation of law. It is well settled that an insurer who wrongfully refuses to defend a suit against its insured is liable to the insured for sums expended in payment or settlement of the claim, for reasonable attorneys' fees, for other expenses of defending the suit, for court costs, and for other expenses incurred because of the refusal of the insurer to defend. *Nixon v. Insurance Co.,* 255 N.C. 106, 120 S.E. 2d 430; *Anderson v. Insurance Co.,* 211 N.C. 23, 188 S.E. 642; Annot., 49 A.L.R. 2d 694 (1956); 44 Am. Jur. 2d, Insurance § 1547 (1969).

[3] This appeal poses the question: Can the plaintiff insurance company recover sums paid out in settlement of the claims

against the insured when the defendant insurance company wrongfully refused to defend its insured? Nationwide contends not, relying on the authority of *Fireman's Fund Insurance Company and the Insurance Company of the State of Pennsylvania v. North Carolina Farm Bureau Mutual Insurance Company,* 269 N.C. 358, 152 S.E. 2d 513. In *Fireman's Fund* the injured party brought suit against the named insured in an automobile liability policy and against the driver of the truck owned by the named insured. The insurer in the policy defended the action on behalf of the named insured while refusing to defend it on behalf of the driver. Upon the refusal of the insurer to defend the action as to the driver, the driver called on his liability insurers, in policies which only covered liability in excess of other insurance, to defend the action. His insurers employed attorneys to defend him but withdrew upon discovering facts which excluded coverage under their policies. Driver's insurers then brought this action against the insurer in the owner's liability policy to recover the amount expended by them for attorney's fees defending the driver. This Court held that judgment denying recovery was properly entered. In *Fireman's Fund* the injured party was claiming in excess of the limit of the primary policy so that the driver's defending insurers had their own interests to protect, and, in addition, each under the terms of their policies had a separate and distinct obligation to provide defense for the driver. This is not true in the present case. Under an automobile garage liability policy containing exactly the same exclusion clause as does Jamestown's policy in this case, our Court in *Allstate Insurance Co. v. Shelby Mutual Insurance Co.,* 269 N.C. 341, 152 S.E. 2d 436, held that the existence of other liability insurance was an event activating the exclusion clause of the garage liability policy (Jamestown's policy in this case) relieving the insurer under the garage liability policy from any liability or duty to defend its insured who was covered by other liability insurance. Nationwide's coverage having been established by the declaratory judgment action, Jamestown under *Allstate v. Shelby Mutual, supra,* had no liability and no duty to defend. These facts distinguish *Fireman's Fund* from the present case.

Upon Nationwide's refusal to defend William in this action, Jamestown, at the request of William, undertook to do so and settled two of the claims against William, tried the Lovelace case and obtained a stay of execution on the judgment until the ultimate liability to pay it could be determined, and provided a defense in the Holland case from the time of the in-

stitution of the action in September, 1964 until April, 1966 when relieved of the obligation to do so by the decision of the North Carolina Supreme Court in the declaratory judgment action. Jamestown also turned over to Nationwide, at Nationwide's request, all of Jamestown's investigative file relating to the Holland case. Nationwide stipulated that the settlements and the charges made by Jamestown for these services are fair and reasonable. Obviously, Nationwide benefited from the settlements made and services paid for by Jamestown. Under these circumstances, Nationwide should not be allowed to shift the burden of defense to its insured William or to Jamestown simply by denying coverage to William. To allow Nationwide to do so would allow it to escape its obligations under its policy.

[4] Nationwide contends, however, that Jamestown was a mere volunteer or intermeddler under no legal duty to defend in this case, and as such is not entitled to recover under the principle of subrogation. As stated in 50 Am. Jur., Subrogation § 23 (1944): "The right of subrogation is not necessarily confined to those who are legally bound to make the payment, but extends as well to persons who pay the debt in self-protection, since they might suffer loss if the obligation is not discharged."

[5] Generally, the doctrine of equitable subrogation may be invoked if the obligation of another is paid by the plaintiff for the purpose of protecting some real or supposed right or interest of his own. *Boney v. Central Mutual Ins. Co. of Chicago,* 213 N.C. 563, 197 S.E. 122; *Moring v. Privott,* 146 N.C. 558, 60 S.E. 509; *Davison v. Gregory,* 132 N.C. 389, 43 S.E. 916; 22 N. C. L. Rev. 167 (1944). In *Boney,* the Home Insurance Agency took an order for an automobile liability policy from Thomas-Howard Company and confirmed placement with the Central Mutual Insurance Company of Chicago. Later, when Thomas-Howard Company had a liability claim made against it, Central Mutual denied coverage and Home Insurance Agency stepped in and provided a defense. It later turned out that Central Mutual had coverage and on appeal the Court asked this question: "Was claimant such a pure volunteer as to be deprived of the right of subrogation?" In answer, the Court said:

> " 'Cases in our own reports illustrate the doctrine that though the party who makes the payment may, in fact, have no real or valid legal interest to protect, he may yet be subrogated when he acts in good faith, in the belief that

he had such interest.' *Publishing Co. v. Barber, supra* [165 N.C. 478, 81 S.E. 694]. . . .

* * *

"It is sufficient to invoke the doctrine of subrogation if (1) the obligation of another is paid; (2) 'for the purpose of protecting some real or supposed right or interest of his own.' 60 C. J., Subrogation, Sec. 113."

[4] In the instant case Jamestown defended because Nationwide refused to do so. Jamestown defended in good faith as Jamestown would have been liable had it been adjudged that Nationwide's policy did not provide coverage for William. Under these circumstances, Jamestown was not such a pure volunteer as to be deprived of the right of subrogation. *Boney v. Central Mutual Ins. Co. of Chicago, supra; Publishing Co. v. Barber,* 165 N.C. 478, 81 S.E. 694.

[6] Finally, Nationwide contends that a portion of expenses incurred by Jamestown in connection with the settlements and defense of claims against William were paid more than three years prior to the institution of this action (31 October 1967) and are barred by the three-year statute of limitations, G.S. 1-52(1).

"Generally, a cause of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being at that time under no disability. . . . When the statute of limitations begins to run it continues until stopped by appropriate judicial process." *Acceptance Corp. v. Spencer,* 268 N.C. 1, 149 S.E. 2d 570; *Peal v. Martin,* 207 N.C. 106, 176 S.E. 282; *Washington v. Bonner,* 203 N.C. 250, 165 S.E. 683; 5 Strong's N. C. Index 2d, Limitation of Actions § 4.

In the present case Jamestown was under no disability and could have instituted suit against Nationwide at the time it paid those items which it contends Nationwide should have paid. The rights and obligations of Jamestown and Nationwide under their respective policies could have been determined in such action as well as in a declaratory judgment action. Jamestown having delayed more than three years after payment to bring action for collection of some of such items is now barred by the three-year statute as to those paid more than three years prior to the institution of this action.

We hold that the items paid more than three years prior to 31 October 1967, the date of the institution of this action, shown by the record to amount to $1,813.60, are barred by the statute of limitations, and that the judgment entered by Judge Clarkson should be reduced by that amount. As modified, the judgment is affirmed.

Modified and Affirmed.

ARTIE W. GOLDMAN v. PARKLAND OF DALLAS, INC.

No. 3

(Filed 14 October 1970)

1. **Process § 14— service on nonresident defendant — jurisdiction of state court — contract made in this state**

In an action by a North Carolina resident against a nonresident manufacturer of dresses for breach of a contract whereby the resident undertook to act as the manufacturer's representative in this and other states, the trial court properly found that the contract was made in this State, thereby subjecting the manufacturer to the *in personam* jurisdiction of the courts of this state, where there was evidence that (1) the parties entered into general discussions in another state concerning a possible contract; (2) the salesman later received a letter from the manufacturer detailing the terms of a proposed contract; (3) the letter provided that "if the above is agreeable, please sign and return the original copy of the letter"; and (4) the resident signed the letter in this state and mailed it back to the manufacturer. G.S. 55-145(a)(1).

2. **Appeal and Error § 57— findings of fact — review on appeal**

The findings of fact by the trial judge are conclusive if supported by competent evidence even though there is evidence *contra.*

3. **Contracts § 2— offer and acceptance — letter of proposed contract**

A letter from a dress manufacturer to a North Carolina resident which set forth the terms of a proposed contract whereby the resident would represent the manufacturer in the sale of dresses and which provided that "if the above is agreeable, please sign and return the original copy of the letter," *is held* to constitute an offer; the final act necessary to make the letter a binding contract was the resident's acceptance in signing the letter and depositing it, properly addressed to the manufacturer, in the U. S. mail.

4. **Process § 14; Constitutional Law § 24— service on nonresident defendant — contract made in this state — due process**

A contract between a North Carolina resident and a nonresident manufacturer of dresses met the due process requirement of "substantial connection" with this state so as to subject the manufacturer to the *in personam* jurisdiction of the courts of this state, where (1) the contract was made in this state; (2) the resident, under the terms of the contract, solicited business for the manufacturer in thirty or more North Carolina cities and towns; and (3) the resident devoted a larger part of his time to promoting the manufacteurer's business in this state than in any other state.

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

Plaintiff, a resident of North Carolina, instituted this action for breach of contract against defendant, a Texas corporation not licensed to do business in North Carolina. Pursuant to the provisions of G.S. 55-145(a)(1) and G.S. 55-146, the complaint and summons were served on the Secretary of State on 11 March 1969 and were duly forwarded by letter to the defendant at its principal office in Dallas, Texas, by registered mail, return receipt requested.

At the September 8, 1969 Civil Session of Superior Court of Guilford County, Greensboro Division, defendant made a special appearance before the Honorable Robert A. Collier, Jr., Judge Presiding, and moved to dismiss the action for lack of jurisdiction; to quash the summons and to set aside the attempted service of summons on the ground that the court had not acquired jurisdiction over the defendant since defendant was a foreign corporation not doing business in North Carolina, and for the reason the contract out of which the plaintiff's cause of action arises was not made in North Carolina and there was no substantial performance under the contract in North Carolina. The court considered the verified complaint, the affidavits or Ira Orenstein, vice president of defendant corporation; Artie W. Goldman, the plaintiff; and Leonard Smoler, and found that the contract involved in the action was made in North Carolina, and denied defendant's motion to dismiss. Defendant appealed, and the Court of Appeals affirmed. 7 N.C. App. 400, 173 S.E. 2d 15.

Smith, Moore, Smith, Schell & Hunter by Harold N. Bynum for defendant appellant.

Harry Rockwell and John R. Hughes for plaintiff appellee.

MOORE, Justice.

Appellant questions the validity of service of summons on defendant, a foreign corporation, by service on the Secretary of State in accordance with the provisions of G.S. 55-146(a)(b) and challenges the constitutionality of G.S. 55-145(a)(1) as applied in this case.

The verified complaint alleges in substance these facts: Plaintiff is a resident of Guilford County, North Carolina, and defendant is a Texas corporation with its principal office in the city of Dallas therein and is engaged in the business of manufacturing and selling dresses. Shortly before 4 January 1968, plaintiff and defendant entered into a written contract under which the plaintiff undertook to act as a manufacturer's representative for the defendant in the sale of its "Petites Unlimited" line of dresses in specified states in the southeastern region of the United States, including North Carolina. The contract was to remain in full force and effect for one year, commencing 4 January 1968 and ending 3 January 1969, and the plaintiff was to receive a commission on sales of defendant's merchandise with a minimum "draw" of $250 per week. Plaintiff entered into the performance of the contract in accordance with its terms and continued to perform the same until 20 June 1968, at which time the plaintiff alleges the defendant breached said contract and by reason of this breach defendant is indebted to the plaintiff in the sum of $7,000. The plaintiff further alleges the contract, a copy of which was attached to the complaint, was made in North Carolina and was to be performed in North Carolina.

[1] This appeal poses two questions: (1) Did the court err in finding as a fact that the contract was made in North Carolina? (2) Upon the facts and circumstances disclosed by the record, does the assumption of *in personam* jurisdiction of corporate defendant by the North Carolina court, pursuant to G.S. 55-145(a)(1), offend the due process clause of the Constitution of the United States? We hold both questions should be answered, no.

The record discloses that plaintiff and Ira Orenstein, vice president of defendant corporation, discussed a possible contract between plaintiff and defendant corporation in Atlanta, Georgia, in late October or early November, 1967. Defendant contends, and offers an affidavit of Ira Orenstein tending to show, that a verbal agreement was entered into at that time in Atlanta and that the letter, which plaintiff contends is the contract and

which was attached to the plaintiff's complaint as Exhibit "A," simply confirmed the prior verbal agreement. Plaintiff contends, and offers his affidavit and that of Leonard Smoler which tend to show, that no agreement was reached in Atlanta, but to the contrary there was only a general discussion concerning a possible contract and that the subsequent letter setting out in detail the terms of a proposed contract constituted an offer which was to be accepted or rejected by plaintiff; that the letter itself said: "If the above is agreeable, please sign and return the original copy of this letter"; that plaintiff accepted this offer in Greensboro, North Carolina, by signing the letter and depositing it in the United States mail in Greensboro, North Carolina, addressed to Parkland of Dallas, Inc., Dallas, Texas.

Based on the complaint and affidavits, the trial court found:

> "1. That the conversations between the plaintiff and the defendant's agent at the Atlanta Merchandise Mart the latter part of October, 1967, were preliminary negotiations looking toward the entry into a future contract; that the conversations constituted neither an offer nor an acceptance of the terms of the contract attached to the complaint as Exhibit "A."
>
> "2. That the contract, Exhibit "A," when forwarded by the defendant to the plaintiff in Greensboro for execution, constituted an offer to the plaintiff to enter into a contract upon the terms therein set forth; and that the said offer was accepted by the plaintiff in Greensboro, North Carolina, by his signature thereto, and the same became a binding contract between the parties at the time the accepted offer was placed in the United States mails in Greensboro, North Carolina."

Upon the foregoing findings of fact, the court concluded that the contract, the alleged breach of which is the subject of this action, was made in North Carolina.

[2] It is established law that the findings of fact by the trial judge are conclusive if supported by competent evidence even though there is evidence *contra. Zopfi v. City of Wilmington,* 273 N.C. 430, 438, 160 S.E. 2d 325, 333; *Burgess v. Gibbs,* 262 N.C. 462, 466, 137 S.E. 2d 806, 809; *Farmer v. Ferris,* 260 N.C. 619, 133 S.E. 2d 492; 1 Strong's N. C. Index 2d, Appeal and Error § 57, p. 223.

[3] The letter in this case by its terms constituted an offer.

The final act necessary to make it a binding agreement was its acceptance, which was done by the plaintiff by signing it in Greensboro, North Carolina, and there depositing it in the United States mail properly addressed to defendant. The trial judge's findings were based upon ample competent evidence, and the conclusion that the contract was made in North Carolina was correct. *Board of Education v. Board of Education,* 217 N.C. 90, 6 S.E. 2d 833; *Bundy v. Commercial Credit Co.,* 200 N.C. 511, 157 S.E. 860; *Rucker v. Sanders,* 182 N.C. 607, 109 S.E. 857; 2 Strong's N. C. Index 2d, Contracts § 2, p. 294.

[4] Defendant further contends, conceding the contract was made in North Carolina, the assumption of *in personam* jurisdiction by the North Carolina court, pursuant to G.S. 55-145(a) (1), offends the due process clause of the Constitution of the United States since the defendant did not have sufficient "minimum contacts" with the State as required by the decisions of the United States Supreme Court.

G.S. 55-145(a) (1) provides in pertinent part:

> "Every foreign corporation shall be subject to suit in this State, by a resident of this State. . . , whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> "(1) Out of any contract made in this State or to be performed in this State. . . ."

This Court in construing G.S. 55-145(a) (1) in *Byham v. House Corp.,* 265 N.C. 50, 143 S.E. 2d 225, a case involving a contract made in Tennessee but performed in North Carolina, held that the service of process upon the foreign corporation was proper under the terms of the statute since the contract was to be performed in this State. On the due process question, the Court stated:

> ". . . The controlling authority in this field is found in the decisions of the Supreme Court of the United States. The correct criteria are set out in the landmark case, *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) [66 S. Ct. 154, 90 L. ed 95]. As stated in *McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957) [78 S. Ct. 199, 2 L. ed. 2d 223]:
>
> " 'Since *Pennoyer v. Neff,* 95 U.S. 714 [24 L. ed. 565 (1878)], this Court has held that the Due Process Clause

of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned "consent," "doing business," and "presence" as the standard for measuring the extent of state judicial power over such corporations. See Henderson, the Position of Foreign Corporations in American Constitutional Law, c. V. More recently in *International Shoe Co. v. Washington,* 326 U.S. 310 [66 S. Ct. 154, 90 L. ed. 95 (1945)], the Court decided that "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'the traditional notions of fair play and substantial justice.' " *Id.,* at 316.'

" 'In *McGee* the Court noted the trend of expanding personal jurisdiction over nonresidents. As technological progress has increased the flow of commerce between states, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff,* 95 U.S. 714 [24 L. ed. 565 (1878)], to the flexible standard of *International Shoe Co. v. Washington,* 326 U.S. 310 [66 S. Ct. 154, 90 L. ed. 95 (1945)]. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.' *Hanson v. Denckla,* 357 U.S. 235, 250 [78 S. Ct. 1228, 2 L. ed. 2d 1283 (1958)]."

Hanson v. Denckla, 357 U.S. 235, 2 L. ed. 2d 1283, 78 S.Ct. 1228, continued: "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that state that are prerequisite to its exercise of power over him."

For a full discussion of these and other cases, see Annot., 20 A.L.R. 3d 1205 (1968); 44 N. C. L. Rev. 449; 2 Wake Forest Intra. L. Rev. 1.

This Court in *Byham v. House Corp., supra,* listed a number of factors, some essential and others only having weight, to be considered in determining whether the test of "minimum contacts" and "fair play" have been met. The essential requirements are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) the Legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. The Court then states: "It is sufficient for the purpose of due process if the suit is based on a contract which has substantial connection with the forum state," citing *McGee v. International Life Ins. Co., supra.*

In *McGee* the United States Supreme Court held it was "fair" to subject a foreign corporation to jurisdiction when the only contact with the state of the forum (California) was a single life insurance policy mailed to the forum state and on which premiums had been mailed from the forum state to the foreign corporation in Texas, holding that such insurance contract had a "substantial connection" with the forum state.

In the instant case the contract in question clearly met the requirement of "substantial connection" with North Carolina. It was made in this State. Plaintiff, under the terms of the contract, solicited business in thirty or more North Carolina cities and towns for the purpose of creating and expanding a market for appellant's dresses in North Carolina. He devoted a larger part of his time to promoting defendant's business in North Carolina than in any other state and did in fact sell a quantity of dresses manufactured by the defendant to customers within this State. The other essential requirements set out in *Byham v. House Corp., supra,* are also met; that is, the form of substituted service adopted by North Carolina gives reasonable assurance that the defendant would be given actual notice—in fact, there is no contention on the part of the defendant that it did not receive actual notice; by entering into a contract made in North Carolina and to be performed in part in North Carolina, the defendant availed itself of the privilege of conducting its business in this State thus invoking the benefits and protection of its laws, and clearly the North Carolina Legislature, by the express

words of the statute authorizing such service on a foreign corporation when the contract was made in North Carolina, sought to give to its courts the power to assert jurisdiction over nonresident defendants to the full extent permitted by the due process requirement.

The court's assumption of *in personam* jurisdiction over defendant in this action fully meets the requirements of due process under the decisions of the United States Supreme Court and the decisions of this Court. The judgment below is

Affirmed.

AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC. v. WILLARD REALTY COMPANY, INC., OF RALEIGH

No. 20

(Filed 14 October 1970)

1. **Constitutional Law § 26; Judgments §§ 22, 51— foreign judgment — lack of jurisdiction over person of defendant**

   If the court of another state which rendered judgment *in personam* against defendant did not have jurisdiction over the person of defendant, the judgment is void even in such other state.

2. **Judgments § 51— action to enforce foreign judgment — determination of whether summons was properly served in foreign state**

   When suit is brought in a court of this State upon a judgment rendered by a court of another state, before reaching any question as to the validity of a statute of such other state purporting to provide a substitute for personal service of process upon a nonresident thereof, or any question as to the validity and effect of a purported appointment by the defendant of an agent for the service of process upon him in the other state, the courts of this State must first determine whether summons was served in accordance with the law of the state in which the judgment was rendered.

3. **Judgments §§ 1, 17— lack of jurisdiction over person of defendant — void judgment**

   Unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, the court has no jurisdiction of the person and judgment rendered against him is void.

4. **Constitutional Law § 26; Judgments §§ 22, 51— validity of foreign judgment — laws of foreign state**

   The validity and effect of a judgment of another state must be determined by reference to the laws of the state wherein the judgment was rendered.

5. **Constitutional Law § 26; Judgments § 51; Evidence § 2— judicial notice — law of another state**

In determining the validity and effect of a judgment rendered in another state, the Supreme Court is required by G.S. 8-4 to take judicial notice of the law of such other state.

6. **Constitutional Law § 26; Judgments § 51— foreign judgment — full faith and credit — transcript shows invalid service of summons**

Where it appears on the face of the transcript of a default judgment rendered against defendant corporation in Missouri that the purported service of process on an alleged agent of defendant for service of process in that state was "by leaving a true copy hereof at the regular business office of the within named appointed agent," but the return does not purport to show a delivery of the summons to the named agent or to any person in the office or that anyone was present in the office when the constable left the summons therein, the transcript shows that service of summons upon defendant was attempted by a method not authorized by Missouri statute or by the rules of court of that state, and the district court erred in giving full faith and credit to the Missouri judgment.

ON *certiorari* to the Court of Appeals to review its decision affirming a judgment for the plaintiff rendered by the District Court of WAKE County.

The plaintiff instituted this action in the District Court of Wake County for the recovery of $1,369.00 alleged to be due it from the defendant upon a default judgment entered by the Magistrate's Court of the Seventh District, St. Louis County, Missouri, on 13 February 1968. The defendant filed an answer alleging that the Missouri judgment is not valid for the reason that the court in which it was rendered had no jurisdiction over the defendant.

At the trial in the District Court of Wake County, the evidence for the plaintiff consisted of a certified transcript of the judgment entered by the Missouri court. In addition to reciting the entry by that court of the judgment, the transcript states:

"January 22, 1968, Issued Summons for above named defendant, returnable on the 13th day of February, 1968, at 9:30 o'clock A.M. and delivered the same to the Constable of Second District, St. Louis County, Missouri.

"January 30, 1968, Writs of Summons returned duly executed as follows:

"By leaving a true copy hereof at the regular business office of the within named appointed agent, George M. Kinder."

The transcript further recites that the defendant did not appear in the Missouri court and judgment was rendered by default.

The defendant offered in evidence in the District Court of Wake County certain exhibits, including a copy of the contract, for the alleged breach of which the Missouri action was instituted, and a copy of the summons issued in the Missouri action. The printed form for the return of the officer, appearing upon this copy of the summons, is not completed and is unsigned.

The contract is one for membership in the plaintiff's marketing and sales program. It provided that the plaintiff would perform certain services and supply certain materials and the defendant would make payments to the plaintiff and comply with certain requirements. The contract provided:

"f. Aims. [plaintiff] and Broker [defendant] mutually agree that Mr. George M. Kinder, located at Route 3 Box 25, U.S. Hwy. 40, in Chesterfield, St. Louis County, Missouri, shall serve * * * Broker as Broker's Agent for the receipt of any legal documents including process as may be required under this Agreement or the enforcement thereof."

The District Court of Wake County concluded, "Said service of process on George M. Kinder as appointed agent of defendant on January 30, 1968, was valid and the Magistrate's Court of St. Louis County acquired personal jurisdiction over the defendant." It, therefore, gave judgment for the plaintiff. The Court of Appeals affirmed.

Boyce, Mitchell, Burns & Smith for defendant appellant.

Jordan, Morris & Hoke for plaintiff appellee.

LAKE, Justice.

The appellant contended, in the Court of Appeals and before this Court, that the provision in the contract between the parties hereto for the appointment of George M. Kinder as agent of the defendant, "for the receipt of any legal documents including process" required for the enforcement of the contract, was not sufficient to enable the Missouri court to acquire jurisdic-

tion, so as to render a judgment *in personam* against the defendant, by the service of summons upon Kinder. The briefs and arguments of the parties in the Court of Appeals and before us were directed to this question alone. The Court of Appeals determined it in favor of the plaintiff. It held this provision in the contract is a sufficiently clear and definite announcement to the defendant that, by entering into such contract, he consented to being sued in Missouri in an action in which summons was served upon Kinder as the defendant's agent. Accordingly, the Court of Appeals affirmed the judgment of the District Court of Wake County in favor of the plaintiff. We reverse without reaching this question and without expressing any opinion thereon.

[1] Article IV, § 1, of the Constitution of the United States, provides, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Nevertheless, if the Missouri court, which rendered this judgment *in personam* against the defendant, did not have jurisdiction over the person of the defendant, the judgment is void even in Missouri. *Hanson v. Denckla,* 357 U.S. 235, 2 L. ed. 2d 1283, 78 S. Ct. 1228, rehear. den., 358 U.S. 858, 3 L. ed. 2d 92, 79 S. Ct. 10; *Pennoyer v. Neff,* 95 U.S. 714, 24 L. ed. 565. In the Hanson case, the Court said:

> "* * * With the adoption of that [Fourteenth] Amendment, any judgment purporting to bind the person of a defendant over whom the Court had not acquired *in personam* jurisdiction was void within the State as well as without. * * *
>
> "* * * Delaware is under no obligation to give full faith and credit to a Florida judgment invalid in Florida because offensive to the Due Process Clause of the Fourteenth Amendment. 28 USC, § 1738. Even before passage of the Fourteenth Amendment this Court sustained state courts in refusing full faith and credit to judgments entered by courts that were without jurisdiction over nonresident defendants. *D'Arcy v. Ketchum,* 11 How 165; *Hall v. Lanning,* 91 U.S. 160. See *Baker v. Baker, Eccles & Co.,* 242 U.S. 394; *Riley v. New York Trust Co.,* 315 U.S. 343."

[2, 3] When suit is brought in a court of this State upon a judgment rendered by a court of another state, before reaching any question as to the validity of a statute of such other state

purporting to provide a substitute for personal service of process upon a nonresident thereof, or any question as to the validity and effect of a purported appointment by the defendant of an agent for the service of process upon him in the other state, the courts of this State must first determine whether summons was served in accordance with the law of the state in which the judgment was rendered. "It is elementary that unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, the court has no jurisdiction of the person and judgment rendered against him is void." *Thomas v. Frosty Morn Meats, Inc.,* 266 N.C. 523, 146 S.E. 2d 397; *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26.

[6] Assuming, without deciding, that Kinder was the duly appointed agent of the defendant for service of summons in Missouri, it appears upon the face of the transcript of the Missouri judgment that the purported service was "by leaving a true copy hereof [i.e., the summons] at the regular business office of the within named appointed agent, George M. Kinder." The return does not purport to show a delivery of the summons to Kinder or to any other person in the office. It does not purport to show that anyone was present in the office when the constable left the summons therein. For all that appears upon the transcript, the summons may have been deposited by the constable in the wastebasket in the office of Mr. Kinder.

[4, 5] Since the validity and effect of a judgment of another state must be determined by reference to the laws of the state wherein the judgment was rendered, it is necessary for us to examine the statutes of the State of Missouri. *Dansby v. Insurance Co.,* 209 N.C. 127, 183 S.E. 521. We are required by G.S. 8-4 to take judicial notice of the Missouri law. Stansbury, North Carolina Evidence, 2d ed, § 12.

Vernon's Annotated Missouri Statutes, 506.150 reads as follows:

> "*Summons and petition shall be served together—how service shall be made.*
>
> "The summons and petition shall be served together. Service shall be made as follows:
>
> * * *
>
> "(3) Upon a domestic or foreign corporation or upon a partnership, or other unincorporated association, when

by law it may be sued as such, *by delivering a copy of the summons and of the petition* to an officer, partner, a managing or general agent, or by leaving the copies at any business office of the defendant with the person having charge thereof, or *to any other agent authorized by appointment* or required by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." (Emphasis added.)

Rule 54.06 of the Missouri Rules of Court, Rules of Civil Procedure, 1970 edition, Vernon's Annotated Missouri Statutes, provides:

"*Summons and Petition—How Served.*

"The summons and petition shall be served together.

Service within the state shall be made as follows:

"* * * (c) *Service—On Corporation.* (1) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, when by law it may be sued as such, by delivering a copy of the summons and of the petition to an officer, partner, or a managing or general agent, or by leaving the copies at any business office of the defendant with the person having charge thereof *or by delivering copies to any other agent authorized by appointment* or required by law to receive service of process, and if the agent is one authorized by law to receive service and the law so requires, by also mailing a copy to the defendant." (Emphasis added.)

[6] Since it appears upon the face of the transcript of the Missouri judgment that service of summons upon the defendant was attempted by a method not authorized by the Missouri statute or by the rules of court in that state, it follows that the Missouri judgment is void. Consequently, the judgment of the District Court of Wake County giving it full faith and credit as a valid judgment was erroneous.

The judgment of the Court of Appeals is reversed and the matter is remanded to the Court of Appeals for the entry of a proper judgment by it reversing the judgment of the District Court of Wake County.

Reversed.

STATE OF NORTH CAROLINA v. BERNARD GAITEN

No. 12

(Filed 14 October 1970)

1. **Constitutional Law § 31— right of confrontation and cross-examination — N. C. Constitution**

"The law of the land" guaranteed by Article I, Section 17 of the North Carolina Constitution, synonymous with "due process," preserves the right of confrontation and cross-examination to an accused in a criminal action.

2. **Criminal Law § 88— cross-examination as to prior inconsistent statements or acts**

By cross-examination a witness may be questioned as to prior inconsistent statements or as to any act inconsistent with his testimony in order to impeach him or cast doubt upon his credibility.

3. **Constitutional Law § 37— waiver of statutory or constitutional rights**

A defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.

4. **Constitutional Law § 31— right of confrontation and cross-examination — statement by court that testimony was irrelevant**

In this common law robbery prosecution, defendant was not denied the right of confrontation and the right of cross-examination as to prior inconsistent statements when the trial judge, in the absence of the jury, stated that testimony concerning another person presumably involved in another criminal charge was "irrelevant to the issue here."

5. **Constitutional Law § 31; Criminal Law § 66— identification procedure — excusing jury to determine if defendant desires voir dire**

Defendant's constitutional rights were not impaired when the trial court excused the jury to determine whether defendant desired a *voir dire* on the question of identification after defense counsel questioned a State's witness as to the procedure used to identify defendant.

6. **Criminal Law § 86— cross-examination of defendant — prior convictions**

When defendant testified, he subjected himself to cross-examination as to prior unrelated criminal offenses for the purpose of impeaching his credibility, but the State was bound by his denial of additional convictions and could not offer evidence to contradict him.

7. **Criminal Law § 86— denial by defendant of additional convictions — further cross-examination by State**

Where defendant on cross-examination admitted three past convictions and then stated, "and that's all," the State was not precluded from further cross-examination of defendant concerning other prior unrelated criminal convictions so as to "sift the witness."

8. **Criminal Law § 86— questions as to prior convictions — information and good faith — necessity for voir dire**

While it is permissible for the trial court to hold a *voir dire* hearing and find facts as to whether questions asked defendant on cross-examination by the solicitor concerning prior convictions were based on information and asked in good faith, such procedure is not required.

9. **Criminal Law § 86— questions as to prior convictions — presumption of good faith**

Where the record fails to show that questions asked defendant on cross-examination concerning prior convictions were not based on information and asked in good faith, action of the trial judge in allowing such questions is presumed correct.

10. **Criminal Law § 112— instructions on reasonable doubt — lack or insufficiency of evidence**

In this prosecution for common law robbery, the trial court did not err in failing to instruct the jury that a reasonable doubt could arise from the lack or insufficiency of the evidence.

APPEAL by defendant from decision of the North Carolina Court of Appeals finding no error in the trial before *Beal, S.J.*, at 17 November 1969 Schedule "B" Session, MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment with the offense of common law robbery from the person of Henry James Reeves on 7 July 1969. He entered a plea of not guilty. The jury returned a verdict of guilty as charged in the bill of indictment. The court imposed judgment of imprisonment for a term of five years, and defendant appealed. The Court of Appeals found no error in the trial below, and defendant appealed to this Court pursuant to G.S. 7A- 30 (1), asserting that a substantial question under the United States and North Carolina Constitutions is presented because defendant was denied his right to confront and cross-examine witnesses.

Attorney General Morgan, Assistant Attorney General Bernard A. Harrell, and Assistant Attorney General Millard R. Rich, Jr., for the State.

Hicks & Harris, by Richard F. Harris III, for defendant.

BRANCH, Justice.

Appellant's first and principal assignment of error is as follows:

> The defendant excepts to and assigns as error the court's exclusion of the following relevant cross examination of the prosecuting witness, Henry J. Reeves, by sustaining objections to proper questions, ordering the jury to retire from the courtroom to the jury room, and stating that said cross examination was irrelevant to this case, in violation of the defendant's constitutional right to confront the witnesses against him and to submit them to his cross examination in the presence of the jury, as guaranteed by the Sixth Amendment to the Constitution of the United States and by the Constitution of North Carolina, Article I, Section 2.

The witness Reeves testified before the jury that he first identified defendant in Hickory, North Carolina. When the witness was questioned as to the procedure used to identify defendant, the trial judge excused the jury. In the jury's absence defendant's counsel stated that he did not contend that there was a line-up and that he did not want a *voir dire* on the question of identification. The trial judge then allowed defendant's counsel to question the witness for the purpose of determining when and how he identified defendant. The witness testified that he first identified defendant at the preliminary hearing in Mecklenburg County and that he was shown a photograph in Hickory of one John Wilson Patton, but that "I don't really believe I was shown a picture of this man. . . . The first time I recall identifying him for sure was when I appeared at the hearing and I saw him in person."

The record, *inter alia,* shows the following:

> COURT: He said that this man was charged but not arrested. He didn't arrest him. He doesn't know anything about it. He just understands he was charged but not arrested, that this defendant here was; that a hearing came on sometime or other by some reason or other and this boy appeared in court and he was there and identified him. Is that what you're saying?
>
> EXCEPTION No. 17 (R p 26)
>
> A. That's correct.
>
> COURT: So all of that's irrelevant to the issue here.
>
> EXCEPTION No. 18 (R p 27)

COURT: All right, let the jury come back. I'm going to let the jury go now. You gentlemen stay here just a minute.

(WHEREUPON, the jury returned to the courtroom.)

[1-3] "The law of the land" guaranteed by Article I, Section 17 of the North Carolina Constitution, synonymous with "due process," preserves the right of confrontation and cross-examination to an accused in a criminal action. *Pointer v. Texas,* 380 U.S. 400, 85 S.C. 1065, 13 L. Ed. 2d 923; *State v. Hightower,* 187 N.C. 300, 121 S.E. 616; *State v. Dixon,* 185 N.C. 727, 117 S.E. 170. By cross-examination a witness may be questioned as to prior inconsistent statements or as to any act inconsistent with his testimony in order to impeach him or cast doubt upon his credibility. *State v. McPeak,* 243 N.C. 273, 90 S.E. 2d 505; *State v. Chambers,* 238 N.C. 373, 78 S.E. 2d 209; *State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773. However, it is a general rule that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *State v. Mitchell,* 119 N.C. 784, 25 S.E. 783, 1020; *Cotton Mills v. Local 578,* 251 N.C. 218, 111 S.E. 2d 457, 79 ALR 646, *cert.* den. 362 U.S. 941, 4 L. Ed. 2d 770, 80 S. Ct. 806.

[4] Defendant apparently contends that he was denied the right of confrontation and the right of cross-examination as to prior inconsistent statements when the trial judge, in the jury's absence, stated that the testimony concerning another person presumably involved in another criminal charge was "irrelevant to the issue here." When the jury returned to the courtroom defendant's counsel continued a lengthy cross-examination without offering to pursue the question of inconsistent statements.

The Judge's statement that the other criminal matter was irrelevent did not amount to a denial of the right of cross-examination concerning prior inconsistent statements. Further, defendant's failure to assert the right of cross-examination amounted to a waiver of this right. Our conclusion as to this assignment of error draws strength from the facts of the case. Defendant testified that he was present in witness' automobile and that he saw his friends attack witness. Thus, contradictory statements as to when and how witness identified defendant became insignificant and without prejudice to defendant in light of his admissions.

[5] We find no merit in defendant's contention that his con-

stitutional rights were impaired when the trial judge excused the jury, since the trial judge properly excused the jury to determine whether defendant desired a *voir dire* on the question of identification.

The other portion of this assignment of error is broadside and is not properly related to any exception.

This assignment of error is overruled.

Defendant contends that the trial court erred by not making a determination as to whether questions asked on cross-examination by the solicitor concerning prior convictions were based on information and asked in good faith.

[6] When defendant testified, he subjected himself to cross-examination as to prior unrelated criminal offenses for the purpose of impeaching his credibility as a witness. *State v. Neal,* 222 N.C. 546, 23 S.E. 2d 911. The State was bound by his denial of such additional convictions and could not offer evidence to contradict him. *State v. Heard,* 262 N.C. 599, 138 S.E. 2d 243.

[7, 8] Defendant admitted three past convictions, and then stated, "And that's all." This statement did not prevent further cross-examination concerning other prior unrelated criminal convictions so as to "sift the witness." *State v. King,* 224 N.C. 329, 30 S.E. 2d 230. Whether the cross-examination went too far or was unfair rests largely in the sound discretion of the trial judge. *State v. Conner,* 244 N.C. 109, 92 S.E. 2d 668; *State v. Neal, supra.* In the case of *State v. Heard, supra,* the trial court held a *voir dire* hearing and found facts as to whether the solicitor's questions were based on fact and asked in good faith. This procedure is permissible but not required.

[9] This record fails to show that the questions asked were not based on information and asked in good faith, and when a record is silent on a particular point, the action of the trial judge is presumed to be correct. *State v. Dew,* 240 N.C. 595, 82 S.E. 2d 482. We hold that the court correctly allowed the challenged cross-examination.

[10] Defendant contends that the court erred in its charge concerning definition of reasonable doubt, because the trial judge failed to instruct that a reasonable doubt could arise from the lack or insufficiency of the evidence. The trial judge charged, in part, as follows:

"Now, ladies and gentlemen of the jury, a reasonable doubt is not a vain, imaginary or fanciful doubt, but is a sane and rational doubt. It is a doubt based on common sense. When it is said that you, the jury, must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that you must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge.

"I instruct you, members of the jury, that the burden of proof in this case is upon the State of North Carolina from the beginning to the close of the case. The burden of proof in the sense of ultimately proving or establishing the issue is upon the State, and it rests upon the State throughout the trial and the burden of proof never shifts. The defendant, who has not the burden of proof, is not bound to disprove the State's case, for the State must fail if, upon the whole evidence, the State fails to satisfy you, the jury, beyond a reasonable doubt that the defendant is guilty of every element of the offense charged against him in the bill of indictment."

The evidence in this case was not circumstantial. There was ample direct evidence to support the verdict. This charge as to reasonable doubt was adequate and meets the tests in both the opinion and the concurring opinion in the case of *State v. Britt*, 270 N.C. 416, 154 S.E. 2d 519.

We do not deem it necessary to further discuss the remaining assignments of error. Suffice it to say, we have carefully examined each of the remaining assignments of error without finding any prejudicial error.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. JAMES SUMNER LEE

No. 27

(Filed 14 October 1970)

1. **Weapons and Firearms — possession of machine or submachine gun — sufficiency of warrant — motion to quash**

A warrant charging that the defendant "did possess a machine gun or submachine gun or other like weapon, to wit: a Universal Caliber 30 M1 Carbine, Serial No. 135258, capable of firing 31 shots by the successive pulling of the trigger," *is held* sufficient to charge a violation of the offense making it unlawful for any person to possess machine guns, submachine guns, or other automatic or semiautomatic weapons, with the exception of such weapons which shoot less than 31 shots; the trial court in this case erred in granting defendant's motion to quash on the ground that the carbine in his possession could only fire 30 shots. G.S. 14-409.

2. **Statutes § 5— construction of words**

When the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a definite meaning is apparent or definitely indicated by the context.

3. **Statutes § 5— ejusdem generis rule**

In the construction of statutes, the *ejusdem generis* rule is that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.

4. **Indictment and Warrant § 14— motion to quash**

A motion to quash can be properly allowed on the ground that the matter charged does not constitute a criminal offense.

5. **Indictment and Warrant § 14— motion to quash — consideration of extraneous evidence**

In ruling on a motion to quash, the court is not permitted to consider extraneous evidence, and when the defect must be established by evidence *aliunde* the record, the motion must be denied.

APPEAL by the State under the provisions of G.S. 7A-30(2) from the Court of Appeals.

Defendant was tried in District Court in Lee County on 9 September 1969 on a warrant charging the unlawful possession of a machine gun or submachine gun or other like weapon, in violation of G.S. 14-409, and from a verdict of guilty appealed to the Superior Court for trial *de novo*. Upon the call of the case in

Superior Court on 28 October 1969, defendant moved to quash the warrant because: (1) the weapon described in the warrant was not such a weapon as was covered by the statute, and (2) as applied to defendant the statute (G.S. 14-409) was void for vagueness. The trial court ruled that the weapon described in the warrant was not a machine gun, submachine gun or other like weapon within the meaning of G.S. 14-409, and quashed the warrant. The State appealed, and the Court of Appeals affirmed, with Judge Graham dissenting. 8 N.C. App. 601, 174 S.E. 2d 658.

Attorney General Robert Morgan and Staff Attorney Donald M. Jacobs for the State.

Pearson, Malone, Johnson & DeJarmon for defendant appellee.

MOORE, Justice.

[1] The warrant charged that defendant "did possess a machine gun or submachine gun or other like weapon, to wit: a Universal Caliber 30 M1 Carbine, Serial No. 135258, capable of firing thirty-one (31) shots, by the successive pulling of the trigger . . . in violation of G.S. 14-409." G.S. 14-409 in pertinent part provides: "It shall be unlawful for any person . . . to possess machine guns, submachine guns, or other like weapons. . . . Provided, further, that automatic shotguns and pistols or other automatic weapons that shoot less than thirty-one shots shall not be construed to be or mean a machine gun or submachine gun under this section."

[2] When the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a definite meaning is apparent or definitely indicated by the context. *Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292; *Alliance Co. v. State Hospital,* 241 N.C. 329, 85 S.E. 2d 386. The usual and customary definitions of the words used in this statute are as follows: A machine gun is defined as "an automatic gun using small-arms ammunition for rapid continuous firing"; a submachine gun as "a lightweight automatic or semiautomatic portable firearm fired from the shoulder or hip"; a carbine as "a light automatic or semiautomatic military rifle" (Webster's Seventh New Collegiate Dictionary) ; and an automatic rifle as "a rifle capable commonly of either semiautomatic or full automatic fire and de-

signed to be fired without a mount." (Webster's Third New Collegiate Dictionary.)

The word "automatic" as used in connection with a firearm is one "using either gas pressure or force of recoil and mechanical spring action for repeatedly ejecting the empty cartridge shell, introducing a new cartridge and firing it," while a semiautomatic firearm is defined as one "employing gas pressure or force of recoil and mechanical spring action to eject the empty cartridge case after the first shot and load the next cartridge from the magazine but requiring release and another pressure of the trigger for each successive shot." (Webster's Seventh New Collegiate Dictionary.) The technical difference then between the automatic and semiautomatic weapon is that the automatic continues to fire without further pull of the trigger while the semiautomatic requires another pull of the trigger for each successive shot. The semiautomatic is autoloading in that it is loaded automatically but does not fire automatically. The automatic both loads and fires automatically. While technically there is this difference, in ordinary usage the word "automatic" is used to describe both automatic and semiautomatic weapons.

[3] Applying the definitions from Webster to the words of the statute (G.S. 14-409), a machine gun is automatic, a submachine gun can be automatic or semiautomatic. What then is meant by the phrase, "or other like weapons"? "In the construction of statutes, the *ejusdem generis* rule is that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated." *State v. Fenner,* 263 N.C. 694, 140 S.E. 2d 349; *State v. Smith,* 265 N.C. 173, 143 S.E. 2d 293; *State v. Ross,* 272 N.C. 67, 157 S.E. 2d 712. Applying this rule, the statute would then read: "It shall be unlawful for any person . . . to possess machine guns, submachine guns, or other automatic or semiautomatic weapons."

The statute goes further, however, and has a proviso which excludes automatic shotguns and pistols or other automatic weapons that shoot less than 31 shots. Again, giving the usual and customary meaning to the word "automatic," the proviso would exclude automatic weapons or semiautomatic weapons which shoot less than 31 shots. That this interpretation is correct seems apparent from the use of the words "automatic shotguns," which

ordinarily are called automatic but invariably are semiautomatic. The real reason for the exclusion under this proviso is not the difference in the rate of fire between an automatic and a semiautomatic weapon, but the more important consideration is the number of shots which can be fired without reloading. The better reasoning seems to be, and we so hold, that the General Assembly intended to include within the prohibition of the statute all weapons either automatic or semiautomatic which shoot 31 times or more and to exclude such weapons which shoot less than 31 times.

[1] The warrant in this case charges that the defendant "did possess a machine gun or submachine gun or other like weapon, to wit: a Universal Caliber 30 M1 Carbine, Serial No. 135258, capable of firing 31 shots by the successive pulling of the trigger." In effect this charges that the carbine in question was a semiautomatic weapon capable of firing 31 shots. The defendant contends that by the manufacturer's specifications this carbine shoots less than 31 shots—30 to be exact—and therefore it is expressly excluded from the operation of the statute, and that the trial court properly allowed the motion to quash.

[4, 5] A motion to quash can be properly allowed on the ground that the matter charged does not constitute a criminal offense. *State v. Turner,* 170 N.C. 701, 86 S.E. 1019. In ruling on a motion to quash, however, the court is not permitted to consider extraneous evidence, and when the defect must be established by evidence *aliunde* the record, the motion must be denied. *State v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663; *State v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846, app. dismd. in part 359 U.S. 951, 3 L. ed. 2d 759, 79 S. Ct. 737, app. dismd. *Wolfe v. North Carolina,* 364 U.S. 177, 4 L. ed. 2d 1650, 80 S. Ct. 1482, reh. den. 364 U.S. 856, 5 L. ed. 2d 80, 81 S. Ct. 29.

[1] The warrant in this case properly charged that the carbine in question was capable of firing 31 shots. To sustain the motion to quash, it was necessary for the trial court to find from evidence *dehors* the record that it would fire only 30 shots. This was error.

If the defendant's contention is correct and the carbine shoots only 30 shots, it is legal under the statute; if it shoots more, it is illegal. This is a matter to be determined in the trial,

upon proper proof, and the motion to quash should have been overruled.

The decision of the Court of Appeals is

Reversed.

Case #1

JIMMY V. MARRONE, JR., AND WIFE, ARTHUR MAE MARRONE v. CHARLES E. LONG

— AND —

Case #2

CHARLES FRANKLIN HELMS AND WIFE, DELANA HELMS v. CHARLES E. LONG

No. 2

(Filed 14 October 1970)

Deeds § 20— restrictive covenant in recorded deed from grantor — subsequent sale of subdivision lots — enforcement

The owners of a 15-acre tract conveyed to plaintiffs a lot therefrom by recorded deed which provided, "This conveyance is made subject to the following restrictions, which shall run as covenants with the land, violations of which restrictions shall be exposure to suits for damages by any and all adjoining property owners, who shall be defined as the grantors herein or any of their subsequent grantees who might acquire any portion of the original 15 plus acre tract . . . 2. Exterior construction shall not be less than 1,500 square feet of heated living area." The owners thereafter conveyed other lots from the tract, including a lot to defendant who erected a residence thereon containing 1000 square feet of heated living area. *Held:* The plaintiffs are not entitled to enforce the restrictive covenants in their deed against the defendant, since the deed imposed restrictions only upon the lot conveyed to plaintiffs and not upon the remaining lots of the 15-acre tract.

PLAINTIFFS appeal under G.S. 7A-30(2) from the decision of the Court of Appeals affirming the judgment of *Crissman, J.*, entered at the August 1969 Session of UNION. The decision is reported in 7 NC App. 451.

These two actions were brought by owners of lots in a subdivision to enforce restrictive covenants allegedly applicable to

all lots in the subdivision but contained only in the deed to one of the plaintiffs. The cases were consolidated for trial. The parties waived a jury and stipulated the following facts:

Prior to 22 June, 1965, E. B. Aycock and wife owned a 15-acre tract of land in Monroe Township, Union County. On that date they conveyed to plaintiffs Marrone a portion of that tract, a lot 200 feet x 200 feet, fronting on U. S. Highway No. 74 and a "60-foot wide proposed subdivision street." The lot was described by metes and bounds without reference to map or lot number. The deed contained the following provisions:

"THIS CONVEYANCE IS MADE SUBJECT TO THE FOLLOWING RESTRICTIONS, WHICH SHALL RUN AS COVENANTS WITH THE LAND, VIOLATIONS OF WHICH RESTRICTIONS SHALL BE EXPOSURE TO SUITS FOR DAMAGES BY ANY AND ALL ADJOINING PROPERTY OWNERS, who shall be defined as the Grantors herein or any of their subsequent Grantees who might acquire any portion of the original 15 plus acres tract:

"1. Property shall be restricted to residential uses only, and no residence shall have more than one detached outbuilding.

"2. Exterior construction shall be not less than 1,500 square feet of heated living area.

"3. Exterior construction shall not have any exposed concrete, cinder or solite block.

"4. No more than one dwelling improvement shall be constructed on any one lot, as originally sold by the Grantors herein.

"5. No construction improvements shall be erected nearer than 30 feet to an adjacent street or road right-of-way, nor nearer than 8 feet to any other property line.

"6. No sign of greater size than 3′ x 5′ shall be displayed for any purpose."

Thereafter, the Aycocks subdivided the 15 acres into streets and lots numbered 1 through 27, as shown by the "Map of Boulevard Park," surveyed 27 September 1965 by Ralph W. Elliott, R. L. S. This map was duly recorded in the office of the Register of Deeds on 1 October 1965. The land previously conveyed to plaintiffs Marrone was designated on the map as lot No. 1. The remaining lots in the subdivision (2 through 27) were subsequently conveyed by deeds which contained no restrictive cove-

nants and made no reference to the deed from Aycock to Marrone. On 5 October 1965 the Aycocks conveyed lots 7, 8, 9, and 12 to plaintiffs Charles F. Helms and wife. On the same day lots 2, 3, 4, and 5 of the subdivision were conveyed to Robert O. Helms and wife. On 10 December 1968, Robert O. Helms and wife conveyed lots 2, 3, 4, and 5 to defendant Charles E. Long. Only lot No. 5 is involved in this controversy.

Defendant erected upon lot No. 5 a residence containing approximately 1,000 square feet of heated living area. Plaintiffs, contending that the restrictions contained in the deed to Marrone apply to all lots in the subdivision and that defendant's dwelling is in violation of Restriction No. 2, which requires not less than 1,500 square feet of heated living area for a residence, instituted these actions. In each suit they seek damages and a mandatory injunction requiring defendant either to remove his building from the subdivision or to bring it into compliance "with the covenants and restrictions in effect upon the subdivision."

The parties agreed that the only question raised is whether the restrictions in the Marrone deed apply to defendant's lot. Judge Crissman ruled the restrictions inapplicable and dismissed the actions. Plaintiffs appealed and, in a decision by Judge Vaughn and Chief Judge Mallard, the Court of Appeals affirmed the decision of the trial court. Judge Morris dissented and plaintiffs appealed as a matter of right to this Court.

Dawkins and Holland for plaintiff appellants.

Coble Funderburk for defendant appellee.

SHARP, Justice.

Plaintiffs rely upon *Reed v. Elmore,* 246 N.C. 221, 98 S.E. 2d 360. That case, however, is not authority for their position. In *Reed,* the grantor, Mrs. Shannon, sold the plaintiff lot No. 3 of the 7-lot subdivision of a 154-acre tract. In the plaintiff's deed, lot No. 3 was subjected to a building restriction which, it was specifically provided, should "likewise apply to adjoining lot No. 4, retained by grantor." The plaintiff duly recorded his deed. Thereafter, by a deed containing no restrictions and no reference to the plaintiff, Mrs. Shannon conveyed lot No. 4 to the defendants' predecessor in title. No deed in the defendants' chain of title imposed any restriction upon lot No. 4 or referred

to the plaintiff's deed. Notwithstanding, this Court held that the subsequent purchaser of lot No. 4, and all subsequent transferees, were charged with notice of the restriction put upon lot No. 4 in the plaintiff's prior recorded deed, since an examination of the recorded Shannon conveyances would have revealed the restriction.

The distinction between these cases and *Reed* is that in *Reed* the deed to the plaintiff imposed a *specific* restriction upon certain lands *retained* by the grantor. Here, the deed to plaintiffs Marrone imposed restrictions *only* upon the land *conveyed* to them and provided in clear language that any violation of those restrictions would subject the Marrones or their grantees to suit by E. B. Aycock and wife or any of their subsequent grantees who might acquire any portion of the original 15-acre tract of which the Marrone lot was a part. When the Aycocks sold the remaining lots in the subdivision by number, no restrictions were imposed upon any of them, either specifically or by reference.

Although the Marrone lot was described by metes and bounds and not by a lot number, the reference to a "60-foot wide proposed subdivision street" indicates that the grantors had already plotted the Boulevard Park Subdivision. The map of Boulevard Park, which was subsequently recorded, is part of the record. It shows the Marrone property to be the largest lot in the subdivision and to have a frontage of 200 feet on three public thoroughfares. No other lot provided such an attractive site for a filling station or some other business which might not have been welcome in the area. No other lot was so apt to be subdivided. Thus, it is plausible to assume that the grantors had reasons not applicable to the other 26 lots for restricting lot No. 1. In any event, had the grantors intended to impose the Marrone restrictions upon the remaining 26 lots, it is inconceivable to us that they would have failed to include them specifically. We concur in the reasoning of the majority opinion of the Court of Appeals.

Affirmed.

ROBERT MEEKS v. JOHN C. ATKESON, JR.

No. 19

(Filed 14 October 1970)

Automobiles § 88— sufficiency of evidence to require submission of issue of contributory negligence

In this action growing out of a collision between the automobiles of plaintiff and of defendant, the evidence failed to establish plaintiff's contributory negligence as a matter of law but required that the issue of contributory negligence be submitted to the jury.

ON *certiorari* to the Court of Appeals.

This action grows out of a collision between the automobiles of plaintiff and of defendant. The pleadings raise issues of negligence and contributory negligence. In a trial before Wheeler, District Court Judge, and a jury, at the March 1969 Civil Session of PITT District Court, the only evidence was that offered by plaintiff. At the conclusion of plaintiff's evidence, the court entered judgment of involuntary nonsuit. The Court of Appeals reversed. 7 N.C. App. 631, 173 S.E. 2d 509. We allowed defendant's petition for *certiorari.*

Pritchett, Cooke & Burch, by W. L. Cooke, for plaintiff appellee.

James, Speight, Watson & Brewer, by William H. Watson, for defendant appellant.

PER CURIAM.

There being plenary evidence of defendant's negligence, the crucial question was whether the evidence established that plaintiff was contributorily negligent as a matter of law. The opinion of Judge Parker, for the Court of Appeals, reviews plaintiff's evidence and states the applicable legal principles. Repetition is unnecessary. After further consideration, we agree that the evidence, when considered in the light most favorable to plaintiff, required that the issue of contributory negligence be submitted to the jury. Hence, the decision of the Court of Appeals is affirmed.

Affirmed.

CAGLE v. ROBERT HALL CLOTHES

No. 13 PC.

Case below: 9 N.C. App. 243.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

ENTERPRISES, INC. v. STEVENS

No. 141 PC.

Case below: 9 N.C. App. 228.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

GIBSON v. MONTFORD

No. 8 PC.

Case below: 9 N.C. App. 251.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

HODGES v. WELLONS

No. 3 PC.

Case below: 9 N.C. App. 152.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

HORTON v. INSURANCE CO.

No. 7 PC.

Case below: 9 N.C. App. 140.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

JERNIGAN v. R. R. CO.

No. 12 PC.

Case below: 9 N.C. App. 186.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

KALE v. FORREST

No. 140 PC.

Case below: 9 N.C. App. 82.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 October 1970.

LINK v. LINK

No. 144 PC.

Case below: 9 N.C. App. 135.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 October 1970.

MILLING CO., INC. v. SUTTON

No. 10 PC.

Case below: 9 N.C. App. 181.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

OLIVER v. ERNUL

No. 1 PC.

Case below: 9 N.C. App. 221.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 October 1970.

PANHORST v. PANHORST

No. 145 PC.

Case below: 9 N.C. App. 258.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 October 1970.

PARTIN v. CITY OF RALEIGH

No. 143 PC.

Case below: 9 N.C. App. 269.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

PERRY v. SUGGS

No. 2 PC.

Case below: 9 N.C. App. 128.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

PUBLIC SERVICE CO. v. KISER

No. 5 PC.

Case below: 9 N.C. App. 202.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

SMITH v. FOUST

No. 11 PC.

Case below: 9 N.C. App. 264.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

STATE v. CLEARY

No. 6 PC.

Case below: 9 N.C. App. 189.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

STATE v. HILL

No. 17 PC.

Case below: 9 N.C. App. 279.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 October 1970.

STATE v. MOORE

No. 130 PC.

Case below: 8 N.C. App. 603.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 11 September 1970.

STEWART v. CHECK CORP.

No. 4 PC.

Case below: 9 N.C. App. 172.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 October 1970.

TAYLOR v. WRIGHT

No. 139 PC.

Case below: 9 N.C. App. 267.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 11 September 1970.

WISE v. ISENHOUR

No. 9 PC.

Case below: 9 N.C. App. 237.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1970.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION, LEE TELEPHONE COMPANY (APPLICANT), AND COMMISSION STAFF (INTERVENOR), APPELLEES v. ROBERT MORGAN, ATTORNEY GENERAL OF NORTH CAROLINA (INTERVENOR IN BEHALF OF THE USING AND CONSUMING PUBLIC OF NORTH CAROLINA), AND WALKERTOWN TELEPHONE EXCHANGE COMMITTEE (PROTESTANT), APPELLANTS

No. 10

(Filed 18 November 1970)

1. **Utilities Commission § 1— regulation of utilities — responsibility for poor service by utilities**

   A public utility which has been allowed to charge rates sufficient to enable it to maintain its properties, in addition to earning a fair return thereon, and which nevertheless permits its properties to fall into such a poor state of maintenance as to impair the quality of its service, must accept the responsibility for its resulting inability to render adequate service to its patrons.

2. **Utilities Commission § 1— duty of public utility**

   A public utility, having been granted a monopoly in its franchise area, is under a duty to render reasonably adequate service. G.S. 62-42; G.S. 62-131(b).

3. **Telephone and Telegraph Companies § 1— responsibility of telephone company for adequate service — effect of change in ownership**

   The identity of a telephone company seeking a rate increase was not changed by the transfer of its stock from the former stockholders to the present stockholders; nor could the change in stock ownership enable the company to avoid the responsibility for its failure to maintain its plant and to render adequate service.

4. **Utilities Commission § 1— statutory power and duties of the Commission**

   The clear purpose of Chapter 62 of the General Statutes is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in G.S. 62-133.

5. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate determination — effect of poor and substandard service by telephone company**

   In determining rates for a telephone company pursuant to G.S. 62-133(b), the Utilities Commission is not required to shut its eyes to "poor" and "substandard" service resulting from the company's willful or negligent failure to maintain its properties or to heed complaints from its subscribers; however, it does not follow that the Commission is forbidden to grant any rate increase to a company whose service is inadequate, even though the inadequacy be due to the company's willful or negligent failure to perform its duty.

6. **Utilities Commission § 1— jurisdiction of the Commission**

The statutes confer upon the Utilities Commission, not upon the Supreme Court, the duty and authority to determine adequacy of service and reasonable rates therefor.

7. **Utilities Commission § 6— rate determination — consideration of inadequate service.**

Assuming adequate findings of fact, supported by competent and substantial evidence, the Utilities Commission, in the exercise of its sound administrative discretion, may lawfully conclude (1) that an increase in rates is warranted, notwithstanding existing service inadequacy due to the company's neglect of its properties, and (2) that such increase is an appropriate step in the improvement of the service. G.S. Ch. 62.

8. **Utilities Commission § 6— rate determination — ultimate question — consideration of inadequate service by utility**

The ultimate question for determination in a rate hearing is, What is a reasonable rate to be charged by the particular utility company for the service it proposes to render in the immediate future; serious inadequacy of such service is one of the facts which the Commission is required to take into account in making that determination. G.S. 62-133.

9. **Utilities Commission § 9— rate determination — review on appeal**

The determination of reasonable rates to be charged by a particular utility company may not be reversed by the Court of Appeals or by the Supreme Court merely because they would have reached a different conclusion on the evidence.

10. **Telephone and Telegraph Companies § 1; Utilities Commission §§ 6, 9— rate determination — poor service by telephone utility — effect on rate increase — *findings of fact***

In a hearing on a telephone company's petition for authority to increase its rates for local service in this State, the order of the Utilities Commission granting some of the requested rate increase is reversed and remanded by the Supreme Court, where (1) the Commission stated in the order that it had considered the substandard quality of the company's existing service as an element bearing upon the company's permissible rate of return but (2) the Commission failed to make specific findings of fact showing what effect the substandard service had upon its decision to increase the company's rates.

11. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate determination — fair value of company property — insufficiency of evidence**

In a hearing on a telephone company's petition for authority to increase its rates for local service in this State, the finding by the Utilities Commission as to the fair value of the company's properties at the end of the test period *is held* unsupported by substantial evidence in the record.

12. **Utilities Commission § 6— rate determination — what constitutes the rate base**

In determining just and reasonable rates under G.S. 62-133, there is but one rate base—the fair value of the public utility's property used and useful in providing the service rendered to the public within the State, which value must be determined as of the end of the test period; it is incorrect to speak of "the original cost rate base" and the "trended original cost rate base."

13. **Utilities Commission § 6— rate determination — fair return on properties**

A public utility is not entitled to rates which will enable it to earn a fair return on either the original cost or the replacement cost, *per se.*

14. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate determination — present fair value of properties that were improperly maintained**

Neither the original cost nor the reproduction cost may properly be taken as the present fair value of telephone properties which were improperly engineered, have not been properly maintained, and are consequently in need of extensive rehabilitation.

15. **Telephone and Telegraph Companies § 1— rate determination — profits earned on sales to telephone utility — credit to net operating income**

In determining the local rates to be charged by a telephone company which was owned by a parent holding company, the Utilities Commission was not required to credit to the telephone company's net operating income the profits earned on materials sold to the telephone company by a wholly owned subsidiary of the parent holding company.

16. **Corporations § 1— corporate entity — circumvention of public policy**

The doctrine of the corporate entity may not be used as a means for defeating the public interest and circumventing public policy; in order to prevent such a result, a parent corporation and its wholly owned subsidiaries may be treated as one.

17. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate determination — plant under construction — interest during construction**

In determining the local rates for a telephone company, it was improper for the Utilities Commission (1) to include in the rate base the value of the company's telephone plant that was under construction at the end of the test period but which was not yet in operation and (2) to add the interest charged during construction to the company's operating income. G.S. 62-133(c).

18. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate determination — working capital requirements — advanced payments by customers**

In determining the local rates for a telephone company, the amounts paid to the company by its customers as a result of the company's practice of billing the customers one month in advance was not creditable to the company's working capital requirements.

APPEAL by the Attorney General from the decision of the Court of Appeals, reported in 7 N.C. App. 576.

Lee Telephone Company, hereinafter called Lee, is a Virginia corporation which operates a general telephone business in Virginia and in North Carolina, approximately 21% of its telephones in service being in this State. It petitioned the Utilities Commission for authority to increase its rates for local telephone service in North Carolina, estimating that its proposed increases would produce additional gross revenues of approximately $240,000 annually. The Attorney General intervened on behalf of the public in opposition to the petition. The Walkertown Telephone Exchange Committee, composed of many subscribers to the company's service at its exchange in Walkertown, also intervened in opposition to the petition.

The Commission designated the proceeding a general rate case. Having received, from numerous subscribers to Lee's service at its various exchanges, complaints that the service is inadequate, the Commission consolidated for hearing those complaints and the petition of the company.

Voluminous evidence, consisting of both statistical exhibits and oral testimony, was introduced by the company and by the Commission's staff. Numerous witnesses for the complainants testified in detail concerning the quality of the service. Following the hearing, the Commission entered its order allowing the proposed rate increases in part, the resulting annual increase in the company's gross operating revenues being estimated to be $142,437. Commissioners Biggs and McDevitt dissented. Upon appeal by the Attorney General and the Walkertown Committee, the Court of Appeals affirmed the order of the Commission. From this decision, the Attorney General appealed to the Supreme Court.

The Attorney General contends: (1) No increase in rates should have been allowed in view of the inadequate service presently rendered by the company; (2) the Commission understated the company's net operating income by its failure to credit thereto profits derived by an affiliated company, Centel Service Company, from sales to Lee of equipment, materials and supplies; and (3) the Commission fixed the company's rate base in excess of the amount which should have been determined therefor.

Findings of fact and conclusions by the Commission, material to the appeal, summarized except as indicated, include the following (numbering by the Commission):

1. Central Telephone Company (actually, Central Telephone & Utilities Corporation) acquired a controlling interest in the capital stock of Lee in October 1965, and has operated it since that date.

6. The net investment in utility plant, used and useful in this State on May 31, 1968 (the end of the test period), is $4,158,121, which figure "reasonably represents the original cost rate base applicable."

7. "We find the trended original cost rate base to be $5,009,100."

8. The fair value of Lee's public utility property, used and useful in this State, is $4,500,000.

10. The annual gross operating revenues under the rates approved by the Commission will be $1,155,697.

11. The actual and reasonable operating expenses will be $430,044 annually.

12. The reasonable annual allowance for depreciation is $204,837.

13. Under the rates approved by the Commission, the annual tax liabilities of the company will be $244,037.

14. Under the rates approved by the Commission, the net operating income of the company will be $292,500.

17. Lee is earning 5.74% on its common equity, attributed to North Carolina operations, under its old rates. Under the rates approved by the Commission, it will earn 9.89% on its common equity.

18. Lee is earning a rate of return of 5.19% upon the fair value of its property under the old rates. Under those approved by the Commission, it will earn 6.50% on the fair value of its property.

19. A fair rate of return on the fair value of Lee's utility property is 6.50%.

21. "The quality of service rendered by Lee Telephone Company in this State is poor. In a measure, the

Company conceded the overall justification for these service complaints and stated its plans and intentions for improving its North Carolina facilities in the near future. The inadequate and poor quality telephone service offered by the applicant in this State relates to many factors such as the nature, size and extent of the territory served, the fact that the telephone facilities when acquired by Central Telephone Company in 1965 were engineered in such a way as to engender such service, the plant was inadequate and inefficient and therefore many of their problems were inherited upon purchase. However we find from the nature and extent of the complaints made and from statements and testimony of company representatives that the service being rendered by Lee is substandard, and that such grade of service reflects the failure of the Company to take those steps necessary for the improvement of toll service, local central office service, proper maintenance and the reduction of unsatisfactory multiparty main station service as is economically feasible, as well as its failure to eliminate traffic overloads on toll trunks, extended area service trunks and central office equipment groups, and its failure to take sufficient action to improve transmission and reduce noise levels."

22. "Centel Service Company is a wholly owned subsidiary of Central Telephone Company, which company is a subsidiary of Central Telephone and Utilities Corporation, as is Lee Telephone Company. * * * During the calendar year 1968 Lee's purchases for its North Carolina operations from Centel Service totalled $542,751 which generated a net profit to Centel in the amount of $39,621 * * * There is no evidence in this record relating to comparative prices from other supply outlets."

The order states that the Commission reached the following conclusions, summarized except as indicated, the numbering being that of the Commission:

3. "* * * We have considered the substandard quality of service being rendered by Lee as one element bearing upon the value of its utility investment and the rate it should be permitted to earn, along with other factors, including but not limited to, the nature, size and extent of the territory served, and the condition and level of its telephone facilities when acquired by Central Telephone Company in 1965. * * *"

4. "From the record in this case, we conclude that the telephone service being offered the public in North Carolina by Lee is inadequate and of poor quality particularly in the areas of toll service and local central office service. * * * One necessary factor in obtaining better service in the franchised area here involved is more abundant and improved equipment. The Commission has two courses of pursuit, it may either ignore the duty imposed upon it by statute to grant a fair rate of return and thereby starve the Company making it impossible for it to improve service, or it can take the approach, which we here adopt, for improved service by fixing just and reasonable rates under our statutory formula. * * *"

7. "That the Applicant should take action with all deliberate speed to provide adequate and sufficient telephone service to its subscribers within the rate structure herein found reasonable and approved. In the event that the Company should fail to provide substantial overall improvement in its service by December 31, 1970, and initiate and continue from this date to attainment of such adequate and sufficient telephone service, such action as is necessary, reasonable and proper in that connection, the Commission will consider such further action as is necessary to secure adequate and sufficient telephone service for the public living and being served in the area presently assigned to the Applicant."

14. "The level of profitability of the Centel Service Company on its purchasing and distribution of materials and supplies for its affiliate Lee Telephone Company requires that the Commission take notice of this type of relationship. * * * In the instant proceeding, the reasonableness of the level of prices charged and paid was not clearly demonstrated and no indepth study was made by the Commission Staff due to the fact that Centel Service Company had been in operation approximately one year at the time of the hearing. No adjustment is being made to the rate base or in the operating expenses due to these inter-company transactions, and the Commission is not approving or disapproving the level of profitability of the transactions between these two affiliates. We conclude it to be appropriate for this Commission to reserve for future consideration any need for investigation and possible adjustments which may properly arise therefrom in connec-

tion with the inter-affiliated company transactions."

In addition to the approval of a portion of the rate increases proposed by the company, the Commission ordered, "That the Company shall substantially improve telephone service in its franchised service area and implement plans for service improvements as filed with the Commission and as testified to in the hearing in this case."

Attorney General Morgan, Deputy Attorney General Benoy and Maurice W. Horne, Special Assistant, for appellant.

Edward B. Hipp for appellee North Carolina Utilities Commission.

Burns, Long & Wood by Richard G. Long; Ross, Hardies, O'Keefe, Babcock, McDugald & Parsons by Melvin A. Hardies and Donald W. Glaves; and Duane T. Swanson for appellee Lee Telephone Company.

LAKE, Justice.

In February 1965, this Court remanded to the Utilities Commission a proceeding instituted by Lee Telephone Company in 1963 for an increase in its rates for service in North Carolina. The Commission was directed to hold a further hearing in accordance with G.S. 62-133 and the opinion of this Court. *Utilities Commission v. Telephone Co.,* 263 N.C. 702, 140 S.E. 2d 319. It is presumed that, pursuant to such direction, the Utilities Commission then fixed rates which were fair and reasonable in view of conditions then prevailing. Such rates would, necessarily, include adequate allowances of maintenance and for depreciation of the company's properties and would provide a return upon the fair value of those properties sufficient to enable the company to attract capital for necessary expansion of its plant.

The petition filed with the Commission in the present proceeding states that on 6 June 1968 the Commission granted a further rate increase to Lee. No appeal having been taken therefrom, it is presumed that the rates then fixed were, in the light of conditions then prevailing, fair and reasonable, yielding to the company a return upon the fair value of its properties sufficient to attract capital, under then prevailing conditions, after making adequate provision for maintenance and depreciation of its properties. G.S. 62-132. Four months there-

after the company filed with the Commission its petition in the present matter.

In this proceeding the Commission has found that the company's service is "poor" and "substandard," and that this condition "reflects the failure of the company to take those steps necessary for the improvement of toll service, local central office service, *proper maintenance* and the reduction of unsatisfactory multiparty main station service as is economically feasible, as well as its failure to eliminate traffic overloads on toll trunks, extended area service trunks and central office equipment groups, and its failure to take sufficient action to improve transmission and reduce noise levels." (Emphasis added.)

[1, 2] A public utility, which has been allowed to charge rates sufficient to enable it to maintain its properties, in addition to the earning of a fair return thereon, and which nevertheless permits its properties to fall into such a poor state of maintenance as to impair the quality of its service, must accept the responsibility for its resulting inability to render adequate service to its patrons. Having been granted a monopoly in its franchise area, the utility is under a duty to render reasonably adequate service. G.S. 62-131(b) ; G.S. 62-42.

[3] The identity of Lee Telephone Company was not changed by the transfer of its stock in 1965 from the former stockholders to Central Telephone & Utilities Corporation (erroneously designated by the Commission as Central Telephone Company, the name of another subsidiary of Central Telephone & Utilities Corporation). Lee's responsibility for its failure to maintain its plant, and for the resulting impairment of its ability to render adequate service, is not avoided by the change in stock ownership. The condition of the telephone plant and the resulting quality of service rendered is not, as the Commission called it, an "inherited problem" of the new stockholder. It is a condition acquired by purchase. Lee's brief states that when the new stockholder acquired control of Lee, "following four years of litigation, Lee's plant margins were virtually exhausted." It is not contended that the new stockholder was unaware of this circumstance when it purchased the controlling interest in Lee or when, as shown in its brief, it subsequently increased its ownership to 99.8% of the outstanding common stock.

Lee's brief states that the new stockholder immediately began "an extensive *rehabilitation,* expansion and service im-

provement program." (Emphasis added.) There is nothing to indicate that the new stockholder was not aware of the neglect of maintenance of the properties during the extended litigation related to its acquisition of the stock. The record is replete with testimony by subscribers to the service to the effect that, since 1965, the service has been grossly inadequate and characterized by marked indifference to complaints from subscribers. The Commission has found, in July 1969, that it is still "poor" and "substandard." Nevertheless, the Commission approved, over the vigorous dissent of two of its members, another substantial increase in the rates which the subscribers must pay for this service. The dissenting Commissioners state that the rates so approved for the "substandard" service are "the highest general telephone exchange rates in the State of North Carolina."

The Attorney General contends that if the "substandard" quality of the service is the result of inefficient management, as distinct from inability to attract capital, no rate increase should have been allowed by the Commission. Lee contends that the Commission may not lawfully refuse to approve rates which would yield to it a fair return on the fair value of its properties, regardless of the quality of its service. The Utilities Commission contends that the allowance of a rate increase, otherwise justifiable, is within its discretion, though the service be of substandard quality. To resolve this question, which has not previously been before this Court, we turn to the statutes governing the regulation of public utility rates. G.S., c. 62.

G.S. 62-133 sets forth in detail the steps to be taken by the Commission in fixing rates to be charged by a public utility in this State. Paragraph (b) provides that in fixing such rates the Commission *shall* do the following things: (1) Ascertain the fair value of the property used and useful in providing the service; (2) estimate the revenue to be received under the present and the proposed rates; (3) ascertain the utility's reasonable operating expenses, including depreciation; (4) fix the rate of return on the fair value of the property such as will enable the utility, by sound management, to produce a fair profit for its stockholders, to maintain its facilities, and to compete in the market for capital on reasonable terms; and (5) fix rates to be charged for the utility's services such as will earn such return in addition to reasonable operating expenses. If this paragraph stood alone, there would seem to be merit in the contention of the company. It does not, however, stand alone.

Paragraph (a) of G.S. 62-133 provides that in fixing rates "the Commission shall fix such rates as shall be fair both to the public utility and to the consumer." Paragraph (d) of this section provides, "The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates."

G.S. 62-2 declares the policy of the State, which it is the purpose of the entire chapter to put into effect, as follows:

> "*Declaration of Policy.*—Upon investigation it has been determined that the rates, services and operations of public utilities * * * are affected with a public interest and it is hereby declared to be the policy of the State of North Carolina to provide fair regulation of public utilities in the interest of the public, to promote the inherent advantages of regulated public utilities, *to promote adequate, economical and efficient utility services* to all of the citizens and residents of the State, to provide just and reasonable rates and charges for public utility services without unjust discrimination * * * and to these ends, to vest authority in the Utilities Commission to regulate public utilities generally and their rates, services, and operations, in the manner and in accordance with the policies set forth in this chapter." (Emphasis added.)

G.S. 62-32 confers upon the Commission general supervision over the rates charged and services rendered by all public utilities in this State and vests in the Commission "all power necessary to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service."

G.S. 62-42 provides that whenever the Commission, after notice and hearing, finds that the service of any public utility is inadequate, the Commission shall enter an order directing that "additions, extensions, repairs, improvements, or additional services or changes shall be made or affected [sic] within a reasonable time prescribed in the order."

G.S. 62-131 reads as follows:

> "*Rates must be just and reasonable; service efficient.*—(a) Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable.

"(b) Every public utility shall furnish adequate, efficient and reasonable service."

[4] The clear purpose of chapter 62 of the General Statutes is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in G.S. 62-133.

[5] It is not reasonable to construe G.S. 62-133(b) to require the Commission to shut its eyes to "poor" and "substandard" service resulting from a company's wilful, or negligent, failure to maintain its properties or to heed complaints from its subscribers when the Commission is called upon by the company to permit it to increase its rates for its inadequate service. We reject the contention of the company upon this question.

[5-7] It does not follow, however, that the Commission is forbidden to grant any rate increase to a company whose service is inadequate, even though the inadequacy be due to a wilful, or negligent, failure by the company to perform its duty. The statutes confer upon the Commission, not upon this Court, the duty and authority to determine adequacy of service and reasonable rates therefor. *Utilities Commission v. Telephone Co.,* 266 N.C. 450, 146 S.E. 2d 487; *Utilities Commission v. Champion Papers, Inc.,* 259 N.C. 449, 130 S.E. 2d 890; *Utilities Commission v. State and Utilities Commission v. Telegraph Co.,* 239 N.C. 333, 80 S.E. 2d 133. The authority of the Court of Appeals and of this Court in reviewing an order of the Utilities Commission is limited to that conferred by G.S. 62-94. Assuming adequate findings of fact, supported by competent, substantial evidence, we find nothing in the provisions of chapter 62 of the General Statutes which makes it unlawful for the Commission, in the exercise of its sound administrative discretion, to conclude that an increase in rates is warranted, notwithstanding existing service inadequacy due to the company's neglect of its properties, and that such increase is an appropriate step in the improvement of the service. This appears to be the prevailing view in other states. See: *Baltimore Transit Co. v. Public Service Commission of Maryland,* 206 Md. 533, 112 A 2d 687; *City of Lexington v. Public Service Commission of Kentucky,* 249 S.W. 2d 760 (Ky.); *Village of Apple River v. Illinois Commerce Commission,* 18 Ill. 2d 518, 165 N.E. 2d 329.

[8, 9] There are infinite degrees of inadequate service and many differences in the causes of such deficiencies. The ultimate question for determination is, What is a reasonable rate to be charged by the particular utility company for the service it proposes to render in the immediate future? The determination of this question is for the Commission, in accordance with the direction of G.S. 62-133. Serious inadequacy of such service, found by the Commission upon substantial evidence, is one of the facts which the Commission is required by that statute to take into account in making that determination. The Commission's determination, reached pursuant to the mandate of G.S. 62-133 and to the statutory procedural requirements, may not be reversed by the Court of Appeals or by us merely because we would have reached a different conclusion upon the evidence.

It is otherwise if it does not appear from the order of the Commission that these statutory mandates have been obeyed. In *Utilities Commission v. Public Service Co.*, 257 N.C. 233, 125 S.E. 2d 457, the Commission, in fixing the rate base of a public utility, said, "In so finding we have considered all factors required by G.S. 62-124 [the predecessor to the present G.S. 62-133] and all other facts which we feel have a bearing upon our conclusion—without reference to specific formula." This Court, reversing the Commission, said:

> "The statute gives the Commission the right to consider *all other facts* that will enable it to determine what are reasonable and just rates. The right to consider 'all other facts' is not a grant to roam at large in an unfenced field. The Legislature properly understood that, at times, other facts may exist, bearing on value and rates, which the Commission should take into account in addition to those specifically detailed in G.S. 62-124. However, it was contemplated that such facts be established by evidence, be found by the Commission, and be set forth in the record to the end the utility may have them reviewed by the courts."

In this respect it is, of course, immaterial whether the party seeking judicial review be the utility or its adversary. In the present case, the Commission has said in its order:

> "The statutory rate-making formula is controlling in this matter. We have considered the substandard quality of service being rendered by Lee as one element bearing

upon the value of its utility investment and the rate it should be permitted to earn * * *."

[10] The Commission then stated that the company had made progress in improving its service and the Commission was taking the approach of procuring continued improvement by "fixing just and reasonable rates under our statutory formula." We are unable to determine from the record what specific effect the Commission gave to the poor quality of the existing service in reaching its conclusion that some but not all of the requested rate increase should be allowed. The order does not indicate what increase in rates would have been approved had the service been found adequate. The findings, conclusions and order of the Commission do not, therefore, disclose that in this respect the Commission acted arbitrarily or that its conclusion is in excess of its statutory authority or is affected by an error of law, nor do they disclose the contrary.

[11] We turn now to see how the Commission proceeded in "fixing just and reasonable rates under our statutory formula." It determined what it designates as "the original cost rate base applicable," which it fixed at $4,158,121 as of the end of the test period. It then found the "trended original cost rate base" to be $5,009,100. It then found the fair value of the company's property to be $4,500,000.

[12] We note, in passing, the error of terminology. It is incorrect to speak of "the original cost rate base" and the "trended original cost rate base." See *Utilities Commission v. State and Utilities Commission v. Telegraph Co., supra.* There is but one rate base—the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, which value the Commission must determine as of the end of the test period. G.S. 62-133. The original cost of the properties is simply evidence to be considered in making this determination. The replacement cost, whether determined by use of trended cost indices or otherwise, is also but evidence of the fair value of the properties.

[13] A public utility is not entitled to rates which will enable it to earn a fair return on either the original cost or the replacement cost, *per se.* "Although the sense in which the courts use the phrase 'fair value' is less definite than it should be, it seems clear that the term does not cover money stupidly, extravagantly, or corruptly spent. If a utility has been seriously

overbuilt, or its promoters have been seriously overpaid, the law does not intend that its customers shall be saddled with the payment of interest on the money thrown away." Edgerton, Value of Service as a Factor in Rate Making, 32 Harvard L. Rev. 516.

[14] In the present case, the Commission has found as facts that the properties owned by Lee prior to the acquisition of its stock by the present stockholder "were engineered in such a way as to engender [the inadequate] service," that "the plant was inadequate and inefficient" and the company had failed to maintain it properly. The brief filed by Lee in this Court states that following such stock acquisition the company embarked upon a program for "extensive rehabilitation." Neither the original cost nor the reproduction cost may properly be taken as the present fair value of telephone properties which were improperly engineered, have not been properly maintained and, consequently, are in need of extensive rehabilitation.

The testimony of Lee's vice president shows that, from the date of acquisition of control of Lee by Central Telephone & Utilities Corporation to the end of the test period used by the Commission, Lee made "gross additions" to its plant in the amount of $1,859,000. Of this amount, $709,000 was added during the last five months of the test period. Obviously, the replacement cost at the end of the test period of these "gross additions" to plant, less normal depreciation, would be little, if any, more than the original cost thereof.

The Commission found that at the end of the test period the company's "gross plant and plant under construction" (actual investment, with no deduction for depreciation and exclusive of working capital) was $5,312,766. Subtracting the "gross additions" made from the stock transfer to the end of the test period, it is apparent that the undepreciated original investment in the poorly engineered, poorly maintained properties owned prior to the stock transfer and still in service at the end of the test period was $3,453,766. The Commission found that the "applicable depreciation reserve," virtually all of which would, in the nature of things, be attributed to the older properties, was $1,245,088. The depreciation reserve is, of course, accumulated on the basis of the normal life of properties, assuming normal maintenance and with no allowance for inadequate engineering. Attributing only $1,000,000 of this depreciation reserve to the older properties, the company's net investment

therein at the end of the test period would not have exceeded $2,453,766.

The Commission's finding of $5,009,100 as the "trended original cost" of the entire properties obviously includes an allowance of $90,443 for working capital, leaving $4,918,657 as its computation of the "trended original cost" of the entire plant, less depreciation. Substracting from this figure, the entire "gross additions" made from the time of the stock transfer to the end of the test period, it is clear that the Commission must have estimated the "trended original cost" (less depreciation) of the poorly engineered, poorly maintained property to have been at least $3,059,657 at the end of the test period. Of course, neither the actual depreciation reserve on the company's books nor the "trended depreciation reserve" used by the Commission in these computations reflects any of the abnormal depreciation due to the poor engineering or the poor maintenance. Thus the Commission's computation of the "trended original cost," depreciated, of these poorly engineered, poorly maintained properties was at least $605,891 in excess of their actual original cost less the reserve for normal depreciation.

[11] The Commission's final conclusion was that the fair value of the total properties used and useful in providing the service was $4,500,000. This includes its allowance of $90,443 for working capital, leaving $4,409,557 as the "fair value" of the telephone plant. Again, subtracting from this figure the entire $1,859,000 of "gross additions" from the stock acquisition to the end of the test period, we have a remainder of $2,550,557 allowed by the Commission in the rate base as the fair value of the poorly engineered, poorly maintained properties said by the company itself to be in need of extensive rehabilitation. The full actual cost of these properties, less only normal depreciation was, as above shown, not in excess of $2,453,766. In view of the evidence and the Commission's findings as to the condition of these properties, the Commission's finding as to the fair value of the company's properties at the end of the test period must be deemed unsupported by substantial evidence in the record.

[15] The Commission found that during the calendar year 1968 Lee Telephone Company purchased materials, supplies and equipment from Centel Service Company. Centel is a wholly owned subsidiary of Central Telephone Company. Central Telephone Company is, in turn, a subsidiary of Central Telephone

& Utilities Corporation, the owner of 99.8% of the common stock of Lee Telephone Company. The Commission found that upon Lee's purchases, for its North Carolina operations, from Centel in the calendar year 1968 Centel derived a profit of $39,621. The test period used by the Commission in this proceeding, however, was the twelve months ending May 31, 1968. There is no finding by the Commission concerning sales by Centel to Lee during the test period, and no evidence from which such finding could be made. The Commission's finding with reference to the transactions between Lee and Centel is, therefore, meaningless so far as the reasonableness of the rates established by the Commission's order is concerned.

The Commission found that Centel was incorporated in June 1967. Thus it was in existence throughout all or substantially all of the test period. Centel manufactures nothing. Its sole function is to purchase materials, supplies and equipment for resale to operating companies within the Central Telephone system. According to Lee's brief, Centel's pricing policy is to sell to the operating companies at prices comparable to those which would be paid if the same materials were purchased through other distributors. The record shows Centel's total paid in capital is $1,000. In 1968, the first full calendar year of its existence, Centel paid to its single stockholder dividends of $971,964 and at the end of 1968 had a surplus of $112,958.

The Attorney General contends that the profits made by Centel on its sales in 1968 to Lee Telephone Company for its North Carolina operations, $39,621, should have been credited by the Commission to Lee's net operating income, from its North Carolina operations in the test period, for rate making purposes. If this were done, a smaller rate increase than that allowed would be required to produce the net operating income necessary to constitute a fair return upon the fair value of the company's properties as found by the Commission. The theory of the Attorney General's argument is that the prices paid by Lee for the materials, supplies and equipment purchased are reflected in its statement of its operating expenses for the test period and, therefore, the operating expenses are overstated by the amount of $39,621, with the result that the net operating income is understated by that amount.

In the instant case, the contention of the Attorney General must fail for two reasons. *First,* only those purchases for operating materials and supplies, including current maintenance,

are chargeable to operating expense. The purchases for plant construction go into the account for investment in plant, not to operating expense. An overcharge, if any, to investment in plant does not affect the net operating income. While such overcharge would improperly add to the account for original cost of the plant, which is an item to be considered in computing the rate base, it actually would not affect the rate base directly, since the rate base is the fair value of the plant, not the cost of it. There is in this record no evidence whatever to support a finding as to how much of the profit derived by Centel from its sales to Lee, for North Carolina operations, was made on purchases for use as operating supplies, including current maintenance, and how much was made on purchases for additions to plant. *Second,* the evidence in the record relates to profits made by Centel on Lee's purchases from it in the calendar year 1968. There is no finding, and no evidence in the record which would support a finding, as to Centel's profits on sales to Lee during the test period.

[16] It is well established that the doctrine of the corporate entity may not be used as a means for defeating the public interest and circumventing public policy. *Henderson v. Finance Co.,* 273 N.C. 253, 260, 160 S.E. 2d 39; *Estridge v. Denson,* 270 N.C. 556, 565, 155 S.E. 2d 190; *Terrace, Inc. v. Indemnity Co.,* 243 N.C. 595, 598, 91 S.E. 2d 584. In order to prevent such a result, a parent corporation and its wholly owned subsidiaries may be treated as one. Obviously, an operating telephone company may not justify its application for a rate increase by showing on its books expenditures for materials and supplies in excess of the amount actually paid therefor. For example, Lee Telephone Company, when operating independently, might have purchased certain items in large quantity because of its combined operations in North Carolina and Virginia. Having done so, it could not charge its North Carolina operations with a higher price for such materials than it actually paid therefor, irrespective of the fact that the price so charged might be no higher than would have been paid if the small volume, purchased for use in North Carolina alone, had been purchased separately. In the present case, we refrain from expressing an opinion as to whether a parent company, operating numerous wholly owned subsidiary telephone companies, may establish an additional wholly owned subsidiary to purchase materials in large quantities at favorable prices, due to volume, and then resell to its operating subsidiaries at a higher price and thus enhance the

operating expenses of the subsidiary companies for their respective rate making purposes. Upon the present record, that question is not presented and it was not determined by the Commission or by the Court of Appeals.

[17] The Commission included in the rate base property under construction at the end of the test period in the amount of $318,052. Obviously, such property did not produce any operating income during the test period. As an offsetting adjustment, the Commission added to the company's operating revenue for the test period interest charged to construction during the test period. This is a practice which the Commission has followed for many years. It is commonly accepted in utility rate making. See: *Petition of New England Telephone & Telegraph Co.*, 115 Vt. 494, 66 A 2d 135; *City of Lynchburg v. Chesapeake & Potomac Telephone Company*, 200 Va. 706, 107 S.E. 2d 462. While not the exact equivalent, the addition to the company's operating income during the test period of interest charged to construction is an approximation of the income reasonably to be expected from the properties under construction when placed in service. Nevertheless, this practice cannot be followed in view of G.S. 62-133(c) which reads as follows:

> "(c) The public utility's property and its fair value shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment *in operation at that time.*" (Emphasis added.)

Thus the plant under construction at the end of the test period should not have been included in the rate base and the item of interest during construction should not have been added to the company's operating income during the test period. The result of correcting these offsetting errors will be minimal and would not, alone, justify a remand of the matter to the Commission for further consideration. G.S. 62-94(c) provides that upon appeal from an order of the Commission due account shall be taken of the rule of prejudicial error.

[18] We find no merit in the Attorney General's contention that the Commission erred in its computation of the addition to the rate base for working capital. The basis of the contention is that the company bills its customers for local services for one month in advance. It is true that where the customers of a public utility, in the payment of their bills, provide the com-

pany with funds in order to enable it to meet expenses, which it will not have to pay until some time in the future, those funds, being available to the company for working capital, are to be credited to its need therefor. The rate base should include working capital supplied by the company but not funds supplied by its customers. *Utilities Commission v. State and Utilities Commission v. Telegraph Co., supra.* This principle is not, however, applicable to the present case. While the company bills its customers for local service one month in advance, the record does not show when these bills are actually paid so as to place the money in the hands of the company for use. The Attorney General estimates that they are paid not later than the middle of the month. If so, by the time of payment, half of the month's service has been rendered. Thus the effect is the same as if payment for the service were made as it is rendered and there is no substantial accumulation of funds in the hands of the company for the payment of expenses at some future time.

The Commission said in its order that it had considered the substandard quality of the service being rendered by Lee as an element bearing upon the value of its property and upon the rate of return it should be permitted to earn thereon. Nothing in its order indicates the effect given thereto by the Commission. The order does not show wherein, or the extent to which, the determination of the fair value of the properties or of the rates for service are different from what they would have been had the service been excellent and had the properties been in a high state of efficiency and maintenance.

Under the unusual circumstances of this case, the Commission should make specific findings showing the effect upon its decision of the inadequacy it found in the service and the deficiencies it found in the engineering and maintenance of the properties. The Commission may not lawfully "ignore the duty imposed upon it by statute," as suggested in its order, by reason of the company's poor service, nor does it discharge that duty by a mere statement that it has considered the matter, without showing the effect given to it. Such finding or conclusion is necessary to enable a reviewing court to determine whether the duty imposed by statute has been performed.

The judgment of the Court of Appeals which affirmed the order of the Commission is reversed, and the matter is remanded to that Court with direction that it enter a judgment reversing the order of the Utilities Commission and remanding the matter

to it for further consideration in accordance with this opinion upon the present record or after such further hearing as the Commission shall deem proper.

Reversed and remanded.

HOME SECURITY LIFE INSURANCE COMPANY v. ARTHUR A. McDONALD, JR., TRUSTEE IN BANKRUPTCY FOR THOMAS E. DAVIS, BANKRUPT; THOMAS E. DAVIS AND WIFE, MARY Y. DAVIS

No. 31

(Filed 18 November 1970)

1. **Bankruptcy §§ 2, 8; Homestead and Personal Property Exemption § 6— assets of the estate — cash surrender value of life insurance policies**

The cash surrender value of a life insurance policy issued on the life of a bankrupt for the benefit of his wife, with the bankrupt reserving the right to change the beneficiary, is not an asset of the bankrupt's estate and is therefore exempt from the claims of the trustee in bankruptcy. N. C. Constitution, Art. X, § 7; G.S. 58-206; 11 U.S.C.A. §§ 24, 110(a).

2. **Statutes § 5—construction of terms acquiring settled meaning**

Where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject matter, they are to be understood in the same sense unless by qualifying or explanatory addition the contrary intent of the Legislature is made clear.

3. **Constitutional Law § 6— legislative powers — questions of public policy**

So far as the Constitution of North Carolina is concerned, the General Assembly is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom; absent such constitutional restraint, questions as to public policy are for legislative determination.

4. **Constitutional Law § 2— construction of constitutional provisions**

Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption.

5. **Homestead and Personal Property Exemptions § 6— cash surrender value of life insurance policy — wife and/or children as beneficiaries — protection against creditors**

A life insurance policy in which the "wife and/or children" are the only persons named as beneficiaries *is held* insurance "for the sole

use and benefit of the wife and/or children" within the meaning of N. C. Constitution, Art. X, § 7; and, as long as they remain the only beneficiaries, the policy, including the cash surrender value thereof, is not subject to the claims of the insured's creditors during his lifetime.

APPEAL by Arthur A. McDonald, Jr., Trustee in Bankruptcy for Thomas E. Davis, Bankrupt, from *Canaday, J.*, April 20, 1970 Session of DURHAM Superior Court, certified, pursuant to G.S. 7A-31(a), for review by the Supreme Court without prior determination in the Court of Appeals.

Two insurance policies, which had been issued by plaintiff on the life of Thomas E. Davis, were in force on December 4, 1969, when Davis filed his voluntary petition and was adjudged bankrupt in the United States District Court for the Middle District of North Carolina. Arthur A. McDonald, Jr., who was appointed on December 16, 1969, as Trustee in Bankruptcy by The Honorable Rufus W. Reynolds, Referee in Bankruptcy, contended he was entitled to the cash surrender values ($514.03 and $745.10) of the two policies as assets of the bankrupt estate and demanded that plaintiff pay these amounts to him.

Mary Y. Davis, wife of Thomas E. Davis, is named as beneficiary in each policy; and, in each, the insured reserved the right to change the beneficiary. The insured paid all premiums.

Plaintiff, contending these cash surrender values were exempt under North Carolina law from the claims of the bankrupt's creditors, sought and obtained leave from the Referee in Bankruptcy to institute this action in the Superior Court of Durham County, North Carolina, to obtain a judgment declaring and adjudicating the respective rights and claims of all parties to the cash surrender values of the two policies it had issued on the life of Thomas E. Davis.

The facts necessary to decision, set forth in summary above, were stipulated.

Judge Canaday "ORDERED, ADJUDGED AND DECREED that Arthur A. McDonald, Jr., Trustee in Bankruptcy for Thomas E. Davis, Bankrupt, is not entitled to the cash surrender value of Home Security Life Insurance policies numbers A 110131 and A 116194."

Defendant McDonald, Trustee in Bankruptcy, excepted to the judgment and appealed.

Lillard H. Mount and Richard M. Hutson II, for plaintiff appellee.

Nye & Mitchell, by R. Roy Mitchell, Jr., for defendant appellant Arthur A. McDonald, Jr.

BOBBITT, Chief Justice.

[1] The Bankruptcy Act § 70(a), 11 U.S.C.A. § 110(a), in part provides: "The trustee of the estate of a bankrupt . . . upon his . . . appointment and qualification, shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition . . ., *except insofar as it is to property which is held to be exempt,* to all of the following kinds of property . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: . . . *And provided further,* That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets . . . ." (Our italics.)

The Bankruptcy Act § 6, 11 U.S.C.A. § 24, in part provides: "This title (Bankruptcy) shall not affect the allowance to bankrupts *of the exemptions which are prescribed . . . by the State laws in force at the time of the filing of the petition* . . . ." (Our italics.)

On the basis of these statutory provisions, it is well established that the cash surrender value of the policies under consideration is an asset of the bankrupt estate, *Cohen v. Samuels,* 245 U.S. 50, 62 L. Ed. 143, 38 S. Ct. 36 (1917), and *Cohn v. Malone,* 248 U.S. 450, 63 L. Ed. 352, 39 S. Ct. 141 (1919), *unless*

included within the exemption laws of the State of North Carolina, *Smalley v. Laugenour,* 196 U.S. 93, 97, 49 L. Ed. 400, 402, 25 S. Ct. 216, 217 (1905), and *Holden v. Stratton,* 198 U.S. 202, 49 L. Ed. 1018, 25 S. Ct. 656 (1905).

The Washington statute under consideration in *Holden v. Straton, supra,* provided "that *the proceeds or avails* of all life insurance shall be exempt from all liability for any debt." (Our italics.)

Ordinarily, the beneficiary named in a life insurance policy has a vested interest therein which cannot be destroyed without his (her) consent in the absence of conditions or stipulations to the contrary. *Wilson v. Williams,* 215 N.C. 407, 2 S.E. 2d 19 (1939), and cases cited. Unless he reserves the right to change the beneficiary, the insured cannot, without the consent of the beneficiary, obtain the cash surrender value. In such case, the right to the cash surrender value does not pass to the trustee in bankruptcy under subparagraphs (3) and (5) of § 70(a) of the Bankruptcy Act. *Massachusetts Mut. Life Ins. Co. v. Switow,* 30 F. Supp. 809 (W.D.Ky. 1940). Thus, without reference to the North Carolina statutory and constitutional provisions discussed below, the cash surrender value of a policy in which the insured has not reserved the right to change the beneficiary is not an asset of the bankrupt estate.

Absent decisions of this Court with reference thereto, federal courts have had occasion to consider whether the cash surrender value of a policy in which the insured has reserved the right to change the beneficiary is exempt under North Carolina law.

Resolving a conflict between *In re Pittman,* 275 F. 686 (E.D. N.C. 1921), and *In re Whiting,* 3 F. 2d 440 (W.D.N.C. 1925), the Court of Appeals, affirming *In re Whiting,* held the cash surrender value of a policy on the life of the insured (bankrupt) in which his wife was named as beneficiary and in which the insured had reserved the right to change the beneficiary was not exempt under North Carolina law and the trustee was entitled thereto as an asset of the bankrupt estate. *Whiting v. Squires,* 6 F. 2d 100 (4th Cir. 1925), cert. den., 269 U.S. 587, 70 L. Ed. 426, 46 S. Ct. 203 (1926).

The factual situations involved in *Whiting v. Squires, supra,* and in the present case are substantially the same. However, there are significant differences between the statutory and

constitutional provisions in force then and those in force now.

In *Whiting v. Squires, supra,* the opinion of Circuit Judge Woods quotes (as follows) Sections 1 and 7 of Article X ("Homesteads and Exemptions") of the Constitution of North Carolina, *viz.:*

" 'Exemption of Personal Property.—The personal property of any resident of this state, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any court, issued for the collection of any debt.' Section 1."

" 'The husband may insure his own life for the sole use and benefit of his wife and children, *and in case of the death of the husband* the amount thus insured shall be paid over to the wife and children, or to the guardian, if under age, for her or their own use, free from all the claims of the representatives of her husband, or any of his creditors.' Section 7." (Our italics.)

Judge Woods also quoted the (1899) statute then codified as Section 6464 of the Consolidated Statutes and now codified as G.S. 58-205, *viz.:*

"6464. Rights of beneficiaries. When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, are entitled to its proceeds against the creditors and representatives of the person effecting the insurance. The person to whom a policy of life insurance is made payable may maintain an action thereon in his own name. Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband, or by any other person, and whether the assignment or transfer is made by her husband or by any other person, inures to her separate use and benefit and to that of her children, if she dies in his lifetime."

In *Whiting v. Squires, supra,* the bankrupt claimed as exemptions: (1) Personal property of the value of $500.00; and (2) the cash surrender value ($18,415.78) of insurance policies on his life in which his wife was named as beneficiary and in which he had reserved the right to change the beneficiary.

The basis of decision is stated by Judge Woods as follows: "Section 7 confers on the husband the right to insure for the benefit of his wife and children, and confers on them, 'at the death of her husband,' the right to receive the amount of any policy of which they may then be the beneficiaries, free from the claims of the representatives of the husband or his creditors. This means, in the absence of fraud, that payment of premiums, even by an insolvent husband, shall not defeat payment at the death of the husband to the beneficiaries named in the policy. The limit of the constitutional exemption of an insurance policy on the life of the husband against the claims of his creditors is that the wife or the wife and children take the benefits of a policy payable to her or them as beneficiaries at the death of the insured. . . . But the exemption does not embrace the surrender value, the property of the husband, of a policy in which he can change the beneficiary at will."

With reference to C.S. 6464, Judge Woods stated: "If the statute stood alone, with its language unrestrained by the constitutional provision, the argument would be strong in favor of the view that every possible value of a policy including cash surrender value, though the husband retained the right to change the beneficiary, inures to the benefit and use of the wife or her children." However, citing *Wharton v. Taylor*, 88 N.C. 230 (1883), for the proposition that "(t)he Legislature could not by statute add to the consitutional exemption," Judge Woods stated: "(I)f the statute be construed as embracing the surrender value of a policy like these, it would be invalid as a legislative attempt to enlarge the insurance exemption to the wife and children provided by the Constitution." *Id.* at 102.

When *Wharton v. Taylor, supra,* was decided, Section 2, Article X, of our Constitution provided: "Every homestead, and the dwellings and buildings used therewith, *not exceeding in value one thousand dollars,* to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village with the dwelling and buildings used thereon, owned and occupied by any resident of this State, *and not exceeding the value of one thousand dollars,* shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises." (Our italics.) In *Wharton v. Taylor, supra,* this Court held unconstitutional, as violative of the quoted provision, a statute enacted March 10, 1877, which provided: "The home-

stead of any resident of this state shall not be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon, growing out of any debt contracted, or cause of action accruing after the first day of May, 1877, except such as may be rendered or issued to secure the payment of obligations contracted for the payment of said homestead, or for laborers' or mechanics' liens for work done and performed for the claimant of said homestead, or for lawful taxes." Obviously, the provisions of this 1877 statute were *in direct conflict with* and *in utter disregard of* Section 2, Article X, of our Constitution.

It is noted that *Holden v. Stratton, supra,* recognized expressly, and that *Whiting v. Squires, supra,* recognized impliedly, the right of a State, if its constitution so provided or permitted, to exempt "the proceeds or avails," including the cash surrender value, of a life insurance policy in which the wife is the named beneficiary and in which the insured (bankrupt) reserved the right to change the beneficiary.

It must be presumed that the 1931 General Assembly, when it enacted the statute and submitted the constitutional amendment discussed below, acted with knowledge of the decision in *Whiting v. Squires, supra.*

On March 23, 1931, the General Assembly enacted Chapter 179, Session Laws of 1931, entitled "AN ACT DETERMINING THE RIGHTS OF CREDITORS AND BENEFICIARIES UNDER POLICIES OF LIFE INSURANCE." This statute, now codified as G.S. 58-206, provides: "If a policy of insurance . . . is effected by any person on his own life or on another life in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, *the lawful beneficiary or assignee thereof,* other than the insured or the person so effecting such insurance or the executor or administrator of such insured or of the person effecting such insurance, *shall be entitled to its proceeds and avails* against creditors and representatives of the insured and of the person effecting same, *whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person:* Provided, that subject to the statute of limitations, the amount of any premiums for said insurance paid with the intent to defraud creditors,

with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms unless, before such payment, the company shall have written notice by or in behalf of the creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount claimed." (Our italics.)

On April 10, 1931, the General Assembly enacted Chapter 262, Session Laws of 1931, entitled "AN ACT TO SUBMIT A PROPOSED AMENDMENT TO THE CONSTITUTION OF NORTH CAROLINA TO PROTECT INSURANCE FOR WIVES AND CHILDREN FROM CREDITORS DURING LIFE OF INSURED." This amendment, which was adopted by the electorate in the General Election of 1932, amended Section 7, Article X, of the Constitution of North Carolina, by adding the following: "And the policy shall not be subject to claims of creditors of the insured *during the life of the insured,* if the insurance issued is for the sole use and benefit of the wife and/or children." (Our italics.)

In a factual situation similar to that now under consideration, it was held in *In re Wolfe,* 249 F. Supp. 784 (M.D.N.C. 1966), that, although "(i)t could logically be argued that § 58-206 of the General Statutes of North Carolina, considered alone, exempts policies of life insurance, even though the insured reserves the right to change the beneficiary," the 1931 statute (G.S. 58-206) was in conflict with Section 7 of Article X as amended in 1932; and that under Section 7 of Article X as amended in 1932 a policy in which the "wife and/or children" are designated as beneficiaries is not for their sole use and benefit and therefore not exempt if the insured reserved the right to change the beneficiary. We take a different view. For the reasons stated below, we conclude (1) that G.S. 58-206 does exempt the cash surrender values of policies of life insurance in which the "wife and/or children" of the insured (bankrupt) are designated beneficiaries, and (2) that Section 7 of Article X does not conflict with and nullify G.S. 58-206 in those instances where the "wife and/or children" are designated beneficiaries but on the contrary is in accord therewith.

The 1931 statute (G.S. 58-206), which repeals all laws and clauses of laws in conflict therewith, does not refer to the statute theretofore codified as G.S. 58-205. Although both statutes, G.S. 58-205 and G.S. 58-206, now appear in the 1965

Replacement of the General Statutes, G.S. 58-206 supersedes G.S. 58-205 where there are variations or conflicts. *Board of Education v. Comrs. of Onslow,* 240 N.C. 118, 126, 81 S.E. 2d 256, 262.

The 1931 statute (G.S. 58-206) was taken practically verbatim from the 1927 New York statute construed in *In re Messinger,* 29 F. 2d 158 (2d Cir. 1928), cert. den., 279 U.S. 855, 73 L. Ed. 996, 49 S. Ct. 351 (1929). In deciding the question presented in that case, a bankruptcy proceeding, it was held that the cash surrender value of a policy of life insurance is exempt from the claims of the trustee in bankruptcy of the insured even though the right to change the beneficiary is reserved.

In *Smith v. Metropolitan Life Ins. Co.,* 43 F. 2d 74 (3d Cir. 1930), it was decided, in accord with the construction placed upon New Jersey exemption statutes by cited decisions of the Court of Chancery of New Jersey, that the trustee in bankruptcy was not entitled to the cash surrender value of a life insurance policy in which the wife was the named beneficiary notwithstanding the insured (bankrupt) had reserved the right to change the beneficiary. The New Jersey statutory provisions considered are similar to those in G.S. 58-206 except that the clause in G.S. 58-206, "whether or not the right to change the beneficiary is reserved or permitted," did not appear in the New Jersey statutes.

[2] The significance of the 1931 statute (G.S. 58-206) is to be considered in the light of the general rule of statutory construction that "where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject matter, they are to be understood in the same sense unless by qualifying or explanatory addition the contrary intent of the Legislature is made clear." *Brown v. Brown,* 213 N.C. 347, 350, 196 S.E. 333, 335 (1938).

Decisions in accord with *In re Messinger, supra,* and *Smith v. Metropolitan Life Ins. Co., supra,* based on statutes similar to G.S. 58-206 in that they exempt the "proceeds" or "avails" of life insurance policies, include the following: *In re Beckman,* 50 F. Supp. 339 (N.D. Ala. 1943); *In re White,* 185 F. Supp. 609 (N.D. W.Va. 1960); *Klebanoff v. Mutual Life Insurance Co.,* 246 F. Supp. 935 (D. Conn. 1965); *In re Summers,* 253 F. Supp.

113, 116 (N.D. Ind. 1966), and cases there cited; *In re Lamb,* 272 F. Supp. 393, 396 (E.D. La. 1967).

As stated in *In re White, supra* at 613; "Since the leading case of *Holden v. Stratton, supra,* there have been a host of cases construing statutes of various states and unanimously holding that the words 'proceeds' or 'proceeds and avails' when used in life insurance exemption statutes comprehend the protection of cash surrender values and other values built up during the life of the policies as well as the death benefits."

Although we are presently concerned only with policies in which the wife of the insured (bankrupt) is the name beneficiary, the protection afforded by G.S. 58-206 is not limited to any particular class of beneficiaries. It relates to a policy on the life of the insured payable to any third party beneficiary. Under an Alabama statute substantially the same as G.S. 58-206, it was held that the trustee in bankruptcy was not entitled to the cash surrender value of a policy in which the beneficiaries were the uncle and an aunt by marriage of the insured (bankrupt). *In re Beckman,* 50 F. Supp. 339 (N.D. Ala. 1943). Too, under the 1927 New York statute considered in *In re Messinger, supra,* where the mother and sister of the insured (bankrupt) were the beneficiaries of policies assigned within four months of bankruptcy to a creditor of the insured, the cash surrender value ("avails") realized by the creditor assignee was held exempt from the claims of the trustee in bankruptcy. *In re Rubin,* 29 F. Supp. 416 (S.D. N.Y. 1939). Also, see *In re Hausman,* 209 F. Supp. 219 (M.D. Ga. 1962).

Unquestionably, under G.S. 58-206, considered alone, the "proceeds and avails," including the cash surrender value, of a policy in which the wife is named as beneficiary, are exempt from the claims of the trustee in bankruptcy, "whether or not the right to change the beneficiary is reserved or permitted."

The 1931 statute (G.S. 58-206) was in force and effect from its ratification on March 23, 1931. The amendment to Section 7 of Article X did not become effective until approved by the electorate in the General Election held November, 1932. The obvious purpose of the 1932 amendment was to enlarge rather than to restrict the rights of the wife and children of the insured. As stated in the caption of Chapter 262, Public Laws of 1931, the amendment was submitted by the General Assembly "TO PROTECT INSURANCE FOR WIVES AND CHILDREN FROM CREDITORS DURING LIFE OF INSURED."

When *Whiting v. Squires, supra,* was decided, Section 7 of Article X provided that "(t)he husband may insure his own life for the sole use and benefit of his wife and children, *and in case of the death of the husband* the amount thus insured shall be paid over to the wife and children, or to the guardian, if under age, for her or their own use, free from all the claims of the representatives of her husband, or any of his creditors." (Our italics.)

The exemption provided by Section 7 of Article X is separate from and in addition to exemptions provided in other sections of Article X. Section 7 of Article X *applies only to one factual situation,* namely, where a husband insures his own life for the benefit of his wife and children. In our view, *Wharton v. Taylor, supra,* has no application to the question under consideration.

[3] "(U)nder our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom." *Thomas v. Sanderlin,* 173 N.C. 329, 332, 91 S.E. 1028, 1029. Absent such constitutional restraint, questions as to public policy are for legislative determination. *Reid v. R.R.,* 162 N.C. 355, 358, 78 S.E. 306, 307.

The General Assembly, at the same session, adopted the statute and submitted the constitutional amendment. The constitutional amendment was adopted for the express purpose of protecting insurance for wives and children from creditors during the life of the insured. In our view, the intent of the General Assembly and of the electorate would be thwarted if the constitutional amendment were construed as providing a lesser benefit than that provided by the statute for the "wife and/or children."

[4] As stated by Justice (later Chief Justice) Barnhill in *Perry v. Stancil,* 237 N.C. 442, 444, 75 S.E. 2d 512, 514: "Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished."

[5] We conclude that insurance is "for the sole use and benefit of the wife and/or children" within the meaning of the 1932 amendment when the "wife and/or children" are the only

persons named as beneficiaries; and that, so long as they remain the only persons named as beneficiaries, the policy, including the cash surrender value thereof, is not subject to the claims of the insured's creditors during his lifetime. See Note, 45 N.C.L.Rev. 696, 700 (1967).

Under any other interpretation, the 1932 constitutional amendment to Section 7 of Article X would be devoid of meaning; for, if the right to change the beneficiary is not reserved, the beneficiary has a vested interest and the policy, including the cash surrender value, is not subject to the claims of creditors without regard to G.S. 58-206 or the 1932 amendment to Section 7 of Article X. Manifestly, neither the General Assembly nor the electorate intended or contemplated such an absurd result. *King v. Baldwin,* 276 N.C. 316, 325, 172 S.E. 2d 12, 18.

There is no contention or suggestion that anything was done by the insured (bankrupt) relating to the policies under consideration with intent to defraud his creditors.

For the reasons stated, the judgment of the court below is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. CLARK BRINSON AND JOHNNY JOHNSON

No. 53

(Filed 18 November 1970)

1. **Grand Jury § 3— composition of grand jury— systematic exclusion of Negroes — prima facie case.**

Negro defendants in a first-degree murder prosecution failed to make out a *prima facie* case that members of their race had been systematically excluded from the grand jury, where (1) the defendants merely showed that a disproportionate number of whites sat on a particular jury and that the tax lists from which the jury list was compiled carried racial designations and (2) the defendants produced no population figures, no evidence of disproportionate representation on past juries, and no evidence of actual discrimination.

2. **Criminal Law § 15— change of venue — prejudicial pretrial publicity**

An article in a local newspaper stating that the defendants' first-degree murder prosecution was among the murder cases on the docket

and that "this is the third or fourth time they have been up and not been tried," *is held* insufficient to support defendants' motion for change of venue on ground of prejudicial pretrial publicity.

3. **Criminal Law §§ 76, 95, 169— joint trial of defendants — admission of statements implicating codefendant — harmless error rule**

In a joint trial of two defendants for first degree murder, it was error to admit statements from the confession of each defendant which implicated his codefendant, neither defendant having taken the stand in his own behalf; nevertheless, such error was not prejudicial where the objectionable statements were merely cumulative of other and overwhelming evidence of the defendants' guilt and could not have had a significant impact upon the average juror.

4. **Constitutional Law § 30; Criminal Law § 167— federal constitutional errors — prejudicial effect**

Not all federal constitutional errors are prejudicial.

5. **Criminal Law § 117— scrutiny of accomplice's testimony — instructions**

Failure of the court to caution the jury to scrutinize the testimony of defendant's accomplice is not erroneous where the defendant made no request for such an instruction.

APPEAL by defendants from *Bundy, J.*, at the June 1965 Mixed Session, HALIFAX Superior Court.

Arthur Harper, Clark Brinson and Johnny Johnson were charged in separate bills of indictment with the first degree murder of Elmer M. Taylor in Halifax County on 18 December 1964. Harper pleaded guilty and testified as a witness for the State. The cases against Brinson and Johnson were consolidated for trial. They were convicted by the jury and sentenced to life imprisonment. Notice of appeal was given but the appeal was never perfected. Following a post conviction hearing before Judge Peel, an order dated 12 June 1970 was entered allowing defendants to perfect a belated appeal, and counsel was appointed to represent them. The case is now before us for appellate review.

The State's evidence tends to show that Elmer M. Taylor owned and operated a store located on a rural road in Halifax County. Several people including Arthur Harper worked at the store. Mrs. Taylor was having an affair and had been using Arthur Harper to carry notes and arrange meetings between her and a man named Sam Alford. She wanted her husband killed and picked Arthur Harper as the man to do it. He refused and later quit work at the store when Mr. Taylor accused him of bringing liquor to Mrs. Taylor. Thereafter Clark Brin-

son carried letters from Mrs. Taylor to Harper in which she told Harper how much insurance her husband had taken out and stated that all insurance and everything left to her would be Harper's if he killed her husband. Harper replied that he didn't want the store or anything Mrs. Taylor had. A few days later Clark Brinson brought Harper some cigarettes, pants and shirts from Mrs. Taylor. At the time of the killing she had given him $250 to $260.

When Harper got his crops harvested about the middle of December, he left Halifax County and went to Philadelphia. His wife called and when Harper returned the call, "Mrs. Taylor answered the phone and asked me where I was. She said . . . 'You had better come back here and do what you was told to do.' As a result of that telephone conversation I came back down to Halifax County."

During the week following his return from Philadelphia, Arthur Harper, Clark Brinson and Johnny Johnson had a conversation about Elmer M. Taylor while sitting in a car in front of Taylor's store. Brinson said: "There's more than one way to get him and not have to put your hands on him." Brinson called attention to the fact that Taylor habitually carried certain employees home at night. All three of them knew of this practice. Harper decided at that time to kill Taylor.

Shortly thereafter, on Friday night, December 18, when Harper was at his mother's home, Clark Brinson and Johnny Johnson came for a brief visit, then left and went to Taylor's store. "When they came back they made a sign to me, winked at me," and the three of them left the house. Brinson and Johnson went up the road in Brinson's car and Harper followed on foot. They knew that Taylor would pass along that road driving Harper's stepfather home. They hid in the woods and when Taylor passed they piled pieces of wood in the road to block passage on his return. It was about 9:00 or 9:30 p.m. Shortly thereafter Taylor came back down the road, drove up to the wood and stopped. When he got out of his vehicle Arthur Harper shot him from ambush with a .22 caliber rifle. Both defendants were there in the woods with Harper. "At the time I did the shooting somebody was behind me but nobody was persuading me. . . . Clark Brinson and Johnny Johnson were behind me."

After he was shot Taylor reentered his vehicle and Harper fired again. Taylor drove to his home where officers called an ambulance and a doctor. Taylor later died and it was stipulated at the trial "that Elmer M. Taylor died as a result of a .22 caliber bullet being fired into his body."

SBI Agent J. P. Thomas, after advising defendants of their rights, interrogated them separately and then together. Defendant Brinson stated that he and Johnny Johnson got together in Brinson's car on the day of the shooting; that they went to the home of Harper's mother and then left in the car and went to the scene of the shooting; that Arthur Harper followed them on foot; that all three of them assisted in placing wood in the road to block it; that they saw Taylor go by and blocked the road so he would stop when he returned; that Taylor was shot when he got out of his truck to remove the wood; that after the shooting he and Johnson left in Brinson's car and were not with Harper any more that night.

Defendant Johnson stated that he and Brinson traveled in Brinson's car to the home of Harper's mother; that he and Brinson left in Brinson's car and Harper followed on foot; that they all went to the same location and all three participated in blocking the road with wood after they had seen Taylor go by carrying an employee home; that when Taylor returned and got out to remove the wood a shot was fired and Taylor fell against his truck; that Taylor then got in his truck and left the scene whereupon he and Brinson left.

The foregoing statements were made by Brinson and Johnson in the presence of each other. Both told where each was standing when the shots were fired—Harper behind a poplar tree, one of defendants behind an oak tree and the other defendant behind a pond—"They said there was no water but they called it a pond, all in the same immediate area." These statements were offered in evidence over objection by defendants.

The bullet found in the victim's body was tested by a ballistics expert who determined that it had been fired from the .22 rifle Arthur Harper had used.

Neither defendant testified, but they offered evidence in the nature of alibi. Defense witness Otto Brinson, sixteen-year-old brother of Clark Brinson, testified that Clark Brin-

son and Johnny Johnson came to his father's home at 9:20 p.m. on the night in question, stayed ten or fifteen minutes, and that he left with them to go to the store for cigarettes; that they returned to his father's home, watched television awhile, and then went to the Friendly Grill in Enfield and bought drinks; that they returned home about 11:00 p.m., then carried Johnny Johnson home, and that Clark Brinson returned home with the witness and went to bed. The witness stated that Clark Brinson and his wife and children were living there at that time.

Jasper Brinson, father of Clark Brinson and Otto Brinson, testified that Clark Brinson and Johnny Johnson came to his home about 9:10 p.m. on December 18, stayed a few minutes and left with Otto; that they returned with some drinks about 11:05 p.m., watched television and, when the late show went off, went to their rooms to go to bed.

Emma Lee Johnson, wife of Johnny Johnson and sister of Clark Brinson, testified that she worked for Mrs. Taylor on December 18, 1964; that defendants came in the store about 9:20 p.m., bought something and left; that they came back about 9:30 p.m. and left again saying they were going home "to my father's where my children were"; that she next saw her husband about 11:10 or 11:15 p.m. that night when Clark Brinson brought him home. On cross examination this witness said that Mr. Taylor did not close the store until 10:30 p.m. and that he took her home "about five minutes to eleven on that Friday night"; that from 9:30 p.m. until 11:10 p.m. she did not know the whereabouts of her husband; that neither he nor Clark Brinson were at her father's house when she arrived at "a quarter to eleven."

Julius Lee Brinson, twelve years old, testified that he saw Clark Brinson and Johnny Johnson that night at his father's house; that he went to Taylor's store and back home that night—"Clark and Johnny and me and Otto were in the car"; that they returned home and went to the store a second time but found it closed and went to the Friendly Grill in Enfield to buy drinks; that the four of them returned home, took Johnny Johnson home, watched television and then went to bed.

The jury returned a verdict of guilty recommending life imprisonment, and from judgment pronounced thereon de-

fendants appealed to the Supreme Court assigning errors noted in the opinion.

Parker & Dickens by William F. Dickens, Jr., Attorney for Defendant Appellant Johnson; Charlie D. Clark, Jr., Attorney for Defendant Appellant Brinson.

Robert Morgan, Attorney General; Burley B. Mitchell, Jr. and Charles A. Lloyd, Staff Attorneys, for the State.

HUSKINS, Justice.

[1] Defendants' first assignment of error is based on denial of their motion to quash the bills of indictment. Defendants are Negroes and allege that members of their race had been systematically excluded from the grand jury.

The question of systematic exclusion of Negroes from grand juries has been repeatedly considered by this Court, most recently in *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970). There we outlined the familiar rules of law applicable to such situations. We said that the conviction of a Negro based on an indictment or verdict of a jury from which Negroes were systematically excluded because of their race cannot stand. The burden is on the defendant to establish such racial discrimination; once a *prima facie* case is established, the burden of going forward with rebuttal evidence is on the State. A defendant must be allowed a reasonable opportunity to present evidence regarding the alleged exclusion, and failure to do so is reversible error. See *State v. Spencer, supra,* and cases cited therein.

In rebutting the evidence of a defendant that there has been such systematic discrimination, the State may not rely on general assertions that its officers performed their statutory duties in good faith. There are further affirmative duties: "First, they are obliged, as a constitutional duty of their office, to familiarize themselves with all of the community's elements in which qualified jurors may be found so as to make certain that none is omitted from full and equal consideration for jury service. Second, they may not pursue a 'course of conduct' which, whether so intended or not, has the natural tendency to exclude a group that may not be constitutionally excluded." Roger S. Kuhn, Jury Discrimination: The Next Phase, 41 So. Cal. L. Rev. 235 at 258 (1968); *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109 (1964); *State v. Lowry and Mallory,* 263 N.C. 536, 139 S.E. 2d 870 (1964); *Avery v. Georgia,* 345 U.S. 559, 97 L. Ed.

1244, 73 S. Ct. 891 (1945); *Hill v. Texas*, 316 U.S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159 (1942); Annotation, Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, 1 A.L.R. 2d 1291 (1948).

What is necessary to establish a *prima facie* case of systematic exclusion by reason of racial discrimination? In *Avery v. Georgia, supra*, a *prima facie* case was established by showing that the population of the county in question was twenty-five percent Negro; that the tax list from which jurors were chosen was fourteen percent Negro; that the resulting jury list was five percent Negro; that names drawn were typed on white or colored paper, according to race; and that only a negligible number of Negroes were ever called to jury duty. In the venire in question, all sixty jurors were white. In a Fourth Circuit case, *Witcher v. Peyton*, 382 F. 2d 707 (1967), the following situation was deemed sufficient to establish a *prima facie* case: "Of the thirty-seven grand juries impaneled from January 1957 through September 1962, ten were white, and none of the other twenty-seven included more than one Negro juror."

North Carolina cases follow the same pattern. In *State v. Lowry and Mallory, supra*, "[d]efendants made out a *prima facie* case of systematic exclusion by showing the population ratio and that only a token number of Negroes had served on the grand jury, never more than one on any grand jury, sometimes none, and that such Negroes as were approved on the biennial list were designated 'col.'" In *State v. Brown*, 271 N.C. 250, 156 S.E. 2d 272 (1967), it was suggested that the fact that only three out of eighty-six jurors called in two successive months were Negroes in a county where the Negro population was 5,106 and the white population was 56,360, was not sufficient to make out a *prima facie* case. In *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897 (1968), it was held insufficient to show that the sheriff of the county could identify, from the jury lists of the last ten years, only one to three Negroes on each grand jury, with the exception of two grand juries from which he could identify no Negroes. There, as here, the lists from which the jury list was taken carried racial designations pursuant to statute.

What must be shown is a systematic course of conduct resulting in apparent systematic discrimination against persons of the defendant's race. Thereupon the State must go forward and explain the apparent discrimination. *State v. Wright, supra.*

Merely showing that names on the tax lists from which the jury list is compiled carry racial designations, and that there were a disproportionate number of whites on *a particular jury,* is insufficient. Here, movants produced no population figures, no evidence of disproportionate representation on past juries, and no evidence of actual discrimination. This assignment is overruled.

The problem of unequal treatment of minorities in an imperfect judicial system is a continuing one and will not likely be eradicated as long as the human mind plays a role in it. Even so, the revision of jury selection procedures embodied in Chapter 218 of the 1967 Session Laws, codified as Chapter 9 of the General Statutes, is designed to remove, within the bounds of practicality, any likelihood of discrimination in the selection of jurors in North Carolina.

For interesting discussions of refined but impractical techniques designed to establish *prima facie* discrimination in jury selection and suggesting various remedial approaches to the problem, see Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966) ; *Kuhn, supra,* pp. 266-282.

[2] Defendants next assign as error the refusal of the court to order a change of venue based on prejudicial pretrial publicity amounting to a denial of due process. The record discloses that an article in a local newspaper had stated that "there were several murder cases on the docket and among them were these and that this is the third or fourth time they have been up and not been tried." Nothing else is offered. The showing presents nothing approaching prejudicial pretrial publicity. The motion was properly denied. *Sheppard v. Maxwell,* 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966).

[3] Each defendant contends his constitutional rights were violated in that the trial court admitted in evidence the extrajudicial confessions wherein each implicated the other in the crime for which they were both on trial. Each asserts this violated his Sixth Amendment right "to be confronted with the witnesses against him." This constitutes defendants' third assignment of error.

At the time these defendants were tried in 1965 it was permissible in both state and federal courts to admit the extrajudicial confession of one defendant, even though it implicated

a codefendant against whom it was inadmissible, provided the trial judge instructed the jury to consider the confession only against the confessor. *State v. Lynch,* 266 N.C. 584, 146 S.E. 2d 677 (1966); *State v. Bennett,* 237 N.C. 749, 76 S.E. 2d 42 (1953); *Delli Paoli v. United States,* 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 (1957). But this is no longer the rule. Since the trial of this case, the United States Supreme Court in *Bruton v. United States,* 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968), overruled *Delli Paoli* and held that in a joint trial the admission of the confession of one defendant who did not take the stand, implicating his codefendant, violated the codefendant's right of cross examination secured by the Confrontation Clause of the Sixth Amendment. The decision in *Bruton* is retroactive, *Roberts v. Russell,* 392 U.S. 293, 20 L. Ed. 2d 1100, 88 S. Ct. 1921 (1968), and the right of confrontation is made obligatory on the states by the Fourteenth Amendment to the Federal Constitution. *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965). These principles were recognized and applied by this Court in *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968), and *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230 (1968).

In *State v. Fox, supra,* the post-*Bruton* rule in North Carolina was summarized by Sharp, Justice, as follows:

> "The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra* [250 N.C. 113, 108 S.E. 2d 128 (1959)]), and (2) that the declarant will not take the stand. If the declarant can be cross examined, a codefendant has been accorded his right to confrontation."

In the instant case, Brinson and Johnson were together when they confessed, and the statement of each was made in the presence of the other. The State contends this rendered each confession competent against both defendants, relying on *State v. Bryant, supra,* referred to by Justice Sharp in the *Fox* case. There, seven defendants were charged in separate bills

of indictment with the crime of rape. The solicitor's motion to consolidate all seven cases for trial was allowed over objection and defendants assigned the ruling as error. Speaking to that assignment the Court said: ". . . [A]ll of the defendants who were convicted by the jury were together when they made their confessions, and each defendant, according to the evidence, expressly admitted in the presence of the others that he did have sexual intercourse with the prosecuting witness, forcibly and against her will. This assignment of error is overruled." The *Bryant* case therefore is authority only for the propriety of the consolidation. It is not pertinent on the question of admissibility of the extrajudicial confession of one defendant which implicates a codefendant when the confessor does not take the stand. The rule now applicable in North Carolina was dictated by *Bruton,* declared by Justice Sharp in *State v. Fox, supra,* and reaffirmed in *State v. Parrish, supra.* Applying that rule to the facts here, we hold that it was error to admit those portions of Brinson's confession that implicated Johnson and those portions of Johnson's confession that implicated Brinson. Neither defendant took the stand, and each was therefore denied his constitutional right of confrontation and cross examination guaranteed by the Sixth and Fourteenth Amendments.

[4] Nevertheless, all federal constitutional errors are not prejudicial. Some constitutional errors in the setting of a particular case "are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. . . . [B]efore a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). In deciding what constituted harmless error in *Fahy v. Connecticut,* 375 U.S. 85, 11 L. Ed. 2d 171, 84 S. Ct. 229 (1963), the Court said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." In a factual situation similar to the case before us, the harmless constitutional error test fashioned by *Chapman* was applied in *Harrington v. California,* 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969).

[3] Applying the foregoing standard to the facts in this case, we hold that the admission of those portions of Brinson's and Johnson's confessions wherein each implicated the other was harmless beyond a reasonable doubt. Brief analysis of the com-

petent evidence fortifies this conclusion. Each defendant confessed to having participated in the murderous conspiracy. Each said he helped block the road. Each said he was present when Taylor was shot. Each admission of personal participation in the crime is corroborated by the eyewitness testimony of Harper and by other evidence as well. After establishment of the *corpus delicti* each confession is in itself sufficient to convict the confessor of murder in the first degree. Each confession in all these respects is competent evidence against the confessor. " 'In this setting, the fact that each defendant was also implicated by his codefendant's confession cannot realistically have contributed to either conviction.' " *People v. McFadden,* 84 Cal. Rptr. 675, 4 Cal. App. 3rd 672 (1970). Rather, the tainted portion of each confession was merely cumulative and contained no evidence which had not already been presented against each defendant through other evidence. The impact of the tainted portion on the mind of an average juror in face of the overwhelming evidence of guilt was "so unimportant and insignificant" that it may be deemed harmless. *Chapman v. California, supra.* This assignment of error is accordingly overruled.

For informative discussions of the *Chapman* and *Harrington* cases, see: Note, Harmless Constitutional Error: A Reappraisal, 83 Harv. L. Rev. 814 (1970); Note, Harmless Constitutional Error, 30 U. Pitt. L. Rev. 553 (1969); Philip J. Mause, Harmless Constitutional Error: The Implications of *Chapman v. California,* 53 Minn. L. Rev. 519 (1969). For treatment of *Bruton* as affected by *Harrington,* see: Note, The Admission of a Codefendant's Confession after *Bruton v. United States:* The Questions and a Proposal for their Resolution, 1970 Duke L. J. 329. As to *Bruton,* see also: 35 Mo. L. Rev. 125 (1970); 47 Tex. L. Rev. 143 (1968); 82 Harv. L. Rev. 231 (1968); Annotation, Federal Constitutional Right to Confront Witnesses—Supreme Court Cases, 23 L. Ed. 2d 853 (1970).

[5] The trial judge failed to caution the jury to scrutinize the testimony of Arthur Harper, an accomplice, and defendants assign same as error. No request was made for such an instruction, and the State contends the omission was therefore not error. The State is correct.

"The rule is that in the absence of a special request, the failure of the court to charge the jury to scrutinize the testimony of an accomplice will not be held for error, the matter being a subordinate and not a substantive feature of the case."

State v. Andrews, 246 N.C. 561, 99 S.E. 2d 745 (1957); *State v. Stevens,* 244 N.C. 40, 92 S.E. 2d 409 (1956); *State v. Hooker,* 243 N.C. 429, 90 S.E. 2d 690 (1956); *State v. Henderson,* 206 N.C. 830, 175 S.E. 201 (1934); *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654 (1966); Stansbury, North Carolina Evidence (2nd Ed. 1963) § 21. If a request is made for a specific instruction as to the rule of scrutiny with respect to the testimony of an accomplice, failure to so charge is error. *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165 (1961). This assignment is overruled.

Defendants having failed to show prejudicial error, the verdict and judgment must be upheld.

No error.

CAROLINA BEACH FISHING PIER, INC. v. THE TOWN OF CAROLINA BEACH, NORTH CAROLINA

No. 18

(Filed 18 November 1970)

1. **State § 2; Waters and Watercourses § 7— property of the State — submerged coastal lands**

   The lands beneath coastal waters belong to the states and not to the federal government—subject, however, to the restrictions of the Commerce Clause and to specific reservations for use of such waters for navigation, flood control, or the production of power by the federal government.

2. **State § 2; Waters and Watercourses § 7— ownership of tidal lands and the foreshore**

   In North Carolina, private property ends at the high-water mark, and the foreshore is the property of the State.

3. **Waters and Watercourses § 7— high-water mark defined**

   The high-water mark is generally computed as a mean or average high tide and not as the extreme height of the water.

4. **State § 2; Waters and Watercourses § 7; Eminent Domain §2— title to seashore property — erosive action of the ocean — owner divested of title**

   A fishing pier operator whose seashore lots had been completely eroded by the Atlantic Ocean was not entitled to recover compensation from a municipality on the theory that the municipality's construction of a 15-foot beach erosion seawall constituted a taking of his lots for a public purpose without just compensation, where the

erosive action of the ocean had effectively divested the pier operator of his title prior to the construction of the seawall and had vested title in the municipality. 1963 Session Laws, Ch. 511.

5. **Constitutional Law § 6— legislative powers**
The legislature has the power to abrogate, amend, or make exceptions to its own acts.

6. **Waters and Watercourses § 7; State § 2— title to submerged coastal lands — inconsistent statutes**
Statute which granted municipality title in reclaimed seashore lands down to the *low-water* mark controls over inconsistent provision in another statute which provided that State land under navigable waters cannot be conveyed in fee. 1963 Session Laws, Ch. 511; G.S. 146-3(1).

7. **Pleadings § 37— issues raised by pleadings and evidence — submission to jury**
Plaintiff's cause of action cannot be submitted to the jury on a theory of liability not supported by allegation and evidence; nor can plaintiff avail itself of evidence contrary to the allegations of its complaint.

8. **Eminent Domain § 13— action by fishing pier owner — municipal construction of beach seawall — evidence of damages**
A fishing pier owner who sought compensation from a municipality on the theory that the municipality's construction of a beach erosion seawall constituted a taking of the lots on which the pier was located, *held* not entitled to offer evidence of the costs of a new ramp and of a 180-foot extension to the fishing pier.

APPEAL by plaintiff from *Cohoon, J.*, 16 December 1969 Civil Session of NEW HANOVER Superior Court.

Civil action to recover just compensation for the alleged taking of plaintiff's property for a public purpose without payment in violation of Article I, section 17, of the State Constitution and the Fourteenth Amendment to the Federal Constitution.

Plaintiff alleged and offered evidence tending to show that in December 1964 the Town of Carolina Beach authorized, approved and caused a berm or sand seawall to be built according to plans and under the supervision of the United States Army Corps of Engineers for the purpose of preventing or reducing erosion of the beach within the corporate limits of the town due to the forces of the sea, weather, hurricanes and storms; that the berm consisted of a wall of sand approximately fifteen feet high and running parallel to Carolina Beach Avenue (north) along the coastline with a 45-degree slope

out into the waters of the Atlantic Ocean; that plaintiff owned Lots 1 through 6 and Lot 9 in Block 216 as shown on the official map of Carolina Beach, and a fishing pier located thereon; that in the construction of the berm as aforesaid, plaintiff lost the use of same for the reason that the sand berm covered said lots and plaintiff is forbidden to construct or erect any structure over said areas covered by the berm and is forbidden to cross the berm except at designated crosswalks established by the Town of Carolina Beach, all of which results in a total loss of said lots and constitutes a complete taking of plaintiff's property for a public use without just compensation. (Plaintiff's allegations and evidence relating to damages will be noted in the opinion.)

Defendant filed answer in which it admitted that it built a berm or seawall, as alleged in the complaint, in the exercise of a governmental function and for a public purpose but denied all other material allegations of the complaint.

In its further answer and defense defendant averred, *inter alia,* that:

1. Over many years much of the land fronting on the Atlantic Ocean within the corporate limits of Carolina Beach had been washed away by successive storms, tides, winds and other natural forces. As a result, the Atlantic Ocean had moved westwardly for a great distance, especially along the northern end of Carolina Beach, and further erosion is threatened. By reason of such erosion and the westward movement of the Atlantic Ocean prior to the construction of the berm by the defendant, the eastern boundary of the lots described in plaintiff's complaint moved gradually westward until Lots 1 through 6 and Lot 9 of Block 216, as shown on the official map of Carolina Beach, were completely washed away and submerged by the waters of the Atlantic Ocean so that plaintiff's title to said lots had been divested by the ocean prior to the construction of the berm. If plaintiff ever had a valid claim to the ownership of said lots, defendant denies its claim.

2. All the land described in the complaint was formed by pumping sand from Myrtle Grove Sound and pushing up and hauling sand onto the beach and in that fashion restoring and filling in the shoreline of the Atlantic Ocean. By constructing the berm in this way, defendant replaced sand where it had been washed away and thereby created new land owned by the State of North Carolina.

3. On 22 May 1963 the General Assembly enacted Chapter 511 of the 1963 Session Laws entitled "An Act Relating to the Title to the Land Built Up and Constructed in the Town of Carolina Beach in the County of New Hanover as a Result of Certain Erosion Control Work in Said Town." Section 1 of said Act provides that so much of the lands filled in and restored which lie east of the "building line" (to be established as provided in said Act) is granted and conveyed in fee simple to the Town of Carolina Beach. All the land filled in and restored by defendant is east of said "building line" (shown on a map recorded in Map Book 8, page 52, of the New Hanover County Registry), and by virtue of said Act the land described in the complaint belongs to defendant.

The case was referred to the Honorable Joshua S. James by an order of compulsory reference to which all parties excepted and preserved a jury trial. The referee filed his report on 18 September 1967 in which he made findings of fact and concluded as a matter of law that plaintiff's action was barred by Section 3 of Chapter 511 of the 1963 Session Laws. The superior court affirmed and plaintiff appealed. We reversed and remanded to the Superior Court of New Hanover County, 274 N.C. 362, 163 S.E. 2d 363 (1968), with directions that the case be remanded to the referee to consider and answer the following issues: (1) Did the plaintiff own the property mentioned in the complaint at the time of the alleged taking? (2) Did the defendant take any of the plaintiff's property for a pubilc purpose? (3) What amount in compensation, if any, is the plaintiff entitled to receive from the defendant for such taking? In accordance therewith, the referee filed his report on 20 February 1969 in which he answered the first issue "Yes in part," the second issue "Yes" and the third issue "$5100." Defendant duly excepted to the referee's report and demanded a jury trial. The cause came on for hearing before Judge Cohoon and a jury. Defendant's motion for nonsuit at the close of plaintiff's evidence was allowed, and plaintiff appealed to the Court of Appeals. We allowed motion to bypass and the case is now before us again for appellate review.

George Rountree, Jr. and John C. Wessell, Jr., attorneys for plaintiff appellant.

Addison Hewlett, Jr. and Hogue, Hill & Rowe, attorneys for defendant appellee.

HUSKINS, Justice.

The first question for decision here is whether plaintiff's lots, or any portion thereof, were "taken" by the Town of Carolina Beach for the construction of the berm erected to control tidal erosion. Resolution of this problem requires a discussion of the general principles of ownership applicable to tidal lands.

[1] It has been settled since the passage of the Submerged Lands Act of 1953 by the United States Congress that the lands beneath coastal waters belong to the states, and not the federal government. "The seaward boundary of each original coastal state is approved and confirmed as a line three geographical miles distant from its coast line. . . . Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress." 43 U.S.C. § 1312; 67 Stat. 31; *Bruton v. Enterprises, Inc.*, 273 N.C. 399, 160 S.E. 2d 482 (1968); *Capune v. Robbins*, 273 N.C. 581, 160 S.E. 2d 881 (1968). This concession is subject to specific reservations for use of such waters for navigation, flood control, or the production of power by the federal government. 43 U.S.C. § 1311; 67 Stat. 30. The authority of the State is further restricted by the Commerce Clause of the United States Constitution. "[T]he federal government, by virtue of its constitutional authority to regulate interstate and foreign commerce, has paramount power to control all navigable waters of the United States to the extent necessary for that purpose, and both the state and the riparian owners hold such waters and the lands under them subject to that power." Annotation, Rights to land created at water's edge by filling or dredging, 91 A.L.R. 2d 857 (1963). *See generally,* Aaron L. Shalowitz, Boundary Problems Raised by the Submerged Lands Act, 54 Colum. L. Rev. 1021 (1954). There is no ascertainable federal interest here, and we therefore direct our comments to the interests of the State and its property owners.

Where is the dividing line between the property of the State and that of the littoral private owner? There is a division among the States on that question, and the groups may be conveniently labeled "high-tide" states and "low-tide" states.

[2] The "strip of land between the high- and low-tide lines" is called the foreshore. 1 Powell on Real Property § 163; *Capune*

v. Robbins, supra (273 N.C. 581, 160 S.E. 2d 881). The high-tide states hold that private property ends at the high-water mark, and that the foreshore is the property of the state. The low-tide states, on the other hand, fix the boundary at the low-water mark, and the foreshore is said to belong to the littoral landowner unless it has been otherwise alienated. Powell on Real Property, *supra;* Annotation, *supra,* 91 A.L.R. 2d 857; 6 Thompson on Real Property § 3084 (1962); 56 Am. Jur., Waters § 458.

Although the North Carolina position is somewhat obscured by the vagaries of ancient cases, *see* David A. Rice, Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control, 46 N.C.L. Rev. 779 (1968), North Carolina is a high-tide state. Under the old "entry and grant" statutes (which were replaced in 1959 by the State Land Act, Session Laws, 1959, c. 683, codified as Gen. Stat., c. 146), only land under non-navigable waters could be entered. Ownership which might interfere with navigation was not allowed. Therefore, littoral rights in ocean-front property did not include the title to the foreshore, which remained in the State. *McKenzie's Executors v. Hulet,* 4 N.C. 613 (1817); *Ward v. Willis,* 51 N.C. 183 (1858); *State v. Glen,* 52 N.C. 321 (1859); *Insurance Co. v. Parmele,* 215 N.C. 63, 197 S.E. 714 (1938); *Swan Island Club v. White,* 114 F. Supp. 95 (E.D.N.C. 1953); *Parmele v. Eaton,* 240 N.C. 539, 83 S.E. 2d 93 (1954); *Rice, supra,* p. 805; *Capune v. Robbins, supra.*

The State Land Act of 1959, *supra,* carries forward the distinction between navigable and non-navigable waters and provides that land under navigable waters cannot be "conveyed in fee," but that easements may be granted. G.S. 146-3. More importantly, the act creates a new subclassification for lands "which lie beneath . . . The Atlantic Ocean to a distance of three geographical miles seaward from the coastline of this State," and provides that no such lands can be "conveyed in fee." G.S. 146-3 and 146-64. There is nothing in the new act to change the general rule that ownership of the foreshore remains in the State. On the contrary, it is noteworthy that a special class was created for the protection of the foreshore and the marginal seas. We therefore adhere to our long established rule that littoral rights do not include ownership of the foreshore.

The littoral owner may, however, in exercise of his right of access, construct a pier in order to provide passage from the upland to the sea. " 'But the passage under the pier must be free and substantially unobstructed over the entire width of the foreshore. This means that from low to high water mark it must be at such a height that the public will have no difficulty in walking under it when the tide is low or in going under it in boats when the tide is high.' " *Capune v. Robbins, supra.* This language is consistent with the view we take here that the foreshore is reserved for the use of the public.

[3] Applying the foregoing principles, we hold that the seaward boundary of plaintiff's lots is fixed at the high-water mark. The high-water mark is generally computed as a mean or average high-tide, and not as the extreme height of the water. *People v. William Kent Estate Co.*, 242 Cal. App. 2d 156, 51 Cal. Rptr. 215 (1966); *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 80 L. Ed. 9, 56 S. Ct. 23 (1935).

[4] Chapter 511 of the 1963 Session Laws relating to erosion control work in the Town of Carolina Beach was ratified 22 May 1963. Section 1 of the Act provides that so much of the lands to be filled in and restored which lie east of the "building line" (to be established as provided in said Act) is granted and conveyed in fee simple to the Town of Carolina Beach. Plaintiff's Exhibit "U" is a map of the "building line" established by the Town along the ocean front pursuant to said Act. This map, offered in evidence by plaintiff, shows that in January 1964 Lots 1 through 10 of Block 216 were completely submerged and the mean high-water mark of the Atlantic Ocean was in approximately the center of Carolina Beach Avenue north. The building line at this point was accordingly established along the western margin of Carolina Beach Avenue north. Thus, twelve months before the berm was built, plaintiff's lots had been taken by the sea and title thereto had vested in the State of North Carolina. This condition is confirmed by the following testimony of plaintiff's principal stockholder and witness Sam H. Blake: "By the fall of 1963 I had to extend the entrance of the ramp across the western side of Carolina Beach Avenue, and that was because one would have had to walk through water to get to the ramp at times. That street is approximately 40 feet wide, and our extension was 40 feet to the west in the fall of 1963, which was because the water had moved up into the street, but not all the time."

"It is a general rule that where the location of the margin or bed of a stream or other body of water which constitutes the boundary of a tract of land is gradually and imperceptibly changed or shifted by accretion, reliction, or erosion, the margin or bed of the stream or body, as so changed, remains the boundary line of the tract, which is extended or restricted accordingly. The owner of the riparian land thus . . . loses title to such portions as are so worn or washed away or encroached upon by the water." 56 Am. Jur., Waters § 477; *Jones v. Turlington,* 243 N.C. 681, 92 S.E. 2d 75 (1956). Thus the lots of the plaintiff were gradually worn away by the churning of the ocean on the shore and thereby lost. Its title was divested by "the sledge-hammering seas . . . the inscrutable tides of God." Herman Melville, *Moby Dick.*

[5, 6] G.S. 146-6, which governs the title to land raised from navigable waters, permits vesting of title to such lands in the littoral landowner (1) where he does the filling himself by permission of the State and under approved procedures or (2) where the purpose of the filling is "to reclaim lands theretofore lost to the owner by natural causes." G.S. 146-6(b), (c). Manifestly, the purpose here was the preservation and protection of the Town of Carolina Beach from the fury of the sea rather than the reclamation of the lands of private owners along the beach. Accordingly, we conclude that the purpose to be served by construction of the berm was not to reclaim lands theretofore lost to the owner by natural causes, and when Lots 1 through 6 and Lot 9 of Block 216 were raised above sea level by the sand berm title to the land so created which was located east of the building line vested in fee in the Town of Carolina Beach as provided in Chapter 511 of the 1963 Session Laws. This legislative grant to the Town of title to property east of the building line and extending to the *low water* mark of the Atlantic Ocean is inconsistent with G.S. 146-3(1). Even so, the 1963 Act repeals all laws in conflict with it and must be regarded as controlling in this instance. The Legislature has the power to abrogate, amend or make exceptions to its own acts. In this instance it has done so. Therefore, by virtue of Chapter 511 of the 1963 Session Laws, the Town of Carolina Beach owned the lots in question when the sand berm was built.

[7, 8] Plaintiff did not sue for damages to its fishing pier. Rather, plaintiff alleged that construction of the berm resulted in a total loss of the seven lots described in the complaint upon

which was located a commercial fishing pier extending into the Atlantic Ocean approximately 900 feet from the mean high water mark. Plaintiff sought recovery of $41,000 as the fair market value of said property at the time it was allegedly taken by defendant for a public purpose. Such is the theory of plaintiff's case, and it must be tried upon that theory. It cannot be submitted to the jury on a theory of liability not supported by allegation and evidence. *Moody v. Kersey,* 270 N.C. 614, 155 S.E. 2d 215 (1967); *Calloway v. Wyatt,* 246 N.C. 129, 97 S.E. 2d 881 (1957); *Herring v. Creech,* 241 N.C. 233, 84 S.E. 2d 886 (1954); *Morgan v. Oil Company,* 238 N.C. 185, 77 S.E. 2d 682 (1953). Plaintiff cannot avail itself of evidence contrary to the allegations of its complaint. *Davis v. Rigsby,* 261 N.C. 684, 136 S.E. 2d 33 (1964); *Watson v. Clutts,* 262 N.C. 153, 136 S.E. 2d 617 (1964); *Faison v. Trucking Co.,* 266 N.C. 383, 146 S.E. 2d 450 (1966). Thus the trial court properly rejected plaintiff's proffered evidence of the cost of a 180-foot extension to the fishing pier and the cost of replacing the ramp. That was not the theory of the case, and the complaint understandably contains no allegation which would render such evidence admissible. Had a taking been shown there was no competent evidence upon which the jury could have based its answer to the damages issue.

Plaintiff having failed to show either a taking or damages under applicable rules of law, the judgment of nonsuit is

Affirmed.

STATE OF NORTH CAROLINA v. RICHIE "RICKY" LEE FOWLER

No. 37

(Filed 18 November 1970)

1. Bastards §§ 1, 6— bastardy prosecution — death of child — denial of blood grouping test

In a bastardy prosecution, the fact that the death of the child deprived the putative father of his statutory right to a blood grouping test does not warrant dismissal of the prosecution. G.S. 49-2; G.S. 49-7.

2. **Bastards §§ 4, 6— blood grouping test results — consideration by jury**

Blood grouping test results are not conslusive, but they should be considered by the jury along with all the other evidence in determining the issue of defendant's paternity. G.S. 8-50.1; G.S. 49-7.

3. **Bastards § 1— bastardy prosecution — effect of child's death**

The death of the child does not abate or prevent a prosecution against the father of an illegitimate child for his wilful failure to support and maintain the child prior to its death.

4. **Criminal Law § 1— what constitutes a crime — time of determination**

Whether an act, or a wilful failure to act, constitutes a crime is determined as of the time the act is committed or omitted.

5. **Bastards § 9; Criminal Law § 177— remand of judgment**

In a bastardy prosecution, judgment which required the convicted defendant to pay $2,857.49 to the mother for unpaid hospital and doctor expenses resulting from the illness of the illegitimate child is remanded with direction that the money be paid directly to the doctors and hospitals entitled to receive it. G.S. 49-8.

APPEAL by defendant under G.S. 7A-30(2) from the decision of the Court of Appeals (9 N.C. App. 64) finding no error in the trial conducted by *Falls, J.*, 2 March 1970 Criminal Session of GASTON.

Prosecution under G.S. 49-2. On 19 September 1969 the District Court of Gaston County issued a warrant charging defendant with the willful failure to support his illegitimate child, Michael Wayne Hicks, born to Patricia Ann Hicks on 7 September 1969. He was tried and convicted on 17 February 1970. From the judgment imposed, he appealed to the Superior Court. There, the State's evidence tended to show the following facts.

In December 1968 Patricia Ann Hicks (aged 17) became pregnant as a result of her association with defendant, with whom she had been "going steady" since November. She informed defendant of her condition in March 1969, and soon thereafter he terminated their association. On 7 September 1969 Patricia gave birth to a son, Michael Wayne Hicks. When the child was 12 days old she informed defendant it was sick and that she needed financial assistance for its support and medical bills. Defendant, although gainfully employed, refused to provide any support or financial assistance. In consequence, she instituted this prosecution. Three days later, the baby was taken to Duke Hospital. There, after open-heart surgery, it

died on 15 October 1969. Defendant went to Duke Hospital to discuss with Patricia the disposition of the body. He instructed her to have the body cremated because he could not afford a funeral, and this was done. The medical expenses incident to the birth of the baby, its subsequent operation and treatment, totaled $2,857.49.

When the case was called for trial in the Superior Court on 9 March 1970, defendant filed a written motion requesting a blood-grouping test pursuant to G.S. 49-7. In the motion he recited the death of the child on 15 October 1969 and its subsequent cremation. Then, arguing that the death of the child denied him the "safeguards" of the blood test and that a trial without it would deprive him of due process of law, he moved that the prosecution be dismissed. Judge Falls denied the motion, and the trial proceeded. The State offered the evidence detailed above; defendant offered no evidence.

In conformity with the practice in prosecutions under G.S. 49-2, three written issues were submitted to the jury. Defendant stipulated that he had refused to support the child and to pay the medical bills and that, if the jury should answer the issue of paternity against him, it would also answer the issues of willful failure to support and guilt against him. The jury, answering all issues against defendant, returned a verdict, "guilty as charged in the warrant." The court imposed a prison sentence of six months, which was suspended for five years upon condition (1) that defendant pay the costs immediately; and (2) that he pay into the office of the Clerk of the Superior Court for the use and benefit of Patricia Ann Hicks the sum of $2,857.49, payment to be made at the rate of $25.00 a week, beginning 13 March 1970.

Defendant appealed to the Court of Appeals. In a decision by Judges Hedrick and Brock, Judge Britt dissenting, that Court found no error in his trial. Because of the dissent, defendant appeals as a matter of right to this Court.

Robert Morgan, Attorney General; Ernest L. Evans and Edward L. Eatman, Staff Attorneys for the State.

Richard A. Cohan for defendant appellant.

SHARP, Justice.

[1] This appeal poses the question whether a defendant, charged under G.S. 49-2 with the willful failure to support an illegitimate child, is entitled to have the prosecution dismissed when the death of the child makes it impossible for the court to grant his motion for a blood-grouping test.

In 1945 the legislature provided that the court before which a prosecution under G.S. 49-2 is brought, "upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test; . . . that the results of a blood grouping test shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person; . . . ." G.S. 49-7. In 1949, by G.S. 8-50.1, this same right was extended to "any criminal action or proceedings in any court in which the question of paternity arises, regardless of any presumptions with respect to paternity." Such evidence was made "competent to rebut any presumptions of paternity."

The value of serological blood tests, when made and interpreted by specifically qualified technicians, using approved testing procedures and reagents of standard strength, is now generally recognized. Annot., 46 A.L.R. 2d 1000 (1956); 10 Am. Jur. 2d *Bastards* § 32 (1963); McCormick on Evidence § 178 (1954). Such tests, however, can never prove the paternity of any individual, and they cannot always exclude the possibility. Nevertheless, in a significant number of cases, they can disprove it. 149 A. M. A. J. 699 (1952); 108 A.M. A. J. 2138-2142 (1937), cited in *Beach v. Beach,* 72 App. D.C. 318, 114 F. 2d 479, 131 A. L. R. 804. In other words, the result of the blood test will be either "exclusion of paternity demonstrated" or "exclusion of paternity not possible." 27 Can. Bar Rev. 537, 548 (1949). It has been estimated that by tests, based upon each of three blood type classifications, A-B-O, M-N, and Rh-hr, a man falsely accused has a 50-55% chance of proving his nonpaternity. 34 Cornell L. Q. 72, 75 (1949); McCormick, *supra* at p. 380; 23 Wash. & Lee L. Rev. 411, 419 (1966).

The nature and effect of the blood grouping tests is succinctly stated in a well documented comment in 23 Wash. & Lee L. Rev. 411: "[T]he experts agree that the test results are conclusive only in excluding the putative father. The results might show him to have a blood type which the father of the child must have had; but this only indicates that of all the people of that blood type or group, he, as well as anyone else with

that blood type or group, *could* have been the father of the child. . . ." *Id.* at 416-417.

"Medical experts agree that blood groups never change during lifetime, and that by the laws of genetics it is indisputable that no individual can possess a blood group factor which is absent in both of his true parents. Therefore when the blood types of the mother and child are known, medical experts can determine scientifically what the blood type of the father may be and what it cannot be. The medical profession does not claim that the tests are infallible even if correctly administered, but instead admits that there are theoretical exceptions—one in approximately 50,000 to 100,000 cases. Such exceptions, however, are of little importance when it is considered that when 'tests are accurately performed there is hardly any other evidence that can approach in reliability the conclusions based on such blood tests.' *Id.* at 417-418. . . (Geneticists differ in their estimates of the frequency with which exceptions to the genetic laws occur. In 71 Harv. L. Rev. 466 (1958) it is suggested that, at the most, only one exception for every 10,000 births occurs.)

"The only areas in which the results of blood grouping tests should be open to attack are in the method of testing or in the qualifications of the persons performing the tests." *Id.* at 422. For a discussion of the sources of error in blood group testing and interpretations *see* 5 U. C. L. A. L. Rev. 629, 635 (1958); 50 Mich. L. Rev. 582, 595-596 (1952); 15 Journal of Forensic Medicine 106 (1968). For other explanations of the blood grouping tests for paternity *see:* 1 Wigmore on Evidence (3d ed., 1940 and Supp. 1964) §§ 165a, 165b; 34 Cornell L. Q. 72 (1948).

In a few cases it has been found that an infant's blood group cannot be established immediately after birth. "However, by the age of six months, an accurate determination can always be had." 50 Mich. L. Rev. 592, 596 (1952). In *Fowler v. Rizzuto,* 121 N. Y. S. 2d 666, it is said "that a blood test cannot be completely carried out" until the child is at least one month old.

[2] There can be no doubt that a defendant's right to a blood test is a substantial right and that, upon defendant's motion, the court must order the test when it is possible to do so. However, as Professor Stansbury has pointed out, both G.S. 49-7 and G.S. 8-50.1 are silent as to the weight to be given to the

blood tests. Stansbury, N. C. Evidence (2d Ed., 1963) § 86 n. 7. *See* 33 N. C. L. Rev. 360 n. 15 (1955) ; 27 N. C. L. Rev. 456-457 (1949). Since the statutes do not make the test which establishes nonpaternity conclusive of that issue but merely provide that the results of such test "when offered by a . . . duly qualified person" shall be admitted in evidence, it seems clear that the legislative intent was that the jury should consider the test results, whatever they might show, along with all the other evidence in determining the issue of paternity. *Jordan v. Davis,* 143 Me. 185, 57 A. 2d 209, *Berry v. Chaplin,* 71 Cal. App. 2d 652, 169 P. 2d 442. *See* McCormick, *supra* at pp. 382-383; Annot., 46 A. L. R. 2d 1000, §§ 12-16 (1956) ; 10 Am. Jur. 2d *Bastards* § 32 (1963). *See also* the dissenting opinion in *Houghton v. Houghton,* 179 Neb. 275, 137 N.W. 2d 861, 872; and 9 U. L. A. 110-114, Uniform Act on Blood Tests to Determine Paternity.

[3, 4] There is nothing in N. C. Gen. Stats., Ch. 49, Art. I, which requires the continued life of the child as the basis for a prosecution under G.S. 49-2. The death of the child does not abate or prevent a prosecution against the father of an illegitimate for his willful failure to support and maintain the child prior to its death. *See State v. Beatty,* 66 N.C. 648. Whether an act, or a willful failure to act, constitutes a crime is determined as of the time the act is committed or omitted. "[T]he status of an act as a crime is fixed when it is once completed, and that status cannot be changed by the subsequent act of the criminal or of third persons. . . ." 22 C.J.S. *Criminal Law* § 41 (1961). Thus, if defendant was the father of Michael Wayne Hicks, the child's death did not make his willful failure to support it during its lifetime any less criminal or take away the State's right to punish his crime.

[1] To hold that a prosecution under G.S. 49-2 must be dismissed when the death of the child deprives the defendant of a blood test would be to attach to the test a significance which the legislature failed to give it. Even when a blood grouping test demonstrates nonpaternity our law does not make the test conclusive of that issue. A *fortiori,* the absence of a test, which —if made—would provide one falsely accused only an even chance to prove his nonpaternity, should not result in a dismissal of the action. When the death of the child makes a blood test impossible the situation is analogous to that which occurs when an eyewitness to events constituting the basis for an indictment dies before the accused has interviewed him or taken

his deposition. It would hardly be suggested that to try the defendant after the death of that witness would deprive him of due process and that therefore the prosecution must be dismissed.

Our research, and that of defendant, has discovered only one case involving facts similar to those with which we now deal. In *Burton v. Thompson,* 147 Me. 299, 87 A. 2d 114, the respondent in a bastardy proceeding moved for a blood grouping test. Under the applicable Maine statute, the respondent was entitled to the test, the result of which was admissible in evidence only if it excluded the possibility of paternity. The complainant's child had lived only 12 hours after birth. The respondent's request was "submitted to the law court for ruling and opinion as to any and all questions of law involved." The Supreme Judicial Court of Maine dismissed the case because it was apparent that "final disposition" of it did not turn upon the allowance or denial of the motion, and the rule was that the law court would not decide prematurely interlocutory questions which subsequent proceedings might show to be wholly immaterial. However, the court concluded its opinion by saying: "Although no decision is appropriate under the rules stated, we do not hesitate to point out that 'child' under the blood grouping test statute means a living person. Could a dead child be ordered to submit to the test? We think not." We concur in this obvious good sense.

Although not the basis for our decision in this case, we note that open-heart surgery, which requires blood transfusions, would never be performed unless the patient's blood type had been established. We have no doubt that the records of Duke Hospital contain all the information about the blood of Michael Wayne Hicks which could be obtained by testing the blood of a month-old baby. Although this information was accessible to defendant, the record discloses no effort by him to obtain it.

[5] We hold that the trial court rightly denied defendant's motion to dismiss the action. The case, however, must be remanded to the Superior Court for a modification of condition (2) of the judgment which requires defendant to pay the sum of $2,857.49 to Patricia Ann Hicks. The record discloses that amount to be the total of the following bills incident to the birth and subsequent medical treatment of Michael Wayne Hicks: Garrison Hospital of Gastonia $249.50; Drs. Chambers and Marder $15.00; Gaston Memorial Hospital $19.87; Duke

Medical Center $596.50; Duke Hospital $1,976.62. The record also discloses that at the time of the trial these bills had not been paid. On the oral argument we ascertained that they were still unpaid. G.S. 49-8 does not contemplate that money paid into court to discharge past due obligations such as these should be paid to a person to whom it was not due. When, without compensation, doctors and hospitals have performed immediately necessary services incident to the birth of a child and its subsequent welfare, public policy and simple justice require that money paid into court for them be disbursed directly to them. In no other way can their interests be protected.

This cause is returned to the Court of Appeals for remand to the Superior Court with directions that it amend condition (2) of its judgment so that the money which defendant is ordered to pay into the office of the Clerk of the Superior Court shall be disbursed to the doctors and hospitals entitled to receive it.

Modified and affirmed.

PARNELL-MARTIN SUPPLY CO., INC., A CORPORATION v. HIGH POINT MOTOR LODGE, INC., OWNER (AND CONTRACTING PARTY FOR IMPROVEMENTS), TALTON CONSTRUCTION COMPANY, INC., CONTRACTOR, AND E. R. WOOLARD, D/B/A QUALITY PLUMBING AND HEATING COMPANY, SUBCONTRACTOR

No. 24

(Filed 18 November 1970)

1. **Laborers' and Materialmen's Liens § 3— enforcement of lien — burden of proof**

One who has furnished materials used in the construction of a building under contract with a subcontractor may recover pursuant to G.S. Chapter 44 when he proves (1) that materials were furnished to someone having contractual relations to the work, (2) a balance due him, (3) notice to the owner as required by statute prior to payment of the contract price by the owner to the principal contractor, and (4) a balance due the contractor.

2. **Laborers' and Materialmen's Liens § 3— unexpended contract price — duty of owner**

The law requires the owner to apply the unexpended contract price due the contractor toward payment of the claims of subcontractors and materialmen who have given the required notice.

3. **Banks and Banking § 10; Bills and Notes § 11— stopping payment of check — right of drawer**

As between the drawer of a check and the drawee bank, the drawer has authority to countermand or order the drawee bank to stop payment on the check at any time before the drawee bank has paid the check.

4. **Payment § 1— delivery and acceptance of check**

In the absence of an agreement to the contrary, delivery of a check by a debtor to a creditor and acceptance of the check by the creditor does not constitute payment until the check is paid by the drawee bank, but if the check is paid upon presentation, the payment is deemed to have been made at the time the check was given.

5. **Statutes § 5— construction of statute — legislative intent**

The intent of the Legislature controls the interpretation of a statute, and where the words of the statute have not acquired a technical meaning, they are ordinarily construed according to their common and ordinary meaning.

6. **Laborers' and Materialmen's Liens §§ 3, 8— action against owner — notice of lien given after check given for final payment — no duty to stop payment**

Where statutory notice of a materialman's claim of lien for materials furnished to a subcontractor was delivered to the owner after the owner had given a check to the principal contractor in final payment of the contract price but prior to payment of the check by the drawee bank, the owner was under no legal duty to stop payment on the check given the contractor, and judgment of nonsuit was properly entered in the materialman's action against the owner to enforce a lien for the materials furnished.

7. **Laborers' and Materialmen's Liens § 3— failure of contractor to notify owner of claim — nonliability of owner**

G.S. 44-8 and G.S. 44-12 create no liability on the part of the owner when a contractor fails to furnish to the owner an itemized statement of sums due materialmen as required by G.S. 44-8.

8. **Laborers' and Materialmen's Liens § 4; Evidence § 4— stipulation that notice was mailed — time of receipt — presumption**

While a stipulation that a notice of a claim of lien was mailed by regular mail to a contractor at a specified address establishes *prima facie* that the notice was received by the contractor in the regular course of the mail, no presumption as to time of receipt of the notice arises absent proof of (1) where and when it was mailed, and (2) the frequency or usual course and time of the mails between the mailing place and place of purported receipt of the letter.

9. **Laborers' and Materialmen's Liens § 8— action against principal contractor — failure to give notice of materialman's claim to owner — sufficiency of evidence**

In an action by a materialman against the principal contractor based on the alleged failure of the principal contractor to notify the owner of sums due plaintiff for materials furnished to a subcon-

tractor before accepting payment from the owner in violation of G.S. 44-8, plaintiff's evidence was insufficient for the jury where it failed to show that the contractor possessed information sufficient to enable him to furnish an itemized statement of plaintiff's claim to the owner in time to deliver timely notice to the owner.

10. **Laborers' and Materialmen's Liens § 3— materials furnished subcontractor — duty of contractor to seek information**

G.S. 44-8 did not impose a duty upon the principal contractor to seek out information that was in the hands of plaintiff materialman concerning materials furnished a subcontractor by the materialman, who could have protected his interests by compliance with G.S. 44-9.

11. **Laborers' and Materialmen's Liens § 8; Trial § 3— materials furnished to subcontractor — action against owner, contractor, subcontractor — continuance as to subcontractor — prejudice to materialman**

In this action against a motel owner, the principal contractor and a subcontractor to recover for materials furnished by plaintiff to the subcontractor for use in construction of the motel, plaintiff was not prejudiced by continuance of the case as to the subcontractor, since plaintiff was not prevented from using the subcontractor as a witness to prove any competent matter.

12. **Appeal and Error § 41— judgment and affidavit not before Court of Appeals — consideration by Supreme Court**

Judgment and affidavit which were not before the Court of Appeals but which were included in plaintiff's petition for *certiorari* to review the decision of that Court are not properly before the Supreme Court for consideration.

ON writ of *certiorari* to North Carolina Court of Appeals to review its decision (7 N.C. App. 701) affirming judgment of involuntary nonsuit as to defendant High Point Motor Lodge, Inc., and Talton Construction Company, Inc. The action was continued over plaintiff's objection as to defendant E. R. Woolard, d/b/a Quality Plumbing and Heating Company.

Plaintiff instituted this civil action against High Point Motor Lodge, Inc. (hereinafter called owner), Talton Construction Company, Inc. (hereinafter called contractor), and E. R. Woolard, d/b/a Quality Plumbing & Heating Company (hereinafter called subcontractor).

Plaintiff offered evidence which tended to show that owner entered into a contract with contractor to construct certain motel units. Contractor subcontracted the plumbing, heating and air conditioning to subcontractor Woolard. Plaintiff furnished materials which were used by subcontractor in performing his subcontract obligation with contractor. The materials furnished were charged solely to subcontractor on an

open account, and were not furnished pursuant to an entire contract. Subcontractor failed to pay plaintiff the sum of $3,737.65 due on the account for materials furnished and used on owner's property.

On 1 September 1966 contractor sent to owner a bill and "final certificate" which included a statement that there were no parties remaining to be paid and no liens outstanding. On 7 October 1966 plaintiff sent a letter to contractor advising him that subcontractor owed him $3,737.65 for materials used on owner's property. The letter did not itemize the account due. On 10 October 1966, plaintiff, through its agent, made verbal demand upon contractor for payment of this sum, and contractor refused to pay any part of the sum demanded. Contractor had paid subcontractor in full when this demand was made. Pursuant to the bill and "final certificate" mentioned above, owner, on 14 October 1966 paid contractor by check the sum of $23,120.17, which represented the balance due on the general contract. This check was deposited in contractor's bank account on 17 October 1966. On 18 October 1966 plaintiff sent a notice of claim of lien in form required by statute to Henderson Belk, President of owner, by letter mailed in Charlotte to the Charlotte address of Henderson Belk. On the same date, plaintiff mailed notices of claim of lien in form required by statute to contractor at Grifton, North Carolina, and to subcontractor at Grifton, North Carolina. There was evidence tending to show that Henderson Belk was in Germany for two weeks around the time when the letter was mailed, and that upon his return to Charlotte he turned the notice of lien over to his attorney. The record does not clearly disclose the whereabouts of Belk when the letter was mailed or received. On 21 October 1966 the drawee bank paid the owner's check for $23,120.17.

At the close of plaintiff's evidence the trial judge granted motions for nonsuit lodged by owner and contractor. Plaintiff appealed to North Carolina Court of Appeals, and that Court affirmed the action of the trial judge. This Court granted plaintiff's petition for writ of *certiorari* to North Carolina Court of Appeals to review its decision on 24 June 1970.

Newitt & Newitt for plaintiff.

Sanders, Walker & London and Wallace, Langley & Barwick by James D. Llewellyn, for defendants Talton Construction Co. and High Point Motor Lodge, Inc.

BRANCH, Justice.

[1, 2] One who has furnished materials used in the construction of a building under contract with a subcontractor may recover pursuant to Chapter 44 of the General Statutes when he proves (1) that materials were furnished to someone having contractual relations to the work, (2) a balance due him, (3) notice to the owner as required by statute *prior to payment of the contract price by the owner to the principal contractor,* (4) a balance due the contractor. The law requires the owner to apply the *unexpended* contract price due the contractor towards payment of the claims of subcontractors and materialmen who have given the required notice. *Oldham & Worth v. Bratton,* 263 N.C. 307, 139 S.E. 2d 653; *Powder Co. v. Denton,* 176 N.C. 426, 97 S.E. 372; *Brick Co. v. Pulley,* 168 N.C. 371, 84 S.E. 513. The notice to the owner may be given in two ways: (1) The principal contractor is required by statute before receiving any part of the contract price to furnish owner with "itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, ..." G.S. 44-8 and G.S. 44-12. (2) The subcontractor or materialmen having contractual relations with the work may give notice to the owner of the amount due, which notice shall be in the form of an itemized statement unless the contract is entire and for a gross sum. G.S. 44-9.

In instant case contractor did not give notice to owner pursuant to G.S. 44-8. Thus if required notice was received, it must have been received from plaintiff pursuant to provisions of G.S. 44-9.

[3, 4] It is well recognized that, as between owner and drawee bank, owner had authority to countermand or order the drawee bank to stop payment on the check at any time before drawee bank paid the check. *Bank v. Bank,* 118 N.C. 783, 24 S.E. 524; 10 Am. Jur. 2d, Banks, § 641. It is equally well recognized in this jurisdiction that in the absence of an agreement to the contrary, delivery of a check by a debtor to a creditor and acceptance of the check by the creditor does not constitute payment until the check is paid by the drawee bank, but if the check is paid upon presentation, the payment is deemed to have been made at the time the check was given. *Paris v. Builders Corp.,* 244 N.C. 35, 92 S.E. 2d 405, and cases cited.

The last stated rule is ordinarily applied in debtor-creditor relationships. The courts have applied the rule in determining whether payment by check of an insurance premium was timely made, *Cauley v. Ins. Co.*, 219 N.C. 398, 14 S.E. 2d 39; whether notice was duly given in workmen's compensation cases when notice of greater claim was required within one year from payment by employee, *Paris v. Builders Corp., supra;* and whether taxes were paid before required date, *Tonnar v. Wade,* 153 Miss. 722, 121 So. 156. However, standing alone, the above rules do not control the question of owner's duty to stop payment. Indeed, our research fails to reveal a case which is in point on this novel question, and we therefore look to analogous relationships for guidance.

[6] Conceding, *arguendo,* that the statutory notice was delivered to owner prior to payment of the check by drawee bank, we must decide whether it was incumbent upon owner to stop payment on the check when check was delivered to contractor prior to receipt of statutory notice by owner.

The statutory remedy of garnishment, recognized in many jurisdictions, creates rights and duties which are strikingly similar to those Chapter 44 of the General Statutes creates between subcontractors, owners of property, and claimants. In the usual garnishment proceeding the plaintiff seeks satisfaction of the indebtedness out of property or credits of his debtor in the possession of or owing by a third person. 6 Am. Jur. 2d, Attachments and Garnishment, § 2, at p. 561. The statutory rights conferred by Chapter 44 of General Statutes permit the plaintiff, upon giving required statutory notice, to seek satisfaction of indebtedness due him from the subcontractor from funds retained by owner and due on contract price. Analogy is further enhanced by the fact that if either the garnishee or owner pays his creditor (the principal defendant or the general contractor) after receiving proper notification of the garnishment proceeding or claim of lien, he is personally liable. *Hart v. Veneer Co.,* 287 Ill. App. 89, 4 N.E. 2d 499.

We find, in the framework of garnishment proceedings, that the courts have ruled on the duty of the garnishee to stop payment on a check when he is served with process after he had delivered the check to his creditor in final payment.

In the case of *Hart v. Veneer Co., supra,* the plaintiff served garnishment process upon garnishee two days after he had given a check to the principal debtor. The service was made

several days before the check was paid by the drawee bank. The garnishee, as an affirmative defense, asserted that he owed the defendant nothing because of delivery of the check given in final payment. The plaintiff contended that garnishee had a duty to stop payment on the check. The Illinois garnishment statute required the garnishee, after being properly served with notice of garnishment proceedings, "to thereafter hold any property, effects, choses in action or credits in their possession or power belonging to the defendant which are not exempt, subject to the court's order." The court, holding that the statute did not impose a duty to stop payment, said:

> "In Waples on Attachments and Garnishments, the author says (section 364) : 'One is not liable to garnishment if he has paid what he owed the defendant in attachment by a bank check, though the latter may not have presented the check to the bank and drawn the money prior to the service of the process of garnishment upon the drawer of the check. It is true that the funds in the bank are still under his control, so that he might stop payment of the check; and, so far as the bank is concerned, he has the right to control the deposit; but he has no moral right to do so, considering his relation to the payee who has taken the check in payment or earnest of payment. At all events, the drawer as garnishee, is not under the slightest obligation to countermand his own check for the purpose of enabling a professed creditor of the payee to attach the credit in his hands and suspend settlement of his account with the payee for an indefinite time.' "

Accord: *Universal Supply Co. v. Hildreth,* 287 Mass. 538, 192 N.E. 23, 94 A.L.R. 1389, and cases cited; *Prewitt v. Brown,* 101 Mo. App. 254, 73 S.W. 897.

In 6 Am. Jur. 2d, Attachment and Garnishment, § 517, p. 928, we find the following:

> "Duty of garnishee to stop payment or delivery of check for indebtedness.—The drawer of a check is under no duty or obligation to stop payment, when garnished, for the benefit of the garnishing plaintiff. However, it has been held that where the check is still within the control of the drawer at the time of the service of the writ upon him, it is his duty to withhold delivery or to exercise reasonable diligence to stop its delivery. And where the check has not been delivered at the time of the service of the

> summons upon the drawer, it is revocable, and the debt is still owing and subject to garnishment."

See also 38 C.J.S., Garnishment, § 96, pp. 304-305.

G.S. 44-8, in part, states:

> "When any contractor, architect or other person makes a contract for building, altering or repairing any building or vessel, or for the construction or repair of a railroad, with the owner thereof, it is his duty to furnish to the owner or his agent, before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, and upon delivery to the owner or his agent of the itemized statement aforesaid, it is the duty of the owner to *retain* from the money then due the contractor a sum not exceeding the price contracted for, which will be sufficient to pay such laborer, artisan or mechanic for labor done, or such person for material furnished, ..." (Emphasis ours.)

G.S. 44-9, which provides that the subcontractor, materialmen . . . or persons furnishing materials, may give statutory notice to the owner, states *inter alia:*

> ". . . Upon the delivery of the notice to the owner, agent, or lessee, the claimant is entitled to all the liens and benefits conferred by law in as full a manner as though the statement were furnished by the contractor. If the said owner, agent or lessee refuses or neglects to *retain,* out of the amount due the contractor under the contract, a sum not exceeding the price contracted for which will be sufficient to pay such claimant, then the claimant may proceed to enforce his lien. . . ." (Emphasis ours.)

Ballentine's Law Dictionary defines "retain" as follows: "To retain means to continue to hold; to keep in possession."

[5] The rights of the parties to this action are statutory, and when a statute is interpreted, the intent of the Legislature controls, *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22, and where the words of the statute have not acquired a technical meaning, they are ordinarily construed according to their common and ordinary meaning. *Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292.

Here, owner, in lieu of cash, gave a check to contractor in payment of the contract price. When the check was given there arose an understanding that contractor would get cash, or its equivalent, when he presented the check for payment. A stop-payment order would have breached the implied promise to pay and would have suspended settlement of a recognized debt for services rendered for an indefinite length of time.

[6] Applying the above rules and reasoning, we conclude that owner (High Point Motor Lodge, Inc.) was under no legal duty to stop payment on the check. Plaintiff's evidence affirmatively shows that at the time notice was given owner had not breached his duty, in the language of the statute, "to retain from the money then due the contractor a sum . . . sufficient to pay . . . such person for material furnished." The Court of Appeals correctly decided that nonsuit was properly granted as to this cause of action.

By a second cause of action plaintiff seeks recovery of damages for the entire amount due it because of failure of contractor to comply with G.S. 44-8 and G.S. 44-12.

G.S. 44-8, which in pertinent part is hereinabove quoted, requires the contractor to furnish to owner an *itemized* statement of amounts due by him to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished. Violation of this statute by the contractor is made a misdemeanor by G.S. 44-12.

[7] Since G.S. 44-8 and G.S. 44-12 are directed against the contractor and not the owner, they create no liability on the part of the owner when contractor fails to give the required notice. *Oldham & Worth, Inc. v. Bratton, supra; Pinkston v. Young,* 104 N.C. 102, 10 S.E. 133. Clearly nonsuit was properly entered as to owner as to the second cause of action.

Assuming, without deciding, that a cause of action does accrue to plaintiff against contractor by reason of G.S. 44-8, there are sufficient reasons why nonsuit as to contractor was properly entered.

[8, 9] A review of the record reveals that contractor could not have possessed information sufficient to enable him to furnish an itemized statement unless he had received the information from the notice of claim of lien mailed on 18 October 1966. It was stipulated that this notice was mailed by regular mail

to contractor at Grifton, North Carolina. The stipulation established *prima facie* that the notice was received by contractor in regular course of mail. *Trust Co. v. Bank,* 166 N.C. 112, 81 S.E. 1074; *Bragaw v. Supreme Lodge,* 124 N.C. 154, 32 S.E. 544. However, no presumption as to *time* of receipt of the notice arose absent proof of (1) where and when it was mailed, and (2) frequency or usual course and time of the mails between the mailing place and place of purported receipt of letter. 29 Am. Jur. 2d, Evidence, § 197, p. 250. Plaintiff offered no evidence as to the latter requirement. In fact, plaintiff offered no evidence of any kind tending to show that contractor had received the itemized notice in time to deliver timely notice to owner.

[10] It must be borne in mind that there was no privity between contractor and plaintiff, and that contractor had fully paid subcontractor. We do not interpret G.S. 44-8 to impose a duty owed by the contractor to this plaintiff to seek out information that was in the hands of plaintiff, who could have protected his interests by complying with the provisions of G.S. 44-9. Thus plaintiff's evidence fails to show a violation by contractor of the provisions of G.S. 44-8 and G.S. 44-12.

Decision in this case does not require that we decide whether a cause of action against contractor for money damages could arise because of contractor's failure to comply with the provisions of G.S. 44-8.

The nonsuit as to contractor on the second cause of action was properly allowed.

[11] Plaintiff, without citation of authority, contends that continuance of the case as to subcontractor resulted in error prejudicial to plaintiff. The continuance of the case did not prevent the use of subcontractor as a witness to prove any competent matter. We are aware of the holding of this Court in the line of cases represented by *Lumber Co. v. Hotel Co.,* 109 N.C. 658, 14 S.E. 35, and those found in 100 A.L.R. 128, at 134. However, factual differences distinguish these cases from instant case.

[12] Plaintiff included in his petition for *certiorari* copy of a judgment filed against subcontractor on 1 June 1970 and an affidavit of insolvency executed by subcontractor on 2 June 1970. The opinion of the Court of Appeals was filed on *6 May 1970.* Obviously, the judgment and affidavit were not before

the Court of Appeals and are not properly before us for consideration. *Byrd v. Bazemore,* 122 N.C. 115, 28 S.E. 965; *Presnell v. Garrison,* 122 N.C. 595, 29 S.E. 839.

For the reasons stated, the decision of the Court of Appeals is

Affirmed.

WHITNEY STORES, INC., T/A TREASURE CITY AND GAYLORD OF FAYETTEVILLE, INC., T/A GAYLORDS, ON BEHALF OF THEMSELVES AND SUCH OTHER PERSONS, FIRMS AND CORPORATIONS AS ARE SIMILARLY AFFECTED BY "AN ORDINANCE CONCERNING THE OBSERVANCE OF SUNDAY AS A UNIFORM DAY OF REST IN CUMBERLAND COUNTY," v. W. G. CLARK, SHERIFF OF CUMBERLAND COUNTY, H. E. RAY, CHAIRMAN, AND J. McN. GILLIS, M. M. BEARD, LUTHER PACKER AND E. J. EDGE, JR., COMMISSIONERS, BOARD OF COUNTY COMMISSIONERS FOR CUMBERLAND COUNTY, NORTH CAROLINA

No. 13

(Filed 18 November 1970)

1. **Constitutional Law § 11— exercise of the police power**

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

2. **Constitutional Law § 14; Sundays and Holidays— validity of Sunday observance laws**

Sunday observance statutes and municipal ordinances derive their validity from the power of the General Assembly to legislate for the protection of the public health, safety, morals and general welfare of the people.

3. **Constitutional Law § 7; Counties § 2— delegation of police power to the counties**

Subject to constitutional limitations, the power of the General Assembly to delegate to county commissioners the authority to adopt ordinances in the lawful exercise of the police power is well established.

4. **Counties § 2— power of county commissioners to adopt Sunday observance ordinances**

A statute that confers upon each board of county commissioners in the State the power to adopt ordinances "in the exercise of the general police power" *is held* sufficient to confer upon the commissioners the authority to enact Sunday observance ordinances, notwithstanding the statute, as rewritten in 1969, omitted the follow-

ing words of the original statute: "including but not limited to the regulations and prohibitions of the sale of goods, wares and merchandise on Sunday." G.S. 153-9(55).

5. **Counties § 2; Statutes § 2; Sundays and Holidays— powers of counties — exercise of police power — Sunday observance ordinance — local legislation**

A 1969 Home Rule statute that enables the county commissioners of every county in the State to enact ordinances in the exercise of the general police power, including Sunday observance ordinances, is a general law and does not violate the constitutional prohibition against local legislation regulating trade. N. C. Constitution, Art. II, § 29; G.S. 153-9(55).

6. **Counties § 2— Sunday observance ordinance — motives of county commissioners — *consideration on appeal***

Where the statutes upon which a county Sunday ordinance is based are found to be constitutional and valid, and where the county commissioners do not exceed their delegated or constitutional authority in enacting the ordinance, the Supreme Court will not concern itself with a broadside attack that challenges the motives and wisdom of the commissioners who enacted the ordinance.

APPEAL by plaintiffs from *McKinnon, J.*, March 2, 1970 Session of CUMBERLAND Superior Court, certified, pursuant to G.S. 7A-31(a), for review by the Supreme Court before determination in the Court of Appeals.

This action was instituted on January 29, 1970, as a class action, to enjoin the enforcement of an ordinance adopted January 5, 1970, by the Board of Commissioners of Cumberland County entitled, "AN ORDINANCE CONCERNING THE OBSERVANCE OF SUNDAY AS A UNIFORM DAY OF REST IN CUMBERLAND COUNTY," referred to hereafter as the Ordinance. The preamble recites that the Ordinance was adopted pursuant to the power conferred by G.S. 153-9(55), which is a codification of Chapter 36, Session Laws of 1969, entitled, "AN ACT GRANTING ORDINANCE-MAKING AUTHORITY TO COUNTIES."

The Ordinance, which was to become effective on February 1, 1970, in part provides: "It shall be unlawful for any person to sell, offer or expose for sale, any goods, wares or merchandise in the County of Cumberland on Sunday, nor shall any store, shop, warehouse or any other place of business in which goods, wares, or merchandise are kept for sale, be kept open between 12:00 o'clock midnight Saturday and 12:00 o'clock 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 article; . . ." It is not applica-

ble "within the corporate limits or jurisdiction of any municipality in the County of Cumberland that has conducted the most recent election required by its charter or the general law, whichever is applicable, unless the governing body thereof shall, by resolution, agree to such ordinance."

Plaintiffs operate "self-service retail merchandising discount department stores" in Cumberland County outside of the corporate limits and jurisdiction of any municipality. On Sunday, from 1:00 to 6:00 p.m., they engage in the business of selling goods, wares and merchandise.

Enforcement of the Ordinance was restrained temporarily by orders entered January 29, 1970, and February 13, 1970.

The cause was heard at the March 2, 1970 Session on defendants' motion to dismiss for failure to state a claim upon which relief could be granted, and for summary judgment. After consideration of the pleadings, the stipulations, and affidavits offered by plaintiffs, Judge McKinnon entered an order in which he adjudged the Ordinance "to be constitutional and in all respects valid" and dissolved "the Preliminary Injunction." Plaintiffs excepted and appealed.

By supplemental order, Judge McKinnon, in the exercise of the discretion vested in him by G.S. 1-500 and Rule 62(c) of the Rules of Civil Procedure, enjoined enforcement of the Ordinance "pending a final determination of this cause."

On appeal, plaintiffs assign as error the signing of the judgment and the court's failure to enjoin permanently the enforcement of the Ordinance.

Ervin, Horack & McCartha, by C. Eugene McCartha, for plaintiff appellants.

Clark, Clark & Shaw, by Heman R. Clark; and McCoy, Weaver, Wiggins, Cleveland & Raper, by L. Stacy Weaver, Jr., for defendant appellees.

BOBBITT, Chief Justice.

Affidavits offered by plaintiffs and received in evidence without objection contain factual statements to the effect the enforcement of the Ordinance will subject plaintiffs to irreparable injury and financial loss. In recognition of well-established legal principles, *Kresge Co. v. Tomlinson,* 275 N.C. 1, 8, 165 S.E. 2d 236, 240, and cases cited, defendants do not contest

plaintiffs' standing and right to challenge the constitutionality of the Ordinance.

The question for decision is whether the Ordinance is unconstitutional on the grounds on which plaintiffs attack it. *Kresge Co. v. Tomlinson, supra* at 9, 165 S.E. 2d at 241, and cases cited.

[1, 2] The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people. Sunday observance statutes and municipal ordinances derive their validity from this sphere of legislative power. *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783, and cases cited. Sunday observance ordinances adopted in the exercise of the police power conferred by the General Assembly upon cities and towns by G.S. 160-52 and G.S. 160-200(6), (7) and (10), have been upheld by this Court. *Mobile Home Sales v. Tomlinson,* 276 N.C. 661, 174 S.E. 2d 542, and cases cited. The Ordinance under consideration can be upheld only if adopted in the exercise of the police power conferred by the General Assembly by the 1969 Act codified as G.S. 153-9(55).

[3] Subject to constitutional limitations, the power of the General Assembly to delegate to county commissioners the authority to adopt ordinances in the lawful exercise of the police power is well established. *Jackson v. Board of Adjustment,* 275 N.C. 155, 162-163, 166 S.E. 2d 78, 83, and cases cited.

[4] Predicated on the proposition that county commissioners have no inherent legislative powers, *Surplus Co. v. Pleasants, Sheriff,* 264 N.C. 650, 654, 142 S.E. 2d 697, 701, plaintiffs, as their first ground of attack, assert that the provisions of the 1969 Act do not confer on county commissioners authority to enact Sunday observance ordinances.

Prior to the 1969 Act, G.S. 153-9(55) was the codification of Chapter 1060, Session Laws of 1963, entitled "AN ACT TO AMEND G.S. 153-9, SO AS TO GIVE BOARDS OF COUNTY COMMISSIONERS CERTAIN REGULATORY POWERS" The new paragraph added to G.S. 153-9 by the 1963 Act provided: "55. Regulate and Prohibit Certain Activities.—In that portion of the county, or any township of the county, lying outside the limits of any incorporated city or town, or lying outside the jurisdiction of any incorporated city or town, to prevent and abate nuisances, whether on public or private property; to supervise, regulate,

or suppress or prohibit in the interest of public morals, public recreations, amusements, and entertainments; and to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience and welfare of the people *including but not limited to the regulations and prohibition of the sale of goods, wares and merchandise on Sunday;* and to make and enforce any other types of local police, sanitary, and other regulations; provided, that the board of county commissioners may make such regulations applicable within the limits of any incorporated city or town, or within the jurisdiction of any incorporated city or town, whose governing body, by resolution, agrees to such regulation, and during such time as the governing body continues to agree to such regulation. . . ." (Our italics.) The 1963 Act specifically provided that it did not apply to forty-eight named counties.

Pursuant to the provisions of the 1963 Act, the Board of Commissioners of Wake County, on March 2, 1964, adopted an ordinance or regulation which purported to regulate "Sunday Sales of Goods, Wares and Merchandise"; and, on the same date, the City of Raleigh adopted a resolution agreeing to the regulation. The 1963 Act was held invalid and the enforcement of the Ordinance and Resolution adopted pursuant thereto was enjoined. *Surplus Co. v. Pleasants, Sheriff, supra.* Decision was based on the proposition that the 1963 Act regulated trade; that, since it did not apply to forty-eight counties, it was a *local* act; and that, being a local act regulating trade, it contravened Article II, Section 29, of the Constitution of North Carolina.

The 1969 Act, which rewrote G.S. 153-9(55), in part provides: "(55) To Adopt Ordinances for the Better Government of the County.—To adopt ordinances to prevent and abate nuisances, whether on public or private property; ordinances supervising, regulating, or suppressing or prohibiting in the interest of public morals, comfort, safety, convenience and welfare, public recreations, amusements and entertainments, and all things detrimental to the public good; and ordinances in the exercise of the general police power not inconsistent with the Constitution and laws of the State or the Constitution and laws of the United States. . . . Ordinances adopted pursuant to this subdivision shall apply throughout the county, except that such ordinances shall not be applicable within the corporate limits or jurisdiction of any municipality which has conducted the most recent election required by its charter or the general law,

whichever is applicable, unless the governing body thereof shall, by resolution, agree to such ordinance. . . ."

The 1969 Act conferred upon the board of commissioners of *every* county, for the better government of the county, the power to adopt ordinances "in exercise of the general police power," applicable to all portions of the county outside the corporate limits or jurisdiction of municipalities.

Plaintiffs contend the omission from the 1969 Act of the words, "including but not limited to the regulations and prohibition of the sale of goods, wares and merchandise on Sunday," which had appeared in the 1963 Act, indicates the General Assembly did not intend that the county commissioners should have power to enact Sunday observance ordinances. This contention is unrealistic and unsound. The 1969 Act does not confer or withhold authority in respect of specific activities; on the contrary, it confers authority to enact ordinances in the exercise of the general police power. In this respect, the 1969 Act is similar to the statutes which confer general police power upon cities and towns.

[5] Plaintiffs assert, as their second ground of attack, that the 1969 Act, which regulates trade, is *a local act* in contravention of Article II, Section 29, of the Constitution of North Carolina, because it *enables* the county commissioners of *a single county, e.g.,* Cumberland, to adopt a Sunday ordinance notwithstanding the commissioners of all or certain of the other counties may not see fit to adopt such an ordinance. The reasons for the adoption of Article II, Section 29, are set forth fully in the Report of Albert Coates, Director of the Institute of Government, to the Commission on Public-Local and Private Legislation authorized by the 1949 General Assembly, appearing in the February-March, 1949, issue of Popular Government. Repetition is unnecessary. It is noteworthy that the Coates' Report is entitled: "The Problem of Private, Local, and Special Legislation and City and County Home Rule in North Carolina."

The 1969 Act is a Home Rule statute, applicable throughout the State. It *enables* the county commissioners of *every* county to enact ordinances in the exercise of the general police power within the prescribed territory just as the cited statutes *enable* the governing bodies of cities and towns to enact ordinances in the exercise of the general police power within their

corporate limits. These statutes, G.S. 160-52 and G.S. 160-200(6), (7) and (10), are upheld *as general laws* and therefore valid notwithstanding they regulate (Sunday) trade. *State v. Smith,* 265 N.C. 173, 179, 143 S.E. 2d 293, 298, and cases cited. We hold that the 1969 Act is a general law and therefore does not contravene Article II, Section 29, of our Constitution.

[6] Plaintiffs assert, as their third ground of attack, that, assuming the applicability and validity of the 1969 Act, the Ordinance is invalid because it "has no relationship to the public health, general welfare, safety and morals of the citizens of Cumberland County and is arbitrary, unreasonable and discriminatory in its classification of businesses that may not be kept open on Sunday and the articles that may not be lawfully sold, offered or exposed for sale on Sunday in that it does not uniformly operate on all business in Cumberland County and does not prohibit all business activity in Cumberland County on Sunday and, therefore, violates Article I, Section 17, of the Constitution of the State of North Carolina, and the Fourteenth Amendment to the Constitution of the United States." Neither in their complaint nor in their evidence do plaintiffs indicate what provision(s) of the Ordinance they consider a basis for this broadside attack upon it. The provisions of this Ordinance are essentially the same as in the ordinances sustained by this Court in *Kresge Co. v. Tomlinson, supra,* and in *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370, and in *Clark's v. West,* 268 N.C. 527, 151 S.E. 2d 5.

At the hearing below, the portions of the minutes of the meetings of the Board of County Commissioners held October 20, November 3 and December 12, 1969, and January 5, 1970, pertaining to the adoption of the Ordinance, were offered and received in evidence. Plaintiffs, in their brief, contend these minutes indicate the principal proponents for adoption of the Ordinance were competing retail merchants. It appears from these minutes that those who spoke for adoption of the Ordinance stated that a majority of the retail merchants and of their employees preferred that their stores be closed on Sunday "to allow as many people as possible to use this day for rest, visits, and recreation." Two of those favoring adoption of the Ordinance spoke as representatives of a group known as "Citizens Committee for Sunday Observance." It is noteworthy that counsel for the present plaintiffs spoke in opposition to the adop-

tion of the Ordinance. Be that as it may, if the Board of Commissioners does not exceed its delegated or constitutional authority, "the courts are not concerned with the motives, wisdom, or expediency which prompts its actions." *Clark's v. West, supra* at 531, 151 S.E. 2d 8, and cases cited.

The judgment of the court below, which "adjudged and declared" the Ordinance "to be constitutional and in all respects valid," and which dissolved the preliminary injunction theretofore entered, is affirmed. The supplemental order, which has restrained enforcement of the Ordinance "pending a final determination of this cause," is hereby vacated as of the date of the filing of this opinion.

Judgment affirmed; supplemental order vacated.

HARRY DOYLE THOMAS, SR., IDELL A. THOMAS AND HARRY DOYLE THOMAS, JR. v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 46

(Filed 18 November 1970)

Insurance § 99— automobile liability insurance — failure of insurer to accept compromise offer

Insured motorists, who were required to pay $6500 to the injured party in an automobile accident case in order to discharge that part of a $17,000 verdict against them which was not covered by their policy of automobile liability insurance, failed to prove, in their subsequent action against the insurer, that the insurer was guilty of negligence or bad faith, or both, in not accepting the injured party's offer to settle her claim against plaintiffs for $10,000.

APPEAL by plaintiffs from *Barefoot, J.*, March 16, 1970 Session, PENDER County District Court. After the appeal was docketed in the Court of Appeals, and before it was heard, this Court allowed the plaintiffs' petition and certified the cause here for the appellate review.

The plaintiffs, insureds, instituted this civil action against Nationwide Mutual Insurance Company, insurer, alleging the insurer was guilty of negligence and bad faith, or both, in failing to settle a claim for damages growing out of an automobile accident in which the insured vehicle was involved.

Nationwide Mutual Insurance Company (Nationwide), under its automobile liability insurance policy, provided coverage in the amount of $10,000 for personal injury and $500 for medical expenses, resulting from the use of a 1961 model Ford automobile. On October 7, 1965, Gladys M. Thomson was injured while riding as a guest passenger in the insured vehicle. She instituted a civil action against the plaintiffs, alleging she was entitled to recover $65,000 for her injuries.

The evidence before the court in Mrs. Thomson's case is summarized in this Court's opinion reported in 271 N.C. 450. The jury awarded $17,000 as her damages. This Court found no error in the trial and judgment. The insurer paid $10,500 maximum coverage for the injuries and medical expenses. The present plaintiffs discharged the balance due on the judgment.

As a basis of recovery in this action, the plaintiffs allege that: (1) Nationwide took complete charge of the litigation involving the Thomson claim; (2) the case involved a clear case of liability and serious injury; (3) the evidence indicated the recovery would greatly exceed the amount of the coverage; (4) the defendant "negligently, or in bad faith, or both, refused to settle or try to settle the Thomson claim."

The plaintiffs' evidence, as summarized in the brief, is here quoted, omitting page references:

> "Sometime before the trial, counsel for the claimant Gladys M. Thomson had offered to settle for $12,500. The insurer made no counter offer, and in fact never made any offer or counter offer. On the morning of the last day of the trial, counsel for the claimant indicated that he would recommend a settlement of $10,000 to the claimant if the insurer would offer that amount. Then, while the jury was out deliberating its verdict between 3:00 and 4:00 o'clock that afternoon, counsel for claimant repeated his invitation for an offer in these words: 'Mr Smith, if you will offer me $10,000, I will submit it to my client and I will recommend that she accept this and I believe she will follow my recommendation.' Counsel for the insurer left the room to call the insurer, but came back stating that he could not reach his claims personnel, and no offer for that amount was made. . . ."

In addition to the above, Mrs. Thomson testified that she would have accepted $10,000 prior to the verdict, but she had

not disclosed the fact to her counsel. On cross examination, she testified: "I did not authorize Mr. McGee (her attorney) to accept any fee. He said he didn't authorize any certain amount at that particular time before trial."

At the conclusion of the plaintiffs' evidence, the court allowed defendant's motion for a directed verdict in favor of the defendant upon the ground the plaintiffs' evidence was insufficient to support either a finding of defendant's negligence or of its bad faith by reason of its failure to compromise Mrs. Thomson's claim. From the judgment dismissing the action, the plaintiffs appealed.

Graham A. Phillips, Jr., Moore & Biberstein by R. V. Biberstein, Jr., for the plaintiffs.

Marshall, Williams & Gorham by Lonnie B. Williams for the defendant.

HIGGINS, Justice.

The plaintiffs allege the defendant should have known (1) the plaintiffs had no defense to Mrs. Thomson's action; (2) the recovery for her injuries would greatly exceed the maximum coverage of the policy; (3) since the defendant had the exclusive right to control the litigation, it was under the legal duty to plaintiffs to settle the claim for an amount not in excess of the coverage; (4) the defendant was guilty of negligence or bad faith, or both, in failing to compromise the Thomson claim for $10,000; (5) the jury, having awarded Mrs. Thomson $17,000, the plaintiffs, in order to discharge the judgment were required to pay $6,500. In this action, they demand the defendant should repay them.

It appears that all essential questions in dispute in this case were before this Court and settled adversely to plaintiffs' contention in *Lumber Co. v. Ins. Co.*, 173 N.C. 269, 91 S.E. 946. In that case, the plaintiff alleged the defendant's indemnity policy carried a maximum coverage of $5,000. The insurance company assumed complete control of the litigation. The insured's claim for his injuries could have been settled for $1,000 to $2,500. The defendant negligently or in breach of its duty under its policy failed to settle the claim. The jury returned a verdict for the plaintiff in the amount of $20,000. In *Lumber Co.*, the court sustained the demurrer and dismissed the action,

holding, ". . . the complaint failed to state a cause of action either as a breach of implied contract or in tort for negligence."

In *Lumber Co.*, the Court said: "It is true as held by other courts that when an insurer—on being notified of an action for injuries—assumes the defense thereof and was negligent in conducting the suit to the loss of the employer, the latter was entitled to sue the insurance company for breach of its implied contract to exercise reasonable care in conducting the suit or in tort for negligence." The court held the complaint failed to allege the insurer was guilty of any negligence in the conduct of the suit, or that it failed to employ competent counsel, or that counsel's negligence was responsible for the unfavorable verdict. "So far as the complaint shows, the case was conducted properly and skillfully, though it resulted in a verdict of $20,000 against the plaintiff . . . (I)t turns out that it would have been better . . . if the offer of compromise had been accepted . . . This is a case where *hindsight* turns out to be better than *foresight*. It was a mistake of judgment, something not unusual in the affairs of this life. Such a mistake honestly made does not subject the person to legal liability."

The verdict in *Lumber Co.* was four times the maximum coverage; eight to twenty times the amount for which the complaint alleged the claim could have been settled. These allegations were deemed admitted for the purpose of testing the sufficiency of the complaint. Even so, the court sustained the demurrer and dismissed the action.

In this case, both parties displayed some disposition to settle the original case. However, the equivocal nature of the settlement negotiations, together with the amount of the verdict in proportion to the maximum coverage, indicate neither party was sure of the outcome, especially as to the amount of a recovery. In *Lumber Co.*, the complaint failed to state a cause of action. In the instant case, the evidence was held insufficient to support a cause of action. The proof in the latter is certainly not any stronger than the allegations of the complaint in the former. The decision in *Lumber Co.* has been cited many times in the opinions of this Court, among them: *Connor v. Ins. Co.*, 265 N.C. 188, 143 S.E. 2d 98; *Bradford v. Kelly*, 260 N.C. 382, 132 S.E. 2d 886; *Lampley v. Bell*, 250 N.C. 713, 110 S.E. 2d 316; *Alford v. Ins. Co.*, 248 N.C. 224, 103 S.E. 2d 8.

After all, the plaintiffs' negligence caused the injuries and damages. In addition to defending them in the suit, the de-

fendant paid the full amount of its policy coverage. As the case turned out, the plaintiffs had not bought enough insurance. This evidence, stretched to its outer limits, simply does not go far enough to require the defendant to donate $6,500 additional insurance.

On the authority of *Lumber Co.*, and other cases to the same effect referred to in the cases cited, the Court now holds that the plaintiffs' evidence was insufficient to make out a case. The directed verdict for the defendant was required under Rule 50, Rules of Civil Practice, 1A, 50(a). The judgment dismissing the action is

Affirmed.

STATE OF NORTH CAROLINA v. VERNON WALLACE RICH

No. 45

(Filed 18 November 1970)

1. **Homicide §§ 21, 25— murder committed in perpetration of robbery — instructions — sufficiency of evidence**

In this homicide prosecution, the State's evidence permitted a legitimate inference that the murder was committed in the perpetration of a robbery and supported the court's statement of the State's contentions and its instruction that such a murder "will be deemed murder in the first degree," where the State's evidence tended to show that defendant and his accomplices invited the victim into their automobile ostensibly to take him home in return for beer which the victim had bought, that an accomplice struck the victim in the head with a bottle and defendant shot him in the back of the head with a pistol, that when it was discovered the victim was still alive defendant fired a second shot into his head, that defendant and his accomplices dug a grave, took from the victim's body a wallet containing $13.00, a watch, cigarette lighters and a small amount of change, and that they then buried the body.

2. **Homicide § 18— evidence of premeditation and deliberation**

In this homicide prosecution, want of provocation, absence of excuse, lack of justification and defendant's statement that he shot deceased "to prove a point" permit a legitimate inference of premeditation and deliberation.

APPEAL by defendant from *Crissman, J.*, May 10, 1969, Criminal Session of ROWAN.

Defendant was tried upon a bill of indictment charging that John Lawrence Clark, James L. Blumel and Vernon Wallace Rich, late of Rowan County, on the 16th day of October 1968, with force and arms, at and in said county, feloniously, willfully and of malice aforethought, and with premeditation and deliberation, did kill and murder one Clint Aiken Cheney.

The State's evidence—defendant offered none—is narrated below.

Defendant and the other two men named in the indictment arrived in Rowan County from California on the evening of 15 October 1968. The three men went to the home of John Lawrence Clark's parents where they were greeted and entertained. About 11:15 p.m. the three men and Clifford Clark, a younger brother of John Lawrence Clark, went to the Eagle's Bar and Restaurant in Salisbury to drink beer. There the defendant Vernon Wallace Rich first encountered Clint Aiken (Chuck) Cheney and remarked concerning him, "There's one in every crowd." After leaving the Eagle's Bar and Restaurant the four men returned to the home of Clark's parents where they spent the night.

On the following day these three men in company with Clark's father and his brother Clifford went down Brinkle Ferry Road to the river where they fished and drank beer. While there they explored an old cemetery and defendant mentioned the possibility that treasure might be found in the graves, some of which were 200 years old. It began raining and the group drove to a little bar called "Jack's" where they drank beer. They left the tavern and returned to the Clark home where defendant Rich put shovels and picks and an ax in the car and continued to talk about robbing the graves. It was now "quite late at night." John Lawrence Clark and his brother disapproved of the grave-robbing proposal and decided to get defendant away from the house and talk him out of it. They got defendant in the car and drove up Main Street toward Eagle's Bar and Restaurant where they planned to get beer. As they pulled into the bar Clint Aiken Cheney was walking out of it. Defendant remarked, "There's the queer I was talking to last night." They got out of the car and defendant began talking with Cheney who said he was waiting for a cab to take him home. Defendant asked Cheney where he lived and suggested that if Cheney bought some beer they would take him home. Cheney gave Jim Blumel $5.00 and he bought a

case of beer and all of them got in the car. John Lawrence Clark was driving; defendant Vernon Wallace Rich sat on the left rear seat behind the driver; Jim Blumel sat on the right rear seat and Clint Aiken Cheney sat on the right front seat. They drove out of town, and as they rolled along Brinkle Ferry Road toward the old cemetery Jim Blumel struck Cheney in the back of the head with a bottle. Defendant then shot Cheney in the back of the head with a .22 caliber pistol. Cheney slumped in the front seat and defendant instructed Clark to continue driving. About one-half mile later Cheney began to lean forward whereupon Blumel grabbed his shoulders to pull him back and commented that he was still alive. Defendant then fired a second shot into Cheney's head. The three men continued to drive until they reached the old cemetery at the end of Brinkle Ferry Road. They took their tools into the cemetery and dug a shallow grave. They returned to the car for Cheney's body, opened the door, and defendant pulled the body from the car and proceeded to take all Cheney's belongings, consisting of his wallet containing $13.00 in cash, a watch, cigarette lighters and a small amount of change. Then they carried the body into the cemetery, placed it in the shallow grave and covered it up. Defendant then cut bushes and covered the grave with them.

The three men then returned to the Clark home where they cleaned the car and burned their bloody clothing in a trash barrel at the edge of the woods. Cheney's belongings, with the exception of the money and the watch which they kept, were also thrown in the trash barrel and burned. They then prepared eggs and toast, and a controversy arose over the way the food was being eaten. During the controversy defendant, in an angry voice, said: "I didn't shoot that man just to be shooting him. I shot him to prove a point."

The next morning defendant, Jim Blumel, John Lawrence Clark and Clark's father left for Lenoir and Blowing Rock to visit relatives. They returned home about 3:00 a.m. on Friday morning and left later that day for Florida.

On Sunday afternoon, October 20, 1968, while visiting the old Reed Cemetery, Coleman J. Williams observed fresh dirt on an old grave covered with wild cherry limbs. It looked suspicious to him and he reported it to the sheriff. The sheriff's man excavated the fresh dirt and discovered the body of Clint Aiken Cheney. Police officers later found Cheney's cigarette lighters, key case and wallet in the trash barrel at the Clark home.

Cheney's watch was found in the possession of George Clark (a brother of John Lawrence Clark). The officers then talked with John Lawrence Clark who made a full confession and later testified for the State in this case, relating events substantially as hereinabove narrated. Defendant Rich, John Lawrence Clark and Jim Blumel were thereupon indicted for the murder of Clint Aiken Cheney. The record here does not reveal what disposition was made of the case against Clark and Blumel. The jury convicted defendant Rich of murder in the first degree with a recommendation of life imprisonment. Judgment was pronounced accordingly and defendant appealed to the Supreme Court.

Clinton Eudy, attorney for defendent appellant.

Robert Morgan, Attorney General; Millard R. Rich, Jr., Assistant Attorney General; James F. Bullock, Deputy Attorney General, for the State.

HUSKINS, Justice.

[1] The sole question involved on this appeal is stated in defendant's brief as follows: "Did the trial court err in submitting this case to jury upon the theory of the defendant's guilt of first-degree murder in that he committed a homicide in perpetrating a robbery."

The evidence discloses that defendant and his accomplices invited the victim into their automobile ostensibly to take him home in return for the case of beer which the victim had bought. They left town on the Brinkle Ferry Road traveling toward the old cemetery. Jim Blumel struck the victim in the head with a bottle and defendant shot him in the back of the head with a .22 caliber pistol. A minute or two later, when it was discovered that the victim was still alive, defendant fired a second shot into Cheney's head. These murderous acts were committed as if by prior agreement and understanding and without provocation, excuse or justification. After they reached the old cemetery at the end of Brinkle Ferry Road, entered it and dug a shallow grave, defendant and his accomplices returned to the car for Cheney's body and, at that time, took his wallet containing $13.00 in cash, a watch, cigarette lighters and a small amount of change. They buried the body but kept Cheney's belongings. Items deemed worthless were later burned, but the money and the watch were kept and converted to their own use.

The foregoing evidence permits a legitimate inference that the murder was committed in perpetration of a robbery, and murder so committed is "deemed to be murder in the first degree." G.S. 14-17. Hence it was not error prejudicial to defendant for the court to give the State's contentions and to charge the jury that a murder committed in the perpetration of a robbery "will be deemed murder in the first degree."

[2] Moreover, want of provocation, absence of excuse, lack of justification, and defendant's statement that he shot Cheney "to prove a point"—all permit, if not compel, a legitimate inference of premeditation and deliberation. *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541 (1970).

Defendant's guilt is conclusively shown by competent evidence upon which no other rational conclusion could have been reached by the jury. He has failed to bring to our attention any error injuriously affecting his rights, and we have discovered none. For such a callous murder the jury might well have returned a verdict which would have required a death sentence. His assignment of error must fail for lack of merit.

No error.

DOROTHY M. WRENN v. HERBERT G. WATERS

No. 47

(Filed 18 November 1970)

Automobiles §§ 19, 90— driver entering intersection on green light — duty to use due care — assumption as to other drivers — instructions

An instruction that a driver entering an intersection on a green light must exercise the care that a reasonably prudent person would exercise under the circumstances, taking into consideration the possibility that someone might come into the intersection in violation of the red light, *held* deficient in failing to further charge that in the absence of anything which gives or should give notice to the contrary, a motorist has the right to assume and to act on the assumption that opposing drivers will observe the rules of the road and stop in obedience to a traffic signal.

APPEAL by plaintiff from *Carr, J.,* December 1969 Civil Session, WAKE Superior Court.

Personal injury suit arising out of a collision at 12:30 p.m. on 24 September 1968 between automobiles driven by plaintiff and defendant. The road was dry and the weather was clear.

Plaintiff was driving west on New Bern Avenue in Raleigh, and defendant was driving north on Tarboro Road, approaching its intersection with New Bern Avenue. At this intersection there are five traffic lanes on New Bern Avenue with three lanes used for westbound traffic. The intersection is controlled by traffic control signals. There are left turn signals controlling left turning traffic. These signals operate on the impulse of an electronic eye which is aimed at the left turn lanes on New Bern Avenue. Thus westbound traffic may be flowing freely under a green signal in the westbound lanes of New Bern Avenue while the eastbound traffic on New Bern is stopped by the red light to allow westbound turning traffic to flow south into Tarboro Road.

The two vehicles collided in the intersection. The point of impact was in the center westbound lane of New Bern Avenue six to seven feet into the intersection, measured from the prolonged eastern curb line of Tarboro Road. Plaintiff's testimony, corroborated by a passenger in her car and by the operator of an Esso Station located in the southeast corner of New Bern and Tarboro Road, is to the effect that plaintiff was driving west on New Bern when the light facing her turned green; that two other cars preceding her by two or three car lengths passed through the intersection; that she followed them into the intersection and struck defendant's car in its right side as he attempted to pass through the intersection on Tarboro Road, going north. Plaintiff testified she did not see defendant's car before impact; that there were cars in the left turn lane immediately to her left; and that she was driving 15-20 miles per hour in the center westbound lane. Plaintiff stated on cross examination: "Before I attempted to enter the intersection I looked as I do anytime I am traveling through an intersection. On this particular day at this particular intersection, I do not remember turning and looking to my left. . . . I remember there was traffic around the intersection. I remember I was at the Piggly Wiggly when the light turned green."

Defendant, a 74-year-old man, testified that the light in his lane was green when he entered the intersection. A passenger in his vehicle also said the light facing him was green

although she admitted that she was presently suing defendant for her injuries. Another defense witness testified that the light facing defendant was green as defendant moved into the intersection. No one contends that the traffic control lights at this intersection were malfunctioning. Each party simply contends that the light facing her or him was green. The sequence of the lights was checked by the police following the collision and found to be working properly.

Issues of negligence, contributory negligence, and damages were submitted. The jury answered the negligence issue "yes" and the contributory negligence issue "yes." The court accordingly adjudged that plaintiff recover nothing and pay the costs. Plaintiff appealed to the Court of Appeals, assigning errors in the charge. That court found no error, 9 N.C. App. 39, 175 S.E. 2d 368 (1970), and we allowed *certiorari,* 277 N.C. 117.

Smith, Leach, Anderson and Dorsett, and Hollowell and Ragsdale, by William L. Ragsdale, for the plaintiff appellant.

Teague, Johnson, Patterson, Dilthey and Clay by Ronald C. Dilthey, for the defendant appellee.

HUSKINS, Justice.

On the contributory negligence issue the court charged the jury as follows:

> "The law requires a driver to exercise due care in entering an intersection, even though she is entering on the green light. She must exercise the care that a reasonably prudent person would exercise, under the circumstances, taking into consideration the possibility that someone might come in the intersection in violation of the rule, coming in the intersection on the red light."

This constitutes the entire charge on the second issue. Plaintiff contends this charge is inadequate, incomplete and prejudicial and assigns same as error.

The leading case in North Carolina on the duty of a motorist entering an intersection is *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25 (1952). In that case the Court, speaking through Justice Ervin, overruled earlier cases which held in effect that "the right to rely on a right of way created by posi-

tive legislation and to assume that other users of the highway will obey the law and exercise ordinary care is restricted to those motorists who are themselves absolutely free from negligence." It was said that the cases supporting that principle "constitute a negation of the basic concept that since every person necessarily acts on appearances, his conduct in a given situation must be judged in the light of *all* the circumstances surrounding him at the time."

Four years later in *Wright v. Pegram,* 244 N.C. 45, 92 S.E. 2d 416 (1956), Justice Higgins supplied the much-cited general rule which is grounded on the principles set out in *Cox:*

> "We are not unmindful of the fact that a motorist facing a green light as he approaches and enters an intersection is under the continuing obligation to maintain a proper lookout, to keep his vehicle under reasonable control, and to operate it at such speed and in such manner as not to endanger or be likely to endanger others upon the highway. *Ward v. Bowles,* 228 N.C. 273, 45 S.E. 2d 354 [1947]. Nevertheless, in the absence of anything which gives or should give him notice to the contrary, a motorist has the right to assume and to act on the assumption that another motorist will observe the rules of the road and stop in obedience to a traffic signal. *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25 [1952]."

This language is quoted with approval in *Currin v. Williams,* 248 N.C. 32, 102 S.E. 2d 455 (1958), and in *Galloway v. Hartman,* 271 N.C. 372, 156 S.E. 2d 727 (1967). *See also Troxler v. Motor Lines,* 240 N.C. 420, 82 S.E. 2d 342 (1954); *Hyder v. Battery Company, Inc.,* 242 N.C. 553, 89 S.E. 2d 124 (1955); and *Jones v. Schaffer,* 252 N.C. 368, 114 S.E. 2d 105 (1960), all of which support this view; and 3 Blashfield Automobile Law and Practice (3rd Ed., 1965) § 114.42, where supporting cases from other jurisdictions are collected.

When the instant charge on contributory negligence is laid alongside the language of *Wright v. Pegram, supra,* its deficiency is quite apparent. The charge was correct as far as it went, but it failed to go far enough. The able and conscientious trial judge should have further instructed the jury that in the absence of anything which gives or should give notice to the contrary, a motorist has the right to assume and to act on the assumption that opposing drivers will observe the rules

of the road and stop in obedience to a traffic signal. Failure to so charge was error; hence this assignment must be sustained. We put aside the remaining assignments without discussion.

Error in the respect indicated necessitates a new trial. The case is remanded to the Court of Appeals where it will be certified to the Superior Court of Wake County for a new trial in accordance with this opinion.

Error and remanded.

STATE OF NORTH CAROLINA v. JACK JAMES JORDAN

No. 25

(Filed 18 November 1970)

Criminal Law § 84; Searches and Seizures § 1— search of car without warrant — seizure of burglary tools and stolen money — legality

The warrantless seizure of burglary tools, stolen money and other articles from defendant's car was lawful, and the tools, money and other articles were properly admitted in the trial of defendant for breaking and entering, larceny and safecracking, where (1) defendant was stopped and placed under arrest for running a red light, (2) a passenger in defendant's car fled when officers approached the car, (3) burglary tools were found in an area where the fleeing passenger had dropped something, (4) the arresting officer observed burglary tools on the floorboard of defendant's car and placed defendant under arrest for illegal possession thereof, and (5) the stolen money and other articles admitted in evidence were thereafter discovered by a search of the glove compartment of defendant's car.

APPEAL by defendant from decision of the Court of Appeals, reported in 8 N.C. App. 203, 174 S.E. 2d 112.

Defendant was charged in three separate bills of indictment with breaking and entering, larceny and receiving, and possession of burglary tools and safecracking. The cases were consolidated for trial and defendant entered a plea of not guilty as to each charge. Defendant offered no evidence. The jury returned a verdict of guilty as to each charge. From sentences imposed, defendant appealed to the North Carolina Court of Appeals. The Court of Appeals affirmed. Morris, J., wrote the majority decision for the panel, with Vaughn, J., concurring,

and Mallard, C.J., dissenting. Defendant appealed to this Court as a matter of right pursuant to 7A-30(2).

The opinion of the Court of Appeals contains full and accurate facts, and we will confine further recital of facts to those we deem pertinent to decision.

Attorney General Morgan, Assistant Attorney General Melvin, and Staff Attorney Costen for the State.

Hubert E. Seymour, Jr., for defendant appellant.

BRANCH, Justice.

We approve the principles and reasoning set forth in the majority opinion of the Court of Appeals. However, in view of the dissenting opinion, we deem it necessary to consider the portion of the opinion upon which the dissent was grounded.

Defendant contends that the trial judge erred in admitting evidence obtained by an illegal search of his automobile. He argues that the search was illegal because it was without search warrant, was not incident to a valid arrest, and was not from or about the person of defendant.

In the connection with the search and seizure the State offered evidence which tended to show that on 28 March 1969 at about 3:20 a.m., Officers Hightower and Cooper of the Greensboro Police force started to make a routine check of defendant's automobile, and when they turned the police car around, defendant's car ran a red light at a high speed. After the Officers had pursued the car for about a city block, the car suddenly slowed and a passenger jumped from the car and dropped something as he ran away. Officer Hightower pursued the fleeing passenger but was unable to catch him. Upon returning to the area where the person had dropped something, the officer found a small screwdriver, a pair of metal cutters, an adjustable wrench, a pair of brown cloth work gloves, punches, chisels, and a brace and bit. He then returned to defendant's car where he found defendant standing outside his car with police Officer Cooper. Officer Hightower saw a pistol, two metal flashlights, work gloves, a metal pry bar, a small crowbar, and a large screwdriver on the floorboard of defendant's automobile. Defendant was then placed under arrest for illegal possession of burglary tools, and Officer Hightower proceeded to search the glove compartment of defendant's car and

discovered $50.00 in currency and change and a small punch. Some of the change was in a wrapper marked "Florida Street Baptist Church." It was later discovered that the Florida Street Baptist Church had been broken into during the night. During this time defendant had been warned of his constitutional rights.

The majority opinion relies upon the case of *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753, as authority for overruling this assignment of error. The defendant in *State v. McCloud* was the passenger who fled from defendant's automobile. Considering the question of search and seizure in *State v. McCloud,* this Court stated at p. 530:

> "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.
>
> "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. 3d 314, for a full note and collection of cases concerning lawfulness of search of a motor vehicle following arrest for traffic violation."

The dissenting opinion upon which defendant now relies was based on the case of *Chimel v. California,* 395 U.S. 752, 23 L. ed. 2d 685, 89 S. Ct. 2034, decided June 23, 1969, where officers, without a search warrant, searched defendant's house, garage and workshop, and the Court held that since the search of defendant's home went far beyond his person and the area within which he might have obtained either a weapon or secreted something that could have been used in evidence against him, the scope of the search was unreasonable under the Fourth Amendment, and therefore defendant's conviction could not stand.

The United States Supreme Court, subsequent to decision in *Chimel v. California, supra,* considered the question of search of automobiles in the case of *Chambers v. Maroney,* 399 U.S. 42, 26 L. ed. 2d 419, 90 S. Ct. 1975, decided June 22, 1970. In that case police officers had been furnished with a description of an automobile used in a robbery and a description of the clothes worn by two of the four men seen within the automobile. Within an hour the police stopped a car carrying four passengers. The car fitted the description furnished, and two of the men were clothed as described. The police conducted a warrantless search of the automobile after removing the car to the police station. They found revolvers, ammunition and property stolen in the reported robbery. The articles found in the search were admitted into evidence. The Court, holding that the search was legally made, stated:

> ". . . (T)he Court has long distinguished between an automobile and a home or office. In *Carroll v. United States,* 267 U.S. 132 [69 L. Ed. 543, 45 S. Ct. 280, 39 A.L.R. 790 (1925)], the issue was the admissibility of evidence of contraband liquor seized in a warrantless search of a car on the highway. After surveying the law from the time of the adoption of the Fourth Amendment onward, the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize."

The Court held that where probable cause exists to search an automobile, it is reasonable (1) to seize and hold the automobile before presenting probable cause issue to a magistrate or (2) to carry out an immediate search without a warrant. It was noted that there is little choice in practical consequences between immediate search and immobilization of the automobile until a warrant is obtained.

The decision in *State v. McCloud, supra,* on the question of search was directed solely to search of an automobile as distinguished from search of a dwelling. Relying upon the authorities therein cited and the case of *Chambers v. Maroney, supra,* and the authorities therein cited, we affirm the principles set forth in *State v. McCloud, supra,* as to search of automobiles.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. FRANKLIN VANCE

No. 52

(Filed 18 November 1970)

1. **Criminal Law § 117— wife as interested witness — instructions**

   Instructions as to how the jury should consider the testimony of defendant's wife as an interested witness *held* without error.

2. **Criminal Law § 117— instructions on testimony of interested witnesses**

   Failure of the trial court to instruct the jury as to how they should consider the testimony of possibly interested State's witnesses was not prejudicial where defendant did not request such instruction on this subordinate feature of the trial.

3. **Criminal Law § 113— evidence of alibi — instructions**

   Defendant's evidence of alibi relates to a substantive feature of the case, and he is entitled to an instruction as to the legal effect of his evidence without the necessity of tendering a special prayer therefor.

4. **Criminal Law § 113— instructions on alibi — prejudicial error**

   A charge that referred to defendant's defense of alibi only in the statement of defendant's contentions and that failed to apply the law to the evidence of alibi, *held* reversible error.

5. **Rape § 6; Criminal Law § 120— instruction on guilty verdict with recommendation of mercy**

   Failure of the trial court in a rape prosecution to instruct the jury that a guilty verdict with recommendation of life imprisonment requires the court to pronounce a judgment of life imprisonment *held* erroneous. G.S. 14-17.

APPEAL by defendant from *Crissman, J.*, 11 May 1970 Criminal Session FORSYTH Superior Court.

Defendant was tried upon a bill of indictment charging him with the capital crime of rape of Janice L. Jones.

The State offered evidence of the prosecuting witness, Janice L. Jones, which tended to show that she was thirteen years old and lived in an apartment in Winston-Salem with her mother, two brothers, aged four years and fourteen months,

respectively, and a cousin aged four years. On the morning of 4 April 1970, at about 2:10 to 2:15 o'clock a.m., her mother left to pick up a friend at Reynolds Tobacco Company. Immediately thereafter, defendant came to the apartment and by force and against her will had sexual intercourse with her. He left the apartment at about 3:15 a.m. The State offered other witnesses to corroborate prosecuting witness.

Defendant offered testimony of several witnesses, including his wife, which tended to show that on the night of 3 April 1970 and the morning of 4 April 1970, defendant attended a party at the home of one Saluda Rennick. He remained there until approximately 1:45 a.m., and arrived at his home at approximately 2:15 a.m. His wife testified that he awakened her at about 2:15 and that he was still in bed when she left for work at 5:00 o'clock a.m.

The jury returned a verdict of guilty as charged in the bill of indictment. Defendant appealed from the sentence of death pronounced on the verdict.

Attorney General Morgan and Staff Attorney Jacobs for the State.

Phin Horton, Jr., and Harold R. Wilson for defendant.

BRANCH, Justice.

[1] Defendant assigns as error the instructions of the trial judge concerning the defendant's wife's testimony as an interested witness. In this connection, the trial judge charged:

> "This defendant's wife testified in the case. The court charges you that she is an interested witness; that she is interested in the outcome of your verdict. And so the court charges you that you should scrutinize and look carefully into her testimony. But that if after you have looked carefully into and scrutinized her testimony, you believe she is telling the truth about the matter, then you would give the same weight and the same belief to her testimony that you would to that of any disinterested witness who may have testified."

[2] This assignment of error is without merit. Similar charges have been approved in *State v. Barnhill,* 186 N.C. 446, 119 S.E. 894; *State v. Morgan,* 263 N.C. 400, 139 S.E. 2d 708; *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769. Neither was there preju-

dicial error in the trial court's failure to give a similar instruction as to possibly interested State's witnesses since defendant did not request such instruction on this subordinate feature of the trial. *State v. Sauls,* 190 N.C. 810, 130 S.E. 848.

Defendant assigns as error the failure of the trial judge to correctly instruct the jury on his defense of alibi.

[3] Defendant's evidence of alibi relates to a substantive feature of the case, so without tendering a special prayer he was entitled to an instruction as to the legal effect of his evidence, if it should be accepted by the jury. *State v. Melton,* 187 N.C. 481, 122 S.E. 17; *State v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175.

[4] The sole reference to defendant's chief defense of alibi in the trial judge's instructions to the jury was the following:

> "Now the defendant, on the other hand, says and contends that he wasn't there at all; that there has been a mistake about this thing; that he was somewhere else. He pleads what is sometimes called in law an alibi, which has sometimes been interpreted to mean being somewhere else at the time so that it would have been impossible for him to have been the person or to have committed the crime that was charged. He says and contends that he has accounted to you here in the evidence for his whereabouts at the time that he is accused of having been in this house. He says that his activities were accounted for from about 11 o'clock that night and for the remainder of the night by different persons that saw him at different places and by his wife. So he says and contends, members of the jury, that you ought to return a verdict of not guilty."

In *State v. Spencer, supra,* the court's charge as to defendants' defense of alibi consisted of a statement to the effect that defendants contended they were not present when the crime was committed. This Court, holding the charge to be erroneous, stated:

> "Defendants were entitled to a charge on alibi substantially as follows: *'An accused, who relies on an alibi, does not have the burden of proving it.* It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other

testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal.' *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844. See *S. v. Allison,* 256 N.C. 240, 123 S.E. 2d 465, as to charge on alibi." (Emphasis supplied.)

The State contends that the charge on the defense of alibi is adequate when the entire charge is contextually interpreted. True, in other portions of the charge the court, without relating the charge to the defense of alibi, placed the burden of proof upon the State to satisfy the jury beyond a reasonable doubt of defendant's guilt.

In no place in the charge was the jury told that defendant did not have the burden of proving the defense of alibi.

The doctrine of contextual interpretation of a charge has been applied in proving inexact charges on alibi (*State v. Sheffield,* 206 N.C. 374, 174 S.E. 105, *State v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867), but only in cases where the court "expressly or substantially states that the burden of proving an alibi does not rest on the defendant." *State v. Allison,* 256 N.C. 240, 123 S.E. 2d 465. Here, the trial judge, in effect, only stated defendant's contention that he was not present at the time the crime was committed, without applying the law to the defendant's contention in any manner.

Failure to adequately charge on defendant's defense of alibi resulted in prejudicial error. *State v. Spencer, supra; State v. Melton, supra; State v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921.

[5] Although defendant did not raise the point, we think it proper to observe that the trial judge in this capital case failed to instruct the jury as to the legal effect of a verdict of guilty of rape with recommendation of life imprisonment, which *requires* the court to pronounce a judgment of life imprisonment. Failure to so instruct is error. G.S. 14-17; *State v. Carter,* 243 N.C. 106, 89 S.E. 2d 789; *State v. Cook,* 245 N.C. 610, 96 S.E. 2d 842.

Because of prejudicial error in the charge there must be a new trial.

New trial.

STATE OF NORTH CAROLINA v. THOMAS LOGAN TEAL AND JACK HICKS

No. 55

(Filed 18 November 1970)

Indictment and Warrant § 14; Extradition — motion to quash indictment — wrongful return to this State

The trial court properly denied defendant's motion to quash the indictments on grounds that he signed a waiver of extradition from another state while intoxicated and without being advised of his right to counsel, and that he was returned to this State without being advised of his right to oppose extradition, since in exercising its power to return bills of indictment the grand jury does not concern itself with whether or not the accused is in custody or in this jurisdiction.

APPEAL by defendant, Jack Hicks, from *Brewer, J.*, March, 1970 Session, SCOTLAND Superior Court.

In these criminal prosecutions the appellant, Jack Hicks, and one Thomas Logan Teal, were indicted in two cases of robbery with the use and threatened use of firearms. The cases were consolidated for trial. At the close of the State's evidence, Teal's motion for a directed verdict of not guilty in one of the cases was allowed. He was convicted in the other case and given a prison sentence of five years. He did not appeal. Hicks was convicted in both cases. From consecutive prison sentences of five years, Hicks appealed.

Robert Morgan, Attorney General, William W. Melvin, Assistant Attorney General, T. Buie Costen, Assistant Attorney General, for the State.

J. Robert Gordon for the defendant Hicks.

PER CURIAM.

The defendants were arrested in South Carolina. They signed written waivers of extradition and were returned to North Carolina for trial. Before pleading to the charges, the defendant Hicks moved to quash the indictments on these grounds: (1) At the time of his arrest in South Carolina by the Sheriff of Marlboro County, the defendant had been drinking, and while he was under the influence of liquor, he signed a written waiver of extradition; (2) At the time he signed the waiver, he was not represented by counsel, and had not been

advised that he was entitled to counsel; (3) He was returned by the North Carolina officers without being advised that he had the right to oppose extradition. Hence, his presence in the jurisdiction was wrongful, in violation of his rights, and he could not legally be indicted in North Carolina.

Oddly, the defendant does not challenge the trial on any ground. His only claim is that the indictment should be quashed because he was wrongfully returned to North Carolina. In exercising its power to return bills of indictment, the Grand Jury does not concern itself with questions whether the accused is in or out of custody, in or out of the jurisdiction. The motion to quash the indictment was properly denied.

No error.

ANDERSON v. MANN

No. 34 PC.

Case below: 9 N.C. App. 397.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 November 1970.

DIXON v. SHELTON

No. 26 PC.

Case below: 9 N.C. App. 392.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 November 1970.

GRAY v. CLARK

No. 18 PC.

Case below: 9 N.C. App. 319.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 November 1970.

KING v. LEE

No. 30 PC.

Case below: 9 N.C. App. 369.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 3 November 1970.

POULTRY INDUSTRIES v. CLAYTON, COMR. OF REVENUE

No. 29 PC.

Case below: 9 N.C. App. 345.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 1 December 1970.

PRIDDY v. CAB CO.

No. 16 PC.

Case below: 9 N.C. App. 291.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 November 1970.

ROBBINS v. BOWMAN

No. 31 PC.

Case below: 9 N.C. App. 416

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 November 1970.

ROBBINS v. BOWMAN

No. 32 PC.

Case below: 9 N.C. App. 420.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 November 1970.

STATE v. HILL

No. 27 PC.

Case below: 9 N.C. App. 410.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 November 1970.

STATE v. JOHNSON

No. 21 PC.

Case below: 8 N.C. App. 579.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 November 1970.

STATE v. LYLES

No. 28 PC.

Case below: 9 N.C. App. 448.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 November 1970.

STATE v. REAVES

No. 20 PC.

Case below: 9 N.C. App. 315.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 November 1970.

W. W. HORTON, PETITIONER v. FRANK GULLEDGE, HOUSING INSPECTOR; ARCHIE C. ANDREWS, JR., HOUSING INSPECTOR AND ASSISTANT BUILDING INSPECTOR SUPERVISOR FOR THE CITY OF GREENSBORO; GREENSBORO HOUSING COMMISSION OF THE CITY OF GREENSBORO, RESPONDENTS

No. 41

(Filed 16 December 1970)

1. **Constitutional Law § 23— "law of the land" defined**

   The expression "the law of the land," as used in the North Carolina Constitution, has the same meaning as the expression "due process of law," Art. I, § 19, of the North Carolina Constitution (as amended in 1970).

2. **Constitutional Law §§ 1, 23— interpretation of the law of the land clause in State Constitution**

   A decision of the Supreme Court of the United States construing the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, though persuasive, does not control the North Carolina Supreme Court's interpretation of the Law of the Land Clause in the Constitution of North Carolina.

3. **Municipal Corporations §§ 4, 29; Constitutional Law § 13— exercise of police power — demolition of substandard house — due process**

   Action by a municipality, pursuant to its housing code, in ordering the demolition of a dwelling house without compensation to the owner thereof, and in charging the expense of demolition to the owner upon his failure to demolish the house himself, such action being based upon findings by the city building inspector that the house was unfit for human habitation and that the repairs necessary to bring the house into conformity with the housing code would cost 60% or more of the present value of the house, *is held* violative of the Law of the Land Clause of the State Constitution, where (1) the house could be repaired so as to comply with the housing code and (2) the owner was not afforded a reasonable opportunity to repair the house. Art. I, § 19, of the revised N. C. Constitution (ratified in 1970); G.S. 160-182 *et seq.*

4. **Constitutional Law § 4— standing to assert constitutional right — homeowner threatened with demolition order**

   A homeowner who was faced with a municipal housing inspector's order giving him no alternative but to demolish his home that was declared uninhabitable by the municipality, or to pay the expense of a demolition by the municipality, was not required to propose an alternative remedy for the condition of the house before asserting his constitutional right in the courts.

5. **Constitutional Law § 11; Municipal Corporations § 29— police power — *application to private property***

   The police power of the State, which may be delegated to municipal corporations, extends to the prohibition of a use of private property

which may reasonably be deemed to threaten the public health, safety, morals, or the general welfare; and, when necessary to safeguard such public interest, it may be exercised without payment of compensation to the owner, even though the property is thereby rendered substantially worthless.

APPEAL by petitioner from *Gambill, J.*, at the 29 April 1970 Session of the Superior Court of GUILFORD, heard prior to determination by the Court of Appeals.

In 1966, pursuant to G.S. 160-182 *et seq.*, the City of Greensboro adopted an ordinance known as the Housing Code. Section 10-23(b) thereof provides that if, after notice and hearing, the Inspector of Buildings of the City determines that a building is unfit for human habitation, standards for which are prescribed in the code, he shall state in writing his finding of fact in support of such determination and shall issue an order. If the building can be brought up to the standards prescribed by the code by repairs costing less than 60% of "the *present* value of the building," the order "*shall* require the owner * * * to repair * * * such building so as to render it fit for human habitation or to vacate and close the building as a human habitation * * * ." (Emphasis added.) If repairs bringing the building up to the standards prescribed by the code "cannot be made at a cost of less than 60 percent of the *present* value of the building, the order *shall* require the owner * * * to demolish such building." (Emphasis added.) Upon failure of the owner to comply with the order of demolition, the Housing Commission may direct the inspector to cause the building to be demolished and the cost of demolition by the inspector is made a lien upon the land whereon the building was located.

The city also has enacted ordinances providing for the taking, under the power of eminent domain, for the purpose of urban renewal, of properties constituting blighted areas. The judgment of the Superior Court recites that the property here in question, 305 Gillespie Street in the City of Greensboro, "was included in the Eastside Project of the Greensboro Redevelopment Commission" but, as of the date of the judgment, "funds had not yet been appropriated for said Eastside Project."

Pursuant to the procedures prescribed by the Housing Code, an inspection was made of the dwelling house here in question, owned by Horton and occupied by his tenant. After notice and hearing, the Inspector of Buildings entered his order directing

Horton to demolish the building and advising him that, upon his failure to do so, the inspector would recommend to the Housing Commission of the city that it direct the inspector to proceed with the demolition. This order set forth the following findings of fact made by the Inspector of Buildings:

> "(1) That the repair, alteration or improvement of the above mentioned building cannot be made at a cost of less than 60% of the present value of the building.
>
> "(2) That it is determined as a fact that the above building is dangerous, unsafe and unfit for human occupation because:
>
> "General Dilapidation—building not weather tight—improper plumbing unsafe wiring—improper foundation—floors not level—holes in floor—improper floors—dilapidated siding—holes in walls and ceilings—improper attic ventilation—sagging structural members."

Horton, the owner, appealed to the Housing Commission, pursuant to the provisions of the Housing Code, asserting that the decision of the inspector was arbitrary and not supported by the facts, that the ordinance under which the inspector purported to act is contrary to the Constitution of North Carolina and to the Constitution of the United States, and that the dwelling is not unfit for human habitation.

The Housing Commission heard evidence and the contentions of counsel in the course of three meetings of the commission, including one conducted at the dwelling in question. It made the following findings of fact:

> "1. That the building located at 305 Gillespie Street is unfit for human habitation and dangerous; and
>
> "2. That the repairs, alterations or improvements of said building *necessary to bring it into conformity with the Greensboro Housing Code* cannot be made at a cost of less than 60 percent of the present value of the building." (Emphasis added.)

The Housing Commission thereupon affirmed the decision and the order of the Inspector of Buildings.

Horton petitioned the Superior Court for a writ of *certiorari*. He alleged therein that the order of demolition amounts to a taking of his property without due process of law

in violation of the Fourteenth Amendment to the United States Constitution and, if carried out, would take his property without just compensation and deprive him thereof in violation of Art. I, § 17, of the Constitution of North Carolina. He further alleged that there was no competent evidence before the Inspector of Buildings or before the Housing Commission which would support such order and that competent evidence, introduced by Horton, showed the building "was not sixty percent (60%) dilapidated" but was suitable for human habitation.

The Superior Court issued its writ of *certiorari,* thereby staying the carrying out of the order of demolition until the matter could be heard by that court.

By agreement of the parties, the hearing in the Superior Court was had without a jury, the court considering the transcript of the testimony before the commission and exhibits, including the Housing Code of the city. The Superior Court approved and affirmed the findings and the decision of the Housing Commission, but stayed the order to demolish the building pending this appeal.

The evidence at the hearing before the Inspector of Buildings consisted of the testimony of a city housing inspector describing numerous conditions in the building, which he deemed to constitute defects making it unsuitable for human habitation, and stating his estimate of the cost of repairing such defects and his valuation of the building. He valued the building at $2,000 and estimated that it would cost a total of $2,800 "to put it into condition."

At the hearing before the Housing Commission, the same inspector testified. He recounted the defects observed by him in the building, estimated the value of the house to be $3,000 and the cost of repair "to bring up to minimum standards," to be $2,800. He expressed the opinion, based upon his findings, that "the house was dilapidated, decayed, unsanitary and in a state of disrepair likely to cause sickness, or disease or to work injury to the health, safety and welfare of the occupants." Upon cross examination he gave a breakdown of his estimate of repair costs, item by item, stating that he had never been in the building construction business and had obtained no cost estimates but based his conclusions upon his own general experience. The Assistant Inspector of Buildings testified before the commission that Horton, the owner, had made no counterpro-

posal as to repair of the property, but has requested several times that he be granted permission "to make repairs on his own grounds."

The evidence offered by the owner before the commission consisted of testimony by the owner's rental agent, who estimated the value of the house to be about $2,000 and the cost of repairs necessary "to put it in what you would consider first class rental condition" to be not over $650. In his opinion, the property is not depleted as much as 60% and the expenditure of $650 for repairs would bring the house into conformity with the Greensboro Housing Code. He was also of the opinion that the condition of the house "is because of the condition of the tenants."

The three other witnesses for the owner were men of considerable experience in the business of construction and maintenance of houses in the City of High Point. None of them was familiar with the provisions of the Greensboro Housing Code, but they expressed their several opinions that the house was presently fit for human habitation, or could be made so with the expenditure for repairs of from $500 to $700, and that its present value was from $2,200 to $2,800. One of these witnesses, who had inspected the house shortly before testifying, was of the opinion that it is suitable for human habitation and is not dangerous, though it needs cleaning badly due to "filth that was in the house," which had nothing to do with its structural condition. The house rents for $10.00 a week.

Frazier, Frazier & Mahler by Robert H. Frazier and Harold C. Mahler for appellant.

Jesse L. Warren, City Attorney, and William I. Thornton, Jr., Assistant City Attorney, for appellees.

LAKE, Justice.

The evidence, though in conflict, includes testimony which supports the findings of fact made by the Housing Commission and approved by the Superior Court. Consequently, for the purpose of this appeal, we accept as true the findings that the petitioner's house is presently unfit for human habitation and dangerous, and that repairs *necessary to bring it into conformity with the Housing Code* will cost 60%, or more, of the present value of the building. These findings were made after notice and

after a hearing in which the record discloses no failure to comply with prescribed procedures.

The finding that the petitioner's house is unfit for human habitation would authorize the city to forbid the use of it for such purpose while it remains in that condition. See *Dale v. Morganton,* 270 N.C. 567, 155 S.E. 2d 136. That, however, is not the question presented in this case. This Court has recognized the authority of a city to order the removal of a structure unlawfully erected in violation of its valid zoning ordinance. *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706. That, also, is not the question before us. In *State v. Walker,* 265 N.C. 482, 144 S.E. 2d 419, we affirmed the conviction of the owner of a dwelling house, charged with remodeling and repairing it himself, without first applying for and obtaining a permit from the city. There, as here, the city's Superintendent of Building Inspection had ordered the dwelling demolished, having found it unfit for habitation, but, unlike the present case, it was found in the Walker case that the house could neither be altered nor improved so as to comply with the minimum requirements of the city's housing code. Nevertheless, the judgment which this Court affirmed imposed a sentence suspended on condition that the owner comply with the city's housing code within thirty days. The question in that case was not the authority of the city to demolish the building without paying for it, but the authority of the city to prohibit the making of repairs without a permit. It is within the police power of the State to establish minimum standards of design and materials in the construction of buildings for the safety of the occupants, their neighbors and the public, and this power may be and has been delegated to cities and towns. *State v. Walker, supra.* This, too, is not the question now before us.

We have, in numerous recent decisions, also recognized that the State may delegate, and has delegated, to cities the power to take private property in slum areas under the power of eminent domain, upon payment to the owner of just compensation therefor, the city's purpose being to destroy structures thereon and then to resell the land so as to redevelop the area or to construct thereon low cost housing to be owned by the city and leased to tenants. See: *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391; *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688; *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693. On the other hand, we have held that

even the State, itself, may not, under the guise of the police power, regulate the use of property for aesthetic reasons which have no real or substantial relation to the public health, safety or morals, or to the general welfare. *State v. Brown* and *State v. Narron,* 250 N.C. 54, 108 S.E. 2d 74. It is well established that a municipal corporation has no inherent police power, but may exercise such power only to the extent that it has been conferred upon the city by statute. *Dale v. Morganton, supra; State v. Furio,* 267 N.C. 353, 148 S.E. 2d 275. Obviously, the Legislature cannot confer upon a city a power which the Legislature, itself, does not have. Consequently, a city may not, under the guise of the police power, destroy private property for aesthetic reasons alone.

[1, 2] In *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 99 L.Ed. 27, the Supreme Court of the United States said, "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled." The expression "the law of the land," as used in Art. I, § 17, of the Constitution of North Carolina (Art. I, § 19, of the amended Constitution, ratified at the general election in 1970), has the same meaning as the expression "due process of law." *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731. Nevertheless, a decision of the Supreme Court of the United States construing the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, though persuasive by reason of our respect for the views of that Court, does not control our interpretation of the Law of the Land Clause in the Constitution of North Carolina. Consequently, the above quoted declaration in the Berman case does not release the General Assembly of North Carolina, or its delegatee, from limitations imposed upon it by the Law of the Land Clause as construed by this Court.

The solution of the question before us in the present case is, therefore, not determined by any of the above cited decisions. The present question is:

[3] May a city of this State, pursuant to an ordinance adopted under the authority of G.S. 160-182 *et seq.,* upon finding that a dwelling house therein is unfit for human habitation and that repairs, sufficient to bring it into compliance with the city's housing code, will cost 60% or more of the value of the unrepaired building, demolish the building without paying compensation to the owner, and fasten upon the lot a lien for

the cost of the demolition, without giving the owner a reasonable opportunity to bring the building into conformity with the Housing Code?

We hold that the city may not do so under the circumstances of this case.

[4] The record discloses that this petitioner has made no specific proposal to the city for the repair of his house. However, the order served upon him and the ordinance upon which it rests do not offer him that alternative to demolition of the building. He was served with the blunt direction, Destroy the house within the time specified or the city will do so and charge you for the expense of its demolition. The ordinance is mandatory in its terms. It leaves the Inspector of Buildings and the Housing Commission no alternative to destruction when the cost of repair will exceed 60% of the unrepaired value of the building. Faced with such an order and such an ordinance, the owner is not required to propose an alternative remedy for the undesirable condition of his building before asserting his constitutional right in the courts.

The city does not contend that this house cannot be repaired so as to bring it into conformity with the standards prescribed in its Housing Code. It does not rely upon, or find, the existence of a threat to the safety of persons or property so imminent that immediate destruction of the building is necessary to avoid the danger. Cases dealing with destruction of animals afflicted with an infectious disease, with destruction of contaminated food or destruction of a type of tree which, by its inherent, unalterable nature is a breeding place for a parasite which destroys another, more valuable type of tree are not in point here. See *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568.

This property is located in an area designated by the city's Redevelopment Commission as a project to be carried out by that commission. The fact that the city does not have available, or has not appropriated to its Redevelopment Commission, funds for purchasing the property, or for taking it by eminent domain, does not confer upon the city the power to take it for destruction without compensation.

The city's argument that Horton's property is not to be taken under the order in question because he will still retain the legal title to the lot, subject to a lien for the cost of demolishing

the house, is not convincing. Horton now owns a house and a lot unencumbered. If the order of the Housing Commission be carried out, he will then own only a lot and it will be subject to a lien. This is not a regulation of the use of his property. This is depriving him of a substantial part thereof. The Law of the Land Clause of the State Constitution forbids this to be done without compensation except when necessary to protect the public health, safety, or morals or the general welfare.

Taking the city's evidence at its full face value, the unrepaired house is fairly worth $3,000 over and above the value of the lot on which it is located. By an expenditure of $2,800 for repairs, Horton can bring the house up to the specifications of the Housing Code for human habitation. Obviously, such expenditure will substantially enhance the present value of the building. Let us assume that the repaired and rehabilitated house will be worth only $5,000 over and above the value of the lot. The order of the Housing Commission denies Horton the right to own a $5,000 house in return for an expenditure of $2,800 and leaves him, instead, with an empty lot subject to a lien for the cost of removing the building.

The Ohio Court of Appeals had before it a similar case in *Abraham v. City of Warren*, 67 Ohio App. 492, 37 N.E. 2d 390. In holding that the city could not destroy the building there in question without affording the owner an opportunity to make it safe for occupancy, the Court said:

> "The only warrant for public interference with plaintiff's building is to secure public safety and to protect the health of those occupying the building. * * *
>
> " 'Desirable as it might be from an aesthetic point of view to have public control of private building, the law does not permit an invasion of private rights on such grounds.' *Maxedon v. Rendigs*, Com'r of Buildings [9 Ohio App. 60, 63] * * *
>
> "It is not the province of this court, and this court will not undertake to decide as an economic proposition whether it would be more desirable for plaintiff to raze the present structure to the foundation and use the material and the cost of repair for the erection of another structure upon that foundation, or to repair and rebuild the present structure. That is a matter in which the plaintiff is entitled to

act upon her own choice and judgment, so long as she pays due regard to the right of the public, and tenants of the building, to secure proper safety and sanitary conditions. Even though it might be entirely unwise from a financial viewpoint for the owner to undertake to preserve so much of her building as is admitted to be safe, she has the right to and is acting within her rights in so doing, so long as she does not impair the lives or property of others maintaining the structure so rebuilt."

The order of demolition in this case, if carried out, would clearly deprive the plaintiff both of property presently owned by him and of the liberty to invest in its improvement. This case is distinguishable from the numerous decisions sustaining the power of a city to forbid the substantial repair and restoration of a building in a fire district, or other area zoned for restricted use, which building, having been in such district prior to its establishment, was permitted to remain therein as a nonconforming use. See: *State v. Lawing,* 164 N.C. 492, 80 S.E. 69; *Zalk & Josephs Realty Co. v. Stuyvesant Insurance Co.,* 191 Minn. 60, 253 N.W. 8; *City of Odessa v. Halbrook,* 103 S.W. 2d 223 (Tex. Civ. App.).

As Mr. Justice Holmes, speaking for the Supreme Court of the United States, said in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416, 43 S.Ct. 158, 67 L.Ed. 322, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

[5] It is quite true that the police power of the State, which it may delegate to its municipal corporation, extends to the prohibition of a use of private property which may reasonably be deemed to threaten the public health, safety, or morals or the general welfare and that, when necessary to safeguard such public interest, it may be exercised, without payment of compensation to the owner, even though the property is thereby rendered substantially worthless. *Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205; *McQuillin, Municipal Corporations,* § 24.552. However, the limit of the police power is the reasonable necessity for the action in order to protect the public. *Prichard v. Commissioners,* 126 N.C. 908, 36 S.E. 353; *Moll Co. v. Holstner,* 252 Ky. 249, 67 S.W. 2d 1; Appeal of Medinger, 377 Pa. 217, 104 A 2d 118. In 16 AM. JUR. 2d, Constitutional Law, § 290, it is said:

"The police power does not include power arbitrarily to invade property rights. [Citing, *Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654.] The lawmaking authorities may not, under the guise of police power, impose restrictions which are unnecessary and unreasonable upon the use of private property. Police regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, and such rights may be limited only to the extent necessary to subserve the public interest."

Again, the same authority states in § 368:

"[P]ublic necessity is the limit of the right to destroy property which is a menace to public safety or health and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way."

[3] In the instant case, it appears from the findings of the Housing Commission that the house in question can be repaired so as to comply with the city's Housing Code, be suitable for human habitation and be no longer a threat to public health, safety, morals or general welfare. To require its destruction, without giving the owner a reasonable opportunity thus to remove the existing threat to the public health, safety and welfare, is arbitrary and unreasonable. Such power may not be delegated to or exercised by a municipal corporation of this State by reason of Art. I, § 17, of the Constitution of North Carolina (Art. I, § *19*, of the revised Constitution, ratified at the general election of 1970).

We do not have before us the question of the authority of the city to destroy this property, without paying the owner compensation therefor, in the event that the owner does not, within a reasonable time allowed him by the city for that purpose, repair the house so as to make it comply with the requirements of the Housing Code.

The judgment of the Superior Court is reversed, and the order of the Housing Commission is vacated without prejudice to the right of the city to amend its ordinance and the right of the Housing Commission thereupon to take such further action in this matter, consistent with this opinion, as it may deem advisable.

Reversed.

VIRGINIA R. MANSOUR AND B. D. RABIL, JR. PLAINTIFFS v. SOPHIE S. RABIL, ALBERT RABIL, SR., GEORGE V. SAFY, AND RICHARD J. RABIL, CYNTHIA ANN RABIL AND ROBERT JOSEPH RABIL, MINORS, BY THEIR GUARDIAN AD LITEM, M. ALEXANDER BIGGS, LESTER RABIL, THELMA R. LANHAN, PAULINE R. KELLY, MARGARET R. GREENWOOD, AND ALICE S. LEWIS, DEFENDANTS

— AND —

PEOPLES BANK & TRUST COMPANY, EXECUTOR OF THE WILL OF SUSIE RABIL, DECEASED
INTERVENOR

No. 26

(Filed 16 December 1970)

1. **Wills § 2— contract to make joint will — sufficiency of terms**

Language in a joint will executed by a husband and wife that "we and each of us contract to and with each other that the following is our joint Will and Testament and in every respect binding on both of us," *held* sufficient, in conjunction with the reciprocal devises and bequests, to show the existence of a contract between the husband and wife to execute a joint will.

2. **Wills § 2— contract to make joint will — consideration**

The mutual promises of a husband and wife constituted sufficient consideration to support their agreement to execute a joint will containing reciprocal provisions.

3. **Seals; Wills § 2— contract to make joint will — consideration — signatures under seals**

Where a joint will executed pursuant to a contract as determined from the language of the will was signed by the husband and wife under seals, the seals are conclusive evidence of the existence of consideration for the contract.

4. **Frauds, Statute of § 7; Wills § 2— contract to devise property**

An indivisible contract to devise real and personal property comes within the purview of G.S. 22-2, Statute of Frauds.

5. **Frauds, Statute of § 7; Wills § 2— contract to make joint will — memorandum — provisions of joint will**

A joint will executed by a husband and wife was itself a sufficient memorandum of their contract for the disposition of their estates to satisfy the Statute of Frauds.

6. **Husband and Wife § 4; Wills § 2— contract to make a joint will — acknowledgment by wife — private examination — curative statutes**

A contract between a husband and wife to make a joint will was void as to the wife because it was not executed by her in accordance with G.S. 52-6, and its invalidity was not affected by the curative statutes, G.S. 52-8 and G.S. 39-13.1(b), where both curative statutes

were enacted after the rights of the parties under the contract vested upon the death of the husband, and the contract was not "in all other respects regular" except for the failure to privately examine the wife as required by the curative statutes.

7. **Wills § 8— revocation of joint will — failure to revoke — probation**

In the absence of a valid contract to the contrary, either signer of a joint will may revoke it in any manner permitted by statute during the life of all the persons signing as testators, but upon the death of one of the persons so signing without a valid revocation by that person, the will may be probated and given effect as his or her will.

8. **Wills §§ 2, 8— contract to make joint will void as to wife — subsequent will of wife — revocation of joint will**

Where a contract to execute a joint will was void as to the wife because it was not executed by her in accordance with G.S. 52-6, and the wife revoked the joint will by execution of a subsequent will, the joint will cannot be probated as the wife's will.

9. **Estoppel §§ 4, 5— acceptance of benefits under a will — estoppel to contest will**

One who accepts benefits under a will and those in privity with such person, including heirs and devisees, are estopped to contest the will or attack its validity.

10. **Estoppel § 5— contract to make joint will void as to wife — acceptance of benefits by wife —estoppel to assert invalidity of contract**

Neither the wife nor her heirs were estopped from contending that a contract between the wife and her husband to execute a joint will was void as to the wife because it was not executed by her in accordance with G.S. 52-6, notwithstanding the wife enjoyed the benefits of the contract by going into possession of the husband's property under the terms of the joint will, since a void contract will not work as an estoppel.

11. **Wills § 64— doctrine of equitable election — joint will void as to wife**

The doctrine of equitable election did not apply to estop the wife from disposing of her property in a manner different from that provided in joint will with her husband which was void as to her where, at the husband's death, she did only what his will authorized her to do—that is, take possession of all his property with the right to use it and even dispose of it during her lifetime—and she was not put to any election under contradictory terms in the will or forced to make a choice between inconsistent benefits.

12. **Wills §§ 34, 40— construction of joint will — estate received by surviving wife**

Provisions of a joint will devising and bequeathing all of testators' real and personal property to their two children "subject always to our life estate therein," and authorizing the wife, if she survived the husband, "in her lifetime, if she thinks best to do so," to convey and encumber the property "in just as full and ample manner as if she

. . . was the absolute owner in fee simple thereof," *held* to give the surviving wife a life estate in the real and personal property of the husband with the power to dispose of it during her lifetime.

13. Husband and Wife § 17— entirety property — survivorship

Land owned by a husband and wife by the entirety passed to the wife upon the death of the husband by right of purchase under the original grant or devise and by virtue of survivorship and not otherwise, the husband having no descendible or devisable estate in such land.

APPEAL by both plaintiffs and all answering defendants from *Copeland, J.*, at the March 1970 Special Session of EDGECOMBE County Superior Court, certified pursuant to G.S. 7A-31 for review by the Supreme Court before determination by the Court of Appeals.

This is an action for a declaratory judgment to construe the will of B. D. Rabil (B. D.) and wife, Susie Rabil (Susie). At the trial all parties waived a jury trial and agreed for the court to hear the evidence, find the facts, and make conclusions of law, the parties stipulating that the issues were: (1) the construction of B. D.'s will, and (2) whether or not the will was executed pursuant to a valid and binding contract between B. D. and Susie, his wife.

The court found the following pertinent facts:

"1. That Betrus D. Rabil died July 12, 1964, while a resident of Edgecombe County, North Carolina, and that Exhibit "A" attached to the complaint for declaratory judgment is an exact copy of the Last Will and Testament of Betrus D. Rabil as the same was probated in this county.

"2. That Susie Rabil, the wife of Betrus D. Rabil, died on February 15, 1969, while a resident of Edgecombe County, North Carolina, and that Exhibit "B" attached to the stipulations is an exact copy of the Last Will and Testament of Susie Rabil, as the same was probated in this county.

"3. That Betrus D. Rabil and Susie Rabil intermarried and that of this marriage two children were born, namely, Virginia R. Mansour and Betrus D. Rabil, Jr.

"4. That the instrument attached to the complaint for declaratory judgment and marked Exhibit "A" was signed by Betrus D. Rabil and Susie Rabil.

"5. That a controversy now exists between the plaintiffs and the defendants as to their respective rights, and property interest acquired by or affected by the terms of Exhibit "A."

* * *

"7. That all of the real and personal property received by Susie Rabil from the estate of Betrus D. Rabil and not disposed of during her lifetime for her own use and benefit or by *inter vivos* transfer is now owned in fee simple by Virginia R. Mansour and B. D. Rabil, Jr., as tenants in common.

"8. That Exhibit "A" was not executed by Betrus D. Rabil and Susie Rabil pursuant to and in accordance with a contract between the parties based upon a valid consideration.

"9. That immediately prior to the death of Betrus D. Rabil, he and Susie Rabil owned the following classifications of property:

"a. Real property solely owned by Betrus D. Rabil.

"b. Real property owned as tenants by the entirety.

"c. Personal property owned by Betrus D. Rabil.

"d. Personal property owned by Susie Rabil.

"e. Personal property jointly owned by Betrus D. Rabil and Susie Rabil with right of survivorship by contract.

"10. That immediately following the death of Betrus D. Rabil and under the terms of Exhibit "A," Susie Rabil went immediately into possession of all of the property, both real and personal, individually owned by Betrus D. Rabil at the time of his death.

"11. That the provisions of General Statute 52-12, now General Statute 52-6, do not arise in this case for the reason that the Court has found that Exhibit "A" was not executed by Betrus D. Rabil and Susie Rabil pursuant to and in accordance with a contract between the parties based upon a valid consideration.

"12. That Betrus D. Rabil and Susie Rabil were more than twenty-one years of age at the time of the execution of Exhibit "A."

"13. That upon motion of Peoples Bank & Trust Company to be allowed to intervene and be made party to this matter, the same was allowed, and that on November 7, 1969 this party filed an answer to the complaint herein. That prior to that time all of the other defendants had filed an answer to said complaint. That on February 16, 1970 the plaintiffs filed a paper writing in the court entitled 'Reply' and that in the portion thereof entitled 'Fourth Reply' they allege as follows:

> 'Plaintiff, without waiving their other defenses and specifically relying upon same, in the alternative, allege that Susie Rabil, upon the death of B. D. Rabil purported to make an election to take and did in fact take property under the instrument dated October 3, 1939 probated as the Will of B. D. Rabil, and thereafter during her lifetime used and enjoyed the properties devised and bequeathed to her by said B. D. Rabil, Sr., and said Susie Rabil and those claiming by, through and under the purported Will of Susie Rabil, or otherwise, are estopped from denying the claim of ownership of plaintiffs under the terms of the Will of B. D. Rabil, Sr.' "

Judge Copeland further found that on 16 March 1970 the plaintiffs moved that the court order the filing of their reply setting up the affirmative defense of estoppel, and in its discretion accept the reply filed on 16 February 1970 without court order as the reply filed pursuit to this order; that defendants moved to strike the reply, which motion the court allowed; that in view of this ruling and in view of the stipulations as to the issues before the court, the court would not rule on the legal title to lands held by B. D. Rabil and Susie Rabil as tenants by the entireties.

Upon the foregoing findings of fact, the court made the following conclusions of law:

"1. That Exhibit "A" was not executed by Betrus D. Rabil and Susie Rabil pursuant to a valid and binding contract between them to execute a joint and mutual Last Will and Testament.

"2. That all of the real and personal property in the possession of Susie Rabil at the time of her death which was individually owned by Betrus D. Rabil at the time of

his death is now the sole property of Virginia R. Mansour and Betrus D. Rabil, Jr., as tenants in common under the terms of Exhibit "A."

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

"1. That the plaintiffs are the owners and entitled to the immediate possession of all real and personal property owned by Betrus D. Rabil individually at the time of his death which were in the estate of Susie Rabil at the time of her death.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cost of this proceeding be taxed against the estate and that by separate order of this court attorneys' fees be awarded in the court's discretion."

In addition to the above findings of fact, the parties stipulated to the following pertinent facts:

"5. No dissent to the Will of Betrus D. Rabil has been filed by Susie S. Rabil.

"6. Susie S. Rabil, age 77, died February 15, 1969. The attached exhibit marked 'Plaintiff Exhibit B' is a true copy of the document probated as the Last Will and Testament of Susie S. Rabil in the Superior Court of Edgecombe County.

"7. The children born of the union of Betrus D. Rabil and Susie S. Rabil were: Virginia Rabil Mansour, B. D. Rabil, Jr.

"8. Prior to the marriage of Betrus D. Rabil and Susie S. Rabil, Betrus D. Rabil had children born of his union with Beulah Hudson; they were: Albert Rabil, Talma Rabil, Margaret Rabil, Lester Rabil, Pauline Rabil.

"9. Prior to the marriage of Betrus D. Rabil and Susie S. Rabil, Susie S. Rabil had children born of her union with George Safy; they were: Sofie Safy, George Victor Safy, Alice Safy, Joe Safy (deceased, without issue), Olga Safy (deceased, without issue).

"10. B. D. Rabil, Jr. and Wadad Abu-Arab by their union had three children who are: Richard J. Rabil, Cynthia Ann Rabil, Robert Joseph Rabil."

The pertinent portions of B. D. Rabil's will relative to the determination of this case are as follows:

> "We, Betrus D. Rabil and Susie Rabil, his wife . . . do hereby make, publish and declare the following to be our joint Last Will and Testament, and *we and each of us contract to and with each other that the following is our joint Will and Testament and in every respect binding on both of us:*
>
> "1. That the real estate now owned by us as tenants by the entirety is for the purposes of this Last Will and Testament to be considered, treated and devised just as if we were tenants in common of said property, and it is to be considered and treated in the same manner in respect of any and all personal property, as well as the real estate that we or either of us as individuals may now own or at any time hereafter own so that all of said property is herein disposed of.
>
> * * *
>
> "3. We devise and bequeath unto our beloved children, Virginia and B. D. Rabil, Jr., *subject always to our life estate therein and further subject to the limitations and conditions, hereinafter set out,* all of the real and personal property of every nature and kind and wheresoever situated that we, or either of us, now own or may hereafter own prior to the death of the survivor. That said Virginia and B. D. Rabil, Jr. shall not, however, come into the ownership and possession of said property, the control, nor enjoy the income and rents therefrom until after the death of both of us. In the event that either one of said children shall die, the survivor shall take the share and part of the child deceased, unless said children may have married and leave children, in which case the children of the child so deceased shall take the share and part in all the real estate and personal property that the parent would have taken, if alive.
>
> "4. [This paragraph contains the identical provisions for B. D. Rabil in the event he had survived Susie Rabil as are made in paragraph 5 for Susie Rabil.]
>
> "5. It is expressly devised and declared to be the joint intent and purpose of both of us that in the event of the death of Betrus D. Rabil prior to the death of Susie Rabil, *that Susie Rabil in her lifetime, if she thinks best to do so*

is hereby authorized and fully empowered to sell, rent out, convey by deed, mortgage, or deed in trust, all or any part of the real estate owned by us or either of us to make deed in fee simple for property so sold or make conveyance in fee of all or any part of said property now owned or hereafter owned by us, or either of us, whether real or personal *in just as full and ample a manner as if she, the said Susie Rabil was the absolute owner in fee simple thereof.* That she, the said Susie Rabil, shall not be responsible, held accountable for or made liable because of any conveyance of said property made by her or by her direction after the death of said Betrus D. Rabil, or account for the income thereof or proceeds of sale. Any limitations, conditions, devise or bequest made herein shall not destroy, affect or impair the right of Susie Rabil to dispose of all and every part of our said property by deed, mortgage or *otherwise,* it being the intent and purpose hereof that said Susie Rabil shall have the full right of *alienation* in respect of all and every part of our real and personal estate *just as if she were the absolute owner in fee simple thereof.*

"6. Ample provision has heretofore been made for Albert, Talma, Margaret, Lester and Pauline Rabil. In addition to the provisions that has heretofore been made, it is directed that *the sum of one hundred dollars* each shall be paid to said Albert, Talma, Margaret, Lester and Pauline Rabil. This amount is in full of all they or either of them take from our estate. Said one hundred dollars payments are directed to be made by our executor or executrix after the death of both of us and not before. [Emphasis added.]

* * *

"In Testimony Whereof, we, the said Betrus D. Rabil and Susie Rabil, have hereunto set our hands and seals, this October 3, 1939.

/s/ Betrus D. Rabil (SEAL)
/s/ Susie Rabil (SEAL)"

The pertinent portions of Susie S. Rabil's will relative to the determination of this case are as follows:

"I, Susie S. Rabil . . . do make, publish and declare this my last Will and Testament, hereby expressly revoking all other Wills at any time heretofore made by me.

* * *

"SECOND: I give and devise to my daughter, Virginia Rabil Mansour all my right, title and interest in the property in Goldsboro, North Carolina, the same being a one-half interest at 111 and 115 E. Walnut Street, and 219 and 221 W. Walnut Street, and a one-third interest in 223 A-B-C Walnut Street.

"THIRD: I give and devise to my son, B. D. Rabil, Jr., property in Roanoke Rapids, North Carolina, designated as 1028-30 Roanoke Avenue; property in the City of Rocky Mount, Nash County, known as 2113 S. Church Street; property in Edgecombe County, City of Rocky Mount known as 320-322 S. Washington Street, now occupied by B. D. Rabil, Jr. and Wimbley Electronics in fee simple.

"FOURTH: I give and devise to my grandchildren, Richard Jamil Rabil, Cynthia Ann Rabil and Robert Joseph Rabil, children of B. D. Rabil, Jr., in equal shares property designated as 103-105-107 Marigold Street, also the building known as 316 S. Washington Street, now occupied by Jesse C. Morton.

"FIFTH: I give and devise to my son, George Victor Safy property in Rocky Mount on the West side of N. Church Street, known as 520-22-26-34 N. Church Street in fee simple.

"SIXTH: I give and devise to my daughter, Sophie Safy Rabil my home at 328 Tarboro Street in the City of Rocky Mount, together with the contents thereof in fee simple.

"SEVENTH: I give and devise to my son-in-law Albert Rabil, Sr. property located on the East side of N. Church Street, Rocky Mount, North Carolina, known as 523-31 N. Church Street, and my beachhouse and the contents thereof, located on Greensboro Street, Wrightsville Beach, North Carolina in fee simple.

"EIGHTH: I give and bequeath to Lester Rabil, Thelma Rabil Lanhan, Pauline Rabil Kelley and Margaret Rabil Greenwood, children of my husband by his first wife, the sum of $500.00 each.

"NINTH: I give and bequeath to my daughter, Alice Safy Lewis the sum of $100.00.

"TENTH: All the remainder of my property, real and personal of every kind and character, wherever the same

may be found, is to be divided equally between my son, B. D. Rabil, Jr. and my daughter, Sophie Safy Rabil."

Braswell, Strickland, Merritt & Rouse by Roland C. Braswell; Boyce, Mitchell, Burns & Smith by G. Eugene Boyce; Farris & Thomas by Allen G. Thomas for plaintiff appellants and plaintiff appellees.

Thorp & Etheridge by William L. Thorp, Jr., for Albert Rabil and Sophie Rabil, defendant appellants and defendant appellees.

Weeks, Muse & Brown by T. Chandler Muse for George Victor Safy, defendant appellant and defendant appellee.

M. Alexander Biggs, Guardian Ad Litem for Richard J. Rabil, Cynthia Ann Rabil and Robert Joseph Rabil, defendant appellants and defendant appellees.

Defendants Alice S. Lewis, Lester Rabil, Thelma R. Lanhan, Pauline R. Kelly, and Margaret R. Greenwood elected not to file Answer, made no appearance in this action, were not represented by counsel, and did not appeal.

S. L. Arrington for Peoples Bank & Trust Company, Executor of the will of Susie Rabil, Intervenor.

MOORE, Justice.

The first question is: Was the will of B. D. Rabil and Susie Rabil executed pursuant to a valid, binding contract? There is no evidence of any contract between B. D. and Susie outside the will itself, and the contract, if any, must be determined from the language of the will.

[1, 2] The will of B. D. and Susie contains the following language:

> "We, Betrus D. Rabil and Susie Rabil, his wife . . . do hereby make, publish and declare the following to be our joint Last Will and Testament, and *we and each of us contract to and with each other that the following is our joint Will and Testament and in every respect binding on both of us.*" (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." *Olive v. Biggs,* 276 N.C. 445, 173 S.E. 2d 301. The trial court, however, found that this will was not executed pursuant to and in accordance with a contract between the parties because of the failure of consideration. "A sufficient consideration for a contract between husband and wife to make wills containing reciprocal provisions and providing for the disposition to be made of their property on the death of the survivor may exist in the promises of the spouses to one another to execute such a will provided it appears that the consideration was mutual in the respect that each spouse promised in reliance upon the promise of the other." 57 Am. Jur. § 699 (1948). Or, as stated in Annot., 169 A.L.R. 9, 32: "The mutual promises of husband and wife may be a consideration to support their agreement to execute jointly a will containing reciprocal provisions." *Accord, Godwin v. Trust Co.,* 259 N.C. 520, 131 S.E. 2d 456. In *Godwin,* our Court quoted with approval from *Lawrence v. Ashba,* 115 Ind. App. 485, 59 N.E. 2d 568, as follows: "It is apparent, however, that their minds did meet on a particular testamentary disposition of the property to accomplish a particular purpose, and that they intended the wills made pursuant thereto to remain unrevoked at their death. The mutual agreement of the makers of the will was sufficient consideration to bind the promisors."

[3] The signatures of B. D. and Susie are under seals. "At common law a seal imports a good consideration for the instrument to which it is attached, and under the strict common law doctrine, a device constituting a technical seal is conclusive evidence of the existence of a consideration, and the absence thereof cannot be shown even by clear and indisputable evidence." 47 Am. Jur., Seals § 13 (1943); *Thomason v. Bescher,* 176 N.C. 622, 97 S.E. 654.

We hold there was sufficient consideration to support a contract between the parties to the will and that the trial court erred in its finding of fact No. 8, "that Exhibit 'A' was not executed by Betrus D. Rabil and Susie Rabil pursuant to and in accordance with a contract between the parties based upon a valid consideration."

[4, 5] An indivisible contract to devise real and personal property comes within the purview of G.S. 22-2, Statute of Frauds. *Pickelsimer v. Pickelsimer,* 257 N.C. 696, 127 S.E. 2d 557; *Humphrey v. Faison,* 247 N.C. 127, 100 S.E. 2d 524;

Jamerson v. Logan, 228 N.C. 540, 46 S.E. 2d 561. But a joint will may itself be a sufficient memorandum of such contract to satisfy the Statute of Frauds. *Olive v. Biggs, supra; Godwin v. Trust Co., supra.* This being true, the requirement of the statute is met. There was a valid contract between B. D. and Susie based upon sufficient consideration unless the contract is void because it was not executed as required by G.S. 52-6.

[6] The trial court held that the provisions of G.S. 52-6 did not apply since there was no contract between the parties for want of a proper consideration. This Court having overruled that finding, the applicability of G.S. 52-6 becomes germane. The pertinent provisions of G.S. 52-6 are as follows:

> "(a) 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, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, nor shall any separation agreement between husband and wife be valid for any purpose, unless such contract or separation agreement 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.
>
> "(b) The certifying officer examining the wife shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife. The certificate of the officer shall be conclusive of the facts therein stated but may be impeached for fraud as other judgments may be."

In *Olive v. Biggs, supra*, our Court stated:

> " . . . 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."

If G.S. 52-6 is applicable, plaintiffs contend that G.S. 52-8 and G.S. 39-13.1(b) (curative statutes) would take this case out of the operation of G.S. 52-6.

G.S. 52-8 provides:

"Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between January 1, 1930, and June 20, 1963, which does not comply with the requirement of a private examination of the wife and which is *in all other respects regular* is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation." (Emphasis added.)

G.S. 39-13.1(b) provides:

"(b) Any deed, contract, conveyance, lease or other instrument executed prior to February 7, 1945, which is *in all other respects regular* except for the failure to take the private examination of a married woman who is a party to such deed, contract, conveyance, lease or other instrument is hereby validated and confirmed to the same extent as if such private examination had been taken, provided that this section shall not apply to any instruments now involved in any pending litigation." (Emphasis added.)

G.S. 52-8 was amended in 1967 substituting "January 1, 1930" for "October 1, 1954," and G.S. 39-13.1(b) was passed in 1969. The will in question was executed October 3, 1939, and the rights of the parties vested in 1964 upon the death of B. D. Rabil. Both G.S. 52-8 and G.S. 39-13.1(b) were enacted by the Legislature subsequent to 1964. A void contract cannot be validated by a subsequent act, and the Legislature has no power to pass acts affecting vested rights. *Booth v. Hairston,* 193 N.C. 278, 136 S.E. 879; *Foster v. Williams,* 182 N.C. 632, 109 S.E. 834; 7 Strong's N.C. Index 2d, Statutes § 8; 7 Strong's N.C. Index 2d, Curative Statutes § 9. It is also noted that each of the curative statutes provides that an instrument which is *in all other respects regular* except for the failure to take the private examination of a married woman who is a party to such instrument is validated to the same extent as if such private examination had been taken. In this case, not only was the private examination of Susie not taken but there was no finding by the certifying officer of his conclusions and findings of fact as to whether or not said contract was unreasonable or injurious to the wife as required by G.S. 52-6(b) and no acknowledgment was taken before an officer as required by G.S. 52-6(c).

We hold that under the provisions of G.S. 52-6 the contract to make a will was void as to Susie and that this was not affected by the curative statutes, G.S. 52-8 and G.S. 39-13.1(b).

[7, 8] In the absence of a valid contract to the contrary, either signer of a joint will may revoke it in any manner permitted by statute during the life of all the persons signing as testators, but upon the death of one of the persons so signing without a valid revocation by that person, the will may be probated and given effect as his or her will. Thus, upon the death of B. D., the will in question was properly probated as his will. *Olive v, Biggs, supra; In re Will of Watson,* 213 N.C. 309, 195 S.E. 772; *In re Davis' Will,* 120 N.C. 9, 26 S.E. 636. Had Susie done nothing to revoke the joint will, at her death it could have been probated as her will. However, since Susie revoked the joint will by the execution of a subsequent will (G.S. 31-5.1(1)), the joint will cannot be probated as the will of Susie, and the subsequent will of Susie, if in all other respects valid, could properly be probated as her last will and testament.

[9-11] Plaintiffs further contend that since Susie enjoyed the benefits of the contract and ratified it by going into possession of the property under the will of B. D. that her heirs should be estopped from contending that the contract is void even if it was not executed in accordance with G.S. 52-6. The general rule is that one who accepts benefits under a will is estopped to contest it or attack its validity. *Poplin v. Hatley,* 170 N.C. 163, 86 S.E. 1028; Annot., 28 A.L.R. 2d 121, 144. Where a party would be estopped persons in privity with such party, including heirs and devisees, are estopped. *Hayes v. Ricard,* 244 N.C. 313, 93 S.E. 2d 540; 3 Strong's N.C. Index 2d, Estoppel § 5. However, a void contract will not work as an estoppel. *Bolin v. Bolin,* 246 N.C. 666, 99 S.E. 2d 920; *Daughtry v. Daughtry,* 225 N.C. 358, 34 S.E. 2d 435; *Fisher v. Fisher,* 218 N.C. 42, 9 S.E. 2d 493. Therefore neither Susie nor her heirs were estopped by the contract. Nor were they estopped by B. D.'s will. At B. D.'s death Susie did only what his will authorized her to do; that is, to take possession of all the real and personal property belonging to B. D. with the right to use it and even dispose of it if she desired during her lifetime. She was not put to any election under contradictory terms in the will, or forced to make a choice between inconsistent benefits. She was not then estopped under the will from disposing of the property belonging to her as she

saw fit. For as this Court stated in *Burch v. Sutton,* 266 N.C. 333, 335, 145 S.E. 2d 849:

> "The doctrine of equitable election is in derogation of the property right of the true owner. Hence, the intention to put a beneficiary to an election must appear plainly from the terms of the will. *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29; *Bank v. Misenheimer,* 211 N.C. 519, 191 S.E. 14; *Rich v. Morisey,* 149 N.C. 37, 62 S.E. 762; *Walston v. College,* 258 N.C. 130, 128 S.E. 2d 134. 'An election is required only when *the will* confronts a beneficiary with a choice between two benefits which are *inconsistent with each other.*' *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598. An election is required only if the will discloses it was the testator's manifest purpose to put the beneficiary to an election. *Bank v. Barbee,* 260 N.C. 106, 110, 131 S.E. 2d 666."

Under the stipulations entered into by the parties, the only remaining matter for the consideration and determination by the court is the construction of the B. D. Rabil will. In *Olive v. Biggs, supra,* the Court said:

> " . . . [T]he 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."

As Justice Bobbitt (now Chief Justice) said in *Trust Co. v. Wolfe,* 245 N.C. 535, 96 S.E. 2d 690:

> "When undertaking to reconcile apparently conflicting provisions 'greater regard must be given to the dominant purpose of a testator than to the use of any particular words.' *Trust Co. v. Waddell,* 234 N.C. 454, 461, 67 S.E. 2d 651. If it may reasonably be done, apparently inconsistent subordinate provisions must be given effect in accordance with the general prevailing purpose of the

testator. *Schaeffer v. Haseltine, supra* [228 N.C. 484, 489, 46 S.E. 2d 463]; *Coppedge v. Coppedge, supra* [234 N.C. 173, 176, 66 S.E. 2d 777]."

[12, 13] The will in paragraph 3 provides: "We devise and bequeath unto our beloved children, Virginia and B. D. Rabil, Jr., *subject always to our life estate therein* and further subject to the limitations and conditions, hereinafter set out, all of the real and personal property of every nature and kind and wheresoever situated that we, or either of us, now own or may hereafter own prior to the death of the survivor," and in paragraph 5 provides that " . . . in the event of the death of Betrus D. Rabil prior to the death of Susie Rabil, that Susie Rabil *in her lifetime, if she thinks best to do so,* is hereby authorized and fully enpowered to sell, rent out, convey by deed, mortgage, or deed in trust, all or any part of the real estate owned by us or either of us to make deed in fee simple for property so sold or make conveyance in fee of all or any part of said property now owned or hereafter owned by us, or either of us, whether real or personal *in just as full and ample a manner as if she, the said Susie Rabil was the absolute owner in fee simple thereof."* (Emphasis added.) Considering these provisions and the will in its entirety, we think it apparent that the intent of B. D. was that his wife would not acquire title in fee to his property, but if she survived him his property was to pass to her for life with the right to dispose of it, if she so desired, during her lifetime. In the real estate owned by B. D. she acquired a life estate with the right to dispose of it during her lifetime. The same was true of any personal property owned by B. D. Land owned by B. D. and wife, Susie, by the entirety, passed to Susie upon the death of her husband by right of purchase under the original grant or devise and by virtue of survivorship and not otherwise. In this property B. D. had no estate which was descendible or devisable. *Isaacs v. Clayton, Commissioner of Revenue,* 270 N.C. 424, 154 S.E. 2d 532; *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598; *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566. Consequently, we hold that the real and personal property owned by B. D. Rabil and not disposed of by Susie during her lifetime passed under his will to Virginia Rabil and B. D. Rabil, Jr., as tenants in common, absolutely and in fee simple; that the real property owned by B. D. Rabil and Susie Rabil as tenants by the entirety passed to Susie Rabil by operation of law; and that consequently any real property owned by B. D. Rabil and Susie Rabil by the entirety and any personal property owned by her individ-

ually and any personal property jointly owned by B. D. Rabil and Susie Rabil with right of survivorship by contract was subject to be devised and bequeathed by her subsequent will. The attempt by her to devise and bequeath real estate and personal property remaining in the estate of B. D. at her death was void as she only had a life estate therein, and at her death this passed to Virginia and B. D. Rabil, Jr., under the will of B. D. Rabil.

The judgment of the trial court is modified in accordance with this opinion.

Modified and affirmed.

STATE OF NORTH CAROLINA v. GEORGE EVERETT HATCHER

No. 69

(Filed 16 December 1970)

1. **Criminal Law § 21— delay in holding preliminary hearing**

   In a prosecution charging defendant with felonious assault and with armed robbery, defendant's contention that he was denied a speedy trial in that he was detained in jail for 41 days without a preliminary hearing is without merit, where a major reason for the delay in holding the preliminary hearing was that the prosecuting witness spent 28 days in the hospital recovering from the assault.

2. **Constitutional Law § 30; Criminal Law § 21— right to speedy trial — delays in preliminary hearing**

   Constitutional requirements with respect to a speedy trial apply to a preliminary hearing if unreasonable delay in conducting the hearing works a similar delay in the trial.

3. **Criminal Law § 66; Indictment and Warrant § 6— validity of arrest — contention of illegal photographic identification**

   Defendant's contentions that his arrest was based on an illegal photographic identification by the prosecuting witness and that the evidence obtained as a result of the arrest was consequently inadmissible, *held* without merit, where there was evidence that, prior to the photographic identification, the prosecuting witness had ample opportunity to observe the defendant on the night of the crime and to learn his name, and where the officer had probable cause to arrest the defendant. G.S. 15-20.

4. **Criminal Law § 66— "mug shot" photograph of defendant — admissibility**

   A police department "mug shot" photograph of the defendant was properly admitted to illustrate testimony relating to the defendant's

identity, where the words "Greensboro Police Department—11/67" were deleted from the photograph prior to its admission.

5. **Robbery § 6; Criminal Law §§ 26, 127— arrest of judgment — conviction of two offenses arising out of the same occurrence**

A defendant who was convicted of armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the assault conviction when both offenses arose out of the same occurrence; defendant's contention that the rule should work in reverse so as to nullify the armed robbery conviction is not sustained.

6. **Criminal Law § 127— arrest of judgment**

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

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

APPEAL by defendant from decision of the Court of Appeals, 9 N.C. App. 352, 176 S.E. 2d 401, upholding judgment of *Collier, J.*, at 20 April 1970 Criminal Session, GUILFORD Superior Court.

Defendant is charged in separate bills of indictment with (1) a felonoius assault upon James Edward Brown on 30 October 1969, and (2) armed robbery of James Edward Brown on 30 October 1969, including the felonious taking of Brown's 1962 Pontiac automobile valued at $500. The two charges arise out of one and the same altercation.

The State's evidence tends to show that on 30 October 1969 James Edward Brown lived in Room 539 at the O'Henry Hotel in Greensboro. Around 9 p.m. on that date he left his room and went to the General Greene Restaurant on Greene Street in the City of Greensboro. On arrival there he took a seat at the bar, ordered a glass of water and a beer, and talked with the waitress, Doris Campbell. The defendant George Everett Hatcher entered the restaurant, took a seat next to Brown, and they became acquainted. Defendant gave the name of Bobby Hatcher. They talked for about an hour and defendant left the restaurant. When Brown went outside about 10 p.m. defendant was standing there and asked Brown to drive him home, saying that he first wanted to stop by his girl friend's home. Brown consented to do so and they entered Brown's car, a 1962 Pontiac Bonneville, green two-door hardtop. Brown was not familiar with the area and defendant directed him. They drove to a house

on East Market Street where defendant went inside, returned about ten minutes later and instructed Brown to "keep out 70 toward Burlington." They went east on U.S. 70 and defendant instructed Brown to turn off on an unpaved road, which he did. They drove down the dirt road a short distance, passed a house, and defendant said, "This is as far as we're going." Brown stopped the car and looked over at defendant who had a pistol in his hand. Defendant told Brown to empty his pockets, shot the left front window out of the car and repeated the command: "I told you to empty your pockets." Brown was having difficulty emptying his pockets while in a sitting position and suggested that it would be better if he could get out of the car. As he turned to open the door defendant shot Brown in his right upper arm, and as Brown continued turning he felt two more shots in the back. At that time defendant got out of the car on the right side, walked around to the left side, opened the door and struck Brown a heavy blow on the head. The next thing Brown remembered he was lying on the ground and could feel defendant going through his pockets. Immediately thereafter Brown heard the car start up, turn around and leave. He next remembered being very cold and in much pain whereupon he began crawling toward the house they had passed. He saw the lights from the house and crawled toward the lights. When he finally arrived at this house he opened the door of a car that was parked in the yard and began honking the horn. A light appeared on the porch and someone inquired, "Who is there?" He told the person that he was hurt and had been robbed. Shortly thereafter in response to a telephone call Deputy Sheriff Pettigrew came and carried Brown to Cone Memorial Hospital.

The same night Officer Pettigrew carried Brown to the hospital, Brown told the officer that he had picked up a man at General Greene's and was carrying him home; that he heard a waitress call the man "Bobby Hatcher." Later that same night the officer brought a photograph to the hospital and told Brown he wanted him to look at it. Brown did so and immediately said, "That's the man who shot and robbed me."

A cut in Brown's head was sewed up by Dr. Coggeshall in the emergency room about 2 a.m. on the morning of October 31, and Dr. Deaton treated him thereafter. Examination of Brown revealed three pistol shot wounds on the right side. One struck his right arm just below the socket and broke the arm. The other two missed the arm, entered the right chest with one of

them piercing a lung and lodging in the backbone. Brown had blood in his kidney and blood was oozing into the chest. He was given appropriate treatment, remained in intensive care until 5 November and in the hospital until 28 November, at which time he was released and taken to Rockingham County to recuperate with his relatives. The doctor dismissed him on 29 December 1969.

As a result of information given him by James Edward Brown, Officer Pettigrew talked with the waitress Doris Campbell at the General Greene Restaurant and was informed by her that defendant and Brown left the restaurant together. The officer then went by defendant's home and saw Brown's 1962 Pontiac parked on the street directly in front of it. Officer Pettigrew then obtained warrants, returned to defendant's home at 601 Park Avenue at approximately 6 a.m. on the morning of October 31, knocked on the door, and advised defendant when he came to the door that he had two warrants for him. The officer read the warrants. Defendant seemed to be slightly intoxicated and came to the door with two pistols in his hands. Defendant was arrested and searched incident to the arrest. In his pockets the officer found a small pocket knife, the keys to Brown's car and part of the key ring which had been broken. In addition, what appeared to be a part of a .22 pistol was found in defendant's left front pocket together with 181 rounds of .22 ammunition. Examination of Brown's car there on the street revealed a shattered window on the driver's side, blood marks on the car and blood and broken glass on the seats. The license number coincided with the number which had been furnished the officer. The keys taken from defendant's pocket fit the switch and were used by the officer to start the car. Defendant's only statement was that he wished he had killed the man.

Defendant's evidence tends to show that on 30 October 1969 he was living with his parents at 601 Park Avenue. He saw James Edward Brown at Brandon's News Stand at approximately 7 p.m. and went to the General Greene Restaurant about 8 p.m. Brown was there and they drank and talked for quite a while and then went to Brown's car parked on the O'Henry Hotel parking lot and drank some whiskey. Brown made suggestive advances to him at that time, which he repulsed, and they reentered the General Greene Restaurant, had another beer, and left about 10 p.m. They returned to Brown's car and were accosted by two men, Ernest Chatman and Harold Johnson, who

appeared to be angry because Brown had failed to keep a date with them at his room, but Brown drew a gun and scared them away. Defendant and Brown then took another drink and drove to the Quick Stop on 421 south where they met two girls. Brown gave them canned drinks which he took from the trunk of his car and displayed ten one hundred dollar bills which he gave to defendant with instructions to show them to the girls. A man named Larry Wilson was there playing the harmonica and was invited to join defendant and Brown. Defendant returned Brown's $1,000 to him and they left, accompanied by Larry Wilson, and returned to the General Greene. They then proceeded to Huffine Mill Road ostensibly to see defendant's girl friend, but Brown took the wrong road, pulled off, and renewed his improper advances. When they were repulsed, Brown drew a gun on defendant and said, "Big boy do you realize what I can do with this?" Defendant hit Brown in the head with a chaser bottle, scuffling ensued, shots were fired, and defendant kicked Brown out one side of the car while falling out the other. Defendant ran and while running heard a shot "and something like metal hitting against metal." Shortly thereafter Larry Wilson overtook defendant driving the car. Defendant got in the car and they drove around but eventually returned to the place where Brown had been left. On arrival they found the sheriff's car at a nearby house and they continued to defendant's home on Park Avenue where defendant went in and told his mother what had happened. Defendant retired for the night and his kid brother took Larry Wilson home. The next morning the sheriff came to the house and arrested him.

Defendant admitted on cross examination that he had been tried and convicted on different charges of affray, fighting, assault on a police officer, accessory to common-law robbery, assault on a female, hit-and-run driving, public drunkenness, carrying a switchblade knife, driving drunk, resisting arrest, discharging firearms within the city limits, and felonious assault.

Following his arrest, defendant's bond was set at $5,000 in each case. After he was taken into custody on these charges, defendant's probation officer served a probation violation on him and he was thereafter in custody not only in these two cases but also on the probation matter. He was unable to make bond and was held in jail forty-one days pending recovery of James Edward Brown sufficiently to attend court and testify.

The jury returned a verdict of (1) guilty of assault with a deadly weapon and (2) guilty of armed robbery. On the assault conviction defendant was sentenced to two years in prison. On the armed robbery conviction he was sentenced to a term of 18-30 years in State's Prison. He appealed to the Court of Appeals and that court held that defendant, having been convicted of armed robbery, could not be convicted of the lesser included offense of assault with a deadly weapon, since both offenses arose out of the same act. The verdict in the assault case was thereupon set aside and the judgment arrested. The armed robbery conviction and the sentence pronounced thereon was upheld. Defendant appealed to this Court, allegedly as of right under G.S. 7A-30(1), asserting involvement of substantial constitutional questions, and assigning errors noted in the opinion.

Wallace C. Harrelson, Public Defender, for the Defendant Appellant.

Robert Morgan, Attorney General, and Edward L. Eatman, Jr., Staff Attorney for the State.

HUSKINS, Justice.

[1] Defendant asserts he was held in jail forty-one days without bail before a preliminary hearing was conducted and contends he was thus denied a speedy trial in violation of his rights under the Sixth Amendment to the Federal Constitution. He moved to quash the bills of indictment on that ground and assigns as error the denial of his motion.

[2] Constitutional requirements with respect to a speedy trial apply to a preliminary hearing if unreasonable delay in conducting the hearing works a similar delay in the trial. *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969). Here, however, neither the hearing nor the trial was unreasonably delayed to the prejudice of the defendant. The record discloses that the prosecuting witness, James Edward Brown, remained in Cone Memorial Hospital for twenty-eight days and then went to a relative's home in Rockingham County to recuperate. As soon as he was able to travel he came to Greensboro and the hearing was held. This alone negates the suggestion that prosecution of the cases against defendant was negligently or arbitrarily delayed by the State. In addition, however, the record further shows that while Brown was still in the hospital he was taken to the courthouse on one occasion to testify at a preliminary

hearing, but defendant's privately employed counsel was unable to attend and the hearing was postponed.

Principles governing the right to a speedy trial in North Carolina are outlined with clarity and accuracy by Justice Sharp in *State v. Johnson, supra.* The following language from that opinion is appropriate here:

> "The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870, *appeal dismissed,* 382 U.S. 22, 15 L.Ed. 2d 16, 86 S.Ct. 227 (1965); *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891, *cert. denied,* 376 U.S. 956, 11 L.Ed. 2d 974, 84 S.Ct. 977 (1964); *State v. Webb,* 155 N.C. 426, 70 S.E. 1064.
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> "The possibility of unavoidable delay is inherent in every criminal action. The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case."

In light of the facts this assignment is totally without merit.

[3] Defendant's second assignment of error is based on the contention that his pretrial identification by means of a photograph was so suggestive and conducive to misidentification as to deny him due process of law. On that premise he contends that his arrest was illegal and that the fruits of the search of his person incident to such arrest were tainted and erroneously admitted into evidence.

This assignment must fail because his arrest was legal. In *Simmons v. United States,* 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968), identification by photograph was expressly approved and it was held 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 misidentifica-

tion. This standard accords with our resolution of a similar issue in *Stovall v. Denno,* 388 U.S. 293, 301-302, 18 L.Ed. 2d 1199, 1206, 87 S.Ct. 1967, and with decisions of other courts on the question of identification by photograph." *See People v. Evans,* 39 Cal. 2d 242, 246 P. 2d 636 (1952) ; *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970).

Applying the foregoing standard to this case, there was small chance indeed that the photograph led to misidentification of defendant. The victim Brown had talked to defendant for more than an hour on the night of the crime and had ample opportunity to observe him. Brown had heard the waitress refer to defendant as "Bobby Hatcher." This information was given to Officer Pettigrew and he had verified it by interviewing the waitress. The photograph was then lawfully obtained from the police files and shown to Brown—not so much for identification purposes but to verify an identification already made. Officer Pettigrew was strengthened in his belief that defendant was Brown's assailant when he found the victim's car parked on the street at defendant's place of residence. Certainly at that time he had within his knowledge sufficient facts and circumstances to warrant a man of reasonable caution in the belief that Brown had been shot and robbed and that this defendant was probably the man who did it. By any reasonable standard this constituted probable cause for issuance of the warrant and for defendant's arrest and prosecution. *State v. Matthews,* 270 N.C. 35, 153 S.E. 2d 791 (1967) ; G.S. 15-20. Viewed in that context and evaluated in light of the totality of circumstances, there is little room for doubt that defendant's identification was correct.

We therefore hold that the identification procedure used was not such as to deny defendant due process of law and that his subsequent arrest was in all respects lawful. The items seized from him were taken incident to a valid arrest and were therefore properly admitted into evidence. *See State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507 (1970) ; *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970) ; *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969) ; *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970) ; *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967) ; *Simmons v. United States, supra; Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, 84 A.L.R. 2d 933 (1961).

[4] The State offered various photographs of the victim's car and the photograph of defendant which Officer Pettigrew had

obtained from the police files. The latter was offered after the words "Greensboro Police Department" and the date "11/67" had been covered by an evidence sticker in the absence of the jury. Defendant objected to all the photographs and particularly to the police department photograph. The court instructed the jury to "consider these photographs and all photographs only for the purpose of illustrating the testimony of the witness, and for no other purpose, if you find they do so illustrate his testimony." Defendant's third assignment of error is to the admission of the police department photograph.

We find no North Carolina case which has decided this question. There is a conflict of authority among other jurisdictions on the admissibility of "mug shots" or "rogue's gallery" photographs of a defendant. See Annotation: Admissibility and Prejudicial Effect of Admission, of "Mug Shot," "Rogue's Gallery" Photograph, or Photograph Taken In Prison, of Defendant in Criminal Trial, 30 A.L.R. 3d 908 (1970). In the following cases such photographs were held properly admitted when offered for identification purposes *even though they contained visible markings: United States v. Amorosa,* 167 F. 2d 596 (1948); *Dirring v. United States,* 328 F. 2d 512 (1964), *cert. den.* 377 U.S. 1003, *reh. den.* 379 U.S. 874; *People v. Bracamonte,* 253 Cal. App. 2d 980, 61 Cal. Rptr. 830 (1967); *People v. Maffioli,* 406 Ill. 315, 94 N.E. 2d 191 (1950); *People v. Purnell,* 105 Ill. App. 2d 419, 245 N.E. 2d 635 (1969); *State v. Hopper,* 251 La. 77, 203 So. 2d 222 (1967); *State v. Childers,* 313 S.W. 2d 728 (Mo. 1958).

Photographs offered for identification purposes and *bearing visible markings* were held erroneously admitted in the following cases: *People v. Cook,* 252 Cal. App. 2d 25, 60 Cal. Rptr. 133 (1967); *People v. Murdock,* 39 Ill. 2d 553, 237 N.E. 2d 442 (1968); *Blue v. State,* 235 N.E. 2d 471, 30 A.L.R. 3d 902 (Ind. 1968); *Matters v. Commonwealth,* 245 S.W. 2d 913 (Ky. 1952).

In this State photographs are admissible to illustrate the testimony of a witness. "[W]here there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating to the jury his testimony relevant and material to some matter in controversy." *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824 (1948). *Accord, State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512 (1970). If a photograph is relevant and material it will not be excluded because it was

not made contemporaneously with the occurrence of the events at issue. *State v. Lentz,* 270 N.C. 122, 153 S.E. 2d 864 (1967). *See generally* Stansbury, North Carolina Evidence (2d Ed., 1963) § 34.

Defendant contends, however, that introduction of the "mug shot" photograph of him tended to apprise the jury of the fact that he had been in trouble before, reflected unfavorably upon his character and suggested that he had been convicted of other crimes. Upon the facts before us defendant's contention is unsound and cannot be sustained. Before the jury was allowed to see the photograph in question, the portions which might have been prejudicial to him, *i.e.,* the name of the police department and the date, were covered by an evidence tag. This left only an ordinary photograph, which was offered and admitted for illustrative purposes bearing upon identification of defendant. The photograph was relevant and material on the question of identity and could not have been prejudicial in the sense suggested by defendant. There was nothing on it to connect defendant with previous criminal offenses. In the following cases photographs offered for identification purposes and *containing labels and markings which were covered or removed* were held properly admitted: *Cooper v. State,* 182 Ga. 42, 184 S.E. 716, 104 A.L.R. 1309 (1936); *State v. O'Leary,* 25 N.J. 104, 135 A. 2d 321 (1957); *State v. Tate,* 74 Wash. 2d 261, 444 P. 2d 150 (1968); *People v. Fairchild,* 254 Cal. App. 2d 831, 62 Cal. Rptr. 535 (1967), *cert. den.* 391 U.S. 955; *Johnson v. State,* 247 A. 2d 211 (Del. Sup. 1968); *Huerta v. State,* 390 S.W. 2d 770 (Tex. Crim. 1965).

We therefore hold that the photograph, with inscription and date deleted, was properly admitted for illustrative purposes on the question of identity. This assignment is overruled.

[5, 6] Defendant's final assignment of error is addressed to the failure of the court to allow his motion in arrest of judgment in the armed robbery conviction. He contends that his conviction of assault with a deadly weapon bars prosecution for the greater offense of armed robbery arising out of the same acts.

"In a criminal prosecution, . . . judgment may be arrested when—and only when—some fatal error or defect appears on the face of the record proper." *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970). *Accord, State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966); *State v. Eason,* 242 N.C. 59, 86 S.E. 2d

774 (1955). Here, the record proper shows upon its face that defendant was charged in two bills of indictment which were consolidated for trial, one bill charging felonious assault and the other charging armed robbery. The jury convicted defendant of assault with a deadly weapon in one case and armed robbery in the other. Since both offenses of which he was convicted arose out of the same occurrence, the former is a lesser included offense of the latter. "An indictment for robbery with firearms will support a conviction of a lesser offense such as common law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault, if a verdict for the included or lesser offense is supported by the evidence on the trial." *State v. Davis*, 242 N.C. 476, 87 S.E. 2d 906 (1955). *Accord, State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496 (1964).

Defendant having been simultaneously convicted of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arising out of the same conduct, the Court of Appeals correctly set aside the verdict of guilty of assault with a deadly weapon and arrested the judgment in that case. Defendant's ingenious argument that the rule should work in reverse so as to nullify the armed robbery conviction is not sustained. *State v. Midyette*, 270 N.C. 229, 154 S.E. 2d 66 (1967), cited by defendant, supports our conclusion.

The decision of the Court of Appeals upholding judgment of the trial court in the armed robbery case and arresting judgment in the assault case is

Affirmed.

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

STATE OF NORTH CAROLINA v. O'NEAL REAMS

No. 43

(Filed 16 December 1970)

1. **Criminal Law § 84; Searches and Seizures § 1— unreasonable searches and seizures — inadmissibility of evidence**

Evidence obtained by an unreasonable search and seizure is inadmissible. Fourth and Fifth Amendments to U. S. Constitution; Article I, § 15, N. C. Constitution; G.S. 15-27.

2. **Criminal Law § 84; Searches and Seizures § 1— reasonableness of search — determination by court**

Whether a search is unreasonable is determined by the court upon the facts of each individual case.

3. **Criminal Law § 84; Searches and Seizures § 1— absence of search — seizure without warrant**

The constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant where no search is required.

4. **Criminal Law § 84; Searches and Seizures § 1— delivery of evidence to officer upon request — absence of search**

When evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures.

5. **Criminal Law § 84; Searches and Seizures § 1— evidence delivered by defendant's wife at officer's request — absence of search**

There was no search within the constitutional prohibition against unreasonable searches and seizures when defendant's wife displayed to officers at their request a shotgun which she had told them defendant had, or when she later delivered the shotgun to an officer in defendant's home after telling another officer that he "could come by and get the gun," where there is no evidence of forcible dispossession or that any of the officers examined defendant's home or engaged in any exploratory quests implying coercion, intimidation or force, actual or constructive, which resulted in the shotgun being delivered to them.

6. **Homicide § 4— first degree murder defined**

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

7. **Homicide § 14— intentional use of deadly weapon causing death — presumptions**

When the defendant admits or the State satisfies the jury beyond a reasonable doubt that the defendant intentionally used a deadly weapon and thereby proximately caused the death of a human being, the law raises presumptions that the killing was unlawful and with malice, thereby constituting murder in the second degree.

8. **Homicide § 4— premeditation defined**

Premeditation means thought beforehand for some length of time, however short.

9. **Homicide § 4— deliberation defined**

Deliberation means an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge 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.

10. **Homicide §§ 4, 18— premeditation and deliberation — inference from brutal slaying**

Premeditation and deliberation may be inferred from a vicious and brutal slaying of a human being.

11. **Homicide § 18— premeditation and deliberation — threats against victim**

Evidence of threats against the victim is admissible to show premeditation and deliberation.

12. **Homicide § 21— first degree murder — premeditation and deliberation — sufficiency of evidence for jury**

The trial court properly submitted the issue of first degree murder to the jury where the State's evidence tended to show that the body of the victim was found lying in the street, that her death was caused by shock and hemorrhage resulting from a shotgun blast that removed part of her lower face, that three spent shell casings found near the body had been ejected from a gun found in defendant's home, that a few minutes before the shooting defendant was seen with the victim near the place where the body was found, and that defendant had threatened to kill the victim.

APPEAL by defendant from *Canaday, J.*, 6 April 1970 Regular Session of DURHAM Superior Court.

Defendant was tried upon a bill of indictment charging him with murder in the first degree. He entered a plea of not guilty.

The State offered evidence tending to show that at about 11:15 p.m. on Thursday, 26 February 1970, Loretta Mae Bratcher was killed by a shotgun blast. Police arrived on the scene in about twenty minutes and began their investigation. The victim's body was found lying in the street in front of her home. Three spent shotgun shells were found near her body. Willie McKiver identified State's Exhibit 4 as a shotgun which he had loaned defendant sometime after Christmas 1969, and stated that defendant had never returned the shotgun to him.

Police Officer Brown testified that he knew defendant O'Neal Reams and that he recognized State's Exhibit No. 4.

The officer was then asked where he had seen the shotgun and, upon objection and motion to suppress by defendant's attorney, the court excused the jury and conducted a *voir dire* hearing.

The State's evidence on *voir dire,* in substance, showed: Detective Cameron and Officer Holt went to defendant's house on the morning of Friday, 27 February 1970, at about 1:00 o'clock a.m. Detective Cameron knocked on the door and defendant's wife came to the door. They identified themselves as police officers and asked if her husband was at home. She stated that her husband left home at about 8:30 p.m. and had not returned. She was then asked if her husband owned a shotgun, and she answered in the affirmative. The officers asked if they could see the gun, and defendant's wife went to a closet, obtained the gun and gave it to the officers for inspection. The officers returned the gun to her and left, after telling her that Loretta Mae Bratcher had been hurt and that her husband was a suspect. At that time neither of the police officers stated that they wanted to make a search. The primary reason for going to defendant's home was to question him, and the officers did not intend to make a search for any object. On this occasion they had no warrant for arrest or search.

On the afternoon of Friday, 27 February 1970, police officers, without a warrant, searched for defendant in his house. They were not looking for a weapon, but for defendant. They failed to find defendant, and left. On the morning of Saturday, 28 February 1970, defendant surrendered to the police, and around noon of the same day his wife came to police headquarters and sought out Detective Cameron. She told him she had not told the truth when she had previously stated to him that her husband had not at any time returned to their house on the night of the homicide. She stated that, in fact, he returned for a short time around 11:00 o'clock and that she did not see him when he left on this occasion. She did see him return to their home at about 11:30 when he placed the shotgun in the closet and left again. Detective Cameron asked her if he could get the gun, and she said that he "could come by and get the gun." Officer Brown, upon request by Detective Cameron, went to defendant's home at about 12:30 p.m. on 28 February, and at that time defendant's wife went to the closet, obtained the gun and gave it to Officer Brown. Defendant offered no evidence on *voir dire.*

At the conclusion of the *voir dire* hearing, the trial judge found extensive facts and thereupon entered conclusions of law as follows:

> 1. That Mrs. Cammie Reams, wife of the defendant, on February 27, 1970, voluntarily displayed the shotgun in question to Officers Cameron and Holt; that at this time she was under no compulsion, the officer not having requested that they be permitted to search defendant's house and not having made an attempt to search defendant's house;
>
> 2. That Mrs. Reams on February 28, 1970, voluntarily and of her own initiative sought out Officer Cameron and told Officer Cameron that he could take the shotgun into his possession if he desired to do so and that, thereupon, Officer Brown at the request of Officer Cameron went to defendant's residence to obtain this shotgun and Mrs. Reams voluntarily delivered the shotgun to Officer Brown;
>
> 3. That the search for the shotgun was not necessary under these circumstances and a search for the shotgun was not made by the Officers.

The court then denied defendant's motion to suppress the evidence relating to the shotgun.

The jury returned to the courtroom and Detective Cameron then testified that he sent the shotgun and the three spent shells found near the body of the victim to the FBI Laboratory in Washington for analysis.

Bobby D. Blackburn, a Special Agent with the FBI, was qualified as an expert in the field of firearms identification. He testified that he had seen State's Exhibit 4 (shotgun) and State's Exhibits 5, 6 and 7 (spent shells), and, after describing the tests made by him, concluded that at least two of the shells had been fired from State's Exhibit No. 4.

Delores Bratcher testified:

> " . . . that O'Neal Reams came to her house on the Friday preceding the day Loretta Mae Bratcher was killed and asked if she, Delores Bratcher, had seen Loretta; that Delores Bratcher said no she had not seen her and O'Neal Reams just kept right on talking, saying that he wanted to find her and talk to her and find out what she wanted to

do, whether or not they were going to still go together; and then O'Neal Reams said 'no, I don't want to talk to her, I am going to kill her'; and said, 'if it is the last thing I am going to do'; and further said 'I am going to kill her if I have to go in Anna Bratcher's house and get her.' Delores Bratcher further testified that she saw the defendant, O'Neal Reams, in January 1970 at Loretta Mae Bratcher's house in Few Gardens where the defendant and Loretta Mae Bratcher had a big fight; that the defendant drew his pistol on Loretta Mae Bratcher."

The State offered evidence which tended to show that a few minutes before the homicide occurred, defendant was with deceased near the place where her body was later found.

Defendant offered no evidence.

The jury returned a verdict of guilty of murder in the first degree with recommendation of imprisonment for life. Defendant appealed from judgment imposed.

Attorney General Morgan and Staff Attorney Blackburn for the State.

Charles Darsie and W. G. Pearson II, for defendant.

BRANCH, Justice.

Defendant assigns as error the denial of his motion to suppress evidence relating to the shotgun that his wife delivered to police officers. He contends that this evidence was obtained by an unreasonable search of his home in violation of the constitutional rights secured to him by the Fourth and Fifth Amendments to the United States Constitution and by Article I, Section 15 of the North Carolina Constitution, and he asserts that his wife could not waive his constitutional rights by consenting to a search of their home.

[1-3] It is well settled, in both federal and state courts, that evidence obtained by unreasonable search and seizure is inadmissible. Fourth and Fifth Amendments to the United States Constitution; Article I, Section 15, North Carolina Constitution; G.S. 15-27; *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684; *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376. However, the constitutional protection claimed by defendant does not extend to all searches and seizures, but only to those which are unreasonable. Whether a search is unreasonable is determined

by the court upon the facts of each individual case. *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858. It is also well settled that the constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant where no search is required. *United States v. Pate*, 324 F. 2d 934. *Cert. den.* 377 U.S. 937, 12 L.Ed. 2d 299, 84 S.Ct. 1341; *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28.

Decision of this assignment of error requires that we first determine whether, under the facts of this case, there has been a search.

> "The term 'search,' as applied to searches and seizures, is an examination of a man's house or other buildings or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. As used in this connection the term implies some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a 'search.'" 79 C.J.S., Searches and Seizures, § 1, p. 775. Quoted in part in *State v. Smith*, 242 N.C. 297, 87 S.E. 2d 593.

[4] We find an abundance of authority supporting the proposition that when the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures.

The Supreme Court of Appeals of Virginia considered this question in the case of *Duffield v. Peyton*, 209 Va. 178, 162 S.E. 2d 915. There defendant was tried upon the charge of murder. He was convicted and the death penalty was imposed. His appeal was not duly perfected and he petitioned for a writ of *habeas corpus ad subjiciendum*, which was dismissed after a plenary hearing. On appeal to Supreme Court of Appeals of Virginia from dismissal of the writ of *habeas corpus*, one of

his assignments of error was that clothes worn on the night of the homicide were introduced at his trial. Defendant contended this evidence was inadmissible because it was obtained as a result of an unreasonable search and seizure. The Court, finding no error in the admission of the clothing, stated:

> "Before the reasonableness or legality of an alleged search may be questioned it is necessary to first determine whether there has actually been a search. 'A search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed.' *State v. Coolidge,* 106 N.H. 186, 191, 208 A. 2d 322, 326. It implies 'some exploratory investigation, or an invasion and quest, a looking for or seeking out. * * * [I]t is generally held that the mere looking at that which is open to view is not a 'search.'" 79 C.J.S., Searches and Seizures § 1, pp. 775, 776.
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> "Here, there was no evidence that Detective Asaro and Cherry obtained entry into Duffield's home by intimidation or trickery. On the contrary they properly identified themselves to Mrs. Duffield as police officers and informed her that they wanted to ask Duffield 'a few questions about what happened last night.' The officers were invited into the house to await Duffield's arrival. As was said in *Robbins v. MacKenzie,* 1 Cir., 364 F. 2d 45, 49, 'We do not think that after a householder, who has been fully and honestly informed of the objectives of the police, makes a responsive gesture of invitation, the courts must engage in a psychological or physiological inquiry into whether the invitation was really meant.' While inside, Mrs. Duffield was merely asked if she knew what clothing her husband had worn the previous day. She was not requested to secure them. However, she voluntarily left the room alone and returned with Duffield's blue trousers and T-shirt for the officers to observe. The officers engaged in no exploration whatever, so the question of her consent to a search is not involved."

The case of *State v. Coolidge,* 106 N.H. 186, 208 A. 2d 322, is factually similar to instant case. There police officers dressed in plain clothes went to the home of Coolidge while investigating the murder of a young girl. They knocked on the door, identified themselves as police officers, and were invited in by defendant's wife. They informed Mrs. Coolidge that it was

possible that her husband would be detained at the station that evening, and told her that, as a part of their investigation of the murder, guns owned by various other persons had been taken for tests. She stated that they had four guns in the house. Defendant's wife went to the bedroom closet and got the guns. The officers "did not look into the closet or feel around" and looked in no other areas of the house except where they were invited. Defendant's wife also pointed out some of her husband's clothing and inquired if it might be something they were looking for, stating that she had no objection to their having them. The court held that the guns and clothes were not taken by search and seizure and, *inter alia,* stated:

> "A search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed. A seizure contemplates forcible dispossession of the owner. *Weeks v. United States,* 232 U.S. 383, 397, 34 S.Ct. 341, 58 L. Ed. 652; *United States ex rel Stacey v. Pate,* 324 F. 2d 934, 935 (7th Cir. 1963); *People v. Woods,* 26 Ill. 2d 557, 188 N.E. 2d 1; *State v. Baron,* 106 N.H. 149, 207 A. 2d 447.
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> . . . .
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> "The evidence warranted the Trial Court's finding that 'there was no search by the police of the premises'; and that 'Mrs. Coolidge fully intended to cooperate with the police in every way and to furnish them freely with both information and guns in order, as she stated, to clear her husband of any suspicion.'
>
> "On the facts and circumstances of this case it is our opinion that the four guns and certain objects of defendant's clothing obtained from his residence on the night of February 2, 1964, by officers McBain and Glennon were not secured by search and seizure. On the contrary they were voluntarily shown and given to them by Mrs. Coolidge without coercion on their part and were taken away by the officers with her consent. Consequently they were not obtained in violation of the Constitution of our state or that of the United States and are not subject to being returned to the defendant and are admissible in evidence if found relevant and material at the trial."

The pertinent facts and holdings of the court in the case of *McCoy v. State,* 241 Ind. 104, 170 N.E. 2d 43, are found in the following paragraph:

"Appellant complains that certain exhibits (merchandise alleged to have been stolen) were obtained in violation of the constitutional right against search and seizure. The evidence shows that the police officers, standing on the porch of defendant's home at the time they were investigating the break-in at the Woolworth store, asked Max Allsup, the appellant's son, to get the merchandise out of his home and the appellant's home and give it to them. This he did. It appears first that there was no actual search of the home and that one of the occupants voluntarily turned over the exhibits to the police. In the law of searches and seizures, the term 'search' implies a prying into hidden places for that which is concealed. *McAdams v. State*, 1948, 226 Ind. 403, 81 N.E. 2d 671."

In the case of *United States v. Pate*, *supra*, petitioner was convicted of murder in the Illinois State Courts and after exhausting his state remedies petitioned the United States District Court to issue a writ of *habeas corpus*. The District Court dismissed his petition and he appealed to the United States Court of Appeals, 7th Circuit. The facts show that while petitioner was in custody as result of the murder investigation, the police noticed a spot on his T-shirt which appeared to be blood. He was questioned about the length of time he had worn the T-shirt, and during the questioning the officer told petitioner that he was going to send someone over to his house and prove he was lying. Petitioner replied, "Go ahead." Two officers went to petitioner's house and questioned his wife. She said he had changed shirts during the day, so the officers asked her to produce the shirt. When petitioner's wife asked if her husband had told officers to come and get the shirt, the officers answered in the affirmative. She gave them a blood-stained shirt, and when petitioner was confronted with the shirt, he confessed. On appeal he contended that the shirt was illegally obtained since his wife could not waive his constitutional right against unreasonable search and seizure. The Court rejected this contention and stated:

"Upon a review of all the evidence, we think petitioner's contention that the blood-stained shirt was obtained by an unlawful search of his house has no merit. Police officers went to the premises where incriminating evidence was found and were voluntarily given the shirt. Their action did

not constitute a search. It is of no consequence that the person who gave the police the blood-stained shirt was petitioner's wife.

"As was said in *Haerr v. United States,* 240 F. 2d 533, 535 (5th Cir. 1957), 'A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest.' Petitioner's privacy was not invaded; there was no inspection or examination of his household. Under these circumstances, we hold there was no search either in an actual or legal sense. *Cf. Lee v. United States,* 95 U.S. App. D.C. 156, 221 F. 2d 29 (1954); *Ellison v. United States,* 93 U.S. App. D.C. 1, 206 F. 2d 476 (1953)."

Accord: *State v. Morris,* 243 S.C. 225, 133 S.E. 2d 744, *cert. den.* 377 U.S. 1001, 12 L. Ed. 2d 1050, 84 S.Ct. 1935; *Irvin v. State,* 66 So. 2d 288 (Fla. 1953), *cert. den.* 346 U.S. 927, 98 L.Ed. 419, 74 S.Ct. 316; *State v. Quinn,* 111 S.C. 174, 97 S.E. 62, 3 A.L.R. 1500; *State v. Richberg,* 171 S.E. 2d 592 (S.C. 1969); *Ritter v. Commonwealth,* 210 Va. 732, 173 S.E. 2d 799.

[5] Our review of the record fails to reveal evidence that any of the officers involved in this case examined defendant's home or engaged in any exploratory quests implying coercion, intimidation or force, actual or constructive, which resulted in the challenged shotgun being delivered to them. Neither is there evidence of forcible dispossession. On the contrary, the shotgun was voluntarily displayed to officers by defendant's wife without any coercion on the part of the officers, and the shotgun was later freely delivered to an officer and taken away by him with her consent.

The evidence in instant case amply supports the trial judge's findings of fact, and the findings of fact in turn sustain his conclusions that "Mrs. Cammie Reams, wife of defendant, on February 27, 1970, voluntarily displayed the shotgun in question to officers Cameron and Holt, . . . that Mrs. Reams on February 28, 1970, . . . voluntarily delivered the shotgun to Officer Brown, . . . [and that] a search for the shotgun was not made by the officers."

We hold that there was no search involved when defendant's wife displayed the shotgun to Officers Cameron and Holt on February 27, 1970 or when she delivered it to Officer Brown on February 28, 1970.

Defendant's principal citation of authority is *State v. Hall*, 264 N.C. 559, 142 S.E. 2d 177. *Hall* differs factually from instant case in that the officers admittedly performed an actual search of defendant's home without a warrant with the consent of his wife while defendant was in jail. The search yielded property which had been stolen, and the officers obtained a confession from defendant when he was confronted with the stolen property. At the defendant's trial the property recovered from his home and his confession were admitted into evidence. The holding of the court in *Hall* places North Carolina in the line of authority which holds that the wife's consent to search husband's home does not waive husband's constitutional right to be secure from unlawful search and seizure. However, *Hall* does not control decision in instant case since here we hold that there was no *search* involved in obtaining the shotgun. Therefore the question of consent to search by the wife is not reached.

The trial judge properly denied defendant's motion to suppress the evidence relative to the shotgun.

Defendant's remaining assignment of error is that the trial judge erred in submitting the charge on first degree murder to the jury.

[6-7] "Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation." Strong's N.C. Index, Vol. 4, Homicide, § 4, p. 194; *State v. Robbins, supra*. When the defendant admits or the State satisfies the jury beyond a reasonable doubt that the defendant intentionally used a deadly weapon and thereby proximately caused the death of a human being, the law raises presumptions that the killing was unlawful and that it was done with malice. Such unlawful killing of a human being with malice is murder in the second degree. *State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305. However, no presumption as to premeditation and deliberation arises from a killing proximately caused by the intentional use of a deadly weapon. *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560.

[8] Premeditation means "thought beforehand for some length of time, however short." *State v. Benson*, 183 N.C. 795, 111 S.E. 869.

[9] "Deliberation means that the act is done in cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of

time, but it means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, 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. Benson, supra.*

[10, 11] Premeditation and deliberation may be inferred from a vicious and brutal slaying of a human being. *State v. Stanley,* 227 N.C. 650, 44 S.E. 2d 196. Also, evidence of threats against the victim are admissible in evidence to show premeditation and deliberation, *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769; *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652.

[12] Here, the State offered evidence tending to show that the body of the victim was found lying in the street and that her death was caused by shock and hemorrhage resulting from a shotgun blast that removed part of her lower face; that three spent shell casings were found near the body which were ejected from the gun later found at defendant's home; that defendant had been seen with the victim near the place where her body was found just a few minutes before the shooting. Further, the State offered evidence that on Friday preceding the victim's death defendant stated, "I am going to kill her (Loretta Mae Bratcher) if it is the last thing I am going to do. I am going to kill her if I have to go in Anna Bratcher's house and get her."

There is ample evidence from which the jury could find that defendant, O'Neal Reams, unlawfully killed Loretta Mae Bratcher with malice and with premeditation and deliberation.

The trial judge correctly submitted the issue of murder in the first degree to the jury.

In the trial below we find

No error.

STATE OF NORTH CAROLINA v. WILLIAM ALEXANDER WALKER

No. 6

(Filed 16 December 1970)

1. **Criminal Law § 138— credit on prison sentence — confinement awaiting trial**

In North Carolina credit is given for time served under a previous sentence for the same conduct, but a defendant is not entitled to credit for time spent in custody awaiting trial.

2. **Criminal Law § 138— credit on prison sentence — confinement under reversed felony conviction**

A defendant whose conviction on a felony charge was reversed by the Court of Appeals was not entitled to deduct the time spent in custody under the felony charge from the sentence of imprisonment received in his subsequent trial on a lesser included offense of the felony, where the time spent in custody under the felony conviction resulted solely from his failure to post appearance bond pending his appeal to the Court of Appeals.

3. **Criminal Law § 138— credit on prison sentence — confinement for mental evaluation**

A defendant was not entitled to receive credit on his sentence for the sixty days he was required to spend under observation in a State hospital for the purpose of determining whether he was mentally competent to stand trial.

4. **Criminal Law § 138— credit on prison sentence — effect of 1969 statute**

The 1969 statute which gives a defendant credit on his prison sentence for the time spent in custody pending appeal is not retroactive, nor does the statute apply when the sentence of imprisonment is reversed. G.S. 15-186.1.

Justice HIGGINS dissenting.

Chief Justice BOBBITT dissenting.

Justice SHARP joins in dissenting opinion of Chief Justice Bobbitt.

ON *certiorari* to the Court of Appeals to review its decision upholding judgment of *Bowman, S.J.*, 1 September 1969 Session, DURHAM Superior Court.

The facts in this case occurred in the following chronological order:

1. Defendant was arrested 22 April 1968 on a warrant charging assault with intent to commit rape and immediately released on bond until his preliminary hearing on 7 May 1968.

2. At the preliminary hearing defendant was bound over to superior court and a new bond set. He was held in custody

awaiting trial from 7 May 1968 until 13 June 1968 when he posted the required appearance bond and was released.

3. On 14 June 1968, a question having been raised as to defendant's ability to plead to the bill of indictment, the presiding superior court judge committed defendant to Cherry Hospital for a period of sixty days for observation after which he was again released on the appearance bond which he had previously posted on 13 June 1968.

4. On 20 November 1968 defendant was tried and convicted of assault with intent to commit rape and sentenced to prison for a term of five to seven years. He gave notice of appeal to the Court of Appeals and appearance bond was again fixed. He was not committed to prison to serve this sentence but remained in custody from 20 November 1968 until 4 February 1969 at which time he posted the required appearance bond and was released.

5. On 30 April 1969 defendant's conviction of assault with intent to commit rape was reversed by the Court of Appeals, 4 N.C. App. 478, 167 S.E. 2d 18, and a new trial ordered on the lesser included offense of assault on a female, he being a male person.

6. On 2 September 1969 defendant tendered a plea of *nolo contendere* in the superior court to the charge of assault on a female, he being a male person (G.S. 14-33 as amended by Chapter 618, Session Laws 1969) and was sentenced to a term of not less than three nor more than six months. Defendant requested the trial judge to allow credit on the sentence imposed for all time previously spent in custody. The motion was denied, and defendant appealed to the Court of Appeals which found no error, 7 N.C. App. 548, 172 S.E. 2d 881, opinion filed 1 April 1970. Commitment was thereafter issued by the Clerk of Durham Superior Court, and defendant allegedly served twenty-nine days of his three to six months sentence pending his petition to this Court for *certiorari*. We allowed *certiorari* to review decision of the Court of Appeals, and on 18 May 1970 ordered the Director of the Department of Corrections to release defendant from custody pending our decision, defendant having executed a bond in the sum of $1,000.00 conditioned upon his appearance in the Durham Superior Court to receive and abide by further orders of the court following decision here.

The record contains the following stipulations:

"1. That the defendant appellant in this case was in custody from May 7, 1968 until June 13, 1968 *in lieu of bond.*

"2. That the defendant appellant in this case was in custody from June 14, 1968 until August 14, 1968 under an order for mental and psychiatric observation.

"3. That the defendant appellant in this case was in custody from November 20, 1968, the date of his first trial, until February 4, 1969 *in lieu of bond pending his appeal.*"

John C. Randall, Attorney for the Defendant Appellant.

Robert Morgan, Attorney General; Edward L. Eatman, Jr., Staff Attorney for the State.

HUSKINS, Justice.

[1, 2] In North Carolina credit is given for *time served* under a previous sentence for the same conduct, but a defendant is not entitled to credit for time spent in custody awaiting trial. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 281 (1970). Until the date of his commitment on or about 21 April 1970, following certification to Durham Superior Court of the decision of the Court of Appeals filed 1 April 1970 and reported in 7 N.C. App. 548, 172 S.E. 2d 881, defendant's status was that of a person under indictment awaiting trial in default of bond and not that of a prisoner serving a sentence. "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." *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633 (1965).

[3] The sixty days defendant spent in Cherry Hospital under observation was ordered before any trial had been held for the purpose of determining whether defendant was mentally competent to plead to the indictment and to assist counsel in the conduct of his defense. This order was for the protection of defendant's rights and was properly regarded by the Court of Appeals as time spent in custody awaiting trial. In no sense did it constitute service of a sentence because no trial had been conducted and no sentence pronounced.

In addition to *Virgil* and *Weaver,* heretofore cited, the following authorities are in accord with the views above expressed: *Williams v. State,* 269 N.C. 301, 152 S.E. 2d 111 (1967) ; *State v.*

Foster, 271 N.C. 727, 157 S.E. 2d 542 (1967); *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522 (1968); *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371 (1968); *North Carolina v. Pearce,* 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 2072 (1969). See Annotation, 35 A.L.R. 2d 1283.

Defendant contends, however, that by virtue of G.S. 15-186.1 he is entitled to credit for time spent in custody (November 20, 1968 to February 4, 1969) pending appeal of his felony conviction to the Court of Appeals.

[4] Chapters 266 and 888 of the 1969 Session Laws (codified as G.S. 15-186.1) were ratified, respectively, on April 22, 1969, and June 16, 1969. Defendant's last day in custody "in lieu of bond pending appeal" was February 4, 1969. Thus these enactments designed to give credit on a prison sentence for all time spent in custody *pending appeal* afford defendant no relief because (1) they are not retroactive and (2) they are *by their language* not applicable to this case in that defendant's sentence of imprisonment was reversed rather than affirmed by the Court of Appeals, 4 N.C. App. 478, 167 S.E. 2d 18. Hence, G.S. 15-186.1 does not apply.

[2] Defendant is entitled to credit for time served on the three to six months sentence following commitment (said to be twenty-nine days) and nothing more. All other time in dispute was simply time spent in custody *in lieu of bond awaiting trial,* or time spent in custody *in lieu of bond pending appeal* for which credit is not authorized by G.S. 15-186.1.

The following language appears in *State v. Weaver, supra:* "From the pronouncement of judgment . . . until said judgment was vacated . . . defendant's *de facto* status was that of a prisoner serving a sentence." This language is entirely consistent with the views expressed here because Weaver was commited to State's Prison to serve his sentence on May 9, 1963—*the same day on which judgment was pronounced.* Thus he was serving his sentence and was neither in custody in lieu of bond awaiting trial nor in custody in lieu of bond pending appeal. Not so here. In this case defendant simply failed to make bond and obtain his release pending appeal of his felony conviction. As a result he remained in Durham County Jail from November 20, 1968, to February 4, 1969, when bail was posted and defendant was released. His release on bond at that time took place nearly three months prior to reversal of his felony conviction by the

Court of Appeals on 30 April 1969. These facts conclusively show that defendant was in custody in default of bail pending appeal rather than in custody serving the felony sentence.

For the reasons stated, the decision of the Court of Appeals is

Affirmed.

Justice HIGGINS dissenting:

The record discloses these facts: On April 22, 1968, Durham County officers arrested William Alexander Walker under the authority of a warrant charging assault with intent to commit rape. At the preliminary hearing on May 7, 1968, the court found probable cause and ordered the defendant held for Grand Jury action. In default of bond, the defendant was committed to jail.

On June 13, 1968, the defendant was able to post bond. The following day, the Superior Court committed him to Cherry Hospital for psychiatric evaluation. At the end of the period of commitment (60 days) the authorities found the defendant was without psychosis and released him on his original bond.

On November 20, 1968, the defendant was tried on an indictment charging assault with intent to commit rape. The jury returned a guilty verdict. The court imposed a sentence of 5 to 7 years in prison and ordered the defendant in custody for the service of the sentence. Although the defendant gave notice of his intention to appeal, he remained in custody under the sentence until February 4, 1969, when he was able to post bond and be at liberty pending decision on his appeal.

The Court of Appeals, on April 30, 1969 (4 N.C. App. 478, 167 S.E. 2d 18) reversed the conviction, holding the evidence was insufficient to support the charge of assault with intent to commit rape. The court, however, concluded the evidence was sufficient to go to the jury on a lesser included offense and remanded the case to the Superior Court of Durham County for trial on the charge of assault on a female by a male person.

At the September, 1969 Session, Durham Superior Court, the defendant entered a *nolo contendere* plea to the misdemeanor charge. The court imposed a prison sentence of not less than three nor more than six months (the latter the maximum for the offense). "Counsel for the defendant moved to set aside the

judgment and excepted to the sentence on the ground that the defendant was entitled to have the time spent in detainment credited on the sentence imposed." The trial court denied the motion. The defendant again appealed.

The Court of Appeals (7 N.C. App. 548, 172 S.E. 2d 881) found no error in the judgment and sentence, and thus denied the defendant's claim of credit for any time served prior to the last sentence, citing as authority *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28.

Many cases and statutes bearing on the questions here for review are cited and discussed in *State v. Virgil, supra; State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633, and in the decision of the Court of Appeals in this case. The correct rule fixing the amount of credit due for time previously served for the same unlawful conduct is succinctly stated in *State v. Virgil, supra:* "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.*" (Emphasis added) The Court's opinion in Virgil (in which this writer joined), after stating the rule correctly, perhaps unduly restricted its application by failing to distinguish between the status of a defendant who is in custody awaiting trial and one who is in custody under sentence after trial. The correct rule is stated in this Court's unanimous opinion in *State v. Weaver, supra:* "From the pronouncement of judgment . . . until said judgment was vacated . . . defendant's *de facto* status was that of a prisoner serving a sentence." In *Patton v. N.C.,* 381 F. 2d 636 (4th Circuit), the court, speaking of credit for time served, said: " . . . (H)e shall not be finessed out of credit for time he was forced to serve under an invalid sentence."

The opinion of the Court of Appeals that the defendant is not entitled to credit for the time spent in jail awaiting his first trial or in the hospital for psychiatric evaluation under the court's order is correct. However, under the authorities, I think the defendant is entitled to credit on his misdemeanor sentence for the time he served under the felony conviction involving the same wrongful conduct. Both the State and the defendant were bound by the judgment in the felony conviction. In no sense could it be said the defendant was in custody awaiting trial. When the Court of Appeals reversed the felony conviction and remanded the cause to the Superior Court for trial of the mis-

demeanor, then the defendant was in custody awaiting trial. In my opinion the defendant is entitled to credit on the misdemeanor sentence for the time spent in custody under the felony sentence (November 20, 1968 until February 4, 1969). I am unable to agree with the Court's decision which denies such credit.

Chief Justice BOBBITT dissenting:

I concur in the dissenting opinion of Justice Higgins. In addition to the views expressed therein, I direct attention to the matters discussed below.

On September 2, 1969, defendant tendered, and the court accepted, a plea of *nolo contendere* to (simple) assault on a female, he being a male person. Imprisonment for six months was the maximum (imprisonment) punishment for this offense. G.S. 14-33. The judgment pronounced imposed an indeterminate sentence of not less than three nor more than six months, which authorized the Commissioner of Correction to retain custody of defendant for the maximum term of six months. G.S. 148-42, as amended by Section 9, Chapter 996, of the Session Laws of 1967. Therefore, it appears affirmatively that the court did not take into consideration the time defendant was in custody (November 20, 1968, to February 4, 1969) pending his appeal from the (subsequently vacated) judgment based on the felony conviction. Indeed, the court denied defendant's request that he receive credit for his confinement in jail during this period.

If defendant is required to serve the maximum term imposed by the judgment of September 2, 1969, in addition to his confinement in jail from November 20, 1968, to February 4, 1969, his term of imprisonment will exceed that permitted by G.S. 14-33. *Cf. State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633. The majority ignore or disregard the hard fact of defendant's actual confinement in jail from November 20, 1968, to February 4, 1969, on the ground he was not then *serving* a sentence but was in custody in default of bond pending the outcome of his appeal. For this reason, it is asserted that defendant's involuntary confinement during this period should not be regarded as punishment.

Defendant had been at liberty under bond immediately preceding his conviction for the felony. When convicted, judgment was pronounced and defendant was ordered into custody. True, bond was set for his release pending appeal. Presumably he was unable to arrange for his release on bond until February 4, 1969. On appeal, the judgment under which he was confined

pending appeal was *vacated*. This dissent relates solely to the time he spent in jail under authority of the invalid judgment. In my opinion, involuntary confinement under an invalid judgment should be considered punishment.

If defendant had pleaded guilty or *nolo contendere* to an offense punishable by imprisonment for a longer term, *e.g.*, two years, it might well be assumed that his confinement in jail under the subsequently vacated felony conviction and judgment was taken into consideration when the court pronounced the three-six months sentence. Such is not the case here.

I agree that the 1969 Act now codified as G.S. 15-186.1 does not apply. When applicable, that statute *requires* that credit be given for the time spent in jail pending appeal when *the judgment* from which the appeal is taken *is affirmed*. It is anomalous indeed to *allow* credit for time spent in jail pending appeal under a conviction and judgment held to be valid and *disregard* time spent in jail pending appeal if the conviction and the judgment pronounced are held to be invalid.

Justice SHARP joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. DANNY McVAY

— AND —

STATE OF NORTH CAROLINA v. WOODROW SIMMONS

No. 66

(Filed 16 December 1970)

1. **Criminal Law § 92— consolidation for trial of robbery indictments against two defendants**

   The trial court did not abuse its discretion in consolidating for trial four indictments charging each of the two defendants with the armed robberies of a husband and his wife, the crimes having allegedly occurred at the same time and place.

2. **Constitutional Law § 32; Criminal Law § 66— in-custody photographs — subsequent photographic identification while defendants at liberty — right to counsel**

   Where defendants were released without charge after they had been interrogated about a murder and photographed, and were at liberty when such photographs were exhibited to and identified by an armed robbery victim as photographs of the men who robbed him and his wife, there exists a unanimity of opinion that defendants' Sixth Amendments rights were not violated by the absence of counsel when the photographic identifications were made.

3. **Criminal Law § 66— admissibility of in-court identification — prior photographic identification — sufficiency of evidence to support court's findings**

In this armed robbery prosecution wherein defendants had previously been identified by the male victim from photographs taken of them at the police station during the investigation of a murder for which defendants were not charged, the trial court did not err in the admission, over defendants' objections, of the in-court identification by the male victim of one defendant as the man who robbed him and of the other defendant as the man who robbed his wife, where there was ample competent evidence on *voir dire* to support the court's finding that each defendant voluntarily went with officers to the police station in connection with the murder case, and there was competent, clear and convincing evidence to support the court's finding that the in-court identification of each defendant was based on what the witness saw at the time of the robbery and did not result from any photographic or pretrial identification procedures suggestive and conducive to mistaken identification.

4. **Criminal Law § 66— in-court identification — necessity for voir dire**

When the admissibility of in-court identification testimony is challenged on the ground it is tainted by an out-of-court identification made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility; when the facts so found are supported by competent evidence, they are conclusive on appellate courts.

5. **Criminal Law § 113— joint trial of two defendants — instructions — separate consideration of guilt or innocence of each defendant**

In this joint trial of two defendants for armed robbery, the trial court sufficiently instructed the jury that it should separately consider the guilt or innocence of each defendant and that it could find one defendant not guilty even though it found the other defendant guilty.

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

APPEAL by each defendant from *Anglin, J.*, June 22, 1970 Schedule "C" Criminal Session of MECKLENBURG Superior Court, transferred for initial appellate review by the Supreme Court under an order entered pursuant to G.S. 7A-31(b)(4).

In separate indictments, each defendant was charged (1) with the armed robbery of "Mrs. Luceille *(sic)* Cain King," and (2) with the armed robbery of Elbert Carroll King.

Defendants, who had been adjudged indigents, were represented by court-appointed counsel, defendant Danny Lewis McVay (McVay) by W. Herbert Brown, Esq., and defendant Woodrow Simmons (Simmons) by James J. Caldwell, Esq.

On motion of the State, and over objection by each defendant, the four cases were consolidated for trial.

The State offered evidence tending to show the facts narrated in the following two paragraphs.

Elbert C. King and Lucille C. King, husband and wife, were robbed at gunpoint on March 4, 1970, about 9:00 p.m. The robberies occurred in a well-lighted parking lot at the intersection of North Tryon and East Seventh Streets, Charlotte, N. C. The Kings had returned to their parked car, a two-door Mercury. Mrs. King, the driver, had parked the car about 7:00 p.m. in one of the spaces alongside the brick wall (side) of the First Union Branch Bank building. It was headed towards the building and was some 15-25 feet from North Tryon Street. Other cars were parked in the spaces between the King car and the North Tryon Street sidewalk.

In returning to their car, Mrs. King went with Mr. King to the passenger's side of the car. After unlocking the door for Mr. King, Mrs. King walked to and around the rear of the car and was standing there on the driver's side with the key "to unlock the door on the left-hand side." As King stood on the passenger's side, between the open door and the hood, Simmons came up behind King and "put his gun on (his) neck back of (his) ear." After threatening to blow King's brains out if King did not give him his money, Simmons took from King his billfold and contents, which consisted of credit cards, charge account cards and about six or seven dollars cash. About the same time, McVay came up behind Mrs. King. He grabbed her around the neck with his left arm, placed his left hand over her mouth and pointed a gun "at (her) face." After telling her it was a stickup and that he would kill her if she hollered, McVay opened Mrs. King's handbag and got her billfold and contents, which consisted of twenty-nine dollars cash, a book of 6¢ stamps, credit cards, driver's license, car registration, social security card, hospital insurance identification, pictures of relatives, and other items.

The testimony of the victims is the only evidence as to *what* occurred on the occasion of the robberies. Mr. King testified in detail as to the circumstances under which he was robbed and as to the circumstances under which Mrs. King was robbed. Mrs. King testified in detail as to the circumstances under which she was robbed. With reference to the robbery of Mr. King, Mrs. King testified only that while she was

being robbed she saw a different person attack Mr. King. She testified the two persons left the parking lot and ran behind the building about the same time and headed towards the railroad track.

Mr. King's in-court testimony at the trial was positive and unequivocal. He identified McVay as the man who robbed Mrs. King and identified Simmons as the man who had robbed him (King). The *admitted* testimony of Mrs. King concerning the identity of the man who had robbed her was to the effect that he "was tall and light skinned" and that the person who attacked Mr. King was "a low, dark-skinned boy." The court, on objection by McVay, excluded other proffered testimony of Mrs. King relating to the identity of the person who had robbed her.

At the conclusion of the State's evidence, each defendant moved that the actions against him be dismissed and for judgments as in case of nonsuit. McVay's motion was allowed in respect of the indictment charging him with the armed robbery of King. His motion was denied in respect of the indictment charging him with the armed robbery of Mrs. King. McVay excepted to this ruling. Simmons' motion was allowed in respect of the indictment charging him with the armed robbery of Mrs. King. His motion was denied in respect of the indictment charging him with the armed robbery of King. Simmons excepted to this ruling. After these rulings, each defendant testified and offered evidence.

Each defendant denied he had committed the alleged crimes and denied he had been with the other defendant at any time on March 4, 1970. Too, each defendant testified and offered evidence tending to show he was at an entirely different place at the time the Kings testified they were robbed.

At the conclusion of all the evidence, McVay moved to dismiss and for judgment as in case of nonsuit in respect of the indictment charging him with the armed robbery of Mrs. King, the felony for which he was then on trial; and Simmons moved to dismiss and for judgment as in case of nonsuit in respect of the indictment charging him with the armed robbery of King, the felony for which he was then on trial. Each of these motions was overruled and each defendant excepted.

As to each defendant, in respect of the felony for which he was then on trial, the court submitted for jury determination

whether that defendant was guilty of armed robbery as charged, or guilty of common-law robbery, or not guilty.

In respect of the indictment charging him with the armed robbery of Mrs. King, McVay was found guilty of armed robbery as charged. In respect of the indictment charging him with the armed robbery of King, Simmons was found guilty of armed robbery as charged. On these verdicts, the court, as to each defendant, pronounced judgment which imposed a prison sentence of not less than fifteen nor more than twenty years.

Each defendant gave notice of appeal, and an order was entered that each defendant be represented on appeal by his trial counsel and that the State pay all costs necessary to perfect the appeal.

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

W. Herbert Brown, Jr., for defendant-appellant McVay.

James J. Caldwell for defendant-appellant Simmons.

BOBBITT, Chief Justice.

[1] Defendants excepted to and assign as error the consolidation for trial of the four indictments. This assignment is without merit. The State's motion for consolidation was addressed to the sound discretion of the presiding judge. *State v. Yoes,* 271 N.C. 616, 641, 157 S.E. 2d 386, 406, and cases cited. There is no basis for a contention that he abused his discretion. Ordinarily, consolidation is appropriate when the offenses charged are of the same class and are so connected in time and place that evidence at the trial upon one of the indictments would be competent and admissible at the trial on the other(s). *State v. Hamilton,* 264 N.C. 277, 283, 141 S.E. 2d 506, 511, and cases cited; *State v. Overman,* 269 N.C. 453, 466, 153 S.E. 2d 44, 56, and cases cited. *State v. Dyer,* 239 N.C. 713, 80 S.E. 2d 269, cited by defendants, involved an entirely different factual situation. In separate indictments, each of two men was charged with having received stolen goods, knowing them to have been stolen, the property of Colonial Stores, Inc. The alleged crimes were unrelated. They occurred at different times and places and under different circumstances. Neither defendant was present or in any way involved when the crime charged against the other was committed.

Each defendant excepted to and assigned as error the admission, over his objection, of the in-court identification by King of McVay as the man who robbed Mrs. King and of Simmons as the man who robbed him (King). When King's identification testimony was proffered, each defendant objected and the jury was excused. In the absence of the jury, a *voir dire* hearing was conducted. The evidence offered consisted of the testimony of King and of W. O. Holmberg and of Dale M. Travis. Holmberg and Travis are members of the Criminal Investigation Bureau of the Charlotte Police Department.

At the conclusion of the *voir dire* hearing, Judge Anglin made the following findings of fact:

"FINDINGS OF FACT

"That the parking lot was well lighted — about like daylight; that during the robbery the witness King was part of the time face to face with the man who took his wallet; that the witness King in court pointed to the defendant Simmons as the one who robbed him; that the witness King got a good look at the other man while his wife was being robbed; that he was on one side of the car and they were on the other; that he was looking over the hood of the car; that in court the witness King pointed to the defendant McVay as the one who robbed his wife; that the witness King was positive as to his in-court identification of each defendant based on what he saw at the time of the robbery and on nothing more.

"That three or four days after the robbery officers showed photographs of six to ten different men to the witness King at his home; that he did not recognize any photograph as being of the man who robbed him or of the man who robbed his wife; that later a group of fifteen to twenty photographs were shown by officers to him at his home and he picked out two which he was almost positive were photographs of the men who robbed him and his wife; that they were photographs of the defendant Simmons and the defendant McVay.

"That on 20 April 1970 at the preliminary hearing in these cases the witness Elbert King saw two men and that he 'knew' they were the ones who robbed him and his wife; that the photographs had nothing to do with his recognizing the men; that the defendants McVay and Simmons were the defendants at the preliminary hearing and each defendant had counsel present representing him and participating in the hearing.

"That on or about 6 or 7 March, 1970, at the instance of officers the defendant McVay and the defendant Simmons each voluntarily went with the officers to the criminal investigation center for interrogation with respect to an investigation of the Alexander murder case; that neither McVay nor Simmons was under arrest while at the center; that during the time the defendants were at the center a photograph was taken of each defendant separately, no photograph being taken of them together; that those single photographs were in the second group shown to the witness King at his home.

"That from clear and convincing evidence the in-court identification of the defendant McVay and the in-court identification of the defendant Simmons by the witness Elbert King is each of independent origin, based solely on what he saw at the time of the robbery and does not result from any out-of-court confrontation or from any photograph or from any pretrial identification procedures suggestive and conducive to mistaken identification."

Upon these findings of fact, the court ruled the in-court identifications by King of McVay and of Simmons were competent and admissible in evidence. Each defendant excepted to and assigned as error the court's "findings of fact" and rulings "relating to . . . King's in-court identification of . . . McVay and of . . . Simmons on *voir dire.*" No exception was addressed to any specific finding of fact. Nor does either defendant assert there is no competent evidence to support the court's findings of fact.

It seems appropriate to call attention to certain evidential facts.

[2] Prior to the preliminary hearing, there was no corporeal lineup or confrontation. The photographs of McVay and Simmons, which were exhibited to and identified by King on March 21st or March 22nd, had been taken on March 6th or March 7th at the Criminal Investigation Bureau in connection with the investigation of the Alexander murder case. McVay and Simmons were *released* after they had been interrogated and photographed on March 6th or March 7th. They were at liberty on March 21st or March 22nd when King identified these photographs ("was almost positive") as photographs of the men who had robbed him and his wife. There exists a unanimity of opinion to the effect defendants' Sixth Amendment rights are not violated by

the absence of counsel when photographic identifications are made under such circumstances. *State v. Accor,* 277 N.C. 65, 80, 175 S.E. 2d 583, 592-593, and cases there cited. Defendants' counsel do not contend otherwise.

[3] The Alexander murder occurred on March 6th or March 7th. As indicated, neither defendant testified at the *voir dire* hearing. Although each testified at trial, neither testified that his visit to the Criminal Investigation Bureau and his interrogation by the officers and the taking of his photographs during the investigation of the Alexander murder case was otherwise than voluntary. Suffice to say, there was ample competent evidence to support the court's positive finding that each defendant voluntarily went with the officers to the Criminal Investigation Bureau in connection with the Alexander murder case. Moreover, there was competent, clear and convincing evidence to support the court's positive finding that "the in-court identification of the defendant McVay and the in-court identification of the defendant Simmons by the witness Elbert King (was) each of independent origin, based solely on what he saw at the time of the robbery and (did) not result from any out-of-court confrontation or from any photograph or from any pretrial identification procedures suggestive and conducive to mistaken identification."

[4] "In the establishment of a factual background by which to determine whether a confession meets the tests of admissibility, the trial court must make the findings of fact. When the facts so found are supported by competent evidence, they are conclusive on appellate courts, both State and Federal." *State v. Barnes,* 264 N.C. 517, 521, 142 S.E. 2d 344, 346-347, and cases cited. When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts. See *State v. Blackwell,* 276 N.C. 714, 721, 174 S.E. 2d 534, 539.

It is noted that the State did not offer in evidence either the photograph of McVay or the photograph of Simmons which King had identified on March 21st or March 22nd. In this respect, *inter alia,* this case is distinguishable from *Davis v. Mississippi,* 394 U.S. 721, 22 L.Ed. 2d 676, 89 S.Ct. 1394, and *State v. Accor,*

supra. The only evidence before the jury relating to the exhibition of photographs to King was elicited by counsel for defendants on cross-examination of King.

[3] Defendants have failed to show error in connection with the admission in evidence of King's in-court identification testimony. Since King's testimony was sufficient to require submission of each defendant's case to the jury, the assignments of error directed to the overruling of the motions to dismiss and for judgments as in case of nonsuit are without merit.

[5] Defendants excepted to and assign as error the asserted failure of the court "to instruct the jury of the possibility that it could find one defendant guilty and the other defendant not guilty." Neither defendant excepted to any particular portion of the charge as a basis for this assignment of error. Suffice to say, the charge contains no instruction comparable to that considered by this Court in *State v. Williford,* 275 N.C. 575, 169 S.E. 2d 851, the only decision cited by defendants. Here, Judge Anglin took up each indictment separately and explained in detail what the State had to prove in order to warrant a finding that the defendant named therein was guilty of armed robbery or of common-law robbery, and that if the jury failed to so find it would be their duty to return a verdict of not guilty as to the defendant in the indictment under consideration. There was no confusion in the instructions. On the contrary, each defendant's case was considered separately and each defendant's guilt or innocence was made to depend upon what he did and not on what somebody else may have done.

Defendants' remaining assignments of error are patently without merit and were properly abandoned by defendants' counsel.

For the reasons indicated, the verdicts and judgments will not be disturbed.

No error.

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

IN RE APPLICATION OF JOHN H. ELLIS, JR., AND WIFE, FRANCES N. ELLIS, BY FRED D. CURL, AGENT, FOR SPECIAL EXCEPTION UNDER THE GUILFORD COUNTY ZONING ORDINANCE

No. 1

(Filed 16 December 1970)

1. **Constitutional Law § 15; Counties § 5; Municipal Corporations § 30 — power to zone — constitutional limitation**

Power to zone rests originally in the General Assembly, but this power is subject to the constitutional limitation forbidding arbitrary and unduly discriminatory interference with the right of property owners.

2. **Constitutional Law § 8; Counties § 5; Municipal Corporations § 30 — delegation of power to county or city**

The General Assembly cannot delegate to a city or county more extensive power than it possesses.

3. **Constitutional Law § 11; Counties § 5; Municipal Corporations § 30 — right to use private property for lawful purpose**

Neither the legislature by statute nor a municipal corporation by ordinance or resolution nor an administrative board exercising delegated police powers may arbitrarily or capriciously restrict an owner's right to use his property for a lawful purpose.

4. **Counties § 5; Municipal Corporations § 30— zoning ordinance — definition of special exception**

A special exception within the meaning of a zoning ordinance is one which is expressly permitted in a given zone upon proof that certain facts and conditions detailed in the ordinance exist; it is granted by the board, after a public hearing, upon a finding that the specified conditions have been satisfied.

5. **Counties § 5— county zoning ordinance — special exceptions — G.S. 153-266.10**

G.S. 153-266.10 does not purport to confer more power upon the county commissioners to grant special exceptions under a county zoning ordinance than the commissioners could delegate to the board of adjustment.

6. **Counties § 5— special-exception permit for mobile home park — denial by board of adjustment or county commissioners**

Neither the board of adjustment nor the board of county commissioners can deny a special-exception permit for a mobile home park in its unbridled discretion or refuse the permit solely because, in its view, a mobile home park would "adversely affect the public interest."

7. **Counties § 5— denial of special-exception permit for mobile home park — arbitrariness**

The board of county commissioners acted arbitrarily in denying an application for a permit to establish a mobile home park as a special

exception under the county zoning ordinance where applicants had complied with the regulations of the county board of health and had met all other ordinance requirements, there being no finding or suggestion in the evidence that the mobile home park would create special hazards of any kind.

APPEAL by applicants from *Crissman, J.*, 19 January 1970 Session of GUILFORD, certified pursuant to G.S. 7A-31(a) for review by the Supreme Court before a determination by the Court of Appeals.

Application for a permit to establish a mobile-home park as a special exception under the Guilford County Zoning Ordinance. Applicants appeal from a judgment of the Superior Court affirming the refusal of the Board of County Commissioners to issue the permit.

Turner, Rollins, Rollins & Suggs by Elizabeth O. Rollins for applicants Ellis, appellants.

Ralph A. Walker; W. B. Trevorrow, for defendant appellee.

SHARP, Justice.

Applicants, Mr. and Mr. John H. Ellis, Jr., own a tract of land containing 11.85 acres in Jefferson Township, Guilford County. The county's comprehensive zoning ordinance (ordinance) locates this property in a R-20 zoning district, which is "primarily for single-family residences with provisions for two-family and multi-family residences on large lots." Ordinance § 1-3. The declared purpose in R-20 districts is "to encourage the construction of and the continued use of land for residential purposes; to prohibit commercial and industrial uses of land and to prohibit any other use which would substantially interfere with the development of land for residential purposes in the district; to encourage the discontinuance of existing uses that would not be permitted as new uses in the districts; and to insure that residential development, not having access to a public water supply and dependent upon septic tanks and outdoor privies for sewage disposal, will occur at densities low enough to insure a healthful environment." Ordinance § 5-2A.

Ordinance § 3-10 provides that, subject to certain specified conditions, "a mobile home park may be established as a special

exception in certain districts as prescribed by Article IV of the ordinance." Among the conditions is the requirement that the applicant submit a site plan which meets the detailed specifications for the establishment and use of the park contained in Ordinance § 3-10 A-M and also any other "reasonable and appropriate conditions or requirements necessary to accomplish the purpose of this ordinance" which the board of adjustment might impose. Ordinance § 3-10 N. Finally, the board of adjustment must approve the plan and grant the special exception.

Article IV of the ordinance permits mobile-home parks in R-20 districts subject to the provisions of Ordinance § 6-13B and operation "in accordance with the provisions of Section 3-10 and the Guilford County Board of Health's regulations relating to the establishment and operation of mobile homes."

On 24 April 1969 applicants petitioned the board of adjustment of Guilford County for a permit to establish a mobile-home park containing 33 spaces on their 11.85-acre tract. It is stipulated that applicants have complied with Section 3-10 and that they have satisfied every specific requirement of the ordinance. At the time the application was filed Ordinance § 6-13B provided, *inter alia,* that the board of adjustment could not grant a special exception until, after fifteen days notice and advertisement, it had held a public hearing and then made findings that (1) it had authority to grant the special exception applied for, and (2) its granting of the special exception would "not adversely affect the public interest." These last two requirements were contained in Ordinance § 6-13B(4). However, requirement (2) was invalidated on 12 March 1969 by the decision of this Court in *Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78.

In *Jackson,* the board of adjustment had issued a special-exception permit for a mobile-home park over the protest of the plaintiffs. On appeal protestants asserted that the provision of the ordinance purporting to confer authority upon the board to grant a special exception was a delegation of legislative power in contravention of N. C. Const., Art. II § 1. We held that a property owner's right to a special-exception permit cannot be made to hinge upon whether the board considers the proposed structure beneficial or harmful to the community. Such power would subject the board to the pressures of individuals or groups who, for an infinite variety of reasons, might oppose the

permit, and enable it to make a different rule of law in every case. G.S. 153-266.17, which empowers the commissioners to authorize the board of adjustment to permit special exceptions "in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance," does not purport to confer such unbridled discretion upon it.

In *Jackson*, however, we upheld the issuance of the permit. The ordinance specifically declares that the invalidity of any portion of it shall not affect the validity of remaining portions. Thus, the applicant, who had complied with the specific requirements of Ordinance § 3-10 A-M and the additional requirements which the board of adjustment imposed as being reasonably necessary to accomplish the declared purposes of the ordinance, was entitled to the special-exception permit.

On 28 April 1969, four days after appellants in this case had filed their application with the board of adjustment, the county commissioners adopted the following resolution without complying with the procedure for amendments prescribed in Ordinance §§ 6 and 7.

"RESOLUTION OF COUNTY COMMISSIONERS

"WHEREAS. The Board of Adjustment of Guilford County has heretofore held public hearings and determined public interest in connection with special exceptions under the Guilford County Zoning Ordinance; and

"WHEREAS, the Supreme Court of North Carolina has recently held that the Board of Adjustment does not have the authority to determine public interest and consider this as a part of their decision in special exception cases; and

"WHEREAS, Guilford County Board of Commissioners feels that public interest should be heard and considered in all questions involving a special exception to the Guilford County Zoning Ordinance; and

"WHEREAS, Guilford County Board of Commissioners desires that all cases involving special exceptions be referred to the Board of County Commissioners in order that public hearings may continue to be held;

"NOW, THEREFORE, BE IT RESOLVED:

"1. That the Board of County Commissioners do hereby

declare until further notice that it will hear all requests for special exceptions under Guilford County Zoning Ordinance;

"2. That the proper officials shall give notification and advertise that a public hearing will be held and a decision made by the Guilford County Board of Commissioners;

"3. That where in the Zoning Ordinance the Board of Adjustment is referred to in connection with special exceptions, the Board of County Commissioners shall be substituted instead until further notice;

"4. That this resolution shall be effective with all requests for special exceptions that have not previously to this date been determined and ruled upon by the Guilford County Board of Adjustment.

"The foregoing resolution was adopted by the Board of County Commissioners of Guilford County on April 28, 1969."

On 26 May 1969, after due notice, the commissioners held a public hearing on appellants' application. At the hearing a number of landowners and residents within a half-mile radius of appellants' property opposed the application on the ground that a mobile-home park would depreciate land values and would, therefore, be detrimental to the community. At the conclusion of the hearing the commissioners denied the application without stating any reason and without making any findings whatever.

The Superior Court, upon appellants' application, issued its writ of *certiorari* to review the action of the commissioners, and the matter was heard by Judge Crissman. He concluded as a matter of law "that the County Board of Commissioners had the authority to grant such an application for a special exception, but at the same time had the authority to deny such an application." He rendered judgment affirming the commissioners' denial of the permit and dismissing the writ of *certiorari*. Petitioners appealed to the Court of Appeals and moved this Court to certify the cause for review prior to its determination by that Court. The motion was allowed.

Appellants present three questions: (1) Could the board of county commissioners substitute itself for the board of adjustment to consider all applications for special-exception permits authorized by the zoning ordinance? (2) If so, did the resolution of 28 April 1969, which was not adopted in accordance

with ordinance requirements for amendments, accomplish this purpose? (3) In any event, did the commissioners exceed their authority in denying appellants' application for a permit to construct a mobile-home park?

The resolution of 28 April 1969, by which the county board of commissioners purported to substitute itself for the board of adjustment in all cases involving applications for special exceptions because it "feels that the public interest should be heard and considered in all questions involving a special exception to the Guilford County Zoning Ordinance," clearly reveals that the commissioners have misconstrued our decision in *Jackson v. Board of Adjustment, supra.* Obviously, they have interpreted the decision to mean that, although the commissioners cannot delegate to the board of adjustment authority to grant or refuse a permit for a mobile-home park (or other special-exception permit) according to its notion of the public interest, the commissioners themselves, as the law-making body, do possess such power. We did not so hold.

[1-3] Power to zone rests originally in the General Assembly, but this power is subject to the constitutional limitation forbidding arbitrary and unduly discriminatory interference with the right of property owners. Clearly, therefore, the General Assembly cannot delegate to a city or county more extensive power than it possesses. *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325; *Schloss v. Jamison,* 262 N.C. 108, 136 S.E. 2d 691. Neither the legislature by statute nor a municipal corporation by ordinance or resolution nor an administrative board exercising delegated police powers may arbitrarily or capriciously restrict an owner's right to use his property for a lawful purpose. *Pierce v. Incorporated Town of La Porte City,* 259 Iowa 1120, 146 N.W. 2d 907.

The rule has nowhere been better stated than in *State v. Tenant,* 110 N.C. 609, 14 S.E. 387, a case involving the validity of an ordinance which prohibited the construction or improvement of any building without the permission of the aldermen. In holding the ordinance void, the Court said: "[T]hough the law-making power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the Constitution prohibits the creator from doing. . . . It is equally clear that if an ordinance is passed by a municipal corporation which, upon its face, restricts the right of dominion which the individual might

otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen who may exercise it so as to give exclusive profits or privileges to particular persons." *Id.* at 612, 14 S.E. at 388. *Accord, Bizzell v. Goldsboro,* 192 N.C. 348, 135 S.E. 50; *Clinton v. Oil Co.,* 193 N.C. 432, 137 S.E. 183.

[4-6] A special exception within the meaning of a zoning ordinance is one which is expressly permitted in a given zone upon proof that certain facts and conditions detailed in the ordinance exist. It is granted by the board, after a public hearing, upon a finding that the specified conditions have been satisfied. *Stacy v. Montgomery County,* 239 Md. 189, 210 A. 2d 540; *Kraemer v. Zoning Board of Review of the City of Warwick,* 98 R.I. 328, 201 A. 2d 643; *Tustin Heights Ass'n v. Board of Supervisors,* 170 Cal. App. 2d 619, 339 P. 2d 914; 2 Anderson, American Law of Zoning § 14.03 (1968); 1 Yokley, Municipal Corporations §§ 184, 185 (1956). G.S. 153-266.10, which authorizes the board of county commissioners by regulation to provide "that the board of adjustment *or the board of county commissioners* may issue special use permits or conditional permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified" (emphasis added) in the zoning ordinance, did not purport to confer more power upon the commissioners to grant special exceptions than the commissioners could delegate to the board of adjustment. Like the board of adjustment, the commissioners cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, a mobile-home park would "adversely affect the public interest." The commissioners must also proceed under standards, rules, and regulations, uniformly applicable to all who apply for permits.

In *Pierce v. Incorporated Town of La Porte City, supra,* the Supreme Court of Iowa dealt with a situation equivalent to the one we consider here. In declaring unconstitutional an ordinance which provided that the city council would grant or deny licenses for trailer parks "according to its sound discretion," the court pointed out that, in the absence of standards, the council could "deny any applicant a license for a good reason,

for a bad reason, or for no reason." In effect they were in a position to exercise their discretion arbitrarily. "[A]nd," said the court, "so far as the record shows that is the way they have exercised it. They denied the license to plaintiff without explanation . . . [I]n so doing they demonstrated the (ordinance's) offense against the due process clauses of the federal and state constitutions." *Id.* at 910. *Accord, Wood v. Peckham,* 80 R.I. 479, 98 A. 2d 669; *Drexel v. City of Miami Beach,* 64 So. 2d 317 (Fla.).

[7] On the record before us the commissioners have arbitrarily refused a permit to applicants. It is stipulated that applicants have met all ordinance requirements, one of which is that they comply with the regulations of the county board of health. There is no suggestion that the establishing of this mobile-home park would create special hazards of any kind.

Since appellants' third question requires an affirmative answer, discussion of the first two questions is unnecessary. In view of this decision it would be futile for the board of county commissioners to attempt hereafter to substitute itself for the board of adjustment with reference to the issuance of special-exception permits.

The judgment of Crissman, J., is reversed, and the cause is remanded to the Superior Court for entry of judgment directing the commissioners to issue the special-exception permit for which appellants applied.

Reversed.

STATE OF NORTH CAROLINA v. JERRY ALFORD ADAMS

No. 65

(Filed 16 December 1970)

Criminal Law §§ 25, 135; Homicide §§ 13, 31— homicide prosecution — voluntariness of nolo contendere plea — effect of death penalty

The defendant's plea of *nolo contendere* to second-degree murder was voluntarily and intelligently made and was not coerced by fear of the death penalty, where (1) the defendant, a person of average intelligence, was faced with damaging and uncontradicted evidence sufficient to sustain a verdict of first-degree murder; (2) the defendant authorized his counsel to enter the *nolo contendere* plea after he had been fully apprised of his rights and of the effect of entering such plea; and (3) the trial court carefully examined defendant concerning the voluntariness of his plea and adjudged that the plea was voluntarily and intelligently made.

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

APPEAL by defendant from *Carr, J.*, at 2 October 1969 Regular Criminal Session of Superior Court of WAKE County.

On 27 July 1969 defendant was arrested on a warrant charging him with first degree murder of George O'Neal Sorrell. A probable cause hearing was held in District Court and defendant was bound over to Wake Superior Court for trial without privilege of bond. On 11 August 1969, Thomas D. Bunn was appointed to represent defendant. Upon petition by defendant's counsel, Judge Leo Carr committed defendant to the State Hospital in Raleigh for observation, examination and treatment, pursuant to G.S. 122-91. On 22 September Dr. Andrew Laczko, Director of the Forensic Unit, Dorothea Dix Hospital, made a "Diagnostic Conference Report and Discharge Summary" on defendant, which concluded:

> The psychological testing revealed a full-scale I.Q. of 98, which places this patient in the average intellectual functioning level.
>
> *Diagnosis:* Without Psychosis (Not Insane). *APA Code: 319.80*
>
> *Recommendations:* The examination, observation and testing revealed no evidence of insanity or any other mental disturbance which might interfere with this patient's ability to plead to the Bill of Indictment. Mr. Jerry Alford Adams

can distinguish right from wrong, he understands the true nature and possible consequence of his criminal charges and he is able to assist in his own defense. This patient should be returned to the Court as he is competent to stand trial.

Defendant was thereafter examined by Dr. Nicholos Pediaditakis, Psychiatrist in charge of Wake County Mental Health Center, who at the trial testified:

". . . The facts, the hard fact is that the person was not psychotic at the time of examination and by history and recall, the person was not psychotic at the time of the crime, of the tragedy. Though he gave me evidence that his personality was in such a way as to be triggered from time to time into impulsive aggressive acts."

On 18 August 1969 the Wake County Grand Jury returned a bill of indictment charging defendant with first degree murder. When the case came on for trial, defendant, through his attorney, tendered a plea of *nolo contendere* to the charge of second degree murder. Before the plea was accepted by the State, Judge Leo Carr questioned defendant concerning the voluntariness of his plea and recorded pertinent questions and answers on a "Transcript of Plea," as follows:

The defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

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

Answer: Yes sir

2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills?

Answer: No sir

3. Do you understand that you are charged with the (felony) of Murder in the 2nd degree?

Answer: Yes sir

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

Answer: Yes sir

5. How do you plead to these charges—Guilty, not Guilty or nolo contendere?

Answer: Nolo Contendere

6. Have you had explained to you and do you understand the meaning of a plea of nolo contendere?

Answer: Yes sir

7. Do you understand that upon your plea of (nolo contendere) you could be imprisoned for as much as 30 (years)?

Answer: Yes sir

8. Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promise or threat to you to influence you to plead (nolo contendere) in this case?

Answer: No sir

9. Have you had time to confer with and have you conferred with your lawyer about this case, and are you satisfied with his services?

Answer: Yes sir

10. Have you had time to subpoena witnesses desired by you, and are you ready for trial?

Answer: Yes sir

11. Do you now freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of (nolo contendere)?

Answer: Yes sir

I have read or heard read all of the above questions and answers and understand them, and the answers shown are the ones I gave in open court, and they are true and correct.

s/ Jerry Alford Adams
Defendant

(Sworn to on 24th day of October, 1969)

The trial judge entered the following adjudication:

"[T]he Court ascertains, determines and adjudges, that the plea of nolo contendere, by the defendant is freely,

understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency. It is therefore, ORDERED that his plea of nolo contendere be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded."

The court then heard evidence which tended to show that on 26 July 1969 defendant and his girlfriend, both of Portsmouth, Virginia, came to Knightdale, North Carolina, to visit defendant's uncle, George O'Neal Sorrell. George O'Neal Sorrell, his wife, defendant and his girlfriend, consumed some vodka and beer and then drove to Wendell, where they purchased several bottles of whiskey and steaks. They returned to the Sorrell home, and while Mrs. Sorrell cooked the steaks the others sat around a table drinking and playing a guitar. Just before the shooting, defendant requested Sorrell to play the guitar, and Sorrell said, "I don't feel like picking now." Whereupon defendant went into another room, obtained a pistol from his girlfriend's pocketbook, returned to the room and said: "You pick it or die." He immediately shot Sorrell, who died as a result of the wound.

Defendant offered testimony which tended to show that he remembered nothing of the actual shooting; that he was a heavy drinker but had never before been involved in any serious crime.

At the conclusion of all the evidence the trial judge entered judgment sentencing defendant to not less than 25 years nor more than 30 years in State's Prison.

On 26 October 1969 and on 13 April 1970, defendant directed letters to the Clerk of Superior Court of Wake County stating that he wished to appeal. Thereafter, Judge James H. Pou Bailey appointed Thomas D. Bunn attorney for defendant to seek a writ of *certiorari* to the Court of Appeals. The Court of Appeals allowed the petition for *certiorari* on 17 October 1970. The case is now before the Supreme Court pursuant to its general referral order effective 1 August 1970.

Attorney General Morgan, Assistant Attorney General Costen, and Assistant Attorney General Melvin for the State.

Hatch, Little, Bunn, Jones & Liggett, by Thomas D. Bunn, for Defendant.

BRANCH, Justice.

The sole question presented for decision is whether defendant was coerced into entering a plea of *nolo contendere* to second degree murder in order to avoid the possibility of capital punishment and thereby was deprived of his constitutional rights to trial by jury, to confront his accusers, and his constitutional privilege against compulsory self-incrimination.

Defendant contends that he has never admitted his guilt because he had no recollection concerning the actual homicide, and further, that his plea of *nolo contendere* does not expressly admit guilt. He relies heavily on the case of *Alford v. State of North Carolina,* 405 F. 2d 340. In that case the defendant was indicted for first degree murder and through his counsel tendered a plea of guilty of second degree murder to the State. The solicitor for the State agreed to accept the plea, and the trial court heard damaging evidence against the defendant before accepting the plea. The defendant professed his innocence throughout the proceedings, and contended that his plea was entered because of the threat of the death penalty which he would have faced had he pleaded not guilty. He was sentenced to thirty years in prison. After various petitions and proceedings, the Fourth Circuit Court of Appeals heard an appeal from a denial of petition for writ of *habeas corpus* by Judge Eugene A. Gordon, District Judge for the Middle District of North Carolina. The Court of Appeals, holding the plea to be involuntary because it was motivated by fear of the death penalty *inter alia,* stated:

> "North Carolina law presently prescribes the death penalty for murder in the first degree, as well as certain other crimes. In each instance the penalty prescribed is death; in each instance also the jury may, in its discretion, obligatorily recommend that punishment be imprisonment for life. North Carolina does not permit an accused who pleads not guilty to waive a jury trial. The accused may avoid a jury trial only if he pleads guilty and, by statute, a plea of guilty may not result in a punishment more severe than life imprisonment. Thus, a person accused of a capital crime in North Carolina is faced with the awesome dilemma of risking the death penalty in order to assert his rights to a jury trial and not to plead guilty, or, alternatively, of pleading guilty to avoid the possibility of capital punishment. It was precisely this sort of inhibitory or chilling

effect upon the exercise of constitutional rights which the Supreme Court condemned in *Jackson* (390 U.S. 570, 20 L. Ed. 2d 138, 88 S.Ct. 1209) because a statutory scheme such as that employed by North Carolina 'needlessly encourages' guilty pleas and jury waivers.

. . . . .

"In the light of the principles we distill from *Jackson,* we have no hesitancy in concluding from our examination of the record that petitioner's plea of guilty was made involuntarily, and that petitioner is entitled to relief by habeas corpus."

The State of North Carolina appealed from the decision of the Fourth Circuit Court of Appeals, and the United States Supreme Court noted probable jurisdiction, heard argument on 17 November 1969, and reargument on 14 October 1970. On 23 November 1970 the Supreme Court handed down its opinion (39 L.W. 4001, 400 U.S. 25, 27 L. Ed. 2d 162) vacating the judgment of the Circuit Court of Appeals and remanding the cause for further proceedings consistent with its opinion. We quote excerpts from the Court's opinion:

"We held in *Brady v. United States,* 397 U.S. 742 (1970) that a plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason compelled within the meaning of the Fifth Amendment. *Jackson* established no new test for determining the validity of guilty pleas. *The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.* (Citations omitted) That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be the defendant's advantage. The standard fashioned and applied by the Court of Appeals was therefore erroneous. . . . (Emphasis supplied)

. . . . .

"State and lower federal courts are divided upon whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt. Some courts, giving expression to the principle that '[o]ur law only authorizes a conviction where guilt is shown,' . . . . require that trial judges reject such pleas. But others have concluded that they should not 'force any defense on a defendant in a criminal case,' particularly when advancement of the defense might 'end in disaster . . . . '

. . . . .

"The issue in *Hudson v. United States,* 272 U.S. 451 (1926) was whether a federal court has power to impose a prison sentence after accepting a plea of *nolo contendere,* a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty. The Court held that a trial court does have such power, and except for the cases which were rejected in *Hudson,* the federal courts have uniformly followed this rule, even in cases involving moral turpitude. *Bruce v. United States (supra)* (379 F. 2d 113) at 120 n. 20 (dictum). See, *e.g., Lott v. United States,* 367 U.S. 421 (fraudulent evasion of income tax); *Sullivan v. United States,* 348 U.S. 170 (1954) *(Ibid); Farnsworth v. Zerbst,* 98 F. 2d 541 (CA5 1938) (espionage); *Pharr v. United States,* 48 F. 2d 767 (CA6 1931) (misapplication of bank funds); *United States v. Bagliore,* 182 F. 2d 714 (EDNY 1960) (receiving stolen property). Implicit in the *nolo contendere* cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence.

" . . . An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

" . . . When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the

judge could test whether the plea was being intelligently entered, see *McCarthy v. United States (supra)* (394 U.S. 459), at 466-67 (1969), its validity cannot be seriously questioned. In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it."

Here, the record shows defendant to be a person of average intelligence who was faced with damaging and uncontradicted evidence sufficient to sustain a verdict of murder in the first degree. After consulting with his counsel and after being fully apprised of his rights and the effect of entering a plea of *nolo contendere* to second degree murder, defendant authorized his counsel, whose competency is unchallenged, to enter such plea in his behalf. Before allowing entry of the plea, the trial judge carefully examined defendant concerning the voluntariness of his plea and adjudged that the plea was freely, understandingly and voluntarily made.

Applying the principles set forth by the United States Supreme Court in *North Carolina v. Alford, supra,* we hold that defendant's plea of *nolo contendere* to second degree murder represented a "voluntary and intelligent choice among the alternative courses of action open to the defendant."

The judgment of the Superior Court is

Affirmed.

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

STATE OF NORTH CAROLINA v. GEORGE HARRIS

No. 87

(Filed 16 December 1970)

Rape § 18; Constitutional Law § 36— assault with intent to commit rape — cruel and unusual punishment

Sentence of 12 to 15 years' imprisonment imposed upon defendant's conviction of assault with intent to commit rape does not constitute cruel and unusual punishment; it was immaterial to this question that the maximum permissible punishment for carnally knowing a female between the ages of twelve and sixteen is 10 years' imprisonment. G.S. 14-22; G.S. 14-26.

APPEAL by defendant from *McKinnon, J.*, November 14, 1968 Session of WAKE Superior Court, transferred for initial appellate review by the Supreme Court under an order entered pursuant to G.S. 7A-31(b) (4).

Criminal prosecution on an indictment which charged that defendant, on October 19, 1968, assaulted Annie Lee Harvey, a female, with intent to rape her, a violation of G.S. 14-22.

Defendant was represented at trial by Garland B. Daniel, Esq., court-appointed counsel.

The State offered evidence tending to show the facts narrated below.

Annie Lee Harvey was employed at the Golden Eagle. On October 19, 1968, after dark, she was walking along the sidewalk on South Blount Street. It was raining. As she approached an alley, she was walking "on the edge of the sidewalk right at the trees." Two men whom she had not previously seen walked up behind her and grabbed her, one on each side. She did not know either of these men. Despite her protests and struggles, they dragged her through the alley. Upon reaching an area back from the street, they threw her "over in the weeds and grass." The two men were on their knees, one on each side of her. Both pulled at her panties and succeeded in getting them as far down as her knees. They exchanged talk as to which would be the first to have sexual intercourse with her. Although she protested, wrestled and tusseled, the two men made it unmistakably clear they intended to take turns in having sexual intercourse with her by force, without her consent, against her

will, and notwithstanding any resistance she might make. She was saved from this fate by the intervention of Alton Collins, a State's witness, whom she did not know and who did not know either of the men who assaulted her.

Collins had gone to Harris' poolroom on Blount Street to make a telephone call. Before entering, he stopped and stood under the awning at the entrance, "shaking the water off (his) coat." He heard some loud talking between a woman and two men on the opposite side of the street. He heard the woman tell the two men "to leave her alone, that she was a lady; (that) she couldn't go with them." When this occurred, Collins paid no further attention, walked into Harris' poolroom to make the telephone call, failed to reach his party, and then came back to the sidewalk. At that time, the men had pulled the woman off the sidewalk up into the entrance of the driveway or alley. As he watched, defendant had hold of the woman's left arm and the other man "had her up under his arm" and "they went out of my sight . . . but still (he) could hear them up in the alley." Collins crossed the street. Walter (Buster) Harris was with him. Upon reaching the entrance to the alley, Collins could hear the woman telling the men to leave her alone. Collins and Walter Harris tiptoed through the alley to the edge of the parking lot and got within two or three feet of the woman and the two men. Collins testified that "(r)ight before this other gentleman, whoever he was, threw her on the ground, the defendant Harris told her she was going to have intercourse with him or die or however it was. Those weren't the exact words he used."

When Collins observed that the woman had been thrown to the ground and was still protesting and struggling, he called out: "Ya'll get up and leave that lady alone." Defendant picked up the woman's pocketbook and ran. Walter Harris went to the assistance of the woman. Collins chased defendant some distance, overtook him, grabbed him and threw him down. He had someone call the police. He held defendant until the police arrived and took him into custody.

Apparently, defendant's companion in crime escaped. Nothing in the record indicates he was apprehended or identified.

Defendant did not testify or offer any evidence.

The jury returned a verdict of guilty as charged. Judgment, which imposed a prison sentence of not less than twelve nor more than fifteen years, was pronounced.

Defendant did not appeal or attempt to do so.

On June 4, 1970, after a post-conviction hearing, Hall, J., found that defendant had never taken an appeal but had not known of his right of appeal until the prescribed time for giving notice of appeal had passed. Pusuant to the order of Hall, J., defendant filed a petition with the Court of Appeals for a writ of *certiorari* to permit an appellate review *as upon direct appeal*. This petition, which was not opposed by the Attorney General, was granted August 21, 1970, by the Court of Appeals.

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

John M. Fountain for defendant appellant.

BOBBITT, Chief Justice.

Defendant's appellate counsel concedes, and rightly so, that defendant's motion for judgment as in case of nonsuit was properly overruled. The State's unequivocal and uncontradicted evidence was amply sufficient to support the verdict of guilty as charged.

In pronouncing judgment Judge McKinnon publicly commended Mr. Collins for his responsible action as a citizen in affording protection to Annie Lee Harvey from defendant and defendant's companion in crime, thereby saving her from being the victim of actual rape and possibly saving defendant from a sentence of death or life imprisonment. We endorse Judge McKinnon's appropriate and timely remarks. The chase, overtaking and seizure of defendant by Collins at or near the scene of the crime eliminated all uncertainty as to the identity of defendant as *one* of the assailants.

As noted the State's evidence includes testimony that defendant, after Collins' intervention, picked up and ran away with Annie Lee Harvey's pocketbook. Although no exception was taken to the charge, it seems appropriate to mention that Judge McKinnon instructed the jury they could return (1) a verdict of guilty of assault with intent to commit rape as charged, or (2) guilty of an assault on a female, he being a male person over the age of eighteen years, or (3) a verdict of not guilty. Careful to afford defendant every possible right, Judge McKinnon instructed the jury as follows: "If you find that he (defend-

ant) made an assault on her (Annie Lee Harvey) but you find that his intent was to steal her pocketbook and not to rape her, then he would not be guilty of the felony charge, although he would be guilty of an assault on a female." Understandably, the jury rejected this view of defendant's conduct.

Defendant asserts the prison sentence of not less than twelve nor more than fifteen years constitutes cruel and unusual punishment in violation of Article I, Section 14, of the Constitution of North Carolina, and the Eighth Amendment to the Constitution of the United States.

As a basis for this contention, defendant asserts that the felony created by G.S. 14-22 is a lesser included offense of the felony created by G.S. 14-26.

G.S. 14-22 provides: "Every person convicted of an assault with intent to commit a rape upon the body of any female shall be imprisoned in the State's prison not less than one nor more than fifteen years."

G.S. 14-26 in pertinent part provides: "If any male person shall carnally know or abuse any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court . . . . " Authoritative decisions of this Court hold that imprisonment for ten years is the maximum permissible punishment for a violation of G.S. 14-26. *State v. Blackmon,* 260 N.C. 352, 132 S.E. 2d 880; *State v. Grice,* 265 N.C. 587, 144 S.E. 2d 659.

The differences between these statutes are set forth in detail by Chief Justice Parker in *McClure v. State,* 267 N.C. 212, 214-215, 148 S.E. 2d 15, 17. Repetition is unnecessary. The *decision* of this Court was stated succinctly by Chief Justice Parker as follows: "The felony set forth in G.S. 14-22 is not a less degree of the felony set forth in G.S. 14-26."

Defendant calls attention to *Cannon v. Gladden,* 281 P. 2d 233 (1955), where the Supreme Court of Oregon held the portion of an Oregon statute authorizing the punishment of life imprisonment for the offense of assault with intent to commit rape was null and void as violative of the constitutional provision against cruel and unusual punishment. Another Oregon statute provided for a maximum sentence of not more than twenty years for either statutory or forcible rape. It was held that the penalty

of life imprisonment for the assault was so disproportionate as to shock the moral sense of all reasonable men as to what is right and proper when the greater crime of rape was punishable by a sentence of not more than twenty years. North Carolina statutes are quite different. Rape is punishable by death or life imprisonment. Assault with intent to commit rape is punishable by imprisonment for a term of not less than one nor more than fifteen years.

While we approve the diligence of defendant's counsel, the conclusion reached is that the trial conducted by Judge McKinnon is altogether free from prejudicial error. Accordingly, the verdict and judgment will not be disturbed.

No error.

TOWN OF CONOVER v. RUBY JOLLY; FOY JOLLY, AND WIFE, ODESSA P. JOLLY

No. 70

(Filed 16 December 1970)

1. **Municipal Corporations § 29— extent of police power**

   A city or town in this State has no inherent police power, but may exercise only such powers as are expressly conferred upon it by the General Assembly or as are necessarily implied from those expressly so conferred. G.S. 160-1.

2. **Municipal Corporations § 30— mobile home as permanent residence — nuisance — G.S. 160-200(26)**

   The use of a mobile home as a permanent residence is not a nuisance *per se* which may be prevented or abated under the power conferred upon cities and towns by G.S. 160-200(26).

3. **Municipal Corporations § 30— ordinance prohibiting mobile home as permanent residence — authority of town to enact — G.S. 160-200(6)**

   A well constructed and equipped mobile home connected with the public water, sewer and electric systems cannot be deemed *per se* "detrimental to the health, morals, comfort, safety, convenience and welfare of the people" of a town within the purview of G.S. 160-200(6); consequently, that statute did not confer upon a municipality the authority to enact an ordinance prohibiting the use anywhere within its limits of a single mobile home as a permanent residence.

4. **Municipal Corporations § 30— ordinance prohibiting mobile home as permanent residence — authority of town to enact**

The Town of Conover has not been delegated the authority by the General Assembly to enact an ordinance prohibiting the use anywhere within the town limits of a single mobile home as a permanent residence.

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

APPEAL from the judgment of the District Court of CATAWBA County at its 18 May 1970 Session, heard prior to determination by the Court of Appeals.

The Town of Conover sued to enjoin the defendants from keeping and maintaining a mobile home upon certain premises in the town and to compel them to remove from such premises the mobile home located thereon. The matter was heard in the district court upon an agreed statement of facts. The injunctive relief sought was denied on the ground that the ordinance, relied upon by the plaintiff, is unconstitutional. The town appealed, assigning as error this conclusion of law and the entry of the judgment denying relief.

The stipulated facts include the following (numbering revised):

1. For the purported purpose of promoting the health, safety and general welfare of the community, the town adopted an ordinance which, after defining "TRAILER" to include a mobile home, mounted on wheels or dismounted and placed upon masonry or other stationary foundation, used or designed for use as permanent or semi-permanent living or sleeping quarters, provides:

> "*Prohibitions.* It shall be unlawful for any person * * * to place * * * any trailer or to make use of any trailer, subject to those exceptions hereinafter specifically enumerated, on any premises within the corporate limits of the town * * * "

2. The only exceptions contained in the ordinance relate to a trailer placed on a construction site and used for office or storage purposes so long as construction is in process, a trailer placed on a school or church site and used for school or classroom purposes, and a trailer placed in a business, industrial or neighborhood trading district or area and used for office purposes in

connection with the operation of a business, political or charitable activity.

3. The ordinance further provides that it does not affect or repeal any law of the town regarding location of trailers or mobile homes in residential areas on a temporary permit issued by the Board of Commissioners. (The record does not set forth any other ordinance of the town providing for the issuance of such temporary permits but, in oral argument of the appeal, the Court was advised that the town does have such an ordinance and copies of temporary permits, referred to below, issued by the town to the defendant Ruby Jolly have, by stipulation of counsel, been added to the record upon appeal.)

4. The town also has enacted a zoning ordinance. The ordinance here in question is not made a part thereof and is not denominated a zoning ordinance.

5. The town has a population of over 3,000 and has residential, general business, neighborhood trading, manufacturing and minor farming areas.

6. The defendants are the owners or entitled to the possession of a lot in the town, designated as 421 Fourth Street Place, which lot is in an area zoned for "neighborhood trading" and adjoins areas zoned for "industrial" and for "residential" use by the town's zoning ordinance.

7. On 6 March 1967, the defendant Ruby Jolly applied for and was granted a temporary permit to place one mobile home upon this lot for six months, beginning 6 March 1967. This permit was renewed for two succeeding six months periods. The last renewal of the permit expired prior to the commencement of this action.

8. Pursuant to such permit, Ruby Jolly placed upon the lot a mobile home with the consent of the defendants Foy Jolly and Odessa P. Jolly, the owners of the lot. It is of good, substantial material, has two bedrooms, a bath, and adequate plumbing, heating and electric facilities. It is presently being used as the residence of Ruby Jolly and has been so used since it was placed upon the property. The defendants have been notified to cease using the lot for the location thereon of a mobile home as a dwelling place. Their continuing to so use it is a violation of the ordinance if the ordinance is valid.

9. "[S]ome modern mobile homes of current manufacture when placed on suitable lots within the Town of Conover, in a suitable manner, with adequate water, sewage, electrical, and other utilities would not *per se* be a hazard."

It was not stipulated that § 12-22 of the ordinance bears any substantial relationship to public health, safety or welfare. This is denied in the further answer of the defendants, they alleging therein that the ordinance "is unconstitutional and void as an arbitrary, unreasonable and discriminatory exercise of the police power."

Williams, Pannell & Matthews by Martin C. Pannell for plaintiff appellant.

Lefler, Gordon & Waddell by Lewis E. Waddell, Jr., for defendant appellees.

LAKE, Justice.

We do not have before us in this case any question as to the authority of a city or town, by a properly enacted zoning ordinance, to divide its territory into zones and to restrict the use of mobile homes to one or more of such zones. The ordinance before us is not an exercise of the zoning power conferred upon cities and towns of this State by G.S. 160-172, *et seq.* Under this ordinance there is no land within the town upon which the owner of it may locate a mobile home for his own use, or for the use of a tenant, as a permanent residence. Again, this case does not involve the authority of a city or town to prohibit the establishment of a trailer camp or trailer park within territory subject to its zoning jurisdiction. See *Raleigh v. Morand,* 247 N.C. 363, 100 S.E. 2d 870. We are not here concerned with the validity of an ordinance or regulation requiring the owner or occupant of a mobile home, located within a city or town, to conform to specifications as to construction, size of lot, equipment, connection with water and sewer systems or other sanitary or safety measures.

The narrow question presented by this case is: May a town, with a population of approximately 3,000 persons and containing within its limits residential areas, general business areas, neighborhood trading areas, manufacturing areas and minor farming areas, prohibit by its ordinance the use, anywhere within its limits, of a single mobile home as a permanent residence, the

home being constructed, equipped, located and used so as to present no threat to the health or safety of its occupants or of any other person? We hold that the town has no such authority.

The ordinance in question forbids the owner of a well constructed mobile home, completely equipped for safe, sanitary, healthful occupancy, to use it anywhere in the town for the purpose for which it was designed and purchased. Such a prohibition may be justified, if at all, only as an exercise of the police power of the State delegated to the municipality.

[1] A city or town in this State has no inherent police power. It may exercise only such powers as are expressly conferred upon it by the General Assembly or as are necessarily implied from those expressly so conferred. *State v. Furio,* 267 N.C. 353, 148 S.E. 2d 275; *State v. Bryd,* 259 N.C. 141, 130 S.E. 2d 55; G.S. 160-1.

[2] G.S. 160-200(26) confers upon cities and towns the power to prevent and abate nuisances, but a mobile home is not a nuisance *per se.* As Hall, J., said, dissenting in *Vickers v. Township Committee of Gloucester Township,* 37 N.J. 232, 181 A. 2d 129, "Trailer living is a perfectly respectable, healthy and useful kind of housing, adopted by choice by several million people in this country today." Far from intending to prevent it, the General Assembly of 1969 adopted the Uniform Standards Code for Mobile Homes Act for the purpose of assuring the safe construction of such homes sold in this State.

[3] G.S. 160-200(6) confers upon cities and towns the authority "to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof." A mobile home, well constructed and equipped, connected with the public water, sewer and electric systems, cannot be deemed, *per se,* detrimental to the health, morals, comfort, safety, convenience and welfare of the people of the town without regard to the nature and use of the surrounding properties. We conclude, therefore, that G.S. 160-200(6) does not confer upon the Town of Conover authority to enact § 12-22 of its Code of Ordinances, the ordinance upon which it relies in this action. Our attention has been called to no provision in the charter of the town or to any other legislation which purports to confer such authority upon it.

[4] Since authority to enact the ordinance has not been delegated to the town by the General Assembly, we do not reach the serious question of whether such an ordinance, if authorized by statute, would violate Art. I, § 17, of the Constitution of North Carolina, providing that no person may be deprived of his liberty or property but by the law of the land. *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129; *In Re Parker,* 209 N.C. 693, 184 S.E. 532. The town not having been granted the power to enact the ordinance upon which it relies, the injunctive relief which it sought in this action was properly denied.

Affirmed.

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

JACK CARR STUBBLEFIELD, DECEASED EMPLOYEE; MR. AND MRS. HARVEY STUBBLEFIELD, PARENTS, PLAINTIFFS v. WATSON ELECTRICAL CONSTRUCTION COMPANY, AND THE TRAVELERS INSURANCE COMPANY, DEFENDANTS

No. 39

(Filed 16 December 1970)

1. **Master and Servant §§ 56, 60— workmen's compensation — death arising out of course of employment**

   An apprentice electrician, who idly knocked off dust and pieces of brick from a conveyor belt in a brick factory and became entangled and was dragged to an immediate death between the belt and the rollers, died in an accident arising out of the course of his employment with an electrical contracting firm, where, at the instant of the accident, the apprentice was waiting for his foreman to descend from a ladder in order that the two of them might proceed with the electrical firm's work at the brick plant.

2. **Master and Servant § 56— workmen's compensation — causal relation between accident and employment.**

   An accident arises out of the employment if there is a causal relation between the accident and the employment.

3. **Master and Servant § 56— causal relation between accident and employment — exposed place of danger**

   A causal relation exists between the accident and the employment when the duties of the employment require the employee to be in a place at which he is exposed to a risk of injury to which he would not otherwise be subject, and while there he is injured by an accident due to the peculiar hazard of that location.

4. **Master and Servant § 58— workmen's compensation — negligence by injured employee**

An act of negligence by an employee while he was in the performance of his duty of waiting for his foreman did not bar the employee's right to compensation for the accident resulting from the negligence.

APPEAL from the judgment of the Court of Appeals affirming an award of compensation and funeral expenses by the North Carolina Industrial Commission, which judgment is reported in 9 N.C. App. 4. The undisputed evidence before the Commission was to the effect that:

Jack Carr Stubblefield, the deceased, was employed by Watson Electrical Construction Company as an apprentice electrician. On 29 May 1969, he and his foreman were doing electrical work for their employer at the plant of Cherokee Brick Company in Moncure. In the room where they were working there were several conveyor belts in operation, there being no safety devices or guard rails around these conveyors. Their work was not related to the conveyors but was with reference to some new machinery installed in the plant.

The immediate task of the two men was the transfer of some 60 feet of wire "from one box to another" (presumably, from one switch box to another). The foreman, standing at the top of an eight-foot ladder, was feeding this wire into a conduit. Stubblefield, some distance away, was pulling the wire from the other box and so feeding it to the foreman. When he had pulled about half the wire out, it became tight so that he could pull it no further. He so advised the foreman and then proceeded directly to the point at which the foreman was working, passing under one of the conveyors in so doing. Stubblefield stood waiting for the foreman to descend from the ladder. His purpose in so doing was to assist the foreman in cutting the wire. He was standing near the conveyor, which was approximately five and one-half feet from the floor at that point.

While so standing and waiting for the foreman, Stubblefield undertook to knock some dust and pieces of brick from the conveyor rollers with a nine-inch pair of pliers, which he held in his hand. This action had no relation to his duties. As he knocked the dust and brick fragments from the rollers, his hand became entangled in the belt or the rollers. He was pulled between the rollers and the conveyor and was instantly killed.

The deputy commissioner, who conducted the hearing, found the foregoing facts. The defendants concede that these findings are supported by the evidence. The deputy commissioner further found and concluded that the deceased sustained an injury by accident arising out of and in the course of his employment, which injury resulted in his death. The deceased having no dependents, compensation was awarded to his parents.

Upon appeal by the defendants, the Full Commission adopted as its own the findings, conclusions and award made by the deputy commissioner.

The defendants appealed to the Court of Appeals, contending that the evidence and the remaining findings of fact do not support the finding and conclusion that the death was the result of an injury by accident arising out of and in the course of the employment. The Court of Appeals affirmed the award, Judge Campbell dissenting.

Gene C. Smith for defendant appellants.

Bryant, Lipton, Bryant & Battle, by Victor S. Bryant, Jr., for claimant appellees.

LAKE, Justice.

[1] The deceased was sent to the room, wherein the conveyor was in operation, by his employer for the purpose of performing the duties of his employment. At the instant of the accident, he was standing at a place at which it was proper for him to wait for his foreman to descend from a ladder in order that the two of them might proceed with the work to which they had been assigned by their employer. His work carried him to that place and, while waiting there for the descent of the foreman, he was performing his duties. Thus the accident occurred in the course of his employment. *Clark v. Burton Lines,* 272 N.C. 433, 158 S.E. 2d 569; *Howell v. Fuel Co.,* 226 N.C. 730, 40 S.E. 2d 197.

[2, 3] An accident arises out of the employment if there is a causal relation between the accident and the employment. There is such a causal relationship when, as here, the duties of the employment require the employee to be in a place, at which he is exposed to a risk of injury to which he would not otherwise be subject, and while there, he is injured by an accident due to the peculiar hazard of that location. *Clark v. Burton Lines,*

supra; Allred v. Allred-Gardner, Inc., 253 N.C. 554, 117 S.E. 2d 476; *Bolling v. Belk-White Co.*, 228 N.C. 749, 46 S.E. 2d 838; *Howell v. Fuel Co., supra; Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E. 2d 320.

[4] Had the deceased employee, while standing at the foot of the ladder waiting for his foreman to join him in order to continue the work in which they were engaged, inadvertantly stepped into contact with the conveyor, the requisite causal relation between the employment and the accident would be clear. His idly flicking objects off the conveyor or the rollers, while so waiting for the foreman, was not a stepping aside from his employment. He was still engaged in the only duty then required of him by his employment, namely, waiting for his foreman. *Clark v. Burton Lines, supra; Howell v. Fuel Co., supra.* His act of striking at the objects on the moving conveyor belt with the pliers was negligence, but negligence in the performance of his duty of waiting for his foreman does not bar the right to compensation for the resulting accident. *Allred v. Allred-Gardner, Inc., supra; Howell v. Fuel Co., supra; Archie v. Lumber Co.*, 222 N.C. 477, 23 S.E. 2d 834.

The finding of the Commission that the accident arose out of the employment is supported by evidence and is therefore conclusive upon appeal. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760; *Brown v. Aluminum Co., supra.*

Affirmed.

BETTY SANDERS WILLIAMSON, ADMINISTRATRIX OF LARRY EUGENE SANDERS, DECEASED v. REBECCA BRENDA McNEILL, DANIEL LONNIE CHEEK AND LONNIE THOMAS CHEEK

No. 38

(Filed 16 December 1970)

1. **Automobiles § 86— last clear chance — competency of testimony — dissimilarity of conditions**

The conditions existing when plaintiff's witness approached the post-accident scene were so dissimilar to those existing when the accident occurred that the witness' testimony was without probative value in determining whether defendant, under the conditions existing when she approached the place where plaintiff's intestate and two others were lying on the surface of the road, had the last clear chance to avoid injury to plaintiff's intestate.

2. **Automobiles § 89— person struck by automobile while lying on highway — last clear chance**

In this action to recover damages for the death of plaintiff's intestate which occurred when he was struck by defendant's car while lying prone on the highway at night, the evidence, considered in the light most favorable to plaintiff, was insufficient to require submission of the issue of last clear chance to the jury.

APPEAL by plaintiff from the Court of Appeals.

The Court of Appeals, by a two to one decision of the hearing panel, affirmed the judgment of involuntary nonsuit entered at the conclusion of plaintiff's evidence by *Lupton, J.*, at May 13, 1969 Session of RANDOLPH Superior Court. One member of the panel having dissented, plaintiff's appeal is of right under G.S. 7A-30(2).

The action was dismissed in the superior court as to defendants Cheek by judgment of voluntary nonsuit. Plaintiff and defendant McNeill are the only parties to plaintiff's appeal(s).

Plaintiff alleged and offered evidence that her intestate, aged 18, was fatally injured on August 30, 1966, at approximately 1:25 a.m., when, as he lay prone on the west lane of blacktopped Highway #705, plaintiff's intestate was struck and run over by the southbound car of defendant McNeill.

An analysis of the pleadings and a summary of the basic evidential facts are sufficiently set forth in the statement preceding Judge Britt's opinion for the Court of Appeals. 8 N.C. App. 625, 175 S.E. 2d 294.

H. Wade Yates for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellee.

BOBBITT, Chief Justice

The Court of Appeals conceded, *arguendo*, plaintiff's evidence was sufficient to make out a case of actionable negligence against defendant McNeill. For present purposes, we accept that premise. Plaintiff's evidence established clearly that her intestate was contributorily negligent. This presented for determination the question whether the evidence, when considered in the light most favorable to plaintiff, was sufficient to

require submission of the issue of last clear chance. *Clodfelter v. Carroll,* 261 N.C. 630, 135 S.E. 2d 636.

The factual elements necessary to be established to permit recovery under the last clear chance or discovered peril doctrine have been stated and restated in numerous decisions of this Court, including the decisions cited and discussed by Judge Britt. Repetition would serve no useful purpose. Whether the evidence, when considered in the light most favorable to plaintiff, was sufficient to invoke the doctrine is the crucial question.

Plaintiff relies largely on a single statement in the narrative of the testimony of Mrs. Shamburger, to wit: "When I first observed the bodies in the road, I'd say I was at the bottom of the knoll about 500 feet." Standing alone, the quoted statement might convey the impression that when Mrs. Shamburger saw the bodies she was at the bottom of the knoll *and* that the distance from the bottom of the knoll to the bodies was about 500 feet. Consideration of Mrs. Shamburger's testimony in its entirety and the testimony of plaintiff's other witnesses dispels this impression. A brief summary of the evidence pertinent to this conclusion is set forth below.

Plaintiff's intestate and two companions lay prone upon the blacktopped surface of Highway #705 when the car operated by defendant McNeill ran over plaintiff's intestate and one or both of the others. Approaching the scene, defendant McNeill had been traveling south on Highway #705. Plaintiff's intestate was on the surface of the highway in the (west) lane for southbound traffic.

The investigating State Highway Patrolman testified that the crest of the knoll was approximately 450 feet north of the place where the bodies were after the men had been run over; that it was downgrade for a distance of 300 feet when proceeding south from the crest of the knoll, there being "about a 20-foot drop-off over about 300 feet, or an average of about one foot over every fifteen feet"; and that the road "levels off" about 300 feet south of the crest of the knoll.

Mrs. Shamburger was traveling south on Highway #705 as she approached the scene. The tragic accident had occurred. Her attention was attracted by the presence of five persons in the highway. They were "standing upright" and "waving their arms." Suspecting a holdup, she speeded her car temporarily.

When she saw the bodies lying on the highway *beyond* the persons who were waving for her to stop, she took her foot off the gas and brought her car to a stop in the area where the bodies were lying. She testified: "(T)hese bodies were just a short distance from where that road levels out." She also testified that, in her "best opinion," the knoll was "a tenth of a mile, something over 500 feet," north of the bodies.

[1] We are in agreement with the views expressed by Judge Britt, namely, that the conditions when Mrs. Shamburger approached the post-accident scene were dissimilar to such extent that Mrs. Shamburger's testimony was without probative value in determining whether defendant McNeill, under the conditions existing when she approached the place where plaintiff's intestate and two others were lying on the surface of the road, had the last clear chance to avoid injury to plaintiff's intestate.

[2] After careful consideration of the testimony of each witness, we conclude that the evidence, when considered in the light most favorable to plaintiff, was insufficient to require submission of the issue of last clear chance to the jury. Hence, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE KEG, INCORPORATED, T/A THE KEG, 3106 HILLSBOROUGH STREET, RALEIGH, NORTH CAROLINA, PETITIONER v. STATE BOARD OF ALCOHOLIC CONTROL, RESPONDENT

No. 54

(Filed 16 December 1970)

Intoxicating Liquor § 2— suspension of retail beer permit — sufficiency of ABC Board findings

The superior court erred in setting aside an order of the State Board of Alcoholic Control suspending the petitioner's retail beer permit for 60 days, where the evidence before the Board was sufficient to sustain its findings (1) that on a certain date an intoxicated person was permitted to loiter on the licensed premises of the petitioner in violation of the Board's regulations and (2) that the operator of the petitioner failed to give the premises proper supervision on the above occasion, and where there was no evidence that the Board acted arbitrarily or in excess of lawful authority in suspending the license. G.S. 18-78(d).

APPEAL by State Board of Alcoholic Control from *Cowper, J.*, August 1970 Regular Civil Session of WAKE County Superior Court, transferred for initial appellate review by the Supreme Court under an order pursuant to G.S. 7A-31(b) (4).

This proceeding originated by notice dated February 25, 1970, to State Keg, Inc., T/A The Keg, 3106 Hillsborough Street, Raleigh, North Carolina, to appear before the Hearing Officer of the State Board of Alcoholic Control on March 10, 1970 to show cause why its retail beer permit should not be revoked for:

> "2. Permitting and allowing persons to use loud, profane and indecent language on your retail licensed premise on or about February 21, 1970, 11:30 p.m. in violation of Board of Alcoholic Control Regulation No. 30 (3).
>
> "3. Permitting and allowing Terry Lee Delaney, person in an intoxicated condition, to loiter and consume beer on your retail licensed premise on or about February 6, 1970, 11:15 p.m. in violation of Board of Alcoholic Control Regulation No. 30 (1) & (2).
>
> "4. Failing to give your retail licensed premise proper supervision on or about February 6, 1970, 11:15 p.m. and February 21, 1970, 11:30 p.m. G.S. 18-78."

Graham Oakley, the operator of The Keg, and his attorneys appeared at the hearing before D. L. Pickard, Assistant Director - Hearing Officer, on April 15, 1970. Mr. K. E. Gilliam, a State ABC officer, and Mr. B. C. Nipper, a detective with the Raleigh Police Department, were witnesses for the Board. Mr. Nipper testified in substance that on the evening of February 6, 1970 he, together with another police officer of the Raleigh Police Department, visited The Keg and had been there approximately five or six minutes when Terry Lee Delaney, a white male, was observed on the dance floor trying to dance with a colored female. Delaney was unstable on his feet, and on two or three occasions staggered. On closer observation Officer Nipper testified that Delaney had the strong odor of alcohol on his breath and was intoxicated; that he observed Delaney on the premises for some fifteen or twenty minutes, and as Delaney left he arrested him for public intoxication; that Mr. Oakley, the operator, was there during the time the officer observed Delaney, but the officer did not see him say anything to Delaney. Mr. Gilliam testified as to the loud, profane, and indecent lan-

guage which he heard on the premises on February 6, 1970. After the hearing, D. L. Pickard, the Hearing Officer, found the facts and issued the following order:

"(A) That the permittee known as The Keg permitted and allowed a person to use loud, profane and indecent language on its retail licensed premises on or about February 21, 1970, at 11:30 p.m. in violation of Board of Alcoholic Control Regulation #30 (3).

"(B) It is further found as a fact that The Keg failed to give its retail licensed premises proper supervision on or about February 21, 1970, at approximately 11:30 p.m. by allowing a person to use loud, profane and indecent language on its premises.

"(C) It is further found as a fact that The Keg allowed Terry Lee Delaney, a person in an intoxicated condition, to loiter and consume beer on its retail licensed premises on or about February 6, 1970, 11:15 p.m. in violation of Board of Alcoholic Control Regulation #30 (1) and (2).

"(D) It is further found as a fact that The Keg failed to give its retail licensed premises proper supervision on February 6, 1970, at approximately 11:15 p.m. by allowing Terry Lee Delaney, a person in an intoxicated condition, to loiter and consume beer on its retail licensed premises.

HISTORY

"On March 16, 1970, a letter of reprimand was sent by the Board of Alcoholic Control to The Keg for allowing affrays to take place on the premises of The Keg and also for allowing a person by the name of Jeffrey Allen Theys to use loud, profane and indecent language on the premises on December 6, 1969. A warning dated January 13, 1969, for allowing an intoxicated person to loiter on the premises was issued to The Keg.

RECOMMENDATION OF D. L. PICKARD
ASSISTANT DIRECTOR - HEARING OFFICER
N. C. BOARD OF ALCOHOLIC CONTROL

"That the permit be suspended for a period of 60 days."

Two letters from the Board to The Keg dated July 7, 1969 and March 16, 1970, signed by W. C. Cohoon, Chairman, also appear in the record as follows:

"This Board is in receipt of a report from our local ABC Officer showing that the following prohibited practices were observed at your establishment:

"(1) Employing Richard Robertson, David Coley, and Thomas Jarvis Tripp, minors (persons under 18 years of age) on your retail licensed premises and permitting said minors to work in, about, and in connection with your retail establishment where malt beverages are sold and dispensed on an On-Premises Permit on or about July 2, 1969, 11:30 p.m., in violation of G.S. 110-7 and Malt Beverage Regulation No. 17.

"(2) Failing to give your retail licensed premises proper supervision on or about July 2, 1969, 11:30 p.m. G.S. 18-78.

"All of the above acts are in direct violation of the rules and regulations of the Board of Alcoholic Control. The Board requests that you at once eliminate these acts, if you have not already done so, and that you give your establishment closer supervision by abiding by and complying with all the North Carolina Alcoholic Beverage Control Laws and Regulations.

"The Board has decided to take no active action against your permit at this time; however, consider this a warning letter and if any further violations are reported to this office concerning the operation of your establishment, immediate steps will be taken against your permit."

"The Board, at its meeting in Raleigh, North Carolina, on March 16, 1970, reviewed the evidence presented at the hearing of February 24, 1970 and after due consideration, ruled to take no action against your permit at this time. The Board ordered that a letter of reprimand be issued to you in this matter.

"Officers of this Department will be calling on you from time to time and will be glad to assist you in any matters pertaining to malt beverages and/or wine. However, if they detect violations on your premises, they will report them to this office as is their duty.

"Consider this a letter of reprimand in this matter and if any further violations are detected in the operation of

your establishment, immediate steps will be taken against your malt beverage and/or wine permits."

On May 8, 1970 The Keg was notified that the findings of fact and recommendation of D. L. Pickard, the Hearing Officer, based on the hearing held on April 15, 1970, would be reviewed by the Board on May 18, 1970 at 10 a.m. After this review, the Board notified The Keg as follows:

"The State Board of Alcoholic Control, at its meeting on May 18, 1970, reviewed the recommendation and findings of fact based on the evidence taken at the hearing on April 15, 1970, by D. L. Pickard, Assistant Director (Hearing Officer), after which it approved the findings of fact as its own and made a decision thereon.

"Action is being taken against your retail beer permit because the Board finds as a fact that you permitted and allowed a person to use loud, profane and indecent language on your retail licensed premises on or about February 21, 1970, at 11:30 p.m. in violation of Board of Alcoholic Control Regulation #30 (3); you allowed Terry Lee Delaney, a person in an intoxicated condition, to loiter and consume beer on your retail licensed premises on or about February 6, 1970, 11:15 p.m. in violation of Board of Alcoholic Control Regulation #30 (1) & (2); and you failed to give your retail licensed premises proper supervision on February 6, 1970 at approximately 11:15 p.m. and February 21, 1970, at approximately 11:30 p.m. in violation of G.S. 18-78.

"It is therefore ORDERED that your retail beer permit be suspended for a period of 60 days, effective June 1, 1970, and the local State ABC Officer in your territory will pick up same at your establishment on that date."

On May 26, 1970, The Keg gave notice of appeal to the Superior Court, and on the same date the Honorable James H. Pou Bailey, Resident Judge of the Tenth Judicial District, entered an order staying the operation of the order entered by the State Board of Alcoholic Control until the final determination of a judicial review of the proceeding. This proceeding was heard in the Superior Court of Wake County on August 6, 1970, and the following order was entered.

"THIS CAUSE coming on to be heard and being heard before the Honorable Albert W. Cowper, Judge presiding at

the August Regular Civil Term of the Superior Court of Wake County, and the court, upon reviewing the record and upon reviewing the oral argument of counsel for petitioner and counsel for respondent, is of the opinion that the petitioner's petition should be allowed and that the Order of the respondent entered herein and dated May 18, 1970, suspending the retail beer permit of the petitioner for sixty (60) days be set aside.

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Order of the respondent, Board of Alcoholic Control, entered herein on May 18, 1970, suspending the petitioner's retail beer permit for sixty (60) days, be and the same is hereby set aside and declared to be null and void and that the costs be taxed against the respondent."

From the order of the Superior Court, the State Board of Alcoholic Control appealed to this Court.

Attorney General Robert Morgan, Staff Attorneys Mrs. Christine Y. Densen and James L. Blackburn for respondent, appellant.

Broughton and Broughton by John D. McConnell, Jr., for petitioner, appellee.

Per Curiam. Pertinent regulations adopted by the North Carolina Board of Alcoholic Control pursuant to the authority granted by G.S. 18-78(d) are as follows:

> "30. Permits authorizing the sale at retail of beverages, as defined in G.S. 18-64, and Article 5 of Chapter 18 of the General Statutes, for on or off premises consumption may be suspended or revoked upon violation of any of the following provisions upon the licensed premises:
>
> "1. Permitting intoxicated persons to loiter on the licensed premises.
>
> * * *
>
> "3. Permitting the use of loud, profane or indecent language by any person."

G.S. 18-78 in part provides:

> "(a) If any licensee violates any of the provisions of this article or any rules and regulations under authority of

> this article or fails to superintend in person or through a manager, the business for which the license was issued, or allows the premises, with respect to which the license was issued, to be used for any unlawful, disorderly, or immoral purposes. . . .
>
> * * *
>
> "(d) The State Board of Alcoholic Control . . . may revoke or suspend the State permit of any licensee for a violation of the provisions of this article or of any rule or regulation adopted by said Board."

A violation of either Regulation or of the terms of the statute is sufficient to support the suspension of the license.

We hold that the evidence before the State Board of Alcoholic Control was sufficient to sustain the finding that on February 6, 1970 Terry Lee Delaney was intoxicated and was permitted to loiter on the licensed premises of The Keg in violation of the Board of Alcoholic Control Regulation #30 (1), and that Mr. Graham Oakley, the operator of The Keg on that occasion, failed to give the premises proper supervision. Such findings were sufficient to support the order of suspension of license entered by the Hearing Officer and approved by the Board. Therefore, it is not necessary to consider the evidence concerning the loud, profane and indecent language used on the premises on February 21, 1970.

The principles governing this decision were stated by Justice Higgins in *Freeman v. Board of Alcoholic Control,* 264 N.C. 320, 141 S.E. 2d 499:

> "The duty to weigh the evidence and find the facts is lodged in the agency that hears the witnesses and observes their demeanor as they testify—in this case the Board of Alcoholic Control. Its findings are conclusive if supported by material and substantial evidence. *Campbell v. ABC Board,* 263 N.C. 224, 139 S.E. 2d 197; *Thomas v. ABC Board,* 258 N.C. 513, 128 S.E. 2d 884. 'Courts will not undertake to control the exercise of discretion and judgment on the part of members of a commission in performing the functions of a State agency.' *Williamston v. R. R.,* 236 N.C. 271, 72 S.E. 2d 609. 'When discretionary authority is vested in such commission, the court has no power to substitute its discretion for that of the commission; and in the

absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene.' *Pharr v. Garibaldi,* 252 N.C. 803, 115 S.E. 2d 18. 'Hence it is that the findings of the board, when made in good faith and supported by evidence, are final.' *In re Hastings,* 252 N.C. 327, 113 S.E. 2d 433."

Accord: *Wholesale v. ABC Board,* 265 N.C. 679, 144 S.E. 2d 895.

There is no evidence that the action of the Board was arbitrary or in excess of its lawful authority. The judgment of the Superior Court is reversed and the Stay Order entered by Bailey, J., on May 26, 1970, staying the operation of the Order entered by the State Board of Alcoholic Control on May 18, 1970, is vacated.

Reversed.

AIRPORT AUTHORITY v. STEWART

No. 49 PC.

Case below: 9 N.C. App. 505.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 8 December 1970.

CLOTT v. GREYHOUND LINES

No. 54 PC.

Case below: 9 N.C. App. 604.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 January 1971.

JERNIGAN v. LEE

No. 44 PC.

Case below: 9 N.C. App. 582.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 16 December 1970.

SAMONS v. MEYMANDI

No. 48 PC.

Case below: 9 N.C. App. 490.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 January 1971.

STATE v. BENFIELD

No. 59 PC.

Case below: 9 N.C. App. 657.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 January 1971.

STATE v. MORGAN

No. 6.

Case below: 9 N.C. App. 624.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 January 1971.

STATE v. OWENS

No. 58 PC.

Case below: 9 N.C. App. 727.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 January 1971.

STATE v. TEASLEY

No. 39 PC.

Case below: 9 N.C. App. 477.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied and motion of Attorney General to dismiss appeal allowed 16 December 1970.

STATE v. WARD

No. 55 PC.

Case below: 9 N.C. App. 684.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 January 1971.

STATE v. WINGARD

No. 12.

Case below: 9 N.C. App. 719.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 January 1971.

STATE v. WOOD

No. 56 PC.

Case below: 9 N.C. App. 706.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 January 1971.

J. O. STYERS, R. C. PFAFF AND ROBERT G. SCHULTZ v. CRAIG PHILLIPS, SUPERINTENDENT OF PUBLIC EDUCATION OF NORTH CAROLINA; A. C. DAVIS, CONTROLLER, STATE BOARD OF EDUCATION; EDWIN GILL, TREASURER OF NORTH CAROLINA; AND GEORGE S. LAMBERT, STATE DISBURSING OFFICER

No. 71

(Filed 20 January 1971)

1. **Schools § 16— definition of "intra-city transportation" of school pupils**

   The term "intra-city transportation" means the transportation of public school pupils living within the boundaries of any municipality to a school located therein but more than one and one-half miles from the residence of the pupil. G.S. 115-183(4).

2. **Trial § 18— sufficiency of evidence to support material issue — question for court**

   Whether there is enough evidence to support a material issue is always a question for the court.

3. **Appeal and Error § 58 —review of injunctive proceeding — power of Supreme Court to find facts**

   Upon appeal from an order granting or refusing an interlocutory injunction, the Supreme Court is not bound by the findings of fact of the trial court but may review the evidence and make its own findings of fact.

4. **Schools § 16— school buses — State Board of Education**

   The State Board of Education has been relieved of all responsibility for the operation of school buses by G.S. 115-181(a).

5. **Schools § 16— bus transportation — discretion of local board**

   Whether any school board shall operate a bus transportation system is a matter in its sole discretion. G.S. 115-180.

6. **Schools § 16— transportation of rural pupils to urban schools — transportation of urban pupils to same schools**

   A city school board is not required to transport pupils living in the city and attending schools located therein even though transportation to those same schools is furnished pupils living outside the city. G.S. 115-186(e).

7. **Schools § 16— school bus transportation — allocation of funds by State Board — location of pupils' residences**

   Plaintiffs' contention that it would be illegal for the State Board of Education to allocate funds for the transportation of any class of pupils other than the five classes enumerated in Ch. 990, Session Laws of 1969, *held* without merit.

8. **Schools § 16— intra-city transportation of pupils — G.S. 115-186(e)**

   G.S. 115-186(e) does not forbid either the State Board of Education or the local boards to supply funds for the intra-city transporta-

tion of pupils, the statute merely declaring that the transportation of pupils who live outside the city limits in which the school they attend is located does not impose a correlative *duty* to transport pupils who live within the city and attend the same school.

9. **Schools § 16; Statutes § 5— legislative intent — testimony by legislator — legislative bills which failed to pass**

Neither testimony by a former member of the legislature nor bills which were introduced in the legislature and died in committee were competent to show the legislature's intention in making an appropriation for transportation of public school pupils, since the intention of the legislature cannot be shown by the testimony of a member nor ordinarily by its failure to act.

10. **Schools § 16— intra-city transportation of school pupils — allocation by State Board of Education**

The State Board of Education had authority under G.S. 115-181(f) to make an allocation for the intra-city transportation of public school pupils from the funds appropriated by the General Assembly for transportation purposes during the 1970-71 school year, and the Board did in fact make such an allocation.

11. **Schools § 16— transportation of urban pupils — authorization by State Board — irrelevancy of court's finding**

In this action to restrain the expenditure of State tax funds for the intra-city transportation of public school pupils, purported finding by the trial court that "there is no evidence that the State Board of Education has authorized the transportation" of urban pupils to any school is irrelevant, since the State Board does not authorize the transportation of any pupils, but only allocates funds to those boards which elect to operate transportation systems.

12. **Public Officers § 8— official acts — presumption of regularity**

Absent evidence to the contrary, it is presumed that public officials have discharged their duties in good faith and have exercised their powers in accord with the spirit and purpose of the law, the burden being on the party asserting the contrary to overcome the presumption with competent and substantial evidence.

13. **Schools § 16; Public Officers § 8— failure of State Board officially to allocate school bus funds — burden of proof — failure of proof**

Plaintiffs had the burden of proving their contention that the State Board of Education has never officially made any allocation of funds for the intra-city transportation of pupils, and the contention is without merit where the case on appeal is devoid of any evidence of such failure and contains no suggestion that State Board minutes were unavailable or nonexistent.

14. **Schools § 16— acceleration of use of school bus funds — authority of State Board**

The State Board of Education had authority under G.S. 115-181(g) to accelerate the allocation and expenditure of the legislative appropriation for the transportation of public school pupils for the 1970-71

school year even though such acceleration will exhaust the appropriation by April 1971.

15. **State § 4— illegal diversion of public funds — standing of individual to enjoin**

An individual has standing to contest an allegedly illegal diversion of public funds which will injuriously affect his rights individually or as a citizen and taxpayer.

16. **Schools §§ 5, 16; State § 4— expenditures for intra-city transportation of pupils — taxpayer suit to enjoin — standing to maintain action**

In this action by three taxpayers to enjoin the expenditure of state funds for the intra-city transportation of public school pupils, the Supreme Court has assumed, without deciding, that plaintiffs *might* be adversely affected in some way if funds appropriated for the transportation of public school pupils were illegally diverted and that plaintiffs have standing to maintain the action.

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

Justice HIGGINS concurring in result.

Justice LAKE dissenting.

APPEAL by defendants from *Bailey, J.*, September 1970 Session of WAKE, transferred for initial appellate review by the Supreme Court under an order entered pursuant to G.S. 7A-31(b)(4).

Plaintiffs are three residents of Forsyth County who pay income taxes, "as well as other State taxes," to the State of North Carolina. Defendants are Dr. Craig Phillips, Superintendent of Public Instruction of North Carolina, *ex officio* member of the State Board of Education (State Board) and its secretary; A. C. Davis, Controller of the State Board; Edwin Gill, State Treasurer; and George S. Lambert, State Disbursing Officer.

In their complaint, filed 3 September 1970, plaintiffs allege: (1) Defendants are spending tax funds which the State "collected from these plaintiffs" for the transportation of pupils living in Winston-Salem and other cities and towns of North Carolina to and from public schools located within their respective municipalities. The expenditure of tax funds for this purpose is unauthorized by law and therefore illegal. (2) Defendants Phillips and Davis have supplied discarded school buses gratuitously to city boards of education for the transportation of urban

school children to public schools located within "the towns in which they reside, and the defendants are spending tax funds collected from these plaintiffs" for the operation and maintenance of these buses. Plaintiffs, who sue as individuals and not as representing taxpayers generally, pray an injunction restraining defendants from spending tax funds for the transportation of any city pupils to and from schools located within the municipality in which they live and from supplying discarded school buses for that purpose.

Answering the complaint, defendants deny that they have spent, or plan to spend, tax funds for any unauthorized purpose. They aver that the General Assembly has authorized the State Board to allocate to the respective county and city boards of education all funds which it appropriates for the purpose of providing transportation to pupils enrolled in the State's public schools. Defendants also deny that they have transferred any school buses to city boards of education.

Defendants moved to dismiss the action because, *inter alia,* plaintiffs lack standing to maintain the suit.

On 21 September 1970, Judge Bailey heard plaintiffs' motion for a preliminary injunction pending the final trial. Both plaintiffs and defendants offered evidence. On 24 September 1970, Judge Bailey issued a preliminary injunction to become effective on 6 October 1970 and to remain in force until the further order of the court. His order restrained defendants, their agents, and all others receiving notice of the injunction, from "expending, disbursing and making available for spending tax funds of the State" for the intra-city transportation of public school pupils in any of the municipalities of the State. The order did not restrain defendants from supplying discarded school buses for the transportation of urban pupils to schools within the city limits.

Defendants appealed from Judge Bailey's order and, on 30 September 1970, petitioned this Court to stay the operation of the injunction pending the appeal. Plaintiffs, by answer, opposed the requested stay. A majority of the Court being of the opinion that the preliminary injunction should be suspended pending the hearing of defendants' appeal and the decision thereon, on 5 October 1970 an order was issued staying its opera-

tion. The evidence before Judge Bailey, which was without conflict, will be discussed in the opinion.

Smith, Anderson, Dorsett, Blount and Ragsdale and Hatfield, Allman and Hall for plaintiff appellees.

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General; and Andrew A. Vanore, Jr., Assistant Attorney General for defendant appellants.

SHARP, Justice.

[1, 10] The ultimate question which this appeal presents is whether the State Board of Education has authority to allocate funds from the General Assembly's 1970-71 appropriation for the Nine Months School Fund to city and county boards of education for the purpose of transporting urban pupils to and from schools located within the corporate limits of the cities and towns in which they live. This is a question of law, and the answer must be found in the enactments of the General Assembly. *D & W Inc. v. Charlotte,* 268 N.C. 577, 151 S.E. 2d 241. The term "intra-city transportation" as used herein means the transportation of public school pupils living within the boundaries of any municipality to a school located therein but more than one and one-half miles from the residence of the pupil. G.S. 115-183(4).

Plaintiffs contend, and Judge Bailey held, that the General Assembly had appropriated no money for the purpose of providing urban transportation to pupils living within corporate limits as they were fixed in 1957 and that defendants could not lawfully disburse tax funds for that purpose. Plaintiffs also contend that the State Board has never officially made any allocation of funds for the intra-city transportation of pupils; that the action taken was that of defendants Phillips and Davis. Judge Bailey made a "finding" that there was no evidence before him "that the State Board of Education has authorized the transportation" of urban pupils to any school, and plaintiffs assert that is a finding of fact in accordance with their contention.

[2, 3] Whether there is enough evidence to support a material issue is always a question of law for the court. 7 N. C. Index 2d *Trial* § 18 (1968). However, "[u]pon an appeal from an order granting or refusing an interlocutory injunction, the findings

of fact, as well as the conclusions of law, are reviewable by this Court." *Deal v. Sanitary District,* 245 N.C. 74, 76-77, 95 S.E. 2d 362, 364. In a situation such as this, factual findings made by the Judge of the Superior Court are not conclusive upon us. The Supreme Court may review the evidence and make its own findings of fact. *Cameron v. Highway Commission,* 188 N.C. 84, 123 S.E. 465. Our first task, however, is to determine whether the law authorizes the State Board to make an allocation for the intra-city transportation of public school pupils from the funds appropriated by the General Assembly to the Nine Months School Fund for transportation purposes.

[4] School transportation is governed by Article 22 of Chapter 115 of the General Statutes, which was enacted in 1955. In that year the General Assembly relieved the State Board of Education of all responsibility for the operation of school buses. G.S. 115-181(a); *Huff v. Northampton County Board of Education,* 259 N.C. 75, 130 S.E. 2d 26. At the same time it enacted G.S. 115-180 which, in pertinent part, provides: "Each county board of education, and each city board of education is hereby authorized, but is not required, to acquire, own and operate school buses for the transportion of pupils enrolled in the public schools of such county or city administrative unit. . . . "

[5, 6] It was specifically provided in G.S. 115-186(e) that there is no duty upon the State or any county or city "to supply any funds for the transportation of pupils, or any duty to supply funds for the transportation of pupils who live within the corporate limits of the city or town in which is located the public school in which such pupil is enrolled or to which such pupil is assigned, even though transportation to or from such school is furnished to pupils who live outside the limits of such city or town." Thus, it is quite clear that whether *any* school board shall operate a bus transportation system is a matter in its sole discretion, and that a city board is not required to transport pupils living in the city and attending schools located therein even though transportation to those same schools is furnished pupils living outside the city.

The only authority and control which the State Board has over the transportation of pupils is that provided in Article 22 of N. C. General Stats., Ch. 115. The Board is required by G.S. 115-181(d) to adopt safety regulations with reference to

the construction, maintenance, and operation of school buses. Upon the request of any city or county board of education, G.S. 115-181(e) authorizes the State Board to give advice with reference to the establishment of school bus routes, the acquisition and maintenance of buses, and any other question which may arise in connection with the operation of a school bus transportation system.

G.S. 115-181(f) requires the State Board to allocate "to the *respective county and city boards of education* (that is those which have elected to operate school buses) all funds appropriated from time to time by the General Assembly for the purpose of providing transportation to the pupils enrolled in the public schools within this State." The statute requires the allocation to be made on a fair and equitable basis, *according to the needs of the respective county and city administrative units* and so as to provide the most efficient use of such funds. The State Board is instructed to consider the number of pupils to be transported, the length and condition of bus routes, and any other pertinent facts affecting the cost of transportation. The State Board is directed to make the allocations at the beginning of each fiscal year, but it may reserve for future allocation during the fiscal year, as the need therefor shall be found to exist, an amount not to exceed ten percent (10%) of the total funds appropriated for transportation. (All italics are ours.)

After the State Board has allocated the transportation appropriation, G.S. 115-181(g) directs that the funds "shall be paid over *to the respective county and city boards of education* in accordance with such allocation in equal monthly installments throughout the regular school year: Provided, however, that upon the request *of a county or city board of education,* the State Board of Education may, in its discretion, pay over *to the county or city board* all or any part of any or all monthly installments prior to the time when the same would otherwise be payable. *The respective county and city boards* shall use such funds for the purpose of replacing, maintaining, insuring, and operating public school buses and service vehicles in accordance with the provisions of this subchapter, and for no other purpose, but in the making of expenditures for such purposes shall be subject to no control by the State Board of Education." (Emphasis added.)

In 1957, the General Assembly enacted G.S. 115-190.1, *viz.:*

"In each and every area of the State where school bus transportation of pupils to and from school is now being provided such school transportation shall not be discontinued by any State or local governmental agency for the sole reason that the corporate limits of any municipality have been extended to include such area since February 6, 1957, and school bus transportation of pupils shall be continued in the same manner and to the same extent as if such area had not been included within the corporate limits of a municipality."

In 1963 the foregoing section (G.S. 115-190.1) was repealed. At the same time the General Assembly enacted G.S. 115-181.1, which placed "upon the State, the State Board of Education in its use of funds appropriated by the State for school transportation, and any county or city administrative unit which elects to provide school transportation, the same duty to supply funds for the transportation of pupils who live within the corporate limits of a municipality in which is located a public school in which such pupils are enrolled or assigned as that required for transportation to or from school of any other pupils residing within the county or city administrative unit." N.C. Sess. Laws, Ch. 990 (1963).

The effective date of G.S. 115-181.1 was "from and after July 1, 1965." Prior to that date, by Chapter 1095 of the Session Laws of 1965, effective July 1, 1965, the legislature repealed G.S. 115-181.1 and re-enacted G.S. 115-190.1 in its original form. Thus, legislative approval of the policy of transporting some city children and not others to schools located within the corporate limits (given in 1957) was never actually withdrawn.

In August 1969, a three-judge panel in the U. S. District Court for the Middle District of North Carolina held that G.S. 115-190.1, by denying transportation to urban pupils residing in areas which were within the boundaries of a municipality on 6 February 1957, while providing it for those living in areas annexed by the city after 6 February 1957, violated the equal protection clause of the Constitution of the United States. *Sparrow v. Gill,* 304 F. Supp. 86. The State accepted this decision as correct and did not appeal to the United States Supreme Court. The Federal District Court enjoined the State from providing funds for the transportation of any pupils within a municipality

unless it provided transportation on an equal basis for all pupils residing within the city and living more than one and one-half miles from the school to which they were assigned. The implementation of the federal injunction was stayed until 1 August 1970.

As a result of the decision in *Sparrow*, a number of school boards had to decide whether to discontinue the transportation of about 41,000 children living in areas which had been annexed by municipalities since 6 February 1957 or to transport approximately 57,000 more. The State Board was faced with the problem of allocating the appropriation for the school year 1970-71, which was inadequate to provide this additional transportation.

For the fiscal year 1970-71, the General Assembly, by Chapters 807 and 1103 of the N. C. Session Laws of 1969, appropriated $465,366,589.00 to the State Board of Education for the Nine Months School Fund. This appropriation, as declared by G.S. 143-23, was for the purpose and objects enumerated in the itemized requirements of the State Board of Education as submitted to the General Assembly by the Director of the Budget and the Advisory Budget Commission (or as amended by the General Assembly). Pursuant to the requirements of the Executive Budget Act (N. C. Gen. Stats. Ch. 143, art. I), the Budget Division of the Department of Administration prepared for the State Board of Education a statement (Budget Advice) of its appropriation and the purposes and objects for which the funds could be used. This Advice (under Purpose 66, Auxiliary Agencies, Line 661, Transportation) allotted $14,410,682.00 of the total Nine Months School Fund Appropriation to bus transportation.

The State Board's first attempt to meet the crisis created by the decision in *Sparrow* was to request the Governor as Director of the Budget and the Advisory Budget Commission, in the exercise of authority granted to them by G.S. 143-23, to make a transfer of funds as between objects and items in its budget. Specifically, the State Board requested that it be allowed to transfer $1,796,150.00 appropriated for "lapsed" instructional salaries, retirement, and social security contributions, to Code 66 (transportation). On 9 June 1970 the Advisory Budget Commission denied this request for a transfer of funds. However, noting that the "Budget of the State Board of Education, Nine Months School Fund, provides more than $15,800,000.00 for

School Bus transportation in 1970-71," the Commission issued the following directive:

"The Governor and the Advisory Budget Commission have authorized the State Board of Education to expend from these funds ($15,800,000.00) the amounts necessary to provide for the transportation of urban school children affected by the recent federal court ruling, from the beginning of the 1970-71 school year until such time as the 1971 General Assembly convenes.

"The Governor at that time will determine if, and in what amount, additional funds will be required to provide for continuation of transportation for urban school children for the remainder of the 1970-71 school year, and he will submit an emergency appropriation bill for this purpose for the consideration of the General Assembly."

Following the advice received from the Governor and the Advisory Budget Commission, the State Board, which—according to Mr. Davis—had previously thought it could not allocate funds for the intra-city transportation of children residing within municipal limits as they existed in 1957, allocated funds to city boards of education for that purpose.

In a further effort to assist city and city/county boards of education meet the transportation crisis, defendants Phillips and Davis directed the State Board's division of transportation to request the cooperation of other school administrative units in making available to these boards their discarded buses on a temporary basis. Between June 19 and September 4, 1970, four hundred, seventy-eight (478) of these discarded buses—all of which had been in use during the school year 1969-70—were transferred from one unit to another. Title, which had been in the name of the unit using the bus (G.S. 115-188(d)) was lodged in the board which would use the bus during 1970-71. No funds were involved in these transfers.

At the hearing before Judge Bailey, Dr. Phillips testified that, under the allocations made by the State Board, transportation appropriation funds are being and will be spent for intra-city transportation in Winston-Salem and other cities. In consequence of the accelerated use of these funds and the transfer of the discarded school buses, as of 18 September 1970, bus transportation

was being provided by 114 boards of education for 111,500 urban pupils assigned to schools located within 142 municipalities. Mr. Davis estimated that the 1970-71 transportation appropriation would be exhausted by April 1971.

[7] In support of their contention that the legislature has never authorized the expenditure of tax funds for the intra-city transportation of pupils and that such expenditures are contrary to State policy and illegal, plaintiffs rely upon the recitals in N. C. Sess. Laws, Ch. 990 (1963). These recitals are that in June 1963 the State Board was allocating funds for the purpose of providing transportation for five classes of pupils: (1) Those residing outside municipalities and attending schools located outside municipalities; (2) Those residing outside municipalities and attending schools located inside municipalities; (3) Those residing inside municipalities and attending schools located outside municipalities; (4) Those residing in territory annexed by a municipality after 6 February 1957 and attending schools within the same municipality, when transportation was provided in such area prior to annexation; and (5) Those residing in one municipality but attending schools in another. G.S. 115-181.1, had it not been repealed, would have created a sixth classification—city pupils residing within corporate limits as they existed prior to February 1957. Plaintiffs argue that the five classes of pupils enumerated in N. C. Sess. Laws, Ch. 990 (1963) were the only ones for whose benefit the State Board was then allocating the funds appropriated for transportation and that, after the repeal of G.S. 115-181.1, allocations for any other class would be illegal.

This argument overlooks the fact that in providing transportation for class (4) pupils, tax funds had been and were being spent for intra-city transportation with specific legislative sanction. It ignores the clear wording of G.S. 115-180 which, both before and after the advent of G.S. 115-181.1, has continuously authorized a city board of education, *without limitation,* to transport all pupils residing within the unit. It fails to take into account that the only statutory restriction upon Code 66 funds is that they be used for transportation purposes; that neither the Appropriation Act nor the Budget Advice earmarked transportation funds for the transportation of children with reference to the location of their residence, the location of the school to which they were assigned, or any other criteria. It disregards

the mandate in G.S. 115-181(f) that the State Board shall fairly and equitably allocate to the county and city boards electing to operate transportation systems all funds which the legislature had appropriated for transportation. The 1963 repeal of G.S. 115-186(e) and the enactment of G.S. 115-181.1, followed in 1965 by the re-enactment of the former and the repeal of the latter before its effective date, cannot becloud the clear wording of G.S. 115-180 and G.S. 115-181(f).

Plaintiffs argue (1) that in *Sparrow* the Attorney General took the same position which they take here, that is, that G.S. 115-186(e) *prevents* the State Board from allocating funds for the intra-city transportion of students, and (2) that the opinion of the Attorney General "ought to be strongly considered by this Court." Although the construction of G.S. 115-186(e) was not before the three-judge court in *Sparrow*, it did not endorse this interpretation of the statute. If that was the Attorney General's position in that case, it is not his position in this one. We have considered both and conclude that the second position is correct.

[8] G.S. 115-186(e) does not forbid either the State Board or local boards to supply funds for the intra-city transportation of pupils. This section merely declares that the transportation of pupils who live outside the city limits in which the school they attend is located does not impose a correlative duty to transport pupils who live within the city and attend the same school. This classification is entirely reasonable, since ordinarily school children can obtain both private and public transportation more easily in the cities than in rural areas. In any event, a statute which merely relieves the city boards of any *duty* to provide transportation cannot be construed as a *prohibition* against providing it—especially in the face of G.S. 115-180, which grants to city boards, without limitation, the authority to operate transportation systems.

Plaintiffs further contend that because the legislature has never made an appropriation large enough to provide intra-city transportation and because Code 66 appropriations for the school year 1970-71 were insufficient to provide it for the city boards electing to operate transportation systems, the legislature manifested its intention that no tax funds should be spent for intra-city transportation.

[9] In an effort to show the legislative intent with reference to the 1970-71 appropriation in question, plaintiffs offered the testimony of Mr. Claude Hamrick, a former member of the General Assembly (House of Representatives) from 1961 through 1967. Over defendants' objection and exception, Judge Bailey permitted Mr. Hamrick to testify that in 1967 he and others introduced a bill in the House which would have re-enacted G.S. 115-181.1 as passed in 1963 and repealed in 1965. This bill and a similar one introduced in the Senate in 1969 died in committees. Over defendants' objection and exception these bills were admitted in evidence.

In his order Judge Bailey declared that "no finding of fact or conclusion of law herein is based in any manner or particular upon any bills which were introduced in the General Assembly which failed of passage. . . . " In their brief, however, plaintiffs refer to the testimony of Mr. Hamrick and to the 1967 and 1969 bills. They contend this evidence shows the legislature's intention to reject intra-city transportation of pupils and that this Court should consider this evidence even though Judge Bailey did not. Not so. Both Mr. Hamrick's testimony and the bills were incompetent. The intention of the legislature cannot be shown by the testimony of a member; it must be drawn from the construction of its acts. *D & W Inc. v. Charlotte, supra.* Furthermore, the rule is that ordinarily the intent of the legislature is indicated by its actions, and not by its failure to act. 50 Am. Jur. *Statutes* § 326 (1944).

In *James v. Young,* 77 N.D. 451, 43 N.W. 2d 692, 20 A.L.R. 2d 1086, it was held that the legislature's failure to pass a bill "cannot be said to indicate any intent on the part of the legislature. A public policy is declared by the action of the legislature, not by its failure to act." *Accord, Reed v. Huston,* 24 Idaho 26, 132 p. 109. In *Moore v. Board of Freeholders of Mercer County,* 76 N.J. Super. 396, 184 A. 2d 748, the defendants argued that the failure of the legislature to pass a bill specifically authorizing a citizen to photocopy public records indicated a denial of the right. The court said, "[W]e decline to attribute any such attitude to the legislature. Defendant's conclusion can be nothing more than conjecture. Many other reasons for legislative inaction readily suggest themselves." In *United States v. Allen,* 179 F. 13 (8th Cir.) the court said, "Courts can find the intent of the legislature only in the acts which are in fact passed, and

not in those which are never voted upon in Congress but which are simply proposed in committee."

[10, 11] We conclude (1) as a matter of law, that the State Board was authorized and directed by G.S. 115-181(f) to allocate without restriction the funds appropriated for transportation during the school year 1970-71 to the boards of education which had elected to provide school bus transportation; and (2) as a matter of fact, that the State Board did make the allocation which the statute required it to make. Plaintiffs' contention "that the State Board has not acted in the matter"; that any action taken was that of defendants Phillips and Davis; and that defendants Gill and Lambert have disbursed funds upon the orders of Phillips and Davis is not supported by the evidence. Judge Bailey's "finding" that "there is no evidence that the State Board of Education has authorized the transportation of these 111,500 pupils to any school" is irrelevant. The State Board does not *authorize* the transportation of any pupils; it allocates available funds to those boards which elect to operate transportation systems. It is true that plaintiffs introduced no minutes of the State Board. The oral evidence of its secretary and controller, however, tends to show that allocations were made.

[12, 13] Absent evidence to the contrary, it will always be presumed " 'that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. . . . Every reasonable intendment will be made in support of the presumption.' " *Huntley v. Potter,* 255 N.C. 619, 628, 122 S.E. 2d 681, 686, 687. "[T]he burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence." 6 N. C. Index 2d *Public Officers* § 8 (1968). Thus, the burden was upon plaintiffs to produce evidence that the State Board had failed to make the allocations required by G.S. 115-181(f). The case on appeal is totally devoid of any evidence of such a failure and contains no suggestion that State Board minutes were unavailable or nonexistent.

After the decision in *Sparrow* it was obvious that the funds appropriated for 1970-71 were insufficient to provide nine months transportation for all the units which then elected to operate a transportation system. Unless something was done, the public school education of many thousands of children would be

disrupted by a lack of transportation. Acting with the advice and consent of the Governor and the Advisory Budget Commission (which had refused to transfer funds from other objects and items in the State Board's budget to the purpose of transportation), the State Board allocated the Code 66 funds on a monthly basis sufficient to provide transportation in all the units electing to provide transportation until the funds were exhausted—about April, 1971.

[14] The final question posed by this appeal is whether the law sanctions such an accelerated allocation and expenditure of the transportation appropriation. We hold that it does. G.S. 115-181(g) expressly provides that the funds allocated for transportation "shall be paid over to the respective county and city boards of education in accordance with such allocation in equal monthly installments throughout the regular school year." However, it authorizes the State Board, upon request and in its discretion, to "pay over to the county or city board all or any part of any or all monthly installments prior to the time when the same would otherwise be payable." This is the authority which the State Board has, in effect, been exercising.

The Attorney General argues that authority to authorize the accelerated use of funds is a lesser power included in the authority which G.S. 143-23 gives to the Governor and the Advisory Budget Commission to make transfers or changes as between objects and items in the budget of the State Board of Education. We need not consider this contention in view of the authority which G.S. 115-181(g) gives to the State Board to accelerate payments to the local units. We note, however, plaintiffs' concession that "to accelerate the expenditure of money in the sense that the money may be spent for a legitimate purpose at a faster clip MAY be permissible." Plaintiffs base their case upon the premise, which we reject, that it is "clearly unlawful" to spend any funds for the intra-city transportation of pupils.

[15, 16] This suit is by three taxpayers to enjoin an allegedly unlawful use of public funds. The appeal presents no question of constitutional law. It is the rule with us that an individual has standing to contest an allegedly illegal diversion of public funds which will injuriously affect his rights individually or as a citizen and taxpayer. *Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359; *Freeman v. Madison County,* 217 N.C. 209, 7 S.E. 2d 354; 81

C.J.S. *States* § 191(b) (1953). Plaintiffs are citizens and residents of Forsyth County, an area in which the Winston-Salem/Forsyth County Board of Education is providing transportation for all pupils residing more than one and a half miles from the school to which they are assigned. Were plaintiffs residents of a county where their children might be deprived of bus transportation on and after 1 April 1971 because the expenditure of funds for intra-city transportation elsewhere had exhausted the transportation appropriation, there could be no doubt of their standing to maintain this action. That, however, is not their situation. Furthermore, were the expenditure of state funds for intra-city transportation to be enjoined, the action would not affect the income tax, sales tax, or any other tax which plaintiffs pay. Nevertheless, for the purpose of decision here, we have assumed, without deciding, that plaintiffs *might* be adversely affected in some way if funds appropriated for the transportation of public school pupils were illegally diverted.

We have interpreted the law as it has been written. The General Assembly is now in session and, in the light of present conditions, it may determine whether the transportation of more than one hundred thousand school children shall be discontinued before the end of this school year.

The order of Bailey, J. is

Reversed.

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

Justice HIGGINS concurring in result:

The plaintiffs, as individuals, brought this action in the Superior Court of Wake County against Dr. Phillips, State Superintendent of Public Instruction, *ex officio* member of the State Board of Education, A. C. Davis, Controller, State Board of Education, Edwin Gill, Treasurer of North Carolina, and George S. Lambert, State Disbursing Officer, seeking to restrain their official acts relating to the expenditure of State funds for transporting (by bus) pupils in Winston-Salem and other cities and towns to and from schools located within their respective cities.

The defendants answered and moved to dismiss on the ground the plaintiffs lacked standing to maintain the suit. If the pleadings present the question of the plaintiffs' right to maintain the action, and I think it does, other questions and the necessity for discussing them do not arise.

In the case of *Insurance Company v. Unemployment Compensation Commission,* 217 N.C. 495, 8 S.E. 2d 619, the plaintiff brought suit against the members of the Unemployment Compensation Commission of North Carolina. The court said: "An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State." In *Schloss v. Highway Commission,* 230 N.C. 489, 53 S.E. 2d 517, the court said: "That the sovereign may not be sued, either in its own courts or elsewhere, without its consent, is an established principle of jurisprudence in all civilized nations. (Citing many authorities). In the absence of consent or waiver, this immunity against suit is absolute and unqualified." In the case of *Insurance Company v. Gold, Commissioner,* 254 N.C. 168, 118 S.E. 2d 792, this court said: " 'An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State . . . . ' The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued." See also *Electric Company v. Turner* 275 N.C. 493, 168 S.E. 2d 385.

I think this action should have been dismissed on the ground the plaintiffs failed to show the State had given its consent to be sued.

Justice LAKE dissenting:

Proceeds of State tax levies, appropriated by the General Assembly for one purpose, may not lawfully be disbursed by State officers for a different purpose. Constitution of North Carolina, Art. XIV, § 3; *State v. Davis,* 270 N.C. 1, 9, 14, 153 S.E. 2d 749, *cert. den., Nivens v. North Carolina,* 389 U.S. 828, 88 S.Ct. 87, 19 L. Ed. 2d 84; *Gardner v. Retirement System,* 226 N.C. 465, 468, 38 S.E. 2d 314. See, Art. V, § 7, of the new Constitution which takes effect July 1, 1971. Consequently, the question before us is whether the proposed disbursement by

the defendants of funds, appropriated by the General Assembly of 1969 for transportation of public school pupils, is, in part, for a purpose not intended by that General Assembly when it enacted the Appropriations Act of 1969.

The State Board is required by G.S. 115-181(f) to allocate to the county and city boards, which elect to operate school buses, all funds appropriated by the General Assembly for the purpose of providing transportation to pupils enrolled in public schools. The allocation must be made in light of the number of pupils to be transported and all other circumstances affecting the cost of transportation, to the end that the total appropriation be divided fairly between such boards according to their respective needs. This allocation is required to be made at the beginning of the fiscal year, subject to a provision for holding a portion of the total appropriation in reserve, which provision is not here at issue.

G.S. 115-181(g) authorizes the State Board to pay over to a particular county or city board, if so requested, all or any part of its allocation prior to the time such funds would normally be paid over to such board. This section of the statute, however, explicitly states that normally "all funds so appropriated by the General Assembly [and allocated by the State Board] shall be paid over to the respective county and city boards * * * *in equal monthly installments throughout the regular school year.*" (Emphasis added.)

Clearly, this statute contemplates that the Legislature will make an appropriation for transportation deemed by it sufficient to run the buses through the entire school year and that the appropriated funds will be allocated to that end. Thus, we must assume that the appropriation made by the General Assembly of 1969, for the 1970-71 school year, was intended by it to provide bus transportation throughout the entire school year for rural children attending schools in Dare and Cherokee Counties, and in other rural areas, as well as for children then contemplated as potential school bus riders in Winston-Salem, Charlotte and other cities. It is not contended that the appropriation actually made by the General Assembly of 1969 was not adequate for this purpose.

But for the decision of the Federal Court in *Sparrow v. Gill,* 304 F. Supp. 86, correctly summarized in the majority

opinion, and for the resulting election of certain city boards of education to comply therewith by greatly expanding the number of city pupils to be given bus transportation, this case would not be before us. That sequence of events so greatly enlarged the number of pupils to be transported that the appropriation made by the 1969 General Assembly will not suffice to supply transportation for all the children throughout the State, including new riders in the city, for the entire school year 1970-71.

Sparrow v. Gill, supra, has no effect upon the proper construction of the Appropriations Act of 1969. If it would have been unlawful for the State Board to have allocated, and for the defendants to have disbursed, the appropriation made for the year 1969-70 as the State Board has attempted to do, and as the defendants propose to do, with the appropriation for the year 1970-71, then the allocation and the proposed disbursement now before us was and will be unlawful. The majority opinion states that it was the opinion of the State Board's officers prior to August 1970 that it could not lawfully allocate the appropriation so as to provide funds for transporting children living in portions of the city not annexed since 1957. It is my view that those officers were right then and are in error now.

I agree with the majority that, upon this record, we must assume that the State Board, at the beginning of the 1970-71 fiscal year made an allocation of the total fund appropriated by the 1969 General Assembly for transportation of school children, which allocation, if lawful, would justify the proposed disbursements. The State Board did so by adding many thousands of city children to the bus riders contemplated by the 1969 General Assembly when it made the appropriation for the entire State for the entire school year. In so doing, the State Board necessarily took from the children of Dare, Cherokee, and other rural areas, the opportunity to ride to school after April first in order to provide for the new city bus passengers the opportunity to ride up to that date.

Of course, in so doing, the State Board acted in the hope that the 1971 General Assembly will appropriate additional funds sufficient to enable all the children to ride buses to and from school throughout the school year. There is no duty imposed by law upon the 1971 General Assembly to do so. At the time Judge Bailey was required to act and now, when we are re-

quired to do so, there was and is no way of knowing whether this hope of the State Board will be realized. We must decide this case on the assumption that no further appropriation will be made. Judge Bailey was required, and we are now required, to determine the authority of the State Board, thus to jeopardize the rural child's opportunity in order to afford transportation to the city child, without any assurance that, if the State Board's action is sustained, the entire school system of school bus transportation will not cease to operate on or about April first. Can the rural children lawfully be thus deprived of bus transportation after April first?

The majority opinion is clearly correct in saying that each city board may determine for itself, free from any control by the State Board, or other State agency, whether it will or will not operate school buses. G.S. 115-180. Thus, when the decision of the Federal Court in *Sparrow v. Gill, supra,* made it impossible for a city board to continue to provide bus transportation for children living in areas annexed to the city since 1957, unless it also provides such transportation for other children similarly situated in other areas of the city, each city board was, and is, free to choose between providing bus transportation for all such children or for none. That is not the question before us. The question before us is whether the State Board had authority to allocate to a city board, electing to provide transportation for all, a larger share of the appropriation made by the 1969 General Assembly than otherwise would be proper for the reason that the city board has so elected to transport all; that is, has elected to transport children not contemplated as bus riders by the 1969 General Assembly.

I do not find in the provision of G.S. 115-181(g), authorizing accelerated payments of allocation installments, any support for what the State Board undertook to do. It has not only accelerated payments of allocation installments. It has allocated the appropriation so as to shift funds from county boards to city boards, or to some city boards, with the result that all of them will run out of money about the first of April, which was clearly not the intent of the 1969 General Assembly.

At first glance, G.S. 115-181(f) seems to require the State Board at the start of a fiscal year to divide the total appropriation made by the 1969 General Assembly for school bus opera-

tion among the county and city boards, electing to operate buses, on the basis of the number of pupils each such board determines to transport. If that view be taken, any one of these three things can happen when, as here, the allocated funds will all be exhausted before the school year ends: (1) The buses will stop running, (2) the 1971 General Assembly will come to the rescue with an additional appropriation, or (3) the county and city boards will operate their respective bus fleets with local funds for the rest of the year.

If, on the other hand, the State Board, in allocating the appropriation made by the 1969 General Assembly, could not lawfully take into account the children who live in the parts of the city other than those annexed since 1957, which children the city board has now elected to transport, in deference to the decision of the Federal Court, and so the disputed disbursements are enjoined, these are the possibilities: (1) The county boards will operate their buses throughout the entire school year, and (2) the city boards' buses will (a) stop operating when the lawfully allocated funds are exhausted, or (b) will be operated thereafter by local funds, or (c) the 1971 General Assembly will make a further appropriation to enable these buses to operate.

Judge Bailey's order restrained the defendants from "making available for spending" by city boards any "tax funds of the State" for transportation of children living in the city to public schools within the city. This goes too far. A disbursement to a city board pursuant to a re-allocation, taking into account only those city pupils living in areas annexed to the city since 1957, would clearly be within the right and duty of the defendants, if the remaining transportation needs of the city board are met with local funds. It would not run counter to the decision of the Federal Court in *Sparrow v. Gill, supra.*

The Sparrow case dealt with the right of children living in an older part of the city to ride a public school bus, so long as other children living in areas annexed to the city since 1957 are provided such transportation. It was not concerned with how the cost was to be divided between the State and the city, nor with whether all city school buses were to operate for all or only a part of the school year. It recognized that the Constitution of the United States does not forbid a State to distinguish, in this matter, between urban and rural children. Thus, if the

State Board, at the start of the fiscal year 1970-71, had allocated the total fund appropriated for school bus transportation in such year on the same basis as that used in the allocation for 1969-70, and if the city board's need for additional funds to transport all its pupils, living beyond the specified distance from their respective schools, were met locally, the decision in the Sparrow case would be carried out and the appropriated State funds would have been used as the 1969 General Assembly contemplated. Consequently, Judge Bailey's order should, at least, be modified.

Does G.S. 115-181(f) forbid such allocation of the appropriation made by the 1969 General Assembly? I think not. No session of the General Assembly can bind its successor. The 1969 General Assembly was free to determine for what purpose money appropriated by it might be spent. The question is, how did it mean for its appropriation to be spent?

Nothing else appearing, G.S. 115-181(f) would lead me to the conclusion that the 1969 General Assembly meant for the appropriation to be allocated to the county and city boards just as was done by the State Board. However, something else does appear which brings me to a different conclusion.

The Governor's Budget Message to the 1969 General Assembly expressly requested an appropriation for transportation sufficient to include the cost of busing children living in areas of the city other than those annexed since 1957. This, of course, was prior to the decision in *Sparrow v. Gill, supra.* This was what is known as a B-Budget request; *i.e.*, an appropriation in addition to that deemed sufficient to continue former busing practices. Specifically, the Governor said to the 1969 General Assembly in this message:

> "Further, public school bus transportation should be extended to include urban and suburban children. As long as the State assumes responsibility for school transportation, with all taxpayers supporting it, this service should not be limited to rural children who live more than one and one-half miles from the school."

A bill to put this recommendation into effect, Senate Bill No. 91, was introduced in the General Assembly of 1969. It specifically directed the State Board to take into consideration, in allocating the appropriation for school bus transportation, all

children living within a municipality on the same basis as rural children. That is, this bill specifically provided for allocation of the appropriation for school bus transportation on the basis that children living in parts of a city, other than those annexed to the city since 1957, would be carried to and from public schools by bus, if they lived the required distance from the school. It specifically provided for an appropriation of $1,609,-631 for the accomplishment of this purpose (the transportation of such city children) in the fiscal year 1969-70, and $1,688,921 to do the same in the fiscal year 1970-71. Senate Bill No. 91 was referred to the Appropriations Committee. It was not approved and died in that committee.

Only the A-Budget provision for public school transportation was approved and enacted by the General Assembly of 1969. That is, the appropriation, the allocation of which we now have before us, was made by a General Assembly, which was specifically requested to appropriate money for transportation of city children not theretofore considered by the State Board in making allocations and said, "No."

I can find no basis for doubt that the 1969 General Assembly intended for its appropriation to be divided among the county and city boards without taking into account the desire of any city board, under pressure of a Federal Court decision or otherwise, to transport city children residing in parts of the city not annexed since 1957. That being true, the allocation for the fiscal year 1970-71 made by the State Board is unlawful and will not authorize disbursement of State funds by the defendants. The State Board should make a re-allocation of the appropriation made by the 1969 General Assembly and disbursements heretofore made to the respective county and city boards should be charged against such new allocations.

I also dissent from the holding of the majority opinion that the admission in evidence of bills introduced in the 1967 and 1969 Sessions of the General Assembly was error. Our decision in *D & W, Inc., v. Charlotte,* 268 N.C. 577, 151 S.E. 2d 241, does not support the majority's position in this case. There we were concerned with an affidavit of a member of the Legislature offered in evidence to show what the Legislature intended by a statute which it enacted. Of course, as we there held, that is not competent. Here the evidence shows the Legislature's action,

not some member's opinion about what the action was intended to do. What the General Assembly did, including what it refused to do, may properly be considered by the courts of this State in construing the meaning of its enactment. "In determining the meaning of a statute, it is proper to consider *contemporary* action of the legislature." 50 AM. JUR., Statutes, § 326. (Emphasis added.)

It is true that the defeat of a bill making an action mandatory does not necessarily show an intent to prohibit such action voluntarily undertaken, nor does it necessarily show an intent to exclude such voluntary action from the benefit of an appropriation made by another act of the Legislature. Whether or not rejection of proposed legislation, either on the floor or in committee, is a valuable indication of what the Legislature intended by the statute which it enacted, depends on the nature of the rejected proposal and its relation in time and content to the enacted statute. A contemporaneous rejection of a proposal to appropriate for a specified purpose clearly indicates an intent to omit such purpose from the appropriation made. The majority's sweeping declaration that the Legislature's inaction or refusal to act does not show the proper construction to be placed on what it did enact is too broad.

The refusal of the 1969 General Assembly to accept the Governor's recommendation and B-Budget request for an appropriation to do what the State Board has undertaken to approve is certainly a part of the legislative history of the very appropriation we are considering. In my opinion, it is most persuasive. With the wisdom or lack of wisdom of this legislative decision, we may not properly concern ourselves in this case, nor may we properly construe its action by conjecture as to what it would have done if it had been given the wisdom to foresee what the Federal Court was later to decide in *Sparrow v. Gill, supra.*

I would, therefore, modify and affirm Judge Bailey's order.

STATE OF NORTH CAROLINA v. PRESTON EUGENE DOBBINS

No. 57

(Filed 20 January 1971)

1. **Riot and Inciting to Riot § 1; Municipal Corporations § 33— violation of municipal curfew — authority of the mayor to declare curfew.**

In a prosecution on a warrant charging defendant with the violation of a municipal emergency curfew ordinance, there was ample evidence to support the findings and conclusions of the trial court (1) that the mayor was acting within the scope of his authority in declaring the temporary, city-wide curfew and (2) that the mayor's proclamation of a state of emergency was not arbitrary and did not violate any right of defendant under the State and Federal Constitutions.

2. **Municipal Corporations § 33— right to travel on city streets — nature and extent of the right**

The right of an individual to travel upon the public streets of a city is not absolute but may be regulated, as to the time and manner of its exercise, when reasonably deemed necessary to the public safety, by laws reasonably adapted to the attainment of that objective.

3. **Constitutional Law § 11— scope of the police power**

The police power of the State extends to all the compelling needs of the public health, safety, morals and general welfare.

4. **Constitutional Law §§ 17, 23— due process — extent and scope**

The liberty protected by the Due Process and Law of the Land Clauses of the Federal and State Constitutions extends to all fundamental rights of the individual.

5. **Constitutional Law § 18— restraint on First Amendment freedoms— exercise of police powers**

Even as to those major segments of individual liberty expressly protected from Federal restraint by the First Amendment to the U. S. Constitution, governmental protection of the public safety from present excesses of direct, active conduct are not presumptively bad.

6. **Municipal Corporations § 33; Constitutional Law § 17— right to travel on the public streets — scope of restrictions**

The right to travel on the public streets is a fundamental segment of liberty, and the absolute prohibition of such travel requires substantially more justification than its regulation by traffic lights and rules of the road.

7. **Municipal Corporations § 33— prohibition upon travel — municipality faced with violent upheaval**

A municipality that was faced with a clear and present danger of violent upheaval accompanied by widespread destruction of property and personal injury was not prevented by either the State or Federal Constitutions from imposing a temporary prohibition upon travel. U. S. Constitution, Amendment XIV; N. C. Constitution, Art. I, § 17.

8. **Municipal Corporations § 33— imposition of city-wide curfew — restrictions on defendant's right of travel**

The imposition of a temporary, city-wide curfew did not violate defendant's right to travel upon the streets of the city, where the curfew was imposed in response to a clear and present danger of violent upheaval by the lawless portion of the citizenry.

9. **Constitutional Law §§ 11, 18— police power of the State — restrictions on travel**

The police power of the State is broad enough to sustain the promulgation and fair enforcement of laws designed to restore the right of safe travel by temporarily restricting all travel, other than necessary movement reasonably excepted from the prohibition.

10. **Municipal Corporations § 33; Riot and Inciting to Riot § 1— imposition of municipal curfew — clear and present danger test**

In imposing a curfew, the city authorities are not required to delay such action until fires have been ignited and rioting has commenced; all that is required is the existence of a clear and present danger of such disastrous and unlawful conduct.

11. **Municipal Corporations § 29— police power**

A municipality has no inherent police power.

12. **Municipal Corporations § 29— emergency power of municipality to prohibit movement of people**

A municipality has the delegated authority to enact an ordinance prohibiting the movement of people in public places during a state of emergency. G.S. 14-288.1(10); G.S. 14-288.12.

13. **Municipal Corporations §§ 29, 33; Riot and Inciting to Riot § 1— statutory authority of city to restrict travel — constitutionality of statute**

The statute authorizing a municipality to enact an ordinance giving the mayor authority to determine and proclaim a state of emergency and to impose restrictions upon travel, *held* not unconstitutional for vagueness. G.S. 14-288.1(10); G.S. 14-288.12.

14. **Arrest and Bail § 3; Municipal Corporations § 33— arrest without warrant — violation of municipal curfew**

Arrest of defendant without a warrant for the violation of a municipal curfew ordinance was lawful, since the presence of defendant and his companion upon the city streets while the curfew was in effect furnished the arresting officer with reasonable ground to believe that the defendant had committed a misdemeanor in his presence.

15. **Searches and Seizures § 1; Criminal Law § 84— search incident to lawful arrest — admissibility of articles discovered**

The search of defendant's person immediately following his lawful arrest for the violation of a municipal curfew was incidental to such arrest; consequently, the four shotgun shells found tucked in the tops of his boots were properly admitted in evidence.

16. **Searches and Seizures § 1; Criminal Law § 84— warrantless seizure of gun butt — admissibility of gun butt in evidence**

A highway patrolman who stood outside defendant's automobile and saw by the street light two inches of a gun butt protruding from papers on the floor of the back seat had authority to take the gun butt into his possession without the necessity of obtaining a warrant; the gun butt was properly admitted in evidence during defendant's trial on charges of violating a municipal curfew and of having unlawful possession of a dangerous weapon in an area in which a declared state of emergency existed.

17. **Searches and Seizures § 1; Criminal Law § 84— seizure of partly concealed gun butt — wholly concealed gun barrel**

Where a highway patrolman saw a gun butt that was lying partly concealed under papers in the floor of defendant's car and, in removing the gun butt from the car, the patrolman struck a gun barrel wholly concealed beneath the papers, the subsequent uncovering and removal of the gun barrel from the car was a mere continuation of the lawful removal of the gun butt and did not constitute an unreasonable search forbidden by the Fourth and Fourteenth Amendments of the U. S. Constitution; consequently, admission of the gun barrel in evidence was without error.

18. **Riot and Inciting to Riot § 2; Municipal Corporations § 33— violation of municipal curfew ordinance — burden of proving exception to the ordinance**

In a prosecution charging defendant with the violation of a municipal curfew ordinance, the State did not have the burden to prove that defendant's presence on the streets was for a purpose other than those excepted by the ordinance.

19. **Municipal Corporations § 33; Riot and Inciting to Riot § 2— violation of municipal curfew ordinance — sufficiency of evidence**

In a prosecution charging defendant with the violation of a municipal curfew ordinance, evidence of the defendant's unexplained presence on the streets was sufficient to establish proof of the defendant's violation of the ordinance.

20. **Weapons and Firearms— unlawful possession of weapon in emergency area — sufficiency of evidence**

In a prosecution charging defendant with the unlawful possession of a dangerous weapon in an area in which a declared state of emergency existed, evidence of the State was sufficient to withstand defendant's motion for nonsuit, where there was evidence that (1) a curfew had been declared in a municipality; (2) the defendant was stopped while riding through the streets of the municipality; and (3) a gun butt and a detached gun barrel were lying on the floor of the back seat, and shotgun shells were stuck in defendant's boot tops.

21. **Weapons and Firearms— unlawful possession of dangerous weapon in an area of emergency — validity of sentencing**

In a prosecution charging defendant with the unlawful possession of a dangerous weapon in an area in which a declared state of emer-

gency existed, the sentencing of defendant to six months in the county jail, the sentence being suspended and the defendant placed on probation for three years, *held* lawful. G.S. 14-288.7(c).

22. **Criminal Law § 92; Weapons and Firearms — consolidation of offenses for trial**

Warrants charging defendant with the violation of a municipal curfew and with the unlawful possession of a dangerous weapon in an area in which a declared state of emergency existed, *held* properly consolidated for trial, where both offenses arose out of the same occurrence, and the same evidence was competent and admissible in the trial of both offenses. G.S. 15-152.

23. **Criminal Law § 88— cross-examination of defendant — defendant's request that the examination be limited**

In a prosecution charging defendant with the violation of a municipal curfew ordinance and with the unlawful possession of a dangerous weapon in an area in which a declared state of emergency existed, the trial court properly denied defendant's request that, if he elected to take the stand and testify with reference to the curfew violation only, the State be limited in its cross-examination to that matter and not be permitted to cross-examine him concerning his possession of a disassembled shotgun and some shotgun shells.

24. **Riot and Inciting to Riot § 2; Municipal Corporations § 33— violation of municipal curfew — instructions**

In a prosecution charging defendant with the violation of a municipal curfew ordinance, the trial court was not required to read to the jury, as part of the charge, the section of the ordinance relating to the mayor's authority to prohibit travel upon the public streets except by those so traveling for specified purposes, where there was no evidence purporting to bring the defendant within any exception to the ordinance or otherwise to justify his presence upon the street at the time of his arrest.

25. **Appeal and Error § 4— review of constitutional questions — question not raised on trial**

The Supreme Court will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court, if it could have been raised therein.

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

APPEAL by defendant from the judgment of the Court of Appeals, reported in 9 N.C. App. 452.

At the 19 January 1970 Session of BUNCOMBE Superior Court, the defendant was tried on two separate warrants charging: (1) Wilful and unlawful possession off his own premises of a dangerous weapon, to wit, a 12-gauge shotgun and shells,

in an area in which a declared emergency existed, in violation of G.S. 14-288.7; and (2) violation of an emergency curfew ordinance of the City of Asheville by being on a public street in the city between the hours of 9 p.m. and 6 a.m. He was found guilty of both offenses. Upon the first charge, he was sentenced to six months in the county jail but the sentence was suspended and he was placed on probation for three years. On the second charge, he was fined $25.00. From both judgments he appealed.

On 27 February 1969, the City Council of Asheville adopted Ordinance No. 613. The ordinance provides:

> "A state of emergency shall be deemed to exist whenever, during times of great public crisis, disaster, rioting, catastrophe, or similar public emergency, for any reason, municipal public safety authorities are unable to maintain public order or afford adequate protection for lives or property."

The ordinance authorizes the Mayor of the City to issue a public proclamation declaring the existence of a state of emergency and placing in effect certain restrictions "in the event of an existing or threatened state of emergency endangering the lives, safety, health and welfare of the people within the City of Asheville, or threatening damage to or destruction of property."

Restrictions which the Mayor is authorized by the ordinance to impose during such proclaimed emergency include: (1) Prohibition of the possession off one's own premises of explosives, firearms, ammunition, or dangerous weapons of any kind; and (2) prohibition or regulation of travel upon any public street except by those traveling for specified purposes.

The ordinance provides that it shall be unlawful for any person to violate any restriction so imposed during the existence of a proclaimed state of emergency and such violation shall be a misdemeanor punishable by a fine not exceeding $50.00 or by imprisonment not exceeding 30 days.

At 3 p.m. on 29 September 1969, the Mayor issued a proclamation, effective immediately, providing that it would remain in effect until dissolved by him or by the City Council. The proclamation recited the adoption of the above mentioned ordinance and that "certain unknown persons, by various and sundry illegal acts, have attempted and are now attempting to interfere

with and disrupt normal activities of this City and a great danger exists, both as to persons and property, as a result of the illegal acts of these unknown persons." It proclaimed the existence of a state of emergency within the City of Asheville and declared that until such state of emergency ended "it shall be unlawful for any person to possess off their own premises * * * any explosive, firearms, gunpowder, ammunition or dangerous weapons of any kind." It further declared that any violation of the proclamation during the existence of such state of emergency would be unlawful and punishable, upon conviction, by a fine not exceeding $50.00 or by imprisonment for a term not exceeding 30 days.

At 4:30 p.m. on the same day, the Mayor issued another proclamation reciting the earlier proclamation of a state of emergency and directing all persons "from and after 9 p.m. on this the 29th day of September 1969, to observe a curfew and remain in their homes, offices or businesses during the hours from 9 p.m. o'clock to 6 a.m. o'clock until such time as this proclamation shall be dissolved by the Mayor * * * or City Council * * * said curfew to continue from day to day, subject to the exemptions hereinafter set forth." This proclamation declared that any violation of it would be punishable, upon conviction, by a fine not exceeding $50.00 or by imprisonment for a term not exceeding 30 days.

A like proclamation was issued by the Mayor at 5 p.m. on 30 September 1969 and another like proclamation at 4 p.m. on 1 October 1969. On 2 October 1969, the Mayor, declaring, "It now appears that the cause of danger to the citizens of the City of Asheville has decreased and that the curfew is no longer necessary to the safety and welfare of our citizens," directed that "the curfew imposed upon the 29th day of September, 1969 by proclamation is herein and hereby rescinded."

Evidence for the State, in addition to the above mentioned ordinance and proclamations, consisted of the stock or butt of a shotgun, a barrel of a twelve-gauge shotgun, fitting the butt, five twelve-gauge shotgun shells, loaded with No. 9 shot, and the testimony of a State Highway patrolman and four city police officers.

The substance of the testimony of these officers was:

At approximately 11:10 p.m. on 30 September 1969, Highway Patrolman Jennings and other officers were on duty at a check point at a street intersection in the City of Asheville known as Six Points. A 1968 Mustang, owned by the defendant and driven by Victor Chalk, Jr., approached the intersection, made a right turn onto another street and then stopped for a stop sign. Patrolman Jennings approached the automobile on the driver's side. The defendant was riding as a passenger in the front seat. No one else was in the car.

Patrolman Jennings asked Chalk to exhibit his driver's license and requested Chalk and the defendant to get out of the car. Chalk got out first. When he did so, Patrolman Jennings, standing outside the automobile, was able to look into it and, by means of the street lights, could see upon the floor of the back seat about two inches of the stock or butt of a shotgun protruding from beneath some papers. The defendant was still seated in the right of the two front bucket seats of the car, from which position he could reach the back floor by reaching through the open space between the two front seats. Patrolman Jennings pulled the butt of the shotgun out of the car at that time. He noticed it struck something on the floor with a clanging noise of metal striking metal.

Patrolman Jennings placed Chalk under arrest and turned him over to the custody of Police Officer Simmons. Patrolman Jennings then went around to the other side of the automobile, opened the door and requested the defendant to get out, which he did. The defendant was then arrested for curfew violation and, with Chalk, was turned over to the custody of Sergeant Cook of the City Police Force. Again looking in the back of the car beneath the papers on the floor, Patrolman Jennings found the barrel of a twelve-gauge shotgun, which he removed from the car. He fitted the barrel onto the butt of the gun and delivered both to Sergeant Cook. These two portions of the shotgun are among the State's exhibits above mentioned.

When Patrolman Jennings first asked Chalk for his driver's license, prior to Chalk's getting out of the car and the discovery of the gun butt, he inquired as to why Chalk was "out that night." Chalk replied that "he was afraid they were going to burn his mother's home and he was going to assist her." In addition to the butt and barrel of the shotgun, a length of iron

pipe was lying on the papers on the floor in the back of the car. The firing mechanism of the shotgun was in good working order.

Police Officer Simmons also approached the car and shined his flashlight into it to see what the defendant, then still in the car, was doing. With this he observed a twelve-gauge shotgun shell lying on the back seat, which shell he then took from the car. The defendant and Chalk were then carried to the police station. Sergeant Cook rode with them in the back seat of the police car. During this ride, which took approximately five minutes, nothing was passed from Chalk to the defendant. After they were booked at the police station, Sergeant Cook searched the defendant and found four other twelve-gauge shotgun shells, two in each of his socks, stuck down into the top of his ankle-high boots. The five shells are among the State's exhibits above mentioned.

Prior to the commencement of the trial, the defendant moved to suppress the evidence of the shotgun parts and shells taken from the car, contending that these were fruits of an illegal search without a search warrant. (He also objected at the trial to their introduction in evidence and to the testimony relating to the finding of these articles.) Thereupon, in the absence of the jury, Patrolman Jennings was examined with reference to his discovery of these articles. His testimony on this *voir dire* examination was substantially the same as his subsequent testimony before the jury, above summarized. He took the shotgun butt from the car before any other officer approached the vehicle. The defendant was then seated in the car. Chalk was standing outside the vehicle. Both Chalk and the defendant had gotten out of the car and were standing some 20 feet therefrom, in the custody of Officers Simmons and Cook, when Patrolman Jennings found the barrel of the shotgun under the papers on the floor of the car and removed it therefrom. The motion to suppress the evidence was overruled and Patrolman Jennings thereafter testified in the presence of the jury as above stated.

Over objection by the defendant, the two cases against him were consolidated for trial. At the trial, upon the conclusion of the State's evidence, the defendant requested that he be permitted to take the witness stand to testify concerning "his presence in the curfew and that question only and the cross-exami-

nation be limited to that." The trial judge refused to so limit the State's right of cross-examination if the defendant took the stand as a witness in his own behalf. Thereupon, the defendant elected not to testify and offered no evidence.

Prior to trial, the defendant moved to quash both warrants on the ground that the proclamation of the curfew was invalid. He contended that no actual state of emergency existed when the curfew was proclaimed. For this reason, he contended, the proclamation of a state of emergency and the proclamation of the curfew were arbitrary and denied the defendant his rights in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. A further ground for the motion to quash was that the North Carolina statute, pursuant to which the city ordinance was passed and the state of emergency and the curfew were proclaimed, is unconstitutional because vague and over-broad and because it fails to set forth any objective standards under which a city may declare a state of emergency. For these reasons, the defendant contended that the statute violated his rights under the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States and Article I, § 17, of the Constitution of North Carolina.

Prior to trial, and in the absence of the jury, the court conducted a hearing with reference to the motion to quash. At this hearing, the defendant's evidence consisted of the testimony of Mayor Montgomery. That of the State consisted of the testimony of the Sheriff of Buncombe County, the Chief of Police and the Assistant Chief of Police of the City, the City Manager and the news director of the Asheville Radio Station. At the conclusion of the hearing, the court denied the motion to quash, making detailed findings of fact, amply supported by the evidence, and summarized as follows (numbering revised):

1. On 29 September 1969, at approximately 11 a.m. o'clock, a confrontation took place at Asheville High School between officials of the school and a large group of students. The students were presenting grievances concerning alleged infractions of their rights and were not attending classes. The school officials requested the students engaged in this process to disperse, which they refused to do. The school officials thereupon requested assistance from the Police Department of the city in restoring order on the school premises.

2. In response to this request, police officers were dispatched to the school premises. Prior to the arrival of the police, the City Manager had been in conference with the school officials on the school premises for approximately an hour. Upon arrival at the school, the commander of the police contingent requested the students to disperse. A majority of them did so, but others remained and the police officers were then directed to disperse them. Thereupon, a further confrontation occurred between these students and the police officers, resulting in numerous personal injuries, both to the police officers and to the students, and in extensive destruction of school property, the overturning of an automobile on the school premises, the throwing of rocks and general turmoil on the premises.

3. Immediately following this confrontation, the Mayor went in person to the Asheville High School and observed the damage to property and the emotional disturbance of persons still present at the scene. The Mayor then proceeded to another high school where students had congregated. There he observed law enforcement personnel on the school premises, no personal injury or property damage having taken place at that school.

4. Thereupon, a special meeting of the Community Relations Council, a recently formed organization, was convened, the Mayor being present. A large crowd attended the meeting. The Mayor observed emotional upset prevalent in the crowd and heard threats made by persons, whom the Mayor deemed otherwise responsible leaders of their community, to the effect that unless the demands of the complainants were met the complainants would burn the city.

5. The Mayor, a doctor of medicine, inquired in local hospitals and was informed concerning injuries sustained by various persons during the above events.

6. The Mayor also attended another meeting at the Urban Renewal Office, approximately one mile from the Asheville High School, where there was a conference with 20 or 30 students. The tenor of this meeting was "less than cordial" and the implication was that unless demands of the students were met, "dire results would be invoked upon the property of the City of Asheville."

7. Because of the above confrontations some of the schools of the city were closed.

8. The Mayor then conferred with the Police Department. He was advised by the police of other violations of the law, such as the throwing of rocks at police vehicles and at vehicles of travelers upon local streets of the city, the striking of police cars with bricks and rocks, the infliction of property damage and personal injury, and the making at various meetings of threats to damage the property of the city.

Upon these findings, the judge concluded that the Mayor was acting within the scope of the power conferred upon him by the ordinance, in accordance with G.S. 14-288.1 through G.S. 14-288.19. The court further concluded that the Mayor's proclamation of a state of emergency was not arbitrary and violated no right of the defendant under the Constitution of the United States or under the Constitution of North Carolina.

In a separate order, the court denied the motion to quash the warrants made on the ground that G.S. 14-288.1 through G.S. 14-288.19 are unconstitutional.

At the hearing of the motion to quash the warrants, the Mayor testified that the above confrontation, inspection of damage to school property, meetings attended by him and conferences with police officers occurred on 29 September and that his decision to proclaim the existence of a state of emergency was based upon his own observation and upon the advice of the law enforcement officials. He further testified that, prior to his issuance of the second curfew proclamation on 30 September, he had been advised of no additional property damage or personal injuries, but he had again had a meeting with the Chief of Police of the City, the Sheriff of the County, officers of the State Highway Patrol, the FBI representatives, the SBI representatives, the United States Attorney, the United States Marshal, the ATU representative and the City Manager. Based on this conference and on the experience and opinions of these law enforcement officers, it was his own opinion that the curfew was still necessary on 30 September and so he issued the second curfew proclamation.

The Mayor further testified that, at the meeting of the Community Relations Council on 29 September, which was attended by a crowd which overflowed the conference room, there were threats to burn the community from both students and adults whom he would consider of normal faculties but

emotionally upset. This meeting lasted approximately an hour, with many people expressing themselves. "The tone was always the same with regard to what had happened to them physically at the school, what would happen to the city if certain conditions were not brought about."

At the time the Mayor proclaimed a state of emergency in the city on 29 September, the Governor of the State had dispatched approximately 15 special State Highway Patrol officers to the city on account of these conditions.

On the night of 30 September (the night the defendant and Chalk were arrested), at least one person was arrested and charged with possession of a fire bomb. The Chief of Police of the City recommended to the Mayor that a curfew be imposed on the night of 30 September.

On 29 September, rocks were thrown at the automobile of the Sheriff of the County, the radio antenna was jerked from his car and other damage was done to it by an assembled crowd at the intersection of Southside and Ashland Streets following the incident at the Asheville High School.

In the Court of Appeals, the defendant assigned as error: (1) The denial of his motion to quash, based upon the unconstitutionality of the proclamation of the state of emergency and the proclamation of the curfew; (2) the denial of his motion to quash, based upon the unconstitutionality of G.S. 14-288.1 to G.S. 14-288.19; (3) the admission in evidence of the parts of the shotgun and of the shotgun shells and of the testimony relating to their discovery; (4) the consolidation of the two cases for trial and the refusal to allow his request to curtail the cross-examination of the defendant, if he elected to testify on the charge of curfew violation only; (5) the denial of the defendant's motion for judgment of nonsuit; and (6) the refusal of the trial court, when requested by the defendant, to include in his charge to the jury a reading of a portion of the ordinance of the city above mentioned.

The Court of Appeals found no merit in any of these assignments of error and affirmed the judgment of the Superior Court. In his present appeal, the defendant asserts the same assignments of error.

Attorney General Morgan, Assistant Attorney General Melvin and Assistant Attorney General Costen for the State.

Chambers, Stein, Ferguson and Lanning, by James E. Ferguson II, and Robert Harrell for defendant.

LAKE, Justice.

[1] Each of the findings of fact made by the Superior Court at the hearing upon the motion to quash the warrant is amply supported by evidence. There is not a shred of evidence to the contrary. It is quite clear that at 3 p.m. on 29 September 1969, the City of Asheville was faced with an imminent threat of widespread burning and other destruction of property, public and private. Emotional tension was prevalent. Tragic experiences in other cities across the nation were a reminder that, if those who threatened the destruction of property began to carry out that threat, violence would probably erupt throughout the city, resulting in numerous personal injuries and much bloodshed. The danger was clear and present, the time remaining for preventive measures a matter of hours. Under these circumstances, the contention of the defendant, that the Constitution of the United States and the Constitution of North Carolina forbid the city authorities to declare a state of emergency and to proclaim and enforce a temporary, night-to-night, city-wide curfew, with specified exceptions for emergency and necessary travel, is patently without support either in authority or logic.

The fact that, during the three nights in which this curfew was in effect, there was no such destruction and violence in the city does not support the defendant's assertion that the proclamation of the curfew was unnecessary and was an unreasonable restraint upon the liberty of the people of the city, including the defendant. On the contrary, it is an indication that Mayor Montgomery, a doctor, exercised sound judgment and prescribed an effective preventive measure. This experience of the City of Asheville is further evidence supporting the view that the danger to the public safety from conditions, such as existed in the city during the afternoon of 29 September, rises to a peak with the arrival of darkness and then subsides quickly in the face of resolute declarations of policy by the city administration and firm, fair enforcement of the applicable laws by an efficient police force. Experience in other cities also has demonstrated

the efficiency of a preventive curfew promptly imposed. See: "Judicial Control of the Riot Curfew," 77 Yale Law Journal 1560, 1568; "Legislation and Riot," 35 Brooklyn Law Review 472, 479. In this instance, the City of Asheville was fortunate in having the effective preventive medicine prescribed and administered promptly.

[2] Of course, the right to travel upon the public streets of a city is a part of every individual's liberty, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Law of the Land Clause, Article I, § 17, of the Constitution of North Carolina. The familiar traffic light is, however, an ever present reminder that this segment of liberty is not absolute. It may be regulated, as to the time and manner of its exercise, when reasonably deemed necessary to the public safety, by laws reasonably adapted to the attainment of that objective. The constitutional protection of the freedom of travel "does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area." *Zemel v. Rusk,* 381 U.S. 1, 15, 85 S.Ct. 1271, 1280, 14 L.Ed. 2d 179, 189. The statement in *Kent v. Dulles,* 257 U.S. 116, 78 S.Ct. 1113, 2 L.Ed. 2d 1204. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived *without due process of law* under the Fifth Amendment," (emphasis added) recognizes that this is a right which can be restricted with due process of law. See, *Zemel v. Rusk, supra.* The Zemel and Kent cases involved the right to a passport for international travel and were applications of the Fifth Amendment rather than the Fourteenth. However, these principles, there stated, apply also to the effect of the Fourteenth Amendment upon state imposed restraints on intracity travel.

[3, 4] The police power of the State extends to all the compelling needs of the public health, safety, morals and general welfare. Likewise, the liberty protected by the Due Process and Law of the Land Clauses of the Federal and State Constitutions extends to all fundamental rights of the individual. It is the function of the courts to establish the location of the dividing line between the two by the process of locating many separate points on either side of the line. So long as this Court sits, it will be engaged in that process, but it is not necessary or appro-

priate in the present instance to attempt to draw sharply, throughout its entire length, the line between the right of the individual to travel and the authority of the State to limit travel. It is sufficient, for the present, to hold, as we do, that the Asheville curfew proclamation falls well over on the side of reasonable restriction.

[5] Even as to those major segments of individual liberty, expressly protected from Federal restraint by the First Amendment to the Constitution of the United States, governmental protection of the public safety "from present excesses of direct, active conduct, are not presumptively bad." American Communications Association, *C.I.O. v. Douds,* 339 U.S. 382, 399, 70 S.Ct. 674, 94 L.Ed. 925, 944. As Mr. Justice Brandeis said, concurring in *Whitney v. California,* 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095, 1105:

> "Thus all fundamental rights comprised within the term 'liberty' are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights. * * * These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral."

In *West Coast Hotel v. Parrish,* 300 U.S. 379, 391, 57 S.Ct. 578, 81 L.Ed. 703, 708, Mr. Chief Justice Hughes, speaking for the Court, said:

> "Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

[6] The defendant contends that the right to travel is related to the First Amendment freedoms of speech, assembly and re-

ligion. If so, this does not render it immune to restriction by State law, reasonably necessary for the protection of the public safety in view of prevailing conditions and reasonably calculated to promote such safety under those conditions. Of course, the right to travel on the public streets is a fundamental segment of liberty and, of course, the absolute prohibition of such travel requires substantially more justification than the regulation of it by traffic lights and rules of the road.

[7] We do not have before us a prolonged curfew, imposed by an unduly fearful or arbitrary official upon a serene and peaceful city engaged in its normal pursuits. We have before us a temporary prohibition of travel in a city faced with a clear and present danger of violent upheaval, accompanied by widespread destruction of property and personal injury. To prevent, control and terminate such an upheaval is the primary function of government. Neither the Fourteenth Amendment nor Article I, § 17, of the State Constitution prevents the City Government of Asheville from discharging this duty owed by it to the people of the city.

[8, 9] The ultimate cause of the restraint upon this fundamental freedom of the law abiding citizens of Asheville was not the city government, but the arrogantly lawless portion of the people, who threatened the city with destruction if their demands were not met. In this situation, the reasonableness or unreasonableness of those demands is immaterial. The police power of the State is broad enough to sustain the promulgation and fair enforcement of laws designed to restore the right of safe travel by temporarily restricting all travel, other than necessary movement reasonably excepted from the prohibition. As the Supreme Court of Wisconsin said, in *Ervin v. State,* 41 Wis. 2d 194, 163 N.W. 2d 207:

> "Whatever the cause, given the fact of widespread riotous conditions and criminal activities, the restoration of 'domestic tranquility' becomes, not alone a constitutional right, but a constitutional obligation. The temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, is a legitimate and proper exercise of the police power of public authority."

[10] Neither the Constitution of the United States nor the Constitution of this State requires the city authorities to delay such

action until fires have been ignited and rioting has commenced. All that is required is the existence of a clear and present danger of such disastrous and unlawful conduct. This condition existed in Asheville when the curfew here in question was proclaimed, according to the record before us.

The defendant does not suggest that the curfew was not fairly enforced in Asheville. The officer, who approached his vehicle, inquired as to the reason for the presence on the street of the defendant and his driver. Such inquiry was proper in order to determine whether these individuals were traveling for an excepted purpose. The officer was not bound to accept as true the response of the driver, especially after observing the butt of a gun protruding from papers on the floor of the back seat, easily within the reach of the defendant.

[11, 12] The City of Asheville has no inherent police power, *Town of Conover v. Jolly,* 277 N.C. 439, 177 S.E. 2d 879; *State v. Furio,* 267 N.C. 353, 148 S.E. 2d 275; *State v. Byrd,* 259 N.C. 141, 130 S.E. 2d 55; G.S. 160-1. However, by G.S. 14-288.12, the State has delegated this portion of its police power to its municipalities. This statute authorizes the city to enact an ordinance, such as the one here involved, prohibiting the movement of people in public places "during a state of emergency" as defined in G.S. 14-288.1(10). It provides that such ordinance may delegate to the mayor the authority to determine and proclaim the existence of such state of emergency and to impose such restriction upon travel "appropriate at a particular time."

[13] The statute provides that it is intended to supplement and confirm authority conferred upon municipalities by other statutes "to enact ordinances for the protection of the public health and safety in times of riot or other grave civil disturbance or emergency." The "state of emergency" which is the condition precedent to the exercise of this power by the city is defined as "the condition that exists whenever, during times of public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, *or whenever the occurrence of any such condition is imminent.*" (Emphasis added.) The defendant's contention that this statute is unconstitutionally vague, in that it fails to provide a standard for the exercise of the discretion conferred, is clearly without merit.

The ordinance of the City of Asheville establishes the same standard for the guidance of the Mayor in determining the existence of a state of emergency. The Mayor acted in compliance with the prescribed standard. Thus, the police power of the State was properly exercised in the proclamation of the state of emergency and in the proclamation of the curfew presently before us.

[14, 15] The presence of the defendant and his driver upon the streets, while the curfew was in effect, was a violation of the ordinance, declared thereby to be a misdemeanor, unless they were traveling for an excepted purpose. The arresting officer having, at least, reasonable ground to believe that the defendant had committed a misdemeanor in his presence, the arrest without a warrant was lawful. G.S. 15-41. The search of the defendant's person was incidental to such arrest and, consequently, the four shotgun shells, found tucked in the tops of his boots, were properly admitted in evidence. *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440; *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269; *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544.

G.S. 14-288.7 makes it a misdemeanor for any person "to transport or possess off his own premises any dangerous weapon or substance in any area: (1) In which a declared state of emergency exists." G.S. 14-288.1(2) defines "Dangerous Weapon or Substance" to mean "Any deadly weapon, *ammunition* * * * or any instrument or substance designed for use that carries a threat of serious bodily injury or destruction of property; or any instrument or substance that is capable of being used to inflict serious bodily injury, when the circumstances indicate a probability that such instrument or substance will be so used; or *any part* or ingredient in any instrument or substance included above, when the circumstances indicate a probability that such part or ingredient will be so used." (Emphasis added.)

[16] When the defendant's driver got out of the car, the highway patrolman, standing outside the vehicle, could see by the street lights two inches of a gun butt protruding from papers on the floor of the back seat. The contention of the defendant that this was not enough of the article to enable the highway patrolman to identify it as the butt of a gun cannot be taken seriously. Surely a member of the State Highway Patrol is as familiar with the appearance of such objects as is a normal ten year old boy. Seeing this object, imperfectly concealed within easy reach of the defendant, who was still seated in the car, the

patrolman clearly had authority to take it into his possession, and its admission into evidence was proper. Similarly, the admission into evidence of the shotgun shell found on the rear seat of the automobile was proper. No search warrant is required to render competent in evidence an object seen in an automobile under such circumstances by an officer standing outside the vehicle. *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495; *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25.

[17] In removing what turned out to be a detached gun stock, the officer struck it against the gun barrel concealed beneath the papers on the floor. The subsequent uncovering and removal of the gun barrel from the automobile was a mere continuation of the lawful removal of the gun stock and did not constitute an unreasonable search forbidden by the Fourth and Fourteenth Amendments to the Constitution of the United States. *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419; *State v. Jordan,* 277 N.C. 341, 177 S.E. 2d 289. Clearly, probable cause existed to look beneath the papers for the barrel of the gun. We find no error in the admission of the shotgun barrel into evidence, but if it were error, it was harmless, since the possession of the ammunition and the other part of the gun would constitute the offense with which the defendant was charged by this warrant.

[18] The overruling of the defendant's motion for nonsuit in each case was not error. The defendant's contention that the burden was on the State to prove that his presence on the streets was for a purpose other than those excepted by the ordinance and by the curfew proclamation is without merit. In *State v. Connor,* 142 N.C. 700, 55 S.E. 787, Hoke, Justice, later Chief Justice, speaking for the Court, said.

> "It is well established that when a statute creates a substantive criminal offense, the description of the same being complete and definite, and by a subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negatived in the indictment, nor is proof required to be made in the first instance on the part of the prosecution. In such circumstance, a defendant charged with the crime who seeks protection by reason of the exception, has the burden of proving that he comes within the same."

To the same effect is *State v. Davis,* 214 N.C. 787, 1 S.E. 2d 104.

[19] To hold otherwise would render the enforcement of the curfew impossible, since, the defendant remaining silent, as here, the State could never prove that his purpose in being upon the streets was not one of those excepted by the law. Consequently, the evidence for the State clearly established the defendant's violation of the curfew ordinance by his unexplained presence on the streets.

[20] The shells stuck in his shoe tops, the gun parts lying on the floor of his automobile, within his easy reach, and the shell lying on the back seat of the vehicle were all within the possession of the defendant, he having the immediate power of control over them. *State v. Jones,* 213 N.C. 640, 197 S.E. 152. Consequently, the evidence of the State, if believed by the jury, was sufficient to support a finding of each element of the offense charged in the warrant relating to possession of a dangerous weapon.

[21] Since G.S. 14-288.7, itself, makes the possession of the disassembled shotgun and the shotgun shells in the area in question a criminal offense and specifies the penalty therefor, and since the warrant relating to this offense is founded upon the statute, not the ordinance, the sentence imposable in that case is not limited to the penalty prescribed for such conduct by the ordinance. The sentence imposed does not exceed that authorized by G.S. 14-288.7(c).

[22] The consolidation for trial of the two charges against the defendant was not error. Both arose out of the same course of action and the same evidence used to prove the commission of the one would be competent and admissible in the trial of the other. Under such circumstances, the consolidation of the two cases for trial, so as to save the time of the court and the witnesses, was a matter in the discretion of the trial judge. *State v. White,* 256 N.C. 244, 123 S.E. 2d 483; *State v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250; *State v. Combs,* 200 N.C. 671, 153 S.E. 252; G.S. 15-152.

[23] It was not error to deny the defendant's request that, if he elected to take the stand and testify with reference to the charge of curfew violation only, the State be limited in its cross-examination to that matter and not be permitted to cross-

examine him concerning his possession of the disassembled shotgun and the shotgun shells. The court was not required, in advance of the defendant's taking the stand, to rule upon the limits of permissible cross-examination. Furthermore, the defendant's presence upon the street at the time of his arrest constituted a violation of the curfew ordinance, unless it was for a purpose excepted by the act or otherwise justified by law. Under the circumstances, the court not being advised to the contrary, it could assume that any testimony by the defendant, relating to the charge of curfew violation, would be concerned with an effort to establish justification for his presence at that point and time. If the defendant had undertaken to testify to circumstances purporting to bring him within an exception to the ordinance, or other justifiable reason for being on the street, the State would have had the right, upon cross-examination, to develop matters reflecting upon the credibility of his story. His possession, at that time and place, of a virtually concealed, though dismantled, shotgun, and of live shells therefor tucked in the tops of his boots—a somewhat unusual receptacle for such articles—might well be inquired into by the State for the purpose of casting doubt upon the alleged purity of his purpose in being upon the street at that time. Thus, the court was correct in refusing to limit the right of cross-examination as requested.

[24] The defendant's final assignment of error relates to the refusal of the trial judge, when requested to do so by the defendant, to include in his charge to the jury a reading of the portion of the ordinance relating to the authority of the Mayor to prohibit, during a proclaimed state of emergency, travel upon the public streets except by those so traveling for specified purposes. The entire ordinance was introduced in evidence. The court instructed the jury correctly as to the elements of the offense of curfew violation and that to convict the defendant thereof it must find these elements from the evidence and beyond a reasonable doubt. There being no evidence whatever purporting to bring the defendant within any exception to the ordinance, or otherwise to justify his presence upon the street at the time of his arrest, the court was not required to read to the jury, as part of the charge, the exact language of this section of the ordinance, or to instruct the jury concerning travel purposes not within the prohibition of the ordinance. *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572; *State v. Williamson,* 238 N.C.

652, 78 S.E. 2d 763; *State v. Durham,* 201 N.C. 724, 161 S.E. 398.

In his brief in the Court of Appeals, the defendant asserted, without any further argument upon the point, that the proclamation of the state of emergency and the proclamation of the curfew violated his right to bear arms, guaranteed by the Second Amendment to the Constitution of the United States. This contention was not asserted in the trial court. Consequently, the trial court did not rule thereon. Upon the appeal to the Court of Appeals, no assignment of error related to this question. It is not asserted as a ground of appeal in the notice of appeal to this Court. It is not mentioned in the brief filed in this Court. However, in his brief filed in this Court, the defendant does state that he "reaffirms his arguments made in the Court of Appeals and relies upon the authority cited in his brief therein."

[25] This Court will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court, if it could have been raised therein. *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230; *State v. Dorsett* and *State v. Yow,* 272 N.C. 227, 158 S.E. 2d 15. Consequently, the question of the effect of the Second Amendment to the Constitution of the United States upon G.S. 14-288.7 and upon the ordinance of the City of Asheville and acts of the Mayor pursuant thereto is not presently before us. We do observe, however, that the Second Amendment to the Constitution of the United States, if it reaches State action at all, reaches it by way of the Due Process Clause of the Fourteenth Amendment and, therefore, would, at the most, forbid only an unreasonable and arbitrary restriction by State or municipal law upon the right to keep and bear arms. At no point in this proceeding has the defendant asserted any right under Article I, § 24, of the Constitution of North Carolina. Thus, we do not have before us any question as to the effect of that provision of the State Constitution upon G.S. 14-288.7 or upon the ordinance of the City of Asheville or the proclamation of the Mayor pursuant thereto. No opinion with reference thereto is herein expressed. For a discussion of that provision in relation to a different criminal charge, see *State v. Dawson,* 272 N.C. 535, 159 S.E. 2d 1.

There being no merit in any of the defendant's assignments of error, the decision of the Court of Appeals is affirmed.

Affirmed.

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

GEORGE D. HEATON AND WIFE, EMILY W. HEATON; JULES A. BUXBAUM AND WIFE, RENEE N. BUXBAUM; WILLIAM C. BEAN AND WIFE, DELORES B. BEAN; JOHN COLE HATCHER AND WIFE, ANNE S. HATCHER; JOHN F. BOS AND WIFE, BEVERLY G. BOS; CHARLES F. MOCK AND WIFE, ELIZABETH MOCK v. THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION; THE ERVIN COMPANY, A CORPORATION; CRESCENT LAND AND TIMBER CORPORATION, A CORPORATION; AND W. H. JAMISON, SUPERINTENDENT OF BUILDING INSPECTION FOR THE CITY OF CHARLOTTE

No. 68

(Filed 20 January 1971)

1. **Municipal Corporations § 30— power to zone**

A municipality has no inherent power to zone its territory and possesses only such power to zone as is delegated to it by the enabling statutes, G.S. 160-172 *et seq.*

2. **Municipal Corporations § 30— power to zone — statutory and constitutional limitations**

The authority to enact zoning ordinances is subject to the limitations imposed by the enabling statute and the Constitution forbidding arbitrary and unduly discriminatory interference with property rights.

3. **Municipal Corporations § 30— zoning ordinance — adoption in accordance with enabling statutes**

A zoning ordinance or an amendment thereto which is not adopted in accordance with the enabling statutes is invalid and ineffective.

4. **Municipal Corporations § 30— zoning ordinance — presumption of validity**

A municipal zoning ordinance is presumed to be valid, and the burden is on the complaining party to show it to be invalid.

5. **Municipal Corporations § 30— zoning amendment — notice and public hearing**

There must be compliance with the statutory requirements of notice and public hearing in order to adopt or amend a zoning ordinance.

6. **Municipal Corporations § 30— adoption of zoning ordinance with alteration of proposal advertised and heard — when additional hearing and notice is required**

Ordinarily, in order to adopt a zoning ordinance or amendment containing alterations substantially different (amounting to a new

proposal) from those advertised and publicly heard, there must be additional notice and opportunity for additional hearing; however, no further notice or hearing is required after a properly advertised and properly conducted public hearing when the alteration of the initial proposal is insubstantial or when the initial notice is broad enough to indicate the possibility of substantial changes and the substantial changes made are of the same fundamental character as those contained in the notice and result from objections, debate and discussion at the initial public hearing.

7. **Municipal Corporations § 30— substantial alteration of zoning proposal —changes favorable to complainants**

Alteration of the initial zoning proposal will not be deemed substantial when it results in changes favorable to the complaining parties.

8. **Municipal Corporations § 30— amendment to zoning ordinance — alterations of original proposal made after public hearing — necessary for additional notice and hearing**

No additional notice or public hearing was required for the adoption of an amendment to a municipal zoning ordinance containing alterations of the original proposal made after a public hearing on the proposal had been held where (1) the public notice of the hearing was broad enough to give notice of substantial changes in the area in question, (2) all parties were given an opportunity to be heard at a public hearing, (3) the changes made in the proposed amendment did not alter the fundamental character of the proposal heard and discussed at the public hearing, (4) the alterations incorporated in the ordinance as finally adopted were proposed by the planning commission and the city council as a result of the public hearing, and (5) the alterations, which decreased the area designated for a shopping center and increased the area for apartments, were favorable to the complaining parties.

9. **Municipal Corporations § 30— request for rezoning — authority of city council to rezone to requested classification or "higher classification" — ambiguity**

Provision of a municipal zoning ordinance giving the city council authority to change the existing classification of an area covered by a petition for rezoning "to the classification requested or to a higher classification or classifications without the necessity of withdrawal or modification of the petition," *held* not unconstitutionally vague and ambiguous in failing to state whether the changed classification must be higher than the requested classification, since the ordinance refers to action to be taken upon a requested change and the phrase "or to a higher classification" obviously refers to the "classification requested."

10. **Municipal Corporations § 30— rezoning to higher classification than that requested — omission of adopted classification from code section ranking classifications**

City council's alteration of a portion of the area involved in a petition for rezoning from the requested classification of B-1SCD to R-20MF was to a "higher classification" than that requested in the petition, notwithstanding R-20MF was inadvertently omitted from the

section of the zoning code which ranked zoning districts from the highest classification (most restrictive) to the lowest classification (least restrictive), another section of the zoning code having set forth the uses allowed and restrictions imposed under the R-20MR classification, and it being obvious that the R-20MF is less restrictive and thus a higher classification than B-1SCD.

11. **Statutes § 5— legislative intent**

The heart of a statute is the intention of the law-making body, and an act will not be invalidated when the meaning can be gathered from the full context of the statute and other statutes related to the subject.

12. **Municipal Corporations § 30— zoning amendment — necessity for three-fourths vote — G.S. 160-176 — rezoned property and buffer zone owned by same party**

In determining whether a favorable vote of three-fourths of the city council is required by G.S. 160-176 for the adoption of a zoning amendment, it makes no difference that petitioners own both the property to be rezoned and a buffer strip between such property and property owned by the persons who have protested the rezoning.

13. **Municipal Corporations § 30— G.S. 160-176 — meaning of "immediately adjacent" and "extending one hundred feet therefrom"**

As used in G.S. 160-176, the words "immediately adjacent" mean "adjoining" or "abutting," and the words "extending one hundred feet therefrom" refer to the distance to be measured from the zoned property in establishing the ownership of the "area of lots" referred to in the statute.

14. **Municipal Corporations § 30— conflict between zoning ordinance and enabling act**

In case of a conflict between a municipal zoning ordinance and the enabling act, the enabling act controls.

15. **Municipal Corporations § 30— zoning ordinance amendment — necessity for favorable vote by three-fourths of city council — buffer zone between rezoned property and protestants' property**

In order for plaintiffs to invoke the provisions of G.S. 160-176 requiring a favorable vote of three-fourths of the city council to adopt a zoning amendment, they must own 20% or more of the area extending 100 feet from the property sought to be rezoned; consequently, where defendants left a 100-foot buffer zone surrounding the property which they sought to have rezoned, the property of plaintiffs was not "immediately adjacent" to the rezoned property and a three-fourths vote of the city council was not required.

16. **Municipal Corporations § 30— creation of buffer zone to avoid three-fourths vote**

Even if a buffer zone was created for the sole purpose of avoiding the three-fourths vote required by G.S. 160-176, such action would be valid and effective to avoid such a vote.

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

APPEAL by plaintiffs Jules A. Buxbaum and wife, Renee N. Buxbaum; William C. Bean and wife, Delores B. Bean; John Cole Hatcher and wife, Anne S. Hatcher; John F. Bos and wife, Beverly G. Bos; and Charles M. Mock and wife, Elizabeth Mock, from *Martin, J.*, August 31, 1970 Schedule A Session of MECKLENBURG Superior Court.

Defendants, The Ervin Company (Ervin) and Crescent Land and Timber Corporation (Crescent) are the owners of a 111.786 acre tract of land (tract) in Sharon Township, Mecklenburg County, lying outside the city limits of the City of Charlotte but lying within the City's zoning perimeter. The tract is bounded on the west by Providence Road, on the north by Sardis Lane, on the south by McAlpine Creek, and on the east by several of the plaintiffs' properties. Plaintiffs, with the exception of two persons, adjoin the tract. The tract owned by defendants was included in a comprehensive zoning ordinance adopted in 1962 which zoned 66 acres adjoining Providence Road, Sardis Lane and McAlpine Creek as R-15MF and zoned 45.126 acres of the tract adjoining McAlpine Creek, Sardis Lane, and the property of several of the plaintiffs in this action as R-15. The classification R-15 restricts the use of land to single family residences and permits construction of approximately 2.9 units per acre, and requires 15,000 square feet of development area per dwelling unit on a lot 80 feet wide with a side yard of at least 10 feet; the classification R-15MF permits single family houses, duplexes and multi-family buildings and developments. Charlotte Code § 23-4. Multi-family units in a R-15MF district must have a minimum lot size of 15,000 square feet for the first building plus 3,500 square feet for each additional building, with at least 65% of the area being open and unobstructed. Other classifications pertinent to this decision are the classification R-20MF and B-1SCD. The only uses permitted in R-20MF districts are one-family semi-detached, one-family attached, two-family and multi-family dwellings. The lot must have an area of at least 20,000 square feet for the first unit and 5,000 square feet for each additional unit, with at least 70% of the area being unobstructed.

The B-1SCD classification permits an integrated shopping center and requires a minimum site area of 3 acres per building,

requires a separation of 25 feet between buildings when the building is under 40 feet in height, requires separation of buildings by 35 feet when the building is between 40 and 60 feet in height. For buildings over 60 feet, the separated distance shall be 35 feet plus 1 foot for every 2 feet of building height above 60 feet.

On 13 May 1970 defendants Ervin and Crescent filed a petition requesting that 42.6 acres of the eastern portion of the tract be rezoned. The notice of hearing was properly published, and in pertinent part provided:

> "NOTICE is hereby given that public hearings will be held by the City Council, and the Charlotte-Meckenburg Planning Commission, the Council Chamber, Second Floor of the Charlotte City Hall, on Monday, the 15th day of June, 1970, at 2 o'clock P. M., on the following petitions proposing changes on the official zoning map of the City of Charlotte, N. C. and Perimeter Area:
>
> * * * * *
>
> "PETITION NO. 70-88. Change from R-15 to R-20MF (28.3 acres) and from R-15 and R-15MF to B-1SCD (14.3 acres) property south of Sardis Lane and east of Providence Road adjacent to Providence Square. Petitioners: The Ervin Company and Crescent Land and Timber Co.
>
> * * * * *
>
> "The City Council may change the existing zoning classification of the entire area covered by each petition, or any part or parts of such area, to the classification requested, or to a higher classification or classifications without the necessity of withdrawal or modification of the petition.
>
> "Parties in interest and citizens shall have an opportunity to be heard and may obtain further information on the proposed changes from the Charlotte-Mecklenburg Planning Commission Office, Equity Building, 701 East Trade Street.
>
> "Anyone desiring to file a written petition of protest intended to invoke the ¾ majority vote rule as specified in G.S. 160-176 must file such petition in the Office of the

City Clerk not later than the close of business on June 10, 1970.

"City Clerk,
Ruth Armstrong"

A protest petition was filed within the time required by G.S. 160-176 by owners of 20% in area of the property adjoining the east side of the tract.

The Agreed Statement of Case on Appeal contains the following:

"10. The relationship of the boundary of the 111.786 acre tract to the boundary of the area for which zoning reclassification was requested is shown by Sheet 2 of Exhibit A to this Agreed Statement of Case on Appeal and on the east side consists of a strip which is uniformly one hundred feet in width and denominated 'Buffer.' "

The buffer zone skirted the area proposed to be rezoned so that at no point was the property of any of the plaintiffs within 100 feet of the area proposed to be rezoned. This buffer area was not contained in the area requested for rezoning and remained zoned as classification R-15.

On 15 June 1970 a joint public hearing was held before the Charlotte-Mecklenburg Planning Commission and the Charlotte City Council. At the hearing Ervin and Crescent presented their plans for development of the area proposed for rezoning. The development plan, in brief summary, proposed a shopping center containing a food store, drug store, florist shop, and other miscellaneous specialty shops. The shopping center was to be located near the center of the rezoned tract and not on a major thoroughfare. The proposal called for a lake, common grounds with apartment buildings so placed that they did not face on through streets. The buffer strip was projected as a landscaped area with only walkways traversing it. The protestants contended that the proposed rezoning would aggravate the already congested traffic and road conditions, would lower property values in the area, and would in general be detrimental to the public safety, health, morals and welfare of those located in nearby areas.

After the public hearing, the Charlotte-Mecklenburg Planning Commission requested Ervin and Crescent to submit a

revised site plan reducing the B-1SCD area to 10 acres and increasing the R-20MF area to 31 acres. Applicants complied, and the Planning Commission thereupon recommended approval of the revised plan to the Charlotte City Council. After receiving the recommendation, several members of the Charlotte City Council made it known to Ervin that they thought 10 acres was still too large an area to be rezoned B-1SCD, and requested another revision of the site plan reducing B-1SCD area to 7.4 acres, with 1.4 acres of that total being dedicated to development of a lake and greenway. Applicants thereupon reduced the B-1SCD areas as requested and increased R-20MF area to 32.9 acres.

On 13 July 1970, at a regular meeting, held without additional notice or further public hearing, the Charlotte City Council, by vote of five to two, adopted Zoning Ordinance No. 692-Z, which approved classification of 7.4 acres to B-1SCD and 32.9 acres to R-20MF according to the last revised site plan. In so doing, the City Council ruled that the filed protest petition did not comply with provisions of G.S. 160-176 requiring three-fourths vote because the 100-foot buffer strip prevented the property owners who filed the petition from being "owners of twenty per cent or more . . . of the area of the lots . . . immediately adjacent either in the rear thereof or on either side thereof, extending one hundred feet therefrom."

Plaintiffs thereupon instituted this action seeking to have the ordinance declared void, and at the same time obtained a temporary restraining order preventing use of the property in question other than for uses permitted prior to the adoption of Ordinance No. 692-Z on 13 July 1970. Defendants Ervin and Crescent filed and served motion for summary judgment. The motion was heard by Judge Harry C. Martin on 31 August 1970, and on 3 September 1970 Judge Martin entered summary judgment of dismissal.

All plaintiffs except George D. Heaton and wife, Emily W. Heaton, appealed from the judgment entered. The case is now before the Supreme Court pursuant to its general referral order effective 1 August 1970.

Paul B. Guthery, Jr., and Ray W. Bradley for plaintiff appellants.

Ervin, Horack & McCartha, by William E. Underwood, Jr., for The Ervin Company.

William I. Ward, Jr., for Crescent Land and Timber Corporation.

Henry W. Underhill, Jr., for City of Charlotte and W. H. Jamison.

BRANCH, Justice.

Appellants first contend that the amendment to the zoning ordinance is invalid because it was altered after the initial hearing without additional notice or further hearing.

The notice of and the proceedings at the initial hearing are not challenged.

[1-4] A municipality has no inherent power to zone its territory and possesses only such power to zone as is delegated to it by the enabling statutes, G.S. 160-172, *et seq.* The authority to enact zoning ordinances is subject to the limitations imposed by the enabling statute and by the Constitution. These limitations forbid arbitrary and unduly discriminatory interference with property rights in the exercise of such power. *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325. Thus, a zoning ordinance or an amendment thereto which is not adopted in accordance with the enabling statutes is invalid and ineffective. *Kass v. Hedgpeth,* 226 N.C. 405, 38 S.E. 2d 164; *Eldridge v. Mangum,* 216 N.C. 532, 5 S.E. 2d 721. However, a municipal zoning ordinance will be presumed to be valid, and the burden is on the complaining party to show it to be valid. *Zopfi v. City of Wilmington, supra; Helms v. City of Charlotte,* 255 N.C. 647, 122 S.E. 2d 817.

G.S. 160-175 provides:

> "Method of procedure.—The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an oppor-

tunity to be heard. A notice of such public hearing shall be given once a week for two successive calendar weeks in a newspaper published in such municipality, or, if there be no newspaper published in the municipality, by posting such notice at four public places in the municipality, said notice to be published the first time or posted not less than fifteen days prior to the date fixed for said hearing."

According to our research, the precise question here presented has not been decided by this Court. We therefore turn to other jurisdictions for enlightenment.

In *Klaw v. Pau-Mar Construction Co.*, 50 Del. 487, 135 A 2d 123, the Delaware Supreme Court interpreted an enabling statute substantially like our own G.S. 160-175. The Delaware statute, 22 Del. C. § 304, states:

> "The legislative body of the municipality shall provide for the manner in which the regulations and restrictions and the boundaries of the districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulations, restrictions, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality."

A public hearing concerning apartment house zoning was held after notice according to the Delaware statute, and the ordinance was finally enacted with two changes which were made after the public hearing, without further hearing or notice. The principal change consisted of reducing the areas in which apartments could be placed and permitted 40% of a lot to be occupied by buildings rather than 30% as originally proposed. In holding that there had been compliance with the notice provisions of the enabling act, the Delaware Court, in part, stated:

> " . . . The only absolute requirement with respect to the notice to be given contained in § 304 is of 'the time and place of such hearing.' There is no provision in the section specifically requiring advance notice in detail of what the proposed regulations will accomplish.

"We think the sole requirement of 22 Del. C. § 304 is what is specifically set forth, viz, that it is proposed to *amend the zoning ordinance in certain* general aspects, and that at a certain time and place a public hearing will be held so that interested persons may appear and be heard either in support of or in opposition to the proposal. We have read the published notice of the hearing in this case and are of the opinion that it complies with the law.

* * * * *

"The increase of the bulk requirement from 30% to 40% is not a change of such magnitude as to require the whole matter being commenced again. As a matter of fact, the requirement of the enabling law, that a hearing be held at which citizens may protest, implicitly contemplates that changes might be made in the original proposal as a result of such hearings. This, we think, is what actually happened and this, we think, is what the law contemplates shall happen. Our opinion in this respect is supported by authorities from other jurisdictions. *Cf. Town of Burlington v. Dunn,* 318 Mass. 216, 61 N.E. 2d 243, 168 A.L.R. 1181; *Walker v. Board of County Com'rs,* 208 Md. 72, 116 A. 2d 393; *Ciaffone v. Community Shopping Corp.,* 195 Va. 41, 77 S.E. 2d 817, 39 A.L.R. 2d 757; *City of Corpus Christi v. Jones,* Tex. Civ. App., 144 S.W. 2d 388.

In *Neuger v. Zoning Board,* 145 Conn. 625, 145 A. 2d 738, the plaintiffs attacked an amendment to a zoning ordinance on the ground that the adopted amendment differed radically from the originally noticed proposal. They contended that there was no legal hearing according to the City's charter, which required a public hearing on amendments to zoning regulations after notice published in an official paper stating time, place and purpose of the hearing. The notice published set forth that the amendments proposed would define a shopping center and would make possible the location of a liquor store in every such center. The definition of a shopping center included the requirement that it must be on land under single ownership. After a public hearing, the zoning board eliminated from the definition of a shopping center the requirement of single ownership and added a requirement that only one liquor store could be opened in each center. The changes resulted from objections voiced at the public hearing. The Connecticut Court, finding compliance

with the provisions for public hearing and notice, in part, stated:

> " . . . To be adequate, the notice is required to fairly and sufficiently apprise those who may be affected of the nature and character of the action proposed, to make possible intelligent preparation for participation in the hearing. . . . The very purpose of the hearing was to afford an opportunity to interested parties to make known their views and to enable the board to be guided by them. It is implicit in such a procedure that changes in the original proposal may ensue as a result of the views expressed at the hearing. (Citations omitted) Notice of a hearing is not required to contain an accurate forecast of the precise action which will be taken upon the subject matter referred to in the notice."

The Virginia Supreme Court of Appeals considered the notice provision of a zoning enabling statute similar to our own statute in the case of *Ciaffone v. Community Shopping Corp.*, 195 Va. 41, 77 S.E. 2d 817. We quote the pertinent portion of that decision:

> "The defendant's initial contention is that the C-1 area on the map included in the notice of public hearing differs from the C-1 area on the maps included as a part of the amended ordinance. Code Section 15-859 provides that ' . . . no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard . . . . ' This statutory provision means only that parties in interest and citizens must be apprised of the proposed changes to be acted upon so they can be present to state their views. It does not require that the notice contain an accurate forecast of the precise action which the county board will take upon the subjects mentioned in the notice of hearing."

In *Kalvaitis v. Village of Port Chester*, 235 N.Y. Supp. 2d 44, the changes effected in amendment to a zoning ordinance between initial notice and final enactment consisted of the elimination of certain lots to be rezoned, an increase in the maximum square footage per dwelling, an increase in the maximum permissible height of buildings, an increase in required open space, and an increase in the required distances between buildings.

The Court, overruling surrounding landlords' objections as to lack of notice, stated:

> "Logic appears to dictate that if the only person adversely affected by change does not object, others whose rights are not infringed by the change may not do so. (Cites)"

Similarly, the notice procedures were upheld in *Naylor v. Salt Lake City Corporation*, 17 Utah 2d 300, 410 P. 2d 764, where the notice prior to the public hearing stated that the area in question was subject to be rezoned for "commercial" purposes, but the area was rezoned "business" without further notice or hearing. There the court reasoned that the objecting adjacent landowners had no ground to complain about notice because the originally proposed commercial zone, of which protestants had notice, was less restrictive than the business zone which was finally enacted.

In the case of *Aquino v. Tobriner*, 298 F. 2d 674, the court upheld a summary judgment against the landowner where the evidence showed that the change originally proposed in the notice imposed no requirements respecting the floor area or limitation of lot occupancy on the landowner's land, but the rezoning ordinance as finally passed contained such requirements. The court stated that the very purpose of a zoning hearing is to explore such subjects, and added that, even assuming that the limitations represented substantial changes in the original proposal, the plaintiff did not claim that the changes as adopted were not fully discussed and aired at the public hearing.

In the case of *Hewitt v. Baltimore County*, 220 Md. 48, 151 A. 2d 144, the pertinent provisions of the statute required that the county commissioners publish notice of the "place and time of the beginning of such hearing or hearings." The notice as published advised that there would be a hearing at a specified time and place to hear "objections and recommendation with respect to the final report" on the proposed zoning involving several square miles. The notice referred to a map on file which designated the area in question as residential, and the owners appeared at the hearing and requested that the property be classified for non-residential use. The county commissioners allowed this request, and the adjoining property owners attacked the zoning plan on the ground that notice of the hearing before

the commissioners had not been sufficiently worded as to give them notice of substantial changes. In holding there had been sufficient notice, the court said that the commissioners could hardly know without prejudgment or prophecy what action they might take at the hearing, and that under the circumstances the notice given could not have been more explicit or informative than it was. The court added that the plaintiffs had no right to assume that the county commissioners, the body entrusted with the sole power to enact zoning ordinances, was bound to adopt the preliminary proposals or recommendations submitted to it by the zoning commissioner.

[5-7] Thus, the general rule as applied to Chapter 160, Article 14, is that there must be compliance with the statutory requirements of notice and public hearing in order to adopt or amend zoning ordinances. Ordinarily, if the ordinance or amendment as finally adopted contains alterations substantially different (amounting to a new proposal) from those originally advertised and heard, there must be additional notice and opportunity for additional hearing. However, no further notice or hearing is required after a properly advertised and properly conducted public hearing when the alteration of the initial proposal is insubstantial. Alteration of the initial proposal will not be deemed substantial when it results in changes favorable to the complaining parties. Moreover, additional notice and public hearing ordinarily will not be required when the initial notice is broad enough to indicate the possibility of substantial change and substantial changes are made of the same fundamental character as contained in the notice, such changes resulting from objections, debate and discussion at the properly noticed initial hearing.

[8] In instant case the notice was broad enough to give notice of substantial changes in the area in question. A public hearing was held and all parties were given ample opportunity to be heard. The record shows that the changes made did not alter the fundamental character of the proposal heard and discussed at the properly noticed initial hearing. Minutes of the City Council indicate that alterations incorporated in the ordinance as finally adopted were proposed by the Planning Commission and the City Council as a result of expressions made at the public hearing, and were such that additional public hearing could have resulted only in repetitive statements by the same

parties or parties similarly situated. The ordinance as adopted decreased the area designated for a shopping center by 48% and increased the area for location of apartments by 16%. This action seems to be favorable to the complaining parties. The very purpose of the public hearing was to guide the City Council in making changes in the original proposal consistent with the views reflected at the public hearing. This is exactly what was done.

[9] In connection with this assignment of error appellants contend that the following portion of Section 23-96(a) of the Zoning Code of the City of Charlotte is unconstitutionally vague and ambiguous:

> " . . . The City Council may change the existing zoning classification of the area covered by the petition, or any part or parts thereof, to the classification requested or to a higher classification or classifications without the necessity of withdrawal or modification of the petition; provided, however, notices of hearings on such amendments shall inform the public that such action may be taken."

The ambiguity charged is that the section does not clearly state whether the changed classification would be higher than the requested classification or higher than the existing classification.

> "(A) particular zoning enactment or provision thereof may be judicially declared to be inoperative and void for uncertainty, vagueness or indefiniteness. However, the basis of the principle that courts will not, in doubtful cases, pronounce a legislative act to be contrary to the constitution applies with equal force where the courts are called upon to declare a statute to be so meaningless and unintelligible as to be inoperative . . . . " 58 Am. Jur., Zoning, § 24 pp. 954-955.

This section of the ordinance refers to action to be taken upon a requested change, so the phrase "or to a higher classification or classifications" refers to "the classification requested." Recognizing that every presumption is in favor of the validity of a legislative act, we do not find this section of the Charlotte Zoning Code to be so uncertain, vague or indefinite as to require

us to declare it void. *Lowery v. School Trustees,* 140 N.C. 33, 52 S.E. 267.

[10] Section 23-96(d) of the Charlotte-Mecklenburg Zoning Code ranks zoning districts from the highest classification (most restrictive) to the lowest classification (least restrictive). This section ranks the classification R-15 as higher than R-15MF, which, in turn, is ranked higher than the classification B-1SCD. The classification R-20MF is not ranked in this section, and appellants contend that consequently R-20MF is not a zoning classification, or, in the alternative, that it is not a "higher" classification than the zoning classifications requested by petitioners.

An examination of the Charlotte-Mecklenburg Zoning Code leaves no doubt that it was the intent of the legislative body to classify property by use and to denominate the more restrictive uses as the higher use. Section 23-36.1 of the Zoning Code fully sets out the uses allowed and restrictions imposed under the classification R-20MF. Even the untrained eye can see that the classification R-20MF is less restrictive and thus a lower classification than R-15, and is more restrictive and thus a higher classification than B-1SCD.

[11] The heart of a statute is the intention of the law-making body, and the act will not be invalidated when the meaning can be gathered from the full context of the statute and other statutes related to the subject. *Trust Co. v. Hood, Com'r.,* 206 N.C. 268, 173 S.E. 601.

It is apparent from the legislative history that the omission of R-20MF from the ranking of zoning classifications was inadvertent. We cannot perceive how plaintiffs could have been misled in their preparation for hearings or in any manner prejudiced by this inadvertent omission in the Zoning Code.

[8] We hold that no additional notice or public hearing was required before adoption of Zoning Ordinance 692-Z on 13 July 1970 by the Charlotte City Council.

Appellants next contend that the amendment to the zoning ordinance was invalid because it was not adopted by a favorable vote of three-fourths of all the members of the City Council.

G.S. 160-176 provides:

"Changes; Annexed Territory.—Such regulations, restrictions and boundaries may from time to time be

amended, supplemented, changed, modified or repealed. In case, however, of a protest against such change signed by the owners of twenty per cent or more either of the area of the lots included in such proposed change, or of those immediately adjacent thereto either in the rear thereof or on either side thereof, extending one hundred feet therefrom, or of those directly opposite thereto extending one hundred feet from the street frontage of such opposite lots, such amendment shall not become effective except by favorable vote of three-fourths of all the members of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments."

Section 23-96 of the Zoning Code of the City of Charlotte incorporates the provisions of G.S. 160-176.

We accept the proposition that the amendment would be invalid if twenty per cent of the owners of the property within the area designated by the statute protested, and the ordinance did not receive a favorable vote of three-fourths of all the members of the City Council. Appellants contend that they qualified as protestants under G.S. 160-176 because their properties lie, in relation to the property proposed to be rezoned, "immediately adjacent thereto . . . extending one hundred feet therefrom."

In the case of *Penny v. Durham* 249 N.C. 596, 107 S.E. 2d 72, an owner of lots petitioned for reclassification of his property from residential zone to commercial zone for a shopping center. The City adopted an ordinance rezoning the property lying more than 150 feet from the street (Club Boulevard), thereby leaving unchanged a strip of property 150 feet wide between the zoned property and Club Boulevard. The owners of more than twenty per cent of the area of lots abutting on the opposite side of Club Boulevard from applicant's property protested the change. The protestants contended that the ordinance was invalid because it was not passed by a favorable vote of three-fourths of the members of the City Council, as required by G.S. 160-176. The protestants were not within the zoned area, and in order for them to file a valid protest their property must have come within the provisions of the statute which provided that it be "signed by owners of twenty per cent of the area of the lots . . . directly opposite thereto, extending one hundred feet from the street frontage of such opposite lots. . . . "

This Court, holding the ordinance valid and ruling that petitioner's property did not come within the provisions of G.S. 160-176, stated:

"The fact that Northland owns both the 'buffer strip' and the rezoned area and that both are parts of one tract of land makes no difference in this case. We must consider the matter in the same manner as if those areas were under separate ownership. The 'Zoning Regulations' provide that the City may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article.' G.S. 160-173. To hold that zoning district lines must coincide with property lines, regardless of area involved, would be to render the act largely ineffective.

* * * * *

"So it is our opinion that the expression 'directly opposite' when applied to the lands in this case means those tracts of land on opposite sides of the street with only the street intervening. This seems to be the most natural and logical and best understood application of the expression. With reference to zoning 'the law is disposed to interpret language in the light of surrounding circumstances and to give to words their ordinary meaning and significance.' *In re Builders Supply Co.*, 202 N.C. 496, 163 S.E. 462.

* * * * *

"It must be kept in mind that 'Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they must be liberally construed in favor of such owner.' "

After decision in *Penny*, G.S. 160-176 was amended by the 1959 General Assembly by Ch. 434, s. 1, and inserted the words 'thereto either' immediately after the word 'adjacent' and by inserting the phrase 'or on either side thereof' after the word 'thereto' in the second sentence. The obvious intent of the legislature is clearly stated in Section 2 of the amendatory act as follows:

"It is the purpose and intent of this act to extend the protest provision of G.S. 160-176 to the owners of twenty per cent or more of each of the areas of the lots on either side of and extending one hundred feet from any area in-

cluded in proposed changes or amendments of municipal zoning ordinances."

[12] Subsequent to the passage of this amendment, this Court by its decision in *Armstrong v. McInnis,* 264 N.C. 616, 142 S.E. 2d 670, (1965) approved the creation of a buffer zone 101 feet in width around the outer edge of a tract zoned commercial, thereby separating the commercial zone from a residential zone. The buffer zone was created by allowing the 101 feet zone to remain zoned as residential. Therefore we conclude that the reasoning followed in *Penny* still prevails, and the fact that petitioners own both the property to be rezoned and the buffer strip will not affect decision in this case.

[13] Appellants urge that the words "immediately adjacent" as used in the statute should be interpreted to mean "next in relation to the property to be zoned," and that it was not the intention of the legislature that "immediately adjacent" as used in the statute should refer to lots abutting or adjoining the property under consideration. They also contend that the words "extending one hundred feet therefrom" as used in the statute refer only to the depth required for lots of protesting owners.

Appellees contend that the words "immediately adjacent" as used in the statute mean "adjoining" or "abutting," and that the words "extending one hundred feet therefrom" refer to the distance to be measured from the zoned property in establishing the ownership of the "area of lots."

We find the following definitions in Webster's Third New International Dictionary:

Adjacent: Not distant or far off; nearby but not touching; relatively near and having nothing of the same kind intervening; having a common border.

Immediately: In direct connection or relation; closely (contiguous).

Immediate: Existing without intervening space or substance.

The courts of other jurisdictions have interpreted the phrase "immediately adjacent" in the context of statutes similar to G.S. 160-176.

In the case of *Parsons v. Wethersfield,* 135 Conn. 24, 60 A. 2d 771, owners of property zoned residential sought to have it rezoned for light industrial use. Subsequent to the original zoning as residential, a heavily traveled highway had been constructed along its east side and its western boundary was a 66-foot strip occupied by a railroad. Owners of property beyond the railroad protested the proposed rezoning, relying on a statutory provision which, in part, provided.

> "If a protest shall be filed with the zoning authority against such change, signed by the owners of twenty per cent or more of the area of the lots included in such proposed change, *or of those immediately adjacent in the rear thereof extending one hundred feet therefrom,* . . . such change shall not become effective except by unanimous vote of the zoning authority if such zoning authority is a zoning commission. . . . " (Emphasis ours)

Decision of the principal assignment of error in *Parsons* turned on the meaning of the words "immediately adjacent." The Court, holding the ordinance valid, stated:

> "The intent of the General Assembly in passing an act is to be determined in the first instance by the words it has used. *State v. Bello,* 133 Conn. 600, 604, 53 A. 2d 381. Its general purpose must also be considered. *Biz v. Liquor Control Commission,* 133 Conn. 556, 559, 53 A. 2d 655. The purpose of § 132e as far as the case at bar is concerned is to define the protesting interest deemed sufficient to require unanimous action by the commission. The pertinent words are 'twenty per cent or more of the lots . . . immediately adjacent.' To say that the term 'lots . . . immediately adjacent' is to be defined as lots in the immediate vicinity or neighborhood, as claimed by the plaintiffs, would furnish no definite standard on which to figure the percentage. If, on the other hand, it is construed as meaning 'adjoining or abutting,' the test can be easily applied. The latter is a common definition. *Tudor v. Chicago & S. S. R. T. Co.,* Ill., 27 N.E. 915, 917; Id. 154 Ill. 129, 39 N.E. 136; *City of Lawrenceburg v. Maryland Casualty Co.,* 16 Tenn. App. 238, 242, 64 S.W. 2d 69; *Long v. London & Lancashire Indemnity Co.,* 6 Cir., 119 F. 2d 628, 630; *Pickens v. Maryland Casualty Co.,* 141 Neb. 105, 108, 2 N.W. 2d 593. The property of the

plaintiffs was not immediately adjacent to the land in question and a unanimous vote of the commission was not required."

The case of *Putney v. Abington Township, Pa.*, 176 Pa. Super. 463, 108 A. 2d 134, is one in which the court construed a statute requiring a three-fourths favorable vote of the Board of Township Commissioners when there was a protest of twenty per cent or more of the owners of lots within the area proposed to be zoned or those "immediately adjacent" extending 100 feet from the lots rezoned. There, the Court held that the words "immediately adjacent" meant "touching the area rezoned."

The term "immediately adjacent" has been defined by the courts in other cases factually different from instant case. The Wisconsin Supreme Court, in the case of *Superior Steel Products Corporation v. Zbytoniewski*, 270 Wis. 245, 70 N.W. 2d 671, construed a statute requiring motor vehicles to display rear lights when parked upon or in use upon places "immediately adjacent" to the traveled portion of a highway. There the Court stated that the qualifying word "immediately" gave the phrase "immediately adjacent" the meaning of "adjoining or with no space intervening." For other cases so defining the term "immediately adjacent," see *Pickens v. Maryland Casualty Co.*, 141 Neb. 105, 2 N.W. 2d 593; *Long v. Indemnity Co.*, 119 F. 2d 628; *City of Lawrenceburg v. Maryland Casualty Co.*, 16 Tenn. App. 238, 64 S.W. 2d 69.

We must adopt the sense which promotes the policies and objects of the legislature in enacting the statute. *Nance v. Railroad*, 149 N.C. 366, 63 S.E. 116.

The Supreme Court of Errors of Connecticut in *Park Regional Corp. v. Town Plan. & Zoning Comm.*, 144 Conn. 677, 136 A. 2d 785, interpreted a zoning statute which required a unanimous vote of the zoning commission if protest was filed by owners of twenty per cent or more of the area of lots immediately adjacent in the rear of land included in a proposed zoning change and extending one hundred feet therefrom. There the Court said:

> " . . . The only rational explanation of the language used is that the General Assembly was not thinking of owners of lots but of owners of areas. What is required is a

protest filed by the owners (whether one owner or many owners) of at least 20 per cent of certain areas. It is not the owners of 20 per cent of the lots with whom we are concerned but the owners of 20 per cent of certain areas of lots. An entire lot, as in the case of the Valente lot here, might not be either 'immediately adjacent' to or 'in the rear' of the lots included in the change of zone. But if part of it was, then that part would constitute an area 'immediately adjacent in the rear' of the lots included in the zone change."

[13] In instant case we cannot agree with appellants that the legislature intended to make the width or depth of lots owned by those seeking to protest one of the standards by which their eligibility to protest would be measured. Such standard would have no reasonable relation to the impact of the zoning ordinance. Conversely, the impact of the zoning ordinance would be greatly diminished by the distance that the area owned by protestants lies from the property proposed for zoning. Certainly the owners of lots immediately outside of (within 100 feet) or adjoining the boundary line of the property to be altered, are the parties most directly affected by the alteration and, therefore, most logically are the "owners of . . . the area of the lots" intended by the legislature to qualify as protestants.

[13] When we give the words "immediately adjacent" their ordinary meaning and significance as applied to the facts of this case, and liberally construe the ordinance in favor of the owner of the property to be zoned, we conclude that the expression means "adjoining" or "abutting." This interpretation creates an area easily determinable which lends itself to definite calculations of the percentage required to invoke the provisions of the statute.

[14] We also note appellants' argument that the definition of the word "lot" in section 23-96, subsection A, of the Zoning Code of the City of Charlotte precludes the proposed buffer zone from becoming operative. We do not find this argument persuasive. Even had it been so, the enactment of the section by the City would be subject to the limitations of the enabling act, *Zopfi v. Wilmington, supra,* and in case of conflict the municipal ordinance would yield to the general law regulating the same matter. *Eldridge v. Mangum, supra.* Nor do we perceive that the context of the statute (G.S. 160-176) indicates that the word "lot" has

any meaning other than its common and ordinary meaning. *Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292.

[15] We therefore hold that in order for plaintiffs to invoke the provisions of G.S. 160-176 they must own twenty per cent or more of the area extending 100 feet from the rezoned tract. Plaintiffs do not own lots in such area because of the 100 foot buffer zone.

[16] Finally, appellants contend that the buffer zone is a subterfuge and therefore it does not avoid the right of affected property owners by petition to require the more stringent vote by the City Council in adopting the zoning amendment.

The Law of Zoning and Planning, Rathkopf, Vol. 1, Chap. 28, Section 28-10, contains the following statement:

> " . . . (W)here an applicant for a zoning change seeks to avoid the necessity of a larger than majority vote by creating a buffer zone of 100 feet between that portion of his property sought to be rezoned and the lands of adjacent property owners, such action is valid and avoids the requirement of such larger vote."

In Radnor, Ithan & St. Davids Civic Assn. Appeal, 5 D. & C. 2d 156, 41 De. Co. 396 (Pa. Quar. Sess. 1954), a zoning ordinance was adopted by a simple majority and the zoning code of the township of Radnor contained a section providing that three-fourths of the township commissioners must vote for adoption of the amendment when twenty per cent of the property owners whose property is within one hundred feet of the property to be rezoned file a protest. The property owner filed an amended petition creating a 100-foot buffer zone between his property and the property of protestants. The protestants contended that the creation of the buffer zone was a subterfuge and ineffective to prevent the more stringent vote. Holding that only a majority vote was required, the Court stated:

> "The question of law therefore here presented is whether or not such action, admittedly done for the purpose of avoiding the three-fourths vote made necessary by section 1704 and section 3105, *supra,* is legally effective for that purpose. We are of the opinion that it is.
>
> "A well founded principle of law since time immemorial has been that one may avoid the impact of a particular

statute but may not evade such impact: 43 Am. Jur. § 10. If the changes are actual and not merely simulated, although made for the purpose of avoiding the statute, they do not constitute illegal evasion.

"Webster defines the word 'evade' as meaning 'to take refuge in evasion,' 'to use artifice in avoidance' and defines the word 'avoid' to mean 'to keep away from,' 'to keep clear,' etc., and 'avoidance' is said to be 'the act of avoiding or keeping clear of,' so that in the English language itself there is a clear distinction between 'avoidance' and 'evasion,' the former being an acceptable means and the latter an unacceptable means.

"This theory was the subject of discussion by the late Mr. Justice Holmes, of the United States Supreme Court in *Bullen v. State of Wisconsin,* 240 U.S. 625, 630, 631, wherein he said: 'We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law . . . '; and again, this great jurist said in the case of *Superior Oil Company v. State of Mississippi,* 280 U.S. 390, 395, 396: 'The fact that it (vendor) desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.' "

We see no evidence of evasion in this record. The buffer zone had been proposed before the initial hearing, and it was discussed then. The record leaves the impression that the Charlotte-Mecklenburg Planning Board and the Charlotte City Council recognized their responsibility to meet the demands of growth in the area which they governed and at the same time acted responsively to the objections voiced by the protestants when the ordinance was considered and adopted. The purpose of the "buffer zone" was to lessen the impact between the existing residential area and the newly zoned area. Further, applying the authority above cited, even had the zone been created for the sole purpose of avoiding the three-fourths vote required by G.S. 160-176, the zoning ordinance would not have

been invalidated, since the creation of the buffer zone was in full compliance with the law as enacted by the General Assembly.

The rezoning ordinance No. 692-A adopted by the Charlotte City Council on 13 July 1970 was regularly adopted and is legal and valid.

Affirmed.

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

CLARENCE M. ALLRED, JUNE ALLRED, J. LAWRENCE APPLE, ELLA APPLE, LAWRENCE E. BACH, UNITA BACH, PHILIP BLANK, JR., MARY ALICE BLANK, GLENN W. BOWERS, FLORA LEE BOWERS, BENJAMIN E. BRITT, JOY BRITT, ROBERT S. BRYAN, GERALDINE BRYAN, JOHN A. CARBONE, JEAN CARBONE, BRUCE K. CHESTER, MARGARET CHESTER, ELLIS COWLING, BETSY COWLING, LAWRENCE E. CRABTREE, VIRGINIA CRABTREE, RALPH E. FORREST, LULA D. FORREST, L. E. HANSBROUGH, FREDA HANSBROUGH, WARREN HANSON, HARRIETT HANSON, SOLOMON P. HERSH, ROSALIE HERSH, Z. ZIMMERMAN HUGUS, NANCY HUGUS, JOHN E. JOHNSON, LOIS JOHNSON, MAX LEVINE, PHYLLIS LEVINE, CARL LOWENDICK, MARY LOWENDICK, JAMES B. LYLE, SHIRLEY LYLE, HERBERT MARTIN, MARY MARTIN, EDMUND MENDELL, LOIS MENDELL, LATHAM L. MILLER, FRANCES MILLER, FLOYD MORGAN, ANN MORGAN, WILLIAM D. PAGE, PEGGY PAGE, LEE PERSON, HELEN PERSON, NORMAN PLINER, ROSALYN PLINER, THOMAS H. REGAN, NANCY REGAN, JAMES R. REID, MARJORIE REID, ROBERT T. ROSS, MARTHA ROSS, SAMUEL C. SCHLITZKUS, BOBBIE M. SCHLITZKUS, BERNIE SILVERMAN, FAYE SILVERMAN, W. B. SLOOP, VONNIE SMITH, SYLVIA SMITH, JOHN W. STONE, BETSY STONE, ROBERT WAHL, GERALDINE WAHL, LEWIS P. WATSON, MIRANDA WATSON, J. C. WILLIAMSON, JR., SALLIE JOE WILLIAMSON, CHARLES C. WOOTEN, AND RUTH WOOTEN, ON BEHALF OF THEMSELVES AND OTHER NEARBY PROPERTY OWNERS, PLAINTIFFS v. THE CITY OF RALEIGH, NORTH CAROLINA, TRAVIS H. TOMLINSON, MAYOR AND MEMBER OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA, AND GEORGE B. CHERRY, SEBY B. JONES, WILLIAM M. LAW, CLARENCE E. LIGHTNER, ALTON L. STRICKLAND, AND WILLIAM H. WORTH, MEMBERS OF THE CITY COUNCIL OF RALEIGH, NORTH CAROLINA, AND BLUE RIDGE GARDENS, INC., DEFENDANTS

— AND —

SEBY B. JONES, MAYOR OF THE CITY OF RALEIGH, NORTH CAROLINA, AND JESSE O. SANDERSON, THOMAS W. BRADSHAW, JR., AND ROBERT W. SHOFFNER, MEMBERS OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA, ADDITIONAL DEFENDANTS

No. 11

(Filed 20 January 1971)

1. **Municipal Corporations § 30— rezoning ordinance — presumption of validity**

   A duly adopted rezoning ordinance is presumed to be valid.

2. **Municipal Corporations § 30— facts pertinent to validity of rezoning ordinance — question of fact for superior court**

   Controversies in respect of facts pertinent to the validity of a rezoning ordinance present questions of fact for determination by the superior court judge.

3. **Municipal Corporations § 30— delegation of zoning power to municipalities**

While the original zoning power of the State reposes in the General Assembly, it has delegated this power to the "legislative body" of municipal corporations. G.S. 160-172 *et seq.*

4. **Municipal Corporations § 30— power to zone — limitations of enabling act**

The power of the legislative body of a municipality to zone is subject to the limitations of the enabling act, and within the limits of the powers so delegated, the municipality exercises the police power of the State.

5. **Municipal Corporations § 30— recommendations of planning board — effect**

A municipal planning board has no legislative, judicial or quasi-judicial power, and its zoning recommendations do not restrict or otherwise affect the legislative power of the city council. G.S. 160-22; G.S. 160-177.

6. **Municipal Corporations § 30— power to enact comprehensive zoning ordinance**

The City Council of Raleigh had the power to enact a comprehensive zoning ordinance.

7. **Municipal Corporations § 30— Raleigh zoning ordinance — essentials of comprehensive zoning ordinance**

The zoning ordinance of the City of Raleigh complies with two of the essentials of a comprehensive zoning ordinance, *viz.:* (1) It applies to all territory subject to the zoning jurisdiction of the city council, and (2) all uses permissible in a particular district or zone are available as of right to the owner of property within such district or zone.

8. **Municipal Corporations § 30— zoning — applicability of restrictions to all areas in same classification**

All areas in each zoning classification must be subject to the same restrictions.

9. **Municipal Corporations § 30— rezoning to less restrictive classification — action based on specific plans of applicant — failure to find property should be made available for all uses permitted by new classification**

Municipal ordinance rezoning a 9.26-acre tract of land from one residential classification to a less restrictive residential classification is invalid where the city council did not determine that the 9.26-acre tract and the existing circumstances justified rezoning the tract so as to permit *all* uses permissible under the new classification, but the city council's action was based on its approval of the specific plans of the applicant to construct on the 9.26-acre tract luxury apartments in twin-rise towers.

10. **Municipal Corporations § 30— authority to rezone — limitations**

A municipal legislative body has authority to rezone property when reasonably necessary to do so in the interests of the public

health, safety, morals or welfare, the only limitation upon this authority ordinarily being that it may not be exercised arbitrarily or capriciously.

11. **Municipal Corporations § 30— disregard of fundamental concepts of zoning — arbitrary and capricious action**

Notwithstanding the motivation of the members of the city council may be laudable, any action of the council that disregards the fundamental concepts of zoning as set forth in the enabling legislation may be arbitrary and capricious.

12. **Municipal Corporations § 30— rezoning to less restrictive classification — necessity for finding that property should be made available for all uses permitted by new classification**

The zoning of a tract of land may be changed from the residential classification R-4 to the less restrictive residential classification of R-10 only if and when its location and the surrounding circumstances are such that the property should be made available for all uses permitted in the R-10 district.

13. **Municipal Corporations § 30— rezoning — assurance that tract will be developed according to restricted approved plan.**

Rezoning on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approved plans is not a permissible ground for placing the property in a zone where restrictions of the nature prescribed are not otherwise required or contemplated.

APPEAL by plaintiffs from the Court of Appeals.

Plaintiffs' action is for a declaratory judgment. They seek an adjudication that Ordinance No. 764-ZC-69, referred to hereafter as the Ordinance, which was adopted by the unanimous vote of the City Council at its meeting on March 3, 1969, is invalid and void.

The Ordinance provides:

"Section 1. That the Zoning Ordinance of the City of Raleigh, being Chapter 24 of the City Code and including the Zoning District Map, which is a part of said ordinance, is hereby amended as follows:

"Southwest corner of the intersection of Glen Eden Drive and the Beltline, being Lot No. 28, according to Wake County Tax Map 434, containing approximately 9.26 acres, rezoned to Residential 10 District.

"Section 2. That this ordinance shall become effective twenty days after date of publication."

Plaintiffs alleged, in twenty-two paragraphs, various grounds on which they attack the Ordinance. Separate answers filed by defendant Blue Ridge Gardens, Inc., and by defendant officials, assert the validity of the Ordinance.

When the case came on for hearing at October 1969 Regular Civil Session, Wake Superior Court, Judge Bailey stated: "There will be no jury trial." (Note: Although plaintiffs excepted, their exception is not brought forward on appeal.) Thereafter, evidence was offered by plaintiffs and by defendants, the evidence consisting of testimony, documentary evidence and maps.

Uncontradicted evidence tends to show the facts narrated below.

The 9.26-acre tract referred to in the Ordinance fronts 859.7 feet on the south side of Glen Eden Drive (formerly Nathan Drive) and extends south along the western right-of-way of the Beltline. Its west line extends south to a depth of 408 feet and its east line extends south along the western line of the right-of-way of the Beltline to a depth of 570 feet. The west line is the city limit. The maps in evidence indicate the length of the south (back) line is approximately the same as that of the north (front) line.

The Beltline, with a total right-of-way width of 260 feet, is a limited access highway of four lanes with a dividing median. It carries traffic for U. S. Highways Nos. 1, 70 and 64.

Glen Eden Drive crosses the Beltline on a bridge. There is no means of interchange or access between Glen Eden Drive and the Beltline. Glen Eden Drive affords the only means of travel between the 9.26-acre tract and points east and west of where it crosses the Beltline.

The Glen Eden Drive right-of-way is eighty feet wide. The paved portion of Glen Eden Drive is thirty-nine feet wide. On March 3, 1969, when the Ordinance was adopted, the paved portion of Glen Eden Drive west of the Beltline stopped at the City limits.

The 9.26-acre tract was annexed to and became a part of the City of Raleigh in 1966. Pursuant to authority conferred by Chapter 540, Session Laws of 1949, and G.S. 160-181.2, Section 3 of Chapter 24 of the Raleigh Code, a comprehensive zoning

ordinance, provides: "(F) or the purpose of promoting the health, safety, morals and general welfare of citizens of the city and of the territory and community beyond and surrounding the corporate limits of the city *for a distance of one mile in all directions,* the city council does hereby extend this chapter and the zoning ordinances, together with all amendments thereto, to that area beyond and surrounding the corporate limits of the city for a distance of one mile in all directions; and the area beyond and surrounding the corporate limits of the city *for a distance of one (1) mile in all directions* is divided into classes of districts shown on the zoning maps which are on file in the city planning office, and are hereby declared to be a part of this chapter." (Our italics.)

The zoning map in evidence is dated August, 1966. It consists of four separate sheets, the 9.26-acre tract and surrounding areas appearing on Sheet 1.

According to the zoning map:

Large areas, on both sides of Glen Eden Drive, extending east from the Beltline to Ridge Road and beyond, are zoned R-4. The homes of all plaintiffs, except those referred to below, are located in these areas east of the Beltline. The record before us does not show the exact location (other than the street address) of the property of any of the plaintiffs except that of plaintiff Floyd Morgan, whose home is at the southeast corner of Glen Eden Drive and the Beltline, that is, directly across the Beltline from the 9.26-acre tract.

Large areas lying north, west, southwest and (a smaller area) directly south of the 9.26-acre tract are zoned R-4. The area to the north includes a restricted residential development known as Eden Croft, part of which lies directly across Glen Eden Drive from the 9.26-acre tract. Areas north, northwest, west and southwest of the 9.26-acre tract include portions which are beyond the present city limits but within one mile thereof and therefore subject to the zoning jurisdiction of the City Council. It was stipulated that the properties of plaintiffs Blank and of plaintiffs Regan are located on Arbor Drive and Eden Croft Drive, respectively; but the stipulation does not disclose the location of these properties within the Eden Croft Subdivision.

According to the zoning map offered by plaintiffs and the marked aerial photograph offered by defendants, an area zoned R-4, of substantial but undefined dimensions, separates the 9.26-acre tract and an area located at the northwest corner of the *interchange* intersection of Lake Boone Trail and the Beltline.

It was stipulated that the neighborhood in which plaintiffs' properties are located "is a quiet, orderly neighborhood, useful and being used as a high class residential area." Photographs of the homes of about two-thirds of plaintiffs evidence this stipulated fact.

The 9.26-acre tract was conveyed to Blue Ridge Gardens, Inc., referred to hereafter as the corporate defendant, by deed dated March 16, 1965, from Ezra Meir and wife, Violet S. Meir, and J. McCree Smith and wife, Lucille T. Smith, at which time the 9.26-acre tract was zoned R-4.

On May 24, 1965, the corporate defendant filed an application, requesting that the zoning of the property be changed from R-4 to Shopping Center. The applicant proposed a large ten-story apartment building with a shopping center on the first floor. The Raleigh Planning Commission (Planning Commission), to which the application was referred, voted unanimously to recommend to the City Council that the application be denied for the following reasons: "1. The surrounding neighborhood was almost unanimous in its objection to the change from single family residential, believing that such a change in the plan would have a detrimental effect on their properties. A sufficient petition to require a ¾ vote to *(sic)* the Council was submitted. 2. The Commission did not believe that a change in the plan was warranted at this time, recognizing the neighborhood objection and possible encouragement of such a use to instigate further zoning changes around this intersection." As recommended by the Planning Commission, the City Council denied this application.

On July 24, 1967, the corporate defendant filed a *second* application, requesting that the zoning of the property be changed from R-4 to R-10. The applicant proposed the use of this property "for apartment-type dwellings." The Planning Commission, to which the application was referred, recommended that the application be denied for the following reasons: "(I)t would constitute spot zoning; . . . it does not have direct access to the Beltline; and request was not in keeping with the rest of the area." As

recommended by the Planning Commission, the City Council by unanimous vote at its meeting on August 21, 1967, denied the application.

On December 16, 1968, a *third* application was filed. This application, which was filed by Ezra Meir, requested that the zoning of the property be changed from R-4 to R-10. (Note: Mr. Meir is president of the corporate defendant and he and his wife are the only stockholders.) On January 15, 1969, the City Council, meeting jointly with the Planning Commission, held a public hearing with reference to this third application. The minutes of this meeting disclose: On behalf of the applicant, Mr. Anderson, a planning consultant, presented "a development study of the project, to be called Blue Ridge Gardens, and explained their plans to build luxury apartments in a vertical manner to provide for 10 families per acre in twin high-rise towers." Also, Mr. Anderson "read a letter from the Chamber of Commerce, by W. H. Simonds, endorsing the project." A petition signed by sixty-nine persons in the Glen Eden area, "opposing the rezoning on the basis the establishment of an apartment project on the property would seriously interfere with the use and enjoyment of their property and diminish its value," was presented by Mr. Hunter, their counsel, and some 10-12 persons stood in support of the opposition. The application was referred to the Planning Commission with the understanding that Mr. Bailey, counsel for the applicant, would be permitted to submit his contentions in writing. (Note: Mr. Bailey was unable to present his contentions at the meeting on account of a conflicting engagement as a member of the Rules Committee of the General Assembly.) Later, contentions in favor of the proponents and opponents were submitted in writing by Mr. Bailey and by Mr. Hunter, respectively.

On January 20, 1969, it was reported to the City Council that the Planning Commission had deferred the application for further study.

On February 11, 1969, the Planning Commission adopted the following "Report to the City Council."

"This was the application by Ezra Meir for the rezoning of a tract of land on the Beltline at Glen Eden Drive for R-10 which would allow the construction of two very attractive high-rise apartment buildings. The Commission has discussed this case

on three occasions since the hearing and has at the Council's instruction reviewed written statements submitted by attorneys representing both sides.

"The Commission would first like to admit that it recognizes the potential economic and aesthetic benefits of such a project to the City of Raleigh. We agree with the applicant that such apartments, and particularly such an outstanding architectural project, would be of great benefit to the community, and it was frankly difficult for us to keep foremost in our minds the more important aspects of comprehensive planning and community-wide benefits.

"There are many sites in our community on which such a project could be placed under either existing zoning or under zoning changes which would comply with our planning principles and ideals. The proposed area has none of these planning reasons for a change.

"We have allowed higher density areas to develop adjacent to the Beltline but only in areas where access was more or less directly to and from interchanges. This area does not have that access.

"This action would very definitely constitute spot zoning in that we would be zoning one man's property for a specific proposed use to the detriment of surrounding areas.

"We cannot look only at this proposal and its possible effects on the community. If this high density residential is allowed, there will surely be other requests in the immediate vicinity which can offer the same arguments, and, therefore, should reasonably also be allowed. We should not change our plan to allow this.

"If we were to recommend this with the opinion that we do not believe it would be detrimental to the area, we are substituting our judgment for 69 residents who live in the area and believe such a use would be detrimental through their submission of a petition. Although we admit that neighborhoods do not always think comprehensively in their petitions, we admit this community presentation was very reasonably and soundly based on planning principles which we endorse.

"Again we repeat our enthusiasm for such a project and

would sincerely encourage the applicant to seek another site for its accomplishment.

"The Planning Commission voted unanimously to recommend to the City Council that this application be denied."

At a meeting held February 17, 1969, the City Council, after hearing the report of the Planning Commission, decided to refer the matter for consideration by the Council "as a committee of the whole" at a called meeting. The meeting of the City Council for this purpose was held on February 24, 1969. The minutes of this meeting disclose that, in addition to the members of the City Council, members of the Planning Commission, to wit, Mr. Ivey, Mr. Lortz, Mr. Stanton and Mr. Williams were present. The minutes of this meeting are quoted below.

"L. L. Ivey, chairman of the City Planning Commission, was recognized and reiterated the recommendations of the Commission made at the February 17, 1969 Council meeting. He stated high density areas have been allowed on the Beltline but this location does not have access, and if allowed there will be other requests in the immediate vicinity, which may offer the same reasons for rezoning and should be allowed. He called attention to the petition in protest signed by 69 residents. He said most commission members viewed the plans with favor and liked the design and concept, and it was sometimes difficult to keep planning principles uppermost in their minds, and felt that Raleigh needs such apartments but the Commission would encourage that they seek other sites for location of the project.

"The applicant, Ezra Meir, and his attorney, Ruffin Bailey, were present. Answering a question posed by Councilman Cherry, Mr. Bailey said he had analyzed the petition and of the 69 signatures a total of 37 are actually property owners, and some 5-600 yards away from the immediate neighborhood. He presented a statement signed by owners of property on the same side of the Beltline as the property in question, Billy B. Waters, Eva M. Waters, and J. R. Adams, supporting the request for rezoning to Residential 10 in order that the project may be constructed at the location requested, and also presented a written statement from Charles W. Gaddy, owner of property across the street from the property in question, in which Mr. Gaddy said he did not personally object to the particular project. Mr. Bailey said the applicant has made commitments and cannot sell out and go elsewhere, and because of its nature the apartments must be in

a residential area. Mr. Meir, in answer to a question, assured the Council he plans to go ahead with the project as presented as this has been a dream of his for a long time.

"Discussion centered around the proposed luxury type apartments, possible comprehensive planning for Glen Eden Drive between Beltline and Blue Ridge Road, the undeveloped areas around the property in question, possibility of applicant no(t) building the apartments as planned, and generation of traffic on Glen Eden Drive. After hearing Council members and members of the City Planning Commission express themselves, Mr. Lightner made a motion that approval of the request for rezoning to Residential 10 be recommended to the full Council to afford the community the opportunity of this splendid development, which was seconded by Mr. Worth and passed unanimously on roll call vote."

The minutes of the meeting of the City Council held March 3, 1969, at which the Ordinance was adopted by unanimous vote, include the following: "It was generally agreed that there will be more of the type of apartment complexes planned for this area if the city is to maintain its growth, and there should be some type of protective measure such as site plan approval, etc., to provide the city with some control. The city attorney advised that this would require an ordinance amendment and take 60 to 90 days to enact such an ordinance because of required legal procedures for advertising for any change in the zoning ordinance and publication of the ordinance after approval. In response to questions by the Council, Attorney Ruffin Bailey, representing the applicant, stated that a 60 to 90 day delay would materially affect the project because they have a concept that is new and the first one for Raleigh and construction must start immediately. He assured the Council that the apartments as outlined would be built by his client, and stated that they would voluntarily submit for approval their plans and specifications."

Upon seventeen separately stated findings of fact and four separately stated conclusions of law set forth therein, Judge Bailey "ORDERED, ADJUDGED AND DECREED that (the) Ordinance . . . was adopted in accordance with law and is valid; that the plaintiffs are not entitled to the relief prayed for in the complaint; and that the costs of this action should be taxed by the Clerk against the plaintiffs."

Plaintiffs excepted and appealed to the Court of Appeals. In their appeal, they set forth the fifty assignments of error appearing on pages 192-256 of the record.

The Court of Appeals, by a two to one decision of the hearing panel, affirmed the judgment of Judge Bailey. 7 N.C. App. 602, 173 S.E. 2d 533. One member of the panel having dissented, plaintiffs' appeal to the Supreme Court is of right under G.S. 7A-30(2).

John V. Hunter III, for plaintiff appellants.

Donald L. Smith and Broxie J. Nelson for defendant appellee City of Raleigh.

Bailey, Dixon, Wooten & McDonald, by J. Ruffin Bailey, Wright F. Dixon, Jr., and John N. Fountain for defendant appellee Blue Ridge Gardens, Inc.

BOBBITT, Chief Justice.

Plaintiffs alleged no procedural irregularity in the adoption of the Ordinance. They attack it, *inter alia,* on the ground it exceeds and conflicts with the authority conferred by the enabling legislation.

[1, 2] A duly adopted rezoning ordinance is presumed to be valid. Controversies in respect of facts pertinent to its validity present questions of fact for determination by the superior court judge. *Zopfi v. City of Wilmington,* 273 N.C. 430, 438, 160 S.E. 2d 325, 333. Here, the evidence discloses no conflicts as to essential facts.

[3, 4] The original zoning power of the State reposes in the General Assembly. *Marren v. Gamble,* 237 N.C. 680, 75 S.E. 2d 880. It has delegated this power to the "legislative body" of municipal corporations. G.S. 160-172 *et seq.; In re Markham,* 259 N.C. 566, 131 S.E. 2d 329, and cases cited. The power to zone, conferred upon the "legislative body" of a municipality, is subject to the limitations of the enabling act. *Marren v. Gamble, supra; State v. Owen,* 242 N.C. 525, 88 S.E. 2d 832. Within the limits of the powers so delegated, the municipality exercises the police power of the State. *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897.

G.S. 160-172, in pertinent part, provides: "For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and the use of buildings, structures and land for trade, industry, residence or other purposes."

G.S. 160-173 provides: "For any or all said purposes it may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. *All such regulations shall be uniform for each class or kind of building throughout each district*, but the regulations in one district may differ from those in other districts." (Our italics.)

G.S. 160-174 provides: "*Such regulations shall be made in accordance with a comprehensive plan* and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality." (Our italics.)

G.S. 160-175, in pertinent part, provides: "The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed."

G.S. 160-176, in pertinent part, provides: "Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed."

[5] G.S. 160-22 and G.S. 160-177 provide for the appointment of a planning board (commission). This board (commission) has no legislative, judicial or quasi-judicial power. Its recommendations do not restrict or otherwise affect the legislative power of the "legislative body," *i.e.*, the city council. *In re Markham, supra* at 571, 131 S.E. 2d at 334.

G.S. 160-178 authorizes the appointment of a board of adjustment whose powers include the following: "Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the board of adjustment shall have the power, in passing upon appeals, to vary or modify any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." Decisions relating to hardship variances by a board of adjustment are not germane to the question before us. Here, we are concerned with rezoning, not with variances within a particular zone.

The provisions of the charter of the City of Raleigh which confer authority in respect of zoning and which provide, *inter alia,* for a City Planning Commission are in accord with the provisions of the cited General Statutes.

[6] The cited General Statutes and the charter of the City of Raleigh confer upon the City Council of Raleigh legislative power to enact *a comprehensive zoning ordinance.* The validity of comprehensive zoning ordinances has been recognized by the Supreme Court of the United States and by this Court. *Euclid v. Amber Realty Company,* 272 U.S. 365, 71 L. Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016 (1926); *In re Appeal of Parker,* 214 N.C. 51, 55, 197 S.E. 706, 709; *In re O'Neal,* 243 N.C. 714, 719, 92 S.E. 2d 189, 192, and cases cited.

Section 1 of Chapter 24 of the Raleigh Code, a comprehensive zoning ordinance, provides: "It is deemed necessary in order to preserve and promote the health, comfort, convenience, good order, better government, safety and morals, and in order to promote the systematic future development of the city, the economic and industrial prosperity, prevent or relieve congestion, either of population or traffic, control the fire hazard, preserve the natural and historic features of the city and beautify the same, to divide the city into districts or zones and to make regu-

lations therefor in accordance with a comprehensive plan for the use and development of all parts of the city, designed to insure a fair and adequate division of light and air among buildings, protect the residence districts, conserve property values, facilitate adequate provisions of water, sewerage, schools, parks, and other public requirements, and to encourage the most appropriate use of land throughout the city."

For the purposes set forth in Section 1, Section 4 divides the city into thirteen classes of districts or zones, inclusive of five residential districts or zones designated R-4, R-6, R-10, R-20 and R-30.

In R-4, the permitted structures for residential use are restricted to "single-family dwelling unit(s)" with this exception: "Townhouse developments and unit-ownership developments," as defined elsewhere in the Ordinance, are permitted "when approved as planned unit developments of fifty (50) acres or more under Chapter 20 of this Code."

In R-6, the permitted uses include all uses permitted in R-4. Additional permitted uses in R-6 include "(t)wo (2) family dwelling, multi-family dwelling, townhouses or apartment houses, each on its own lot, fronting on a public street, provided no dwelling shall contain more than eight (8) units on any one (1) story"; "(g)roup housing developments and apartment projects which comply with section 24-42"; and "(h)ospital, sanitarium, rest home, home for the aged provided that such use shall exclude the insane, feebleminded, or chronic alcoholic."

In R-10, the permitted uses include all uses permitted in R-6. Additional uses (subject to specified restrictions) permitted in R-10 include "(a) customary home occupation incidental to the occupancy of the home as a dwelling, carried on by a resident in his own home"; a "(r)ooming house, boarding house or tourist home"; and "(c)lub for civic purposes operated by a civic organization, including offices for local, state and regional officials."

In R-20, the permitted uses include all uses permitted in R-10 and in addition thereto a "(s)ocial fraternity, sorority."

In R-30, the permitted uses are the same as those permitted in R-20. These permitted uses, with the addition of "(s)ocial fraternity, sorority," are the same as the uses permitted in R-10.

Hence, with the indicated exception, R-10 is the least restricted of the residential zones.

[7, 8] We refrain from attempting an all-inclusive definition of a "comprehensive" zoning ordinance. Suffice to say, the Raleigh Zoning Ordinance complies with two of the essentials of a comprehensive zoning ordinance, *viz.:* (1) It applies to all territory subject to the zoning jurisdiction of the City Council, including the area beyond and surrounding the corporate limits of the city for a distance of one mile in all directions; and (2), with reference to property within a particular district or zone, *e.g.*, R-10, *all* uses permissible in R-10 are available as of right to the owner. "(W)hen the classification has been made, all the areas in each class must be subject to the same restrictions. G.S. 160-173." *Walker v. Elkin,* 254 N.C. 85, 88, 118 S.E. 2d 1, 3.

The record discloses no evidence or contention before the City Council or before the court that the 9.26-acre tract was unsuitable for development for the uses permissible in R-4. In *Walker v. Elkin, supra* at 88, 118 S.E. 2d at 4, there was a finding, amply supported by competent evidence, that the 3.56-acre tract there involved was not suitable for residential development. In *Zopfi v. City of Wilmington, supra* at 437, 160 S.E. 2d at 332, the evidence amply supported the conclusion that the rezoned property was not best suited for the construction of single family residences. Here, the minutes disclose affirmatively that the City Council based its decision to change the zoning of the 9.26-acre tract from R-4 to R-10 on other grounds.

As recently as August 21, 1967, the City Council, as recommended by the Planning Commission, had denied the corporate defendant's application that the zoning of the 9.26-acre tract be changed from R-4 to R-10. Notwithstanding, on March 3, 1969, the City Council, rejecting the *recommendation* of the Planning Commission, adopted the Ordinance.

[9] Consideration of the minutes of the Planning Commission and of the City Council show beyond doubt that the City Council did not determine that the 9.26-acre tract and the existing circumstances justified the rezoning of the 9.26-acre tract so as to permit *all* uses permissible in an R-10 district. On the contrary, it appears clearly that the ground on which the City Council based its action was its approval of the specific plans of the applicant to construct on the 9.26-acre tract "luxury apart-

ments . . . in twin high-rise towers." We assume the City Council was fully justified in accepting the assurances of the appplicant that the 9.26-acre tract would be developed in accordance with the particular and impressive plans submitted to the Planning Commission and to the City Council. However, "(i)n enacting a zoning ordinance, a municipality is engaged in legislating and not in contracting." *Marren v. Gamble, supra* at 684, 75 S.E. 2d at 883, and cases cited; *McKinney v. High Point,* 239 N.C. 232, 237, 79 S.E. 2d 730, 734; *Zopfi v. City of Wilmington, supra* at 434, 160 S.E. 2d at 330-331. Without suggesting that the particular applicant would not keep faith with the City Council, if the zoning is changed from R-4 to R-10 the owner of the 9.26-acre tract will be legally entitled to make any use thereof permissible in an R-10 zone.

[10, 11] Unquestionably, Raleigh's "legislative body," namely, its City Council, has authority to rezone property when reasonably necessary to do so in the interests of the public health, the public safety, the public morals or the public welfare. Ordinarily, the only limitation upon this legislative authority is that it may not be exercised arbitrarily or capriciously. *Walker v. Elkin, supra* at 89, 118 S.E. 2d at 4. However, notwithstanding the motivation of the members of the City Council may be laudable, any action of the City Council that disregards the fundamental concepts of zoning as set forth in the enabling legislation may be arbitrary and capricious.

[12, 13] In our view, and we so hold, the zoning of the property may be changed from R-4 to R-10 only if and when its location and the surrounding circumstances are such that the property should be made available for all uses permitted in an R-10 district. Rezoning on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approved plans is not a permissible ground for placing the property in a zone where restrictions of the nature prescribed are not otherwise required or contemplated. Rezoning must be effected by the exercise of legislative power rather than by special arrangements with the owner of a particular tract or parcel of land.

In *Oury v. Greany,* .... R.I. ...., 267 A. 2d 700 (1970), a similar factual situation was considered. The Town Council of North Kingstown, Rhode Island, acting upon an application that the zoning of a 7.32-acre tract be changed from residential

to business "D" adopted a resolution which provided: " . . . IT WAS VOTED that the change of zone on the petition of Timothy J. Greany . . . be granted. FURTHER VOTED that the property be re-zoned to the present zoning if this specified car sales building is not built." In affirming a superior court judgment, which granted injunctive relief on the ground the purported rezoning was invalid, the Supreme Court of Rhode Island said: "No extended argument is required to demonstrate that the rezoning of residential property to a business use on the condition that the land rezoned shall be devoted exclusively to the business use for which application to rezone was made, or otherwise remain residential, constitutes zoning without regard to the public health, safety and welfare, concern for which is basic to that comprehensiveness contemplated in the enabling act."

The findings of fact on which the superior court judge based his judgment, except (1) and (2), are quoted in the opinion of the Court of Appeals. (1) and (2) relate to jurisdiction and to the location of the 9.26-acre tract, respectively. Evidential facts included in these findings are incomplete in the respects indicated in our statement of facts.

Upon the evidence before him, the superior court judge reached the conclusion that the Ordinance "bears a reasonable and substantial relation to the public safety, health, morals, comfort and general welfare and makes adequate provision for transportation without undue concentration of population." Presumably, the court was of opinion that the evidence was sufficient to justify a finding that the 9.26-acre tract should be rezoned so as to make it available for all uses permissible in an R-10 zone. As to this, we express no opinion. However, no legislative power vests in the court. Legislative power vests in the City Council. If the City Council should determine upon further consideration that the circumstances justify a rezoning of the 9.26-acre tract or similarly situated property so as to make these properties available for use for all purposes permitted in an R-10 zone, different questions will be presented.

[9] For the reasons indicated, we hold the Ordinance invalid and unenforceable.

Accordingly, the decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with direction that it enter an order vacating the judgment of the

superior court and directing that the superior court enter judgment declaring the Ordinance invalid and unenforceable.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CHARLES G. HILL III

No. 63

(Filed 20 January 1971)

1. **Arrest and Bail § 3— arrest without warrant — drunken driving — vehicle not operated in officer's presence**

   Arrest of defendant without a warrant for the offense of operating a motor vehicle on a public highway while under the influence of an intoxicant was illegal where defendant had not operated the vehicle in the arresting officer's presence. G.S. 15-41(1).

2. **Arrest and Bail § 7— right to communicate with counsel and friends**

   A defendant's constitutional and statutory right to have communications and contacts with the outside world is not limited to receiving professional advice from his attorney, but he is also entitled to consult with friends and relatives and to have them make observations of his person. Amendment VI, U. S. Constitution; Art. I, § 23, N. C. Constitution; G.S. 15-47.

3. **Arrest and Bail § 7— right of access to counsel and friends**

   The right to communicate with counsel and friends necessarily includes the right of access to them.

4. **Arrest and Bail § 7; Constitutional Law § 30— defendant charged with drunken driving — constitutional and statutory rights**

   One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights as any other accused.

5. **Arrest and Bail § 7; Constitutional Law § 31— defendant charged with drunken driving — necessity for immediate access to counsel and friends**

   If one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives or some disinterested person within a relatively short time after his arrest, since intoxication does not last.

6. **Arrest and Bail § 7— defendant charged with driving while intoxicated — right to have counsel and friends observe and examine him**

   The right of a defendant charged with driving while intoxicated to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him with reference to his alleged intoxication.

7. **Arrest and Bail § 7; Constitutional Law § 31— refusal of jailer to allow attorney-relative to see defendant charged with drunken driving — denial of right to communicate with counsel and friends**

Defendant charged with driving while intoxicated was denied his constitutional and statutory right to communicate with both counsel and friends at a time when the denial deprived him of any opportunity to confront the State's witnesses with other testimony, where (1) defendant was not "permitted" to telephone his attorney until after breathalyzer testing and photographic procedures were completed and the warrant was served; (2) defendant called his attorney, who was also his brother-in-law, to the jail; (3) the attorney's request to see his client and relative was peremptorily and categorically denied by the jailer; and (4) only law enforcement officers saw or had access to defendant from the time he was arrested about 11:00 p.m. until he was released about 7:00 a.m. the next morning.

8. **Constitutional Law § 31— defendant deprived of opportunity to obtain evidence by officer's blunder**

When an officer's blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist.

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

Justice HUSKINS dissenting.

Justice LAKE dissenting.

ON *certiorari* to review the decision of the Court of Appeals reported in 9 N.C. App. 279, 176 S.E. 2d 41, which found no error in the trial before *Johnston, J.*, at the 19 January 1970 Session of the Superior Court of FORSYTH. Defendant appeals a conviction under G.S. 20-138.

Defendant was first tried in the Municipal Court of the City of Winston-Salem upon a charge that on or about 14 March 1968 he unlawfully operated a motor vehicle on a public street of Winston-Salem while under the influence of intoxicating liquor. Upon his conviction he appealed to the Superior Court. There, when the case was called for trial, defendant moved (1) that the prosecution be dismissed because he had been denied counsel at a critical stage of the proceedings; and (2) that a motion picture of him, together with its sound tract, and the results of a breathalyzer test be suppresesd because made while he was under illegal arrest. Judge Johnston conducted a *voir dire* and overruled both motions. The evidence adduced on *voir dire* will be discussed in the opinion.

The State's evidence which was before the jury tended to show: At approximately 10:45 p.m. on 13 March 1968, W. E. Stroupe, accompanied by Wayne Stafford, was driving his automobile on Reynolda Road, a four-lane street in Winston-Salem. The weather was clear and the street well lighted. As Stroupe came over a hill he saw an unlighted Lincoln Continental approaching him from the opposite direction. The vehicle was swerving "broadside" from left to right. In an effort to avoid a collision Stroupe stopped his automobile at the right curb, but notwithstanding the approaching car struck it at the left front door. Defendant Hill appeared from the rear of his vehicle and said repeatedly, "I don't think I hit you, but if I did I am sorry." Stroupe testified that he was so incensed by the collision that he feared to get close to defendant. Therefore, he did not smell his breath, and he could not say how he walked. Wayne Stafford also testified that he did not observe Hill walk, smell his breath, or have any conversation with him.

At 10:47 p.m. Police Officer G. E. Tierney, Jr., arrived at the scene and began an investigation. Defendant told the officer "that he was operating the 1964 Lincoln Continental." According to Tierney's testimony: Defendant's speech was slow; he staggered; his face was red. The odor of alcohol was on his breath and, in his opinion, defendant was under the influence of an intoxicating beverage to the extent that his mental and physical faculties were appreciably impaired.

Although he had not seen defendant operate the motor vehicle Tierney arrested him for drunken driving. After advising him of his constitutional right to counsel and to remain silent, Tierney took defendant to the Forsyth County Jail.

Defendant was again advised of his rights at the jail. When asked if he wanted a lawyer he replied that he was all right and didn't need one. He was then "filmed," and his answers to "certain questions" were recorded. After that procedure defendant was asked if he would take the breathalyzer test. He consented, and the test was administered at approximately 11:45 p.m. It "indicated a reading between .23 and .24%." Immediately thereafter a warrant charging defendant with drunken driving was served upon him. The film, which was introduced in evidence, showed that defendant "sort of staggered and he was slow talking and his writing on the board was impaired."

Defendant offered no evidence before the jury. His motion for nonsuit was overruled. The jury returned a verdict of guilty as charged in the warrant, and from the judgment that he pay a fine of $100.00 and the costs defendant appealed. The Court of Appeals found no error in the trial, and we allowed *certiorari.*

Attorney General Robert Morgan, Assistant Attorneys General William W. Melvin and T. Buie Costen for the State.

Craige, Brawley by Alvin A. Thomas and C. Thomas Ross for defendant appellant.

SHARP, Justice.

Defendant assigns as error the court's denial of his pretrial motions. At the *voir dire* which Judge Johnston conducted upon these motions the evidence for the State tended to show: Officer Tierney, who arrested defendant at the scene of the collision, did not at any time see him drive his automobile. Defendant was taken to jail, filmed, and given the breathalyzer test before a warrant charging him with drunken driving was served upon him. While the film was being made, and during the breathalyzer test, only police officers and employees of the police department were present. As soon as these procedures had been accomplished Tierney permitted defendant to telephone his attorney, and he was present when defendant made the phone call.

Defendant testified: He was arrested about 10:30 p.m. and after his arrest he requested counsel. At no time did he say he did not want an attorney. He was "finally permitted to call a lawyer a little after midnight. . . . They only offered (him) the right to make a telephone call one time." He immediately called his attorney, William T. Graham, "and he was supposed to come down." Mr. Graham is defendant's brother-in-law and has represented him for the past eight years.

Mr. Graham testified that he received a telephone call from defendant a few minutes after midnight, and he talked to both him and Officer Tierney. The officer told Graham that defendant had been charged with drunken driving, and he could take him home if he would come to the jail. Mr. Graham went immediately to the jail, arranged defendant's bond, and requested the jailer, Deputy Sheriff Weldon Keyser, to release his client to him. The jailer refused because of "the four-hour rule." In

response to Graham's request for an explanation of that rule, Keyser said, "Well we can't let the man out until he has been locked up for four hours." The attorney protested that defendant's bond had been posted and that the arresting officer had told him he could take defendant home. The jailer's reply was, "Well, I am running this jail and you are not going to get him out of here until the four hours are up." After Graham's further efforts, which included a call to Winston-Salem's Chief of Police, had failed to secure defendant's release on bond, he requested permission to see his client. The jailer's response was, "The son of a bitch is so drunk he can't stand up. . . . You are not going to see him, git." Graham "got, and that was the end of it." Defendant was released about 7:00 a.m. the following morning.

[1] At the conclusion of the *voir dire,* Judge Johnston denied defendant's motion upon findings (a) that defendant was arrested without a warrant by an officer who had not seen him operating a motor vehicle on the occasion in question; (b) that defendant was not "arrested falsely"; (c) that defendant voluntarily submitted to the breathalyzer test and "was photographed by the police officers at that point"; and (d) that defendant was not at any time denied the right to counsel. Judge Johnston's finding that defendant was not "arrested falsely" was clearly intended to be a ruling that he was not illegally arrested. As such it was erroneous.

N. C. Gen. Stats. § 15-41 provides: "A peace officer may without warrant arrest a person:

"(1) When the person to be arrested has committed a felony or misdemeanor *in the presence* of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor *in his presence.*" (Emphasis added.)

All the State's evidence tends to show that when Officer Tierney arrived at the scene he had reasonable grounds to believe that defendant had committed the offense of operating a motor vehicle on a public highway while under the influence of an intoxicant. Notwithstanding, under G.S. 15-41 the arrest was illegal because defendant had not operated the vehicle in the officer's presence. "[T]he rule is that where the right and power of arrest without warrant is regulated by statute, an arrest without warrant except as authorized by statute is illegal."

State v. Mobley, 240 N.C. 476, 480, 83 S.E. 2d 100, 103. That defendant might have been legally arrested without a warrant for public drunkenness is beside the point; he was not arrested for that offense.

The Attorney General concedes that defendant's arrest was illegal. However, citing *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53, he contends that the illegal arrest did not *ipso facto* render the questioned evidence incompetent, since there were no oppressive circumstances surrounding the arrest. He argues that defendant voluntarily consented to the breathalyzer test and did not object to being photographed, and—since the sound motion picture was not made a part of the case on appeal—that the exception to its admission in evidence is not presented. These contentions are not without merit. However, because we base our decision upon the denial of defendant's motion to dismiss, we will not discuss further the motion to suppress evidence.

Both the state and federal constitutions declare that in *all* criminal prosecutions an accused has the right to have counsel for his defense and to obtain witnesses in his behalf. U. S. Const. amend. VI; N. C. Const. art. I § 23. In pertinent part the specific language of the North Carolina Constitution is that "every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony and to have counsel for defense. . . . " To implement these constitutional rights the General Assembly enacted G.S. 15-47, which provides in pertinent part: "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 permit the person so arrested to communicate with counsel and friends *immediately, and the right of such person to communicate with counsel and friends shall not be denied.*"

[2, 3] Under these constitutional and statutory provisions a defendant's communication and contacts with the outside world are not limited to receiving professional advice from his attorney. He is, of course, entitled to counsel at every critical stage of the proceedings against him. *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740. He is also entitled to consult with friends and relatives and to have them make observations of his person. The right to communicate with counsel and friends necessarily includes the right of access to them.

[4] Justice Higgins called attention to the provisions of G.S. 15-47, in *State v. Wheeler*, 249 N.C. 187, 192-193, 105 S.E. 2d 615, 620. He said: "The rights of communication go with the man into the jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities. . . . The denial of an opportunity to exercise a right is a denial of the right." One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights as any other accused. *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245.

[7] All the evidence in this case tends to show (1) that defendant was not "permitted" to telephone his attorney until after the breathalyzer testing and photographic procedures were completed and the warrant was served; (2) that he called Mr. Graham, his attorney and brother-in-law, who came to the jail; (3) that Mr. Graham's request to see his client and relative was peremptorily and categatorically denied; and (4) that from the time defendant was arrested about 11:00 p.m. until he was released about 7:00 a.m. the following morning only law enforcement officers had seen or had access to him.

[5] When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. The statute says he is entitled to communicate with them *immediately*, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon.

[6] Defendant's guilt or innocence depends upon whether he was intoxicated at the time of his arrest. His condition then was the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this factual situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication. The fact that Mr. Graham was defendant's lawyer,

as well as his friend, did not impair his right to observe defendant at this critical time.

[7] The evidence in this case will support no conclusion other than that defendant was denied his constitutional and statutory right to communicate with both counsel and friends at a time when the denial deprived him of any opportunity to confront the State's witnesses with other testimony. Under these circumstances, to say that the denial was not prejudicial is to assume that which is incapable of proof. Decisions from other jurisdictions, discussed below, support this conclusion.

City of Tacoma v. Heater, 67 Wash. 2d 733, 409 P. 2d 867, involved a situation practically identical with the one we consider. In that case the defendant was arrested for driving while intoxicated. Upon arrival at the jail he requested permission to telephone his attorney. His repeated requests were refused because police department regulations authorized officers to deny a person charged with an offense involving intoxication the right to use the telephone for four hours. The jury found the defendant guilty as charged.

In reviewing his conviction the Supreme Court of Washington said, "This issue to be determined on this appeal is: Is the denial of a request for permission to contact counsel as soon as a person is charged with a crime involving the element of intoxication, the denial of a constitutional right resulting in irreparable prejudice to his defense?" *Id.* at 735, 409 P. 2d at 869. In answering the question YES, the Court said that a critical stage had been reached in the defendant's case when, immediately after the officers had interrogated the defendant and conducted their test for sobriety, they charged him with the offense. The rationale was that the denial of counsel at this point made it impossible for defendant to have disinterested witnesses observe his condition and to obtain a blood test by a doctor—the only means by which defendant might have proved his innocence. "The evidence of intoxication dissipates with the passage of time. The 4-hour rule imposed by the police regulation recognizes that after 4 hours a person under the influence of intoxicating liquor will have reached a state of sobriety so that he is safe to be released, and may use a telephone. . . . It will not do to say that a person who is denied an opportunity to secure the most convincing kind of evidence has been deprived of a constitutional

right but that such deprivation did not harm him. . . . " *Id.* at 739, 740, 409 P. 2d at 871. "Under the 'critical stage' rule, the denial to the defendant of the assistance of his attorney after the officers had conducted their test and questioning, violated his constitutional right to have counsel and due process, and any conviction obtained thereafter was void." *Id.* at 741, 409 P. 2d at 872.

The opinion in *City of Tacoma* collects the pertinent decisions. We approve the Washington court's exposition and that of the Supreme Court of Appeals of Virginia in *Winston v. Commonwealth,* 188 Va. 386, 49 S.E. 2d 611, one of the cases cited in *Tacoma.* In *Winston,* the defendant was arrested for driving while intoxicated and jailed for nearly five hours before he was taken before a judicial officer authorized to issue warrants and fix bail. The applicable Virginia statute required that he be taken "forthwith." In reversing the defendant's conviction and dismissing the prosecution the Supreme Court of Appeals of Virginia pointed out that as a result of his illegal detention the defendant had been forever deprived of material evidence which *might* have supported his claim of innocence; that after the lapse of the time during which he was held in jail a physical examination and blood test would have been useless. The court said: "[W]here, as here, the effect of the failure of the arresting officer and of the custodian of the arrested person to perform their respective duties is such as to deprive a person of the constitutional right to call for evidence in his favor, his subsequent conviction lacks the required due process of law and cannot stand." *Id.* at 396, 49 S.E. 2d at 616.

[8] Before we could say that defendant was not prejudiced by the refusal of the jailer to permit his attorney to see him we would have to assume both the infallibility and credibility of the State's witnesses as well as the certitude of their tests. Even if the assumption be true in this case, it will not always be so. However, the rule we now formulate will be uniformly applicable hereafter. It may well be that here "the criminal is to go free because the constable blundered." *People v. Defore,* 242 N.Y. 13, 21, 150 N.E. 585, 587. Notwithstanding, when an officer's blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist. *In re Newbern,* 175 Cal. App. 2d 862, 1 Cal. Rptr. 80. Defendant has

been deprived of a fundamental right which the constitution guarantees to every person charged with crime. For that reason the prosecution against him must be dismissed.

Reversed.

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

Justice HUSKINS dissenting:

Defendant was convicted of drunken driving. Upon the facts in this record his guilt is so obvious that reasonable men, women or children could not arrive at a different conclusion. Therefore, unless his rights have been prejudicially violated, amounting to a denial of due process, his conviction should be sustained.

The record shows: (1) Officer Tierney arrived on the scene *two minutes* after defendant had driven his 1964 Lincoln Continental into the Stroupe vehicle, which Mr. Stroupe had stopped at the right curb on a *four-lane street* in an effort to avoid the collision; (2) defendant told the officer he was driving the Lincoln, a fact already known to Mr. Stroupe; (3) defendant's speech was slow, his face was red, the odor of alcohol was on his breath, he staggered when he walked—in short, he was drunk; (4) the officer arrested him without a warrant for drunken driving, advised him of his rights, took him to the Forsyth County Jail and again advised him of his rights, whereupon he stated that he was all right and didn't need a lawyer; (5) defendant then consented to take the Breathalyzer test and it "indicated a reading between .23% and .24%"; (6) immediately thereafter defendant was served with a warrant charging him with drunken driving; (7) a few minutes after midnight defendant telephoned his lawyer who went to the jail and arranged bond, but the jailer refused to release defendant until he sobered up and also refused to allow counsel to see defendant, stating that "the s.o.b. is so drunk he can't stand up"; (8) at his trial defendant did not testify and *offered no evidence;* (9) defendant makes no attack whatsoever on the accuracy of the Breathalyzer test and makes no contention that the test was improperly administered; (10) defendant contends, but does not reveal in what way, the failure to permit counsel to talk to him at midnight prejudiced his defense.

On the facts outlined, I am unwilling to "let the criminal go free because the constable blundered." The determinative question is not whether defendant was denied access to his counsel at a critical stage of the proceeding against him. Rather, the question is whether denial of temporary access to counsel prejudiced this defendant in the preparation and trial of his case? *Coleman v. Alabama,* 399 U.S. 1, 26 L. Ed. 2d 387, 90 S.Ct. 1999 (1970). I say not. Admittedly, defendant's constitutional right to counsel was violated by an arrogant, overbearing jailer whose discharge might well serve the orderly administration of criminal justice. Even so, every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, when the court can declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824 (1967); *Harrington v. California,* 395 U.S. 250, 23 L. Ed. 2d 284, 89 S.Ct. 1726 (1969); *Coleman v. Alabama, supra; State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970). See: Note, Harmless Constitutional Error: A Reappraisal, 83 Harv. L. Rev. 814 (1970).

In fashioning a harmless error rule in *Chapman,* the Court said: "We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut,* 375 U.S. 85, 11 L. Ed. 2d 171, 84 S.Ct. 229. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " In *Coleman v. Alabama, supra,* defendant was not provided counsel at his preliminary hearing and, in remanding the case to the state court to determine whether defendant had been prejudiced by the absence of counsel, the Court said: "The test to be applied is whether the denial of counsel at the preliminary hearing was harmless error under *Chapman v. California.* . . . " Applying that test to the facts in this case, I see no *reasonable possibility* that temporary exclusion of defendant's counsel on the night in question could have contributed even remotely to his conviction. Under statutory law of this State, .10% alcoholic content in the blood raises a legal presumption that the person is under the influence of intoxicants. G.S. 20-139.1. Here, in the face of an unchallenged Breathalyzer reading of .23% to .24% alcoholic content in defendant's blood, corroborated by slow speech, a red face, alcoholic breath and a staggered gait, it

is not perceived how denial of access to "midnight counsel" was prejudicial in the slightest degree. He had access to counsel from 7 a.m. the following morning until his trial was completed in Forsyth Superior Court in January 1970—twenty-two months later! Had his lawyer been admitted, he would have seen only a client with a red face, a thick tongue, smelling of alcohol, too drunk to stand, and probably half asleep. Had his lawyer called a doctor and other witnesses, their eyes would have fallen upon the same cheerful sight. How, then, did the jailer's blunder deprive this defendant of "his only opportunity to obtain evidence which might prove his *innocence?*" (Emphasis ours) The truth is, it did not. I believe it was harmless beyond a reasonable doubt, and defendant's conviction should stand. Where an officer's conduct does not adversely affect the outcome of a trial and does not result in a miscarriage of justice, courts should not reverse just to penalize erring authorities.

In the following cases, even though the defendant's right to consult with his counsel had been delayed or denied, the appellate court held that in the absence of evidence that such misconduct on the part of the authorities adversely affected the outcome of the trial or resulted in a miscarriage of justice, defendant's conviction should stand: *Welk v. State,* 99 Tex. Crim. 235, 265 S.W. 914 (1924); *Ellis v. State,* 149 Tex. Crim. 583, 197 S.W. 2d 351 (1946); *Sims v. State,* 194 Ark. 702, 109 S.W. 2d 668 (1937); *Guerin v. Commonwealth,* 339 Mass. 731, 162 N.E. 2d 38 (1959). Accord: *Coleman v. Alabama, supra; Vanater v. Boles, Warden,* 377 F. 2d 898 (1967); *State v. Youngblood,* 217 So. 2d 98 (Fla. 1968). See Annotation: Right to Counsel—Communication, 5 A.L.R. 3d 1360 (1966).

It is significant that after defendant had freely consulted with his counsel for twenty-two months, and after he and his counsel had heard the State's evidence during the trial, defendant has never claimed that he did, in fact, have a defense to the charge against him, or that, had he been permitted to see his counsel on the night of his arrest, he could have presented evidence tending to prove his innocence. He just elected to try the jailer instead.

"The basic purpose of a trial is the determination of truth. . . . " *Tehan v. Shott,* 382 U.S. 406, 15 L. Ed. 2d 453, 86 S.Ct. 459 (1966). The truth has been determined in this case by the verdict of the jury. Yet the majority permits defendant to use the Constitution not as a shield against injustice but as

a sword to avoid the penalty of the law. Such rigid application of constitutional principles is inappropriate in this instance and encourages the vicious habit of drunken driving which has become all too prevalent throughout the State. "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." *Snyder v. Massachusetts,* 291 U.S. 97, 78 L. Ed. 674, 54 S.Ct. 330, 90 A.L.R. 575 (1934).

For these reasons I respectfully dissent from the majority view and vote to affirm the well-reasoned opinion of Chief Judge Mallard in the Court of Appeals upholding defendant's conviction.

Justice LAKE dissenting:

In my view the defendant's constitutional right to counsel has not been violated. At the time his lawyer was at the jail, no police interrogation of the defendant was in progress or contemplated. No such interrogation followed. This distinguishes the present case from *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L. Ed. 2d 977. No lineup for identification, no legal proceeding, such as a preliminary hearing, or other step in the prosecution was being conducted or in preparation. The attorney was not denied access to any such proceeding. I am aware of no previous decision of this Court or of the Supreme Court of the United States which extends the constitutional right of counsel to the right of unlimited jail visitation by counsel at 2 o'clock in the morning, irrespective of the desires of other inmates of the jail to sleep. The defendant was released some five or six hours later.

What this defendant lost by the act of the jailer was not the opportunity for legal advice or counselling but the opportunity to be inspected by a person, not part of the law enforcement personnel, during the period when his drunkenness or sobriety could most readily be determined. For this purpose, a doctor, minister, plumber or school teacher would have served as well as a lawyer. The jailer's denial of such inspection has nothing to do with the constitutional right to counsel. I am aware of no previous decision by this Court or by the Supreme Court

of the United States extending the Fourteenth Amendment, or any other provision of the Federal or State Constitution, so far as to require a drunk driver to be set free, and rendered immune to prosecution for his offense, merely because a rude and unaccommodating jailer denied some friend or relative the right to visit his jail cell at 2 a.m. to smell his breath.

This defendant was permitted to telephone his lawyer and did so. Had the lawyer, as a result of that conversation, believed that the defendant was as sober as a judge ought to be and was being framed by the police and the other driver in an automobile accident, it is obvious that, when the jailer denied the lawyer the opportunity to see him, the telephones of the solicitor, the chief of police or sheriff and the mayor would have been immediately and insistently ringing. No such suggestion appears in this record. This record leaves no reasonable doubt but that the defendant was exceedingly drunk. It is clear that, as the opinion of Justice Huskins demonstrates, his defense at his trial was not prejudiced by the inability of his lawyer to confer with him in the jail.

HAJOCA CORPORATION, A DELAWARE CORPORATION v. I. L. CLAYTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, DEFENDANT

— AND —

COUNTY OF BUNCOMBE AND CITY OF ASHEVILLE, N. C., ADDITIONAL DEFENDANTS

No. 36

(Filed 20 January 1971)

1. **Taxation § 2— discrimination for or against taxpayers in same classification**

The Constitution does not permit a state to levy a tax which discriminates in favor of or against taxpayers in the same classification; therefore, the State cannot levy a tax in 25 counties and exempt 75 counties or set up a valid scheme by which that precise result is accomplished.

2. **Counties § 6— power to levy taxes**

Counties do not have the inherent power to levy taxes but derive their taxing power from the State Constitution or from the State's legislative enactments.

3. **Taxation §§ 2, 15, 31— "Local Option Sales and Use Tax Act" — State tax — unconstitutionality**

The additional 1% sales and use tax authorized by the "Local Option Sales and Use Tax Act," Chapter 1228, Session Laws of 1969,

is a State tax, not a county tax, and is unconstitutional since it is not uniformly applied to all taxpayers of the same class in all counties of the State.

Chief Justice BOBBITT dissenting.

Justices SHARP and MOORE join in dissenting opinion.

APPEAL by plaintiff from *Martin, J.*, June 11, 1970 Session, BUNCOMBE Superior Court.

The plaintiff, a Delaware corporation dealing in plumbing fixtures, is domiciled in North Carolina. Its principal place of business is located in Buncombe County. The original defendant is the North Carolina Commissioner of Revenue. The plaintiff instituted this civil action in the Superior Court of Buncombe County to recover $1,170.14, paid under protest, as a sales and use tax exacted by the defendant under Chapter 1228, Session Laws of 1969 (G.S. 105-164.45).

The complaint alleges the levy and collection of the tax are illegal and discriminatory, in violation of the plaintiff's rights under Article I, Sections 17 and 31; Article II, Section 29; Article V, Sections 3 and 5 of the North Carolina Constitution, and the Fourteenth Amendment to the Constitution of the United States.

The complaint and the brief allege the particulars in which the tax exacted from the plaintiff under Chapter 1228 violates its constitutional rights. The sum of $436.41 was exacted from the plaintiff as a sales and use tax when the sale and delivery were made in counties which did not levy the tax. The plaintiff, a dealer in a taxing county, was forced to pay the tax in all counties of the State when its competitors living in non-taxing counties are not required to pay any tax in any county.

Pertinent parts of Chapter 1228, Session Laws of 1969, are here quoted:

> "It is the purpose of this Act to provide the counties and municipalities of this State with an added source of revenue and to assist them in meeting their growing financial needs by providing that counties may by special election adopt and levy a one per cent (1%) sales and use tax as hereinafter provided.
>
> * * *
>
> "The board of elections of each county shall call and conduct a special election on Tuesday, November 4, 1969, for

the purpose of submitting to the voters of each such county the question of whether a one per cent (1%) sales and use tax as hereinafter provided will be levied.

* * *

"G.S. 105-164.51. Sales tax imposed; Limited to items on which the State now imposes a 3% sales tax. The sales tax which may be imposed under this division is limited to a tax at the rate of one per cent (1%) of: (1) the sale price of those articles of tangible personal property now subject to the three per cent (3%) sales tax imposed by the State under G.S. 105-164.4(1); (2) the gross receipts derived from the lease or rental of tangible personal property where the lease or rental of such property is an established business now subject to the three per cent (3%) sales tax imposed by the State under G.S. 105-164.4(2); (3) the gross receipts derived from the rental of any room or lodging furnished by any hotel, motel, inn, tourist camp or other similar public accommodations now subject to the three per cent (3%) sales tax imposed by the State under G.S. 105-164.4(3); and (4) the gross receipts derived from services rendered by laundries, dry cleaners, cleaning plants and similar type businesses now subject to the three per cent (3%) sales tax imposed by the State under G.S. 105-164.4(4).

* * *

". . . The county shall have no authority, with respect to the local sales and use tax, imposed under this division, to change, alter, add or delete any exemptions or exclusions contained under G.S. 105-164.13.

* * *

". . . For the purpose of this division, it is immaterial that the sale of tangible personal property is consummated by delivery in another county or that tangible personal property leased or rented is or may be located in another county; provided, however, no tax shall be imposed where the tangible personal property sold is delivered by the retailer or his agent to the purchaser at a point outside this State or to a common carrier for delivery to the purchaser at a point outside this State.

* * *

"It is the intention of this division that the provisions of this division and the provisions of the North Carolina Sales

and Use Tax Act, insofar as it is practicable, shall be harmonized. . . . The penalty provisions now applicable to the enforcement of the North Carolina Sales and Use Tax shall be applicable in like manner to the tax authorized to be levied and collected under this division."

The State Commissioner is charged with the responsibility of collecting the taxes, making certain deductions, and paying the balance to each taxing county, to be distributed between the county and its muncipalities, according to a formula based on the assessed valuation of property and of population.

"Sec. 2. The provisions of Section 1 of this Act *shall not be applicable* with respect to any building materials purchased for the purpose of fulfilling any lump sum or unit price contract entered into or awarded, or entered into or awarded pursuant to any bid made *before* the effective date of the tax imposed by a taxing county when, absent the provisions of this Section, such building materials would otherwise be subject to tax under the provisions of Section 1 of this Act."

In the event any county votes against the imposition of the tax, at any time thereafter on written request of the Board of Commissioners or upon a petition of 15% of the voters at the last election, the Board of Elections must call for another referendum on the question. There appears to be no limit to the number of elections that may be called in a county where the vote has been against the tax. On the contrary, no provision whatever is made for any referendum in any county which has voted for the tax.

The election called for was duly held at the time and in the manner prescribed by the General Assembly. When the results of the election were tabulated, 25 counties, including Buncombe, voted for the tax; 75 counties voted against it. The total vote in the State, according to the certificate of the Secretary of State, was: 181,786 for the tax; 349,318 against it.

Buncombe County and the City of Asheville, having been permitted to intervene as parties defendant, filed answers to the complaint denying that the sales and use tax paid by the plaintiff was unconstitutional, or was unlawfully exacted, and that summary judgment dismissing the action should be entered. The material facts, not being in dispute, all parties moved for summary judgment under 1A, Rule 56.

The court entered judgment against the plaintiff, dismissing its action. From the judgment, the plaintiff appealed.

McGuire, Baley & Wood by J. M. Baley, Jr., Richard A. Wood, Jr., for the plaintiff.

Robert Morgan, Attorney General, Myron C. Banks, Assistant Attorney General, for the defendant Commissioner of Revenue.

W. M. Styles (County Attorney) for the defendant County of Buncombe.

James N. Golding (Corporation Counsel) for the defendant City of Asheville.

HIGGINS, Justice.

[3] At the outset, a question arises whether the sales and use tax imposed under the authority of Chapter 1228 is a state or county levy. The question is one of law to be determined by the operative provisions of the Act. "A local tax is defined as 'one laid upon property in the locality, by the governing body thereof for an amount fixed by it, and for local governmental uses declared by it'. . . . A 'state tax' is one imposed by the state, but . . . is none the less a state tax because the legislature uses the municipal taxing machinery in the various political subdivisions of the state for its assessment and collection." Cooley, Taxation, Vol. 1, 4th Ed., Sec. 54, p. 145.

The defendants argue here that by Chapter 1228, the General Assembly extended to each of the counties the opportunity to vote on the proposed tax in the same manner as Chapter 1096 authorized Mecklenburg County to vote on the identical tax; that the tax is local—for the benefit of each county that approves it in the election. They further argue the Court should approve this tax as the Court approved the Mecklenburg tax in *Sykes v. Clayton,* 274 N.C. 398, 163 S.E. 2d 775. There seem to be differences which require careful analysis before accepting *Sykes* as authoritative in the instant case. The Mecklenburg act authorized a county election if called for by "written request" of the Mecklenburg Board of Commissioners or "on petition of fifteen per cent (15%) of the qualified voters." Decision whether there shall be an election is left entirely to the Mecklenburg authorities or the voters. The prospective taxpayers, therefore, have opportunity to appear before the Board of Commis-

sioners or among the voters and be heard as to whether the proposed tax is wise or otherwise, should or should not be levied. The Mecklenburg act provides: ". . . (S)aid county *may by special election adopt and levy* a one per cent (1%) sales and use tax." (Emphasis added.) There seems to be no doubt that when so adopted and levied, the tax is a county tax levied by the county under the permissive authority granted by the General Assembly.

A careful reading of the opinion of Justice Bobbitt upholding the tax *(Sykes v. Clayton, supra)* discloses this Court's grave concern whether the Mecklenburg tax could withstand a frontal assault on all constitutional grounds. "It is noted the plaintiff (Sykes) alleged generally that enforcement of the 1967 Act would violate his constitutional rights under Article I, Section 17 of the Constitution of North Carolina, and under the Fourteenth Amendment to the Constitution of the United States. However, his complaint does not set forth any specific contention with reference thereto. On appeal, 'no reason or argument is stated or authority cited' in his brief with reference to these constitutional provisions. Hence, whatever contention plaintiff may have had in mind is taken as abandoned."

Sykes argued only that his rights under *Sections 3 and 5, Article V,* were violated. The Court held Article V, Sections 3 and 5 inapplicable under the facts of the case. "On this appeal, in passing on the only question presented, we hold the 1967 Act is not void as violative of Sections 3 and 5 of Article V of our Constitution. Whether the 1967 Act, or any portion thereof, is vulnerable to attack as violative of other constitutional limitations is not presented." The Court was careful to say the decision in *Sykes* was limited to the holding that the taxpayer's constitutional rights under Article V, Sections 3 and 5 were not violated *for the reasons which he assigned.*

Specifically, the plaintiff (taxpayer) in the instant case charges that the tax which it was required to pay (and did pay under protest) deprived it of its property without due process of law, in violation of Article I, Section 17, State Constitution. It further contends the tax is unlawful, unconstitutional and discriminatory in that it was required to pay the tax, not only in its own county, but in every non-taxing county in which it did business, and that dealers in a non-taxing county were exempt from payment of the tax in all counties.

The Mecklenburg act *permitted* its governmental authorities to call for the election, and if approved, to levy the tax. Chapter 1228 *forces* every county to hold an election and to be eternally bound by the result if favorable to the tax, but subject to repeated elections if the vote was against the tax. Even that result is subject to the further exception that Edgecombe and Nash counties must vote as a unit, and both counties must approve the tax before it may be levied in either county. Neither county could decide the issue by voting for the tax if the other opposed.

The Mecklenburg act exempts a taxpayer in that county from the imposition of the tax if he delivers to the purchaser at a point outside Mecklenburg County. Chapter 1228 requires the taxpayer, in a taxing county, in all instances, to pay the tax, even though deliveries may be made to all points in the State. The above is subject to this exception: Section 2 of Chapter 1228 provided that a dealer in a taxing county is exempt from payment of the tax on building materials delivered to purchasers in non-taxing counties if (and only if) the contract of sale or a bid, which by acceptance became a contract, was executed prior to the effective date of the tax in his county. All other deliveries made after the effective date of the tax are taxable.

[3] Of course, before holding an act of the co-ordinating branch of the government unconstitutional, the unconstitutionality must clearly appear. Unless it does so appear, the act should not be invalidated as unconstitutional. With this in view, we have searched for some valid way to sustain the constitutionality of Chapter 1228, Session Laws of 1969. We are forced to conclude the Act is not one merely permitting counties, at their election, to determine whether the tax should be imposed. The Act compels each county to take its stand at a compulsory election. This provision denies to the proposed taxpayer the right to be heard by his Board of Commissioners on the question whether local conditions require the imposition of the tax, or whether other means of taxation available to the county would be more equitable, even if the necessity for additional revenue is made to appear. The conclusion seems inescapable that the State of North Carolina (not the several counties) has set up the taxing scheme. Nothing is left to the discretion of the county but to apportion the tax money received from the State Commissioner of Revenue, and to apportion it between the county and its municipalities according to the formula fixed in the Act.

At the time of its passage, the General Assembly had misgivings about the constitutionality of the Act, and provided by Section 3:

> "If any provisions of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application. . . ."

[1] The Constitution does not permit a state to levy a tax which discriminates in favor of or against taxpayers in the same classification. The prohibition extends throughout the State. Hence, the State cannot levy a tax in 25 counties and exempt 75 counties. Nor can the State set up a valid scheme by which that precise result is accomplished. The State cannot tax a dealer in Buncombe County and exempt his counterpart on the other side of an imaginary line which separates Buncombe from McDowell.

The authorities controlling on the question whether the challenged Act is constitutional are here cited:

> "It has been declared by this Court that the power to classify subjects of taxation carries with it the discretion to select them, and that a wide latitude is accorded taxing authorities, particularly in respect of occupation taxes, under the power conferred by Art. V, Sec. 3 of the Constitution." *Bottling Co. v. Shaw*, 232 N.C. 307, 59 S.E. 2d 819.

> "Literally the requirement of uniformity is confined to taxes on property, but repeated judicial interpretations extend this requirement to license, franchise, and other forms of taxation.
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> " . . . (T)he language used restricts uniformity to taxes on property, but an unbroken line of decisions has construed the rule of uniformity required by the Constitution to apply equally to the taxes authorized by the last quoted sentence." (Citing *Kenny Co. v. Brevard*, 217 N.C. 269, 7 S.E. 2d 542; and many cases cited therein.) *Assurance Co. v. Gold*, 249 N.C. 461, 106 S.E. 2d 875.

> "All taxes on property in this State for the purpose of raising revenue are imposed under the rule of uniformity. In express terms the Constitution requires that laws shall

be passed taxing real and personal property . . . by a uniform rule. Article V, Section 3. The same section provides that the General Assembly may tax trades and professions and while this clause does not expressly apply the rule of uniformity to taxes imposed on trades and professions it has been judicially determined that the rule applies to these taxes as well as to taxes on property." (Citing numerous cases) *Roach v. Durham,* 204 N.C. 587, 169 S.E. 149.

"Equality within the class or for those of like station and condition is all that is required to meet the test of constitutionality. . . . 'A tax on trades, etc., must be considered uniform when it is equal upon all persons belonging to the prescribed class upon which it is imposed.' " *Leonard v. Maxwell,* 216 N.C. 89, 3 S.E. 2d 316.

". . . License taxes must bear equally and uniformly upon all persons engaged in the same class of business or occupation or exercising the same privileges." *Kenny Co. v. Brevard, supra.*

"It may also be noted that the requirements of 'uniformity,' 'equal protection,' and 'due process,' are, for all practical purposes, the same under both the State and Federal Constitutions." *Leonard v. Maxwell, supra.*

"The Constitution (Art. V, sec. 3) says that the Legislature shall tax by a uniform rule all moneys, etc., and all property according to its value in money, and that it may also tax trades, etc. Although it is not expressly provided that the tax on trades, etc., shall be uniform, yet a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is apparent in the section of the Constitution above cited, that it may be admitted that the collection of such a tax would be restricted as unconstitutional." *Gatlin v. Tarboro,* 78 N.C. 119.

"Uniformity, in its legal and proper sense, is inseparably incident to the exercise of the power of taxation, but is it absent from the impeached ordinance? It is defined by Mr. Justice Miller, in the *Railroad Tax Cases,* 92 U.S., 575, and the definition accepted as correct by this Court in *Puitt v. Comrs.,* 94 N.C. 709, to consist in putting the same tax upon all of the same class—that is, while the same tax must be enforced upon all innkeepers, upon railroads, and so throughout, a tax discriminating persons of the same class,

whereby some are required to pay more than others, would lack uniformity." *State v. Powell,* 100 N.C. 525, 6 S.E. 424.

"With reference to locality a tax is uniform when it operates with equal force and effect in every place where the subject of it is found . . . and with reference to classification, it is uniform when it operates without distinction or discrimination upon all persons composing the described class." *Railroad v. Lacy,* 187 N.C. 615, 122 S.E. 763.

"Uniformity of taxation, as provided for by state constitution, is required throughout the territorial limits of the taxing district . . . ." Cooley on Taxation, 4th Ed., p. 645.

"Taxing is required to be by a uniform rule—that is, by one and the same unvarying standard . . . . Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. . . ." Burroughs on Taxation, Section 51, p. 62.

"The principles of equality and uniformity are indispensable to taxation, whether general or local. Local taxation must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and must be assessed upon all the property according to its just valuation." Desty on Taxation, Vol. 2, p. 1119.

[2] A sovereign state, as one of its inherent attributes, has the power of taxation, which must be exercised by its legislative branch. The county is not a sovereign and hence does not have the inherent power to levy taxes. A county must derive its taxing power from the State Constitution or from the State's legislative enactments. Article VII of the State Constitution, by Section 1, provides for the election of county commissioners. Section 2 gives the commissioners power to levy taxes. Commissioners must act as a board and by resolution. The County Board of Elections does not have taxing power.

The taxes involved in this action were levied by the General Assembly. The Board of County Commissioners did not take part or perform any function whatever in the levying or the collec-

tion of the taxes. Neither the County Treasurer nor the County Tax Collector participated in any part of the taxing procedure. All functions incident to the collection of the tax are given to the State Commissioner of Revenue. The Act says ". . . (T)he Commissioner of Revenue shall proceed as authorized in this division to administer the tax in such county (certified as having voted for the tax); provided, however" (here follows the special arrangement that both Edgecombe and Nash Counties must vote for the tax before it is made applicable to either county). The Commissioner of Revenue is given the power to make all rules and regulations incident to the collection and distribution of the tax including the duty of determining population ratios between counties and their municipalities upon the basis of which the tax money is apportioned. He must see to it that the provisions of the act and the provisions of the North Carolina Sales and Use Tax Act, insofar as is practicable, shall be harmonized. The *only* authority whatever given to the Board of County Commissioners is the discretionary right to call on the County Board of Elections for another referendum if a county has voted against the tax.

[3] When the provisions of Chapter 1228 are analyzed impartially, the conclusion seems inescapable that the State of North Carolina and not Buncombe County levied the sales and use tax involved in this action. The levy is discriminatory in that it requires the plaintiff to pay the tax involved and it exempts his competitor in a county which votes against the tax. Both Nash and Edgecombe are exempt if either votes against the tax. Uniformity is required. No provision is made for partial uniformity.

Chapter 1228 forces a state-wide referendum to be held on November 4, 1969, at which electors may vote *for or against the tax.* If a majority votes for the tax, collection by the State Commissioner must begin in 90 days and continue until the taxing act is repealed. If the vote is against the tax, another referendum may be called for as often as the Board of Commissioners or 15% of the voters petition for it, or until the county votes for the tax. The foregoing is subject to the exception applicable to Edgecombe and Nash counties. That exception, of course, destroys territorial uniformity. The provision that a dealer in a taxing county must pay taxes on sales and deliveries made in a non-taxing county, as well as his own, and his competitor in

a non-taxing county pays in neither, destroys uniformity of application.

The taxing scheme set up by Chapter 1228, viewed in its nakedness, required a state-wide tax referendum, in which the tax plan was overwhelmingly defeated. We hold the tax which the plaintiff was required to pay was illegally and unconstitutionally exacted, for the reasons herein discussed, and should be refunded.

The judgment of the Superior Court of Buncombe County, for the reasons herein assigned, is

Reversed.

Chief Justice BOBBITT dissenting:

I dissent from the view that the additional one per cent sales and use tax authorized by Chapter 1228, Session Laws of 1969, is "a State tax." The State does not impose the tax. Nor does the State receive for its use any of the revenues therefrom.

The Act required that the initial election be held on the same date in every county of the State. In this manner, the identity of the counties which wished to avail themselves of the provisions of the Act was determined. The Act authorized the voters in each county to determine whether their county would impose the tax. When the tax was imposed by a majority of the voters of a county, the provisions of the Act became operative in that county in respect of (1) the transactions to which the tax applies, (2) the collection of the taxes, and (3) the distribution of the revenues therefrom.

Since the Act *enables* the voters of *every* county to determine whether the tax is to be imposed by that county, it is not a local act in contravention of Article II, Section 29, of the Constitution of North Carolina. *Whitney Stores v. Clark,* 277 N.C. 322, 177 S.E. 2d 418, and cases cited. The special provision relating to Nash and Edgecombe Counties simply recognizes that the Nash-Edgecombe line divides the City of Rocky Mount and the absurdity of having a sales and use tax apply to one portion of the city but not to the other. In my opinion, this special provision appropriate to a unique situation affords no substantial basis for holding the Act is a local act rather than a general law.

The tax, when imposed in a particular county by the majority of the voters thereof, is not a tax on real and personal

property, tangible or intangible, according to the value thereof, and therefore is not void as violative of Article V, Sections 3 and 5, of the Constitution of North Carolina. *Sykes v. Clayton, Comr. of Revenue,* 274 N.C. 398, 163 S.E. 2d 775, and cases cited.

The Act contains this provision: "(I)t is immaterial that the sale of tangible personal property is consummated by delivery in another county or that tangible personal property leased or rented is or may be located in another county . . . ." In contrast, as noted in the majority opinion, the statute applicable to Mecklenburg County considered in *Sykes v. Clayton, Comr. of Revenue, supra,* contains the following provision: "No tax shall be imposed where the tangible personal property is delivered to the purchaser at a point outside this State or Mecklenburg County."

A sales tax is an excise or license tax. *Sykes v. Clayton, Comr. of Revenue, supra* at 404, 163 S.E. 2d at 779-780. A sale, if taxable at all, is taxable where the sale is made. The General Assembly may not constitutionally confer authority upon the voters of one county to impose and collect sales and use taxes except on transactions within the taxing county. Thus, in my opinion, the provision(s) of the Act which purports to authorize a taxing county, *e.g.,* Buncombe County, to impose a tax on a sale made in Rutherford County, *i.e.,* a nontaxing county, because the merchandise is delivered from the seller's place of business in Buncombe to the purchaser in Rutherford, is invalid and unenforceable.

"Legislative power vests exclusively in the General Assembly, Constitution of North Carolina, Article II, and, except as authorized by the Constitution, as in case of municipal corporations, may not be delegated. *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310. While an act, otherwise valid, may be enacted so as to take effect upon approval by a majority of the qualified voters of the affected locality, *Cottrell v. Town of Lenoir,* 173 N.C. 138, 91 S.E. 827, 16 C.J.S., Constitutional Law, Section 142, and 11 Am. Jur., Constitutional Law, Section 216, the General Assembly cannot constitutionally provide that the qualified voters in one governmental unit, *e.g.,* a town, shall decide whether a statute shall be in force and effect elsewhere than in the territory comprising that particular governmental unit. *Levering v. Board of Supervisors of Elec-*

tions of Baltimore City, 137 Md. 281, 112 A. 301." *Taylor v. Racing Asso.*, 241 N.C. 80, 95, 84 S.E. 2d 390, 401.

The Act, as is customary in an extended legislative enactment, contains a separability clause. My vote is to hold invalid only that provision of the Act which purports to tax transactions outside the jurisdictional limits of the taxing county. With this exception, I would uphold the validity of the Act as against the other grounds on which plaintiffs attack it.

Accordingly, upon the facts of the present case, I would hold that plaintiff is entitled to recover the amount collected as taxes on sales made by plaintiff outside Buncombe County ($436.41) but not the amount collected as taxes on sales made by plaintiff within Buncombe County ($733.73).

Justices SHARP and MOORE join in this dissenting opinion.

STATE OF NORTH CAROLINA v. DOUGLAS CRUMP

No. 98

(Filed 20 January 1971)

1. **Homicide § 14— presumptions arising from intentional use of deadly weapon**

When the jury finds from the State's evidence beyond a reasonable doubt that the defendant intentionally shot the deceased with a shotgun and that the shotgun wound so inflicted proximately caused his death, the presumptions arise that the killing was unlawful and that it was done with malice; nothing else appearing, defendant is guilty of murder in the second degree.

2. **Homicide § 21— homicide prosecution — sufficiency of evidence**

In a prosecution charging defendant with the shotgun slaying of his brother, the issue of defendant's guilt of second-degree murder or of manslaughter was properly submitted to the jury.

3. **Criminal Law § 176— motion to dismiss — review of evidence**

All admitted evidence is for consideration when passing upon a motion to dismiss as in case of nonsuit.

4. **Homicide § 16— admissibility of dying declaration**

Testimony in a homicide prosecution that the victim of a gunshot wound stated, during his ride to the hospital, that the defendant had shot him, *held* admissible as a dying declaration of the victim, where there were findings, supported by evidence, (1) that the victim was in

actual danger of death from the gunshot wound and knew it and (2) that the victim, upon arrival at the hospital, was dead from the gunshot wound.

5. **Criminal Law § 76— admissibility of confession — voir dire — insufficiency of evidence to support finding of fact — harmless error**

Although there was no evidence on *voir dire* to support the trial court's finding of fact that the defendant "was advised that if he could not afford a lawyer, one would be appointed for him," testimony relating to defendant's statement to officers that he had shot the deceased was nonetheless competent, where (1) defendant was not under arrest or in custody when he made the statement; (2) defendant himself testified on the trial that he had shot the deceased in self-defense; and (3) there was sufficient evidence, independent of defendant's statement, that the defendant intentionally shot the deceased.

6. **Criminal Law § 75— advising of rights — non-indigent defendant**

A defendant who is able to select and compensate counsel need not be advised in respect of the rights of an indigent.

7. **Criminal Law § 169— admission of State's evidence — similar testimony by defendant**

Exceptions by the defendant to evidence of a State's witness will not be sustained when the defendant or his witness testified, without objection, to substantially the same facts.

8. **Criminal Law § 73— admissibility of hearsay testimony**

If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay.

9. **Homicide § 9— basis of self-defense**

The plea of self-defense rests upon necessity, real or apparent.

10. **Homicide § 9— plea of self-defense — reasonableness of defendant's belief or apprehension of harm**

In passing upon whether defendant, when he shot the deceased, believed it was necessary to do so to protect and defend himself from death or great bodily harm and had reasonable grounds for that belief, the reasonableness of defendant's belief or apprehension must be judged by the facts and circumstances as they appeared to him when the shooting occurred.

11. **Homicide § 19; Criminal Law § 73— evidence competent on question of self-defense — hearsay evidence**

In a prosecution charging defendant with the shotgun slaying of his brother, defendant's testimony that another brother shouted to him, "Run, Doug, Ben is going to kill us," is admissible to establish defendant's plea of self-defense, notwithstanding such testimony was hearsay.

12. **Criminal Law § 170— harmless effect of trial court's remarks on defendant's testimony**

Defendant's testimony, which was competent on the question of self-defense, that someone had told him that his brother was going to

kill him, *held* not prejudiced by the trial court's responses directing the defendant not to tell what another person said, where defendant was ultimately permitted to give such testimony in the presence of the jury, and the jury was not instructed to disregard the testimony.

13. **Homicide § 30— failure to submit instruction on involuntary manslaughter**

Trial court's failure to include involuntary manslaughter as a permissible verdict in a homicide prosecution and to instruct the jury with reference to the distinction between manslaughter and involuntary manslaughter, *held* not erroneous when none of the evidence affords a basis for a verdict of guilty of involuntary manslaughter.

14. **Criminal Law § 91— motion for continuance — time to locate missing witness**

Defendant's motion for the continuance of his trial from May to August on the ground that he was unable to locate the whereabouts of his brother, who was expected to testify in support of defendant's plea of self-defense to a homicide charge, *held* properly denied by the trial court in its discretion, where the evidence in support of defendant's motion revealed his lack of diligence in failing to communicate with his counsel prior to the May Session and in failing to locate his brother.

15. **Criminal Law § 91— motion for continuance addressed to the discretion of the trial judge**

A motion for a continuance is addressed to the sound discretion of the trial judge, and his ruling thereon is not reviewable in the absence of a manifest abuse of discretion.

16. **Criminal Law § 131— new trial for newly discovered evidence — jurisdiction of trial court**

Defendant's motion for new trial for newly discovered evidence, which was made after the expiration of the session of court in which he was tried and after his appeal from the judgment of conviction, was properly denied by the trial court on the ground that it lacked jurisdiction to hear the motion.

17. **Attorney and Client § 5— obligation of attorney in a criminal case**

Independent of his obligations to his client, an attorney, having accepted employment by a defendant and having represented him before the court, is obligated to the court to continue to do so unless and until, after notice to the client, the court permits him to withdraw for cause or by reason of defendant's consent to the termination of his employment.

APPEAL by defendant from *Snepp, J.,* May 1970 Session of RUTHERFORD Superior Court, transferred for initial appellate review by the Supreme Court under an order entered pursuant to G.S. 7A-31(b)(4).

Criminal prosecution on an indictment which charged, in the form prescribed by G.S. 15-144, that defendant, on Novem-

ber 30, 1969, "feloniously, wilfully, and of his malice aforethought, did kill and murder Walter Ben Crump," etc.

After a preliminary hearing on December 11, 1969, at which defendant was represented by Carroll W. Walden, Jr., Esq., privately-retained counsel, the District Court found probable cause and set bond ($5,000.00) for defendant's appearance at the next session of Rutherford Superior Court. The indictment was returned at March 1970 Session. When the case was called for trial at May 1970 Session, defendant, through Mr. Walden, moved for a continuance. The court denied this motion and defendant excepted. The case then proceeded to trial on defendant's plea of not guilty, at which time defendant was represented by Mr. Walden.

The solicitor announced that the State would not place defendant on trial for murder in the first degree, but would place him on trial for second degree murder or manslaughter, as the evidence might warrant.

Evidence was offered by the State and by defendant.

The State's evidence, summarized except where quoted, tends to show the facts set forth below.

Sue Toney and Walter Ben Crump (Ben), by whom Sue had two children, had been living together for three years and three months. On November 30, 1969, they were living with Sue's parents, Mr. and Mrs. Tom Toney, on Duncan's Creek Road, Rutherford County. In addition to the family home, there was an old abandoned house on Mr. Toney's property. In Sue's words: "There was no electricity or anything in the house, but there was a bed and table and stuff that wasn't any good." Ben stayed there at night sometimes. An old dirt road, which crossed a bridge, led from the back of the Toney home to the abandoned house.

On November 30, 1969, about 2:00 a.m., Sue heard a shot and Ben's voice. Leaving her father's home, she went out the dirt road and found Ben lying in the road a few feet from the bridge. His head was on the shoulder of the road. His legs and body were in the road. There was blood all over his leg around the thigh and on the road. Using the bottom part of her gown, Sue tried to tie a tourniquet about Ben's leg "up above where he was hurt."

Ben was put in Mr. Toney's car. Mr. Toney started to drive but was "shook up so he couldn't hardly drive." They went to the home of Jim Gamble, Sue's brother-in-law. This was "a little over a mile" from where Ben was "picked up." Then Jim Gamble took over the driving in the Toney car. En route to the Rutherford Hospital, they met L. D. Davis, a member of the State Highway Patrol, on RPR #1007 "just north of Sunshine." After talking briefly with Davis, they proceeded to Washburn's Store where Ben was transferred to the Rescue Squad ambulance. The ambulance proceeded directly to the hospital in Rutherfordton. Upon arrival there at 3:45 a.m., Ben was dead.

An expert witness, Dr. Harry Hendricks, who examined Ben's body shortly after its arrival at Rutherford Hospital, testified that in his opinion Ben died from bleeding caused by a large wound which "was across the large blood vessel in the upper thigh," inflicted by a shotgun; and that, in his opinion, Ben would not have died had he received medical attention "within 30 minutes or so" from the time he was shot.

Sue was with Ben, first in the Toney car and later in the ambulance. Sue testified Ben told her that Douglas, his brother, had shot him; that he made these statements while lying in the back of the Toney car, with his head in Sue's lap. Over objections by defendant, the statements attributed to Ben by Sue were admitted as dying declarations.

When Sue was going from her father's house to Ben, she met defendant (Ben's brother) coming out the road towards her father's house. She and Howard Crump, Ben's oldest brother, got to where Ben was lying in the road about the same time.

Near the same place on RPR #1007, "just north of Sunshine," where he had stopped the Toney car, and about an hour and a half later, Patrolman Davis met and stopped a pickup truck operated by Dale Crump, in which Dale Crump, Howard Crump, Douglas Crump, and "two girls" Davis did not know, were riding. A twelve-gauge double-barreled shotgun was in the truck. Over defendant's objections, Patrolman Davis was permitted to testify that defendant stated, referring to the shotgun in the truck, that "that was the gun he shot Ben Crump with and that was the shell he shot him with." This was "the only one in the gun." Patrolman Davis took possession of the shotgun and put it in his patrol car. Defendant was put in the car of one

of the deputies. Later, Patrolman Davis turned over the shotgun to the Sheriff's Department at the County Jail.

Evidence offered by defendant consists of the testimony of defendant, of Howard Crump, of Betty Crump, defendant's wife, and of Ruth Carpenter, a sister of the Crump brothers.

Mrs. Carpenter and Betty Crump testified in substance that Ben had a general reputation for violence and fighting.

With reference to events prior and subsequent to the shooting, Betty Crump testified in substance as follows: Dale Crump and his wife, Judy Crump, had come over from Shelby to spend the weekend with Douglas and Betty in the Mall Walker residence in Sunshine. They arrived about 5:00 p.m. About 6:30 or 7:00 p.m., "it was already getting dark," Douglas and Dale left in Dale's pickup truck stating they were going over to see Ben for a little while. Douglas took his shotgun, saying he was going to show it to Ben. About 2:00 a.m., after the shooting, Dale returned in the pickup truck. Betty and Judy had not gone to bed but were "waiting for the men to get back." Betty and Judy got in the truck with Dale. At that time she saw the shotgun in Dale's truck. Dale drove the truck (approximately six miles) to the Toney house. Douglas was standing "at the porch." When he saw the truck come up the road, Douglas walked to the gravel road and stopped. Betty got out and went to him. Douglas was crying and he was nervous and shaking all over. In Betty's words, "Ben had already been taken to the doctor . . . ."

Evidence offered by defendant, which does not contradict but complements the State's evidence, tends to show the facts narrated in the following numbered paragraphs.

1. It was approximately 500 yards from Duncan's Creek Road to the abandoned house. The dirt road leading from the Toney home to the old abandoned house behind it was old, narrow, little-used and bordered with bushes. The bridge was about midway between the two houses.

2. In one of the three rooms of the abandoned house there were an old bedstead, a table and a fireplace. The only light, inside or outside of the abandoned house, was from the fire in the fireplace.

3. Howard, aged 38, was the oldest of the four Crump brothers. He lived in a cabin at the end of Duncan's Creek Road,

about three miles from the scene of the shooting. Ben, aged 33, was next. He was six feet and three inches tall and weighed about 170 pounds. He lived on the Toney premises, often staying at nights in the abandoned house. Dale, about 24 years old, then lived in Shelby with Judy, his wife. Douglas, aged 21, was five feet tall. He lived with his wife, Betty, in the home of Mall Walker, his father-in-law, in Sunshine, about six miles from the scene of the shooting.

Uncontradicted evidence tends to show the four Crump brothers were the only persons present preceding and at the time of the shooting. Testimony as to Ben's dying declarations is set forth in the opinion. Dale was not present at the trial. Douglas and Howard were the only witnesses who testified as to what occurred preceding and at the time of the shooting.

Douglas testified in substance as follows. Douglas was at the abandoned house during the afternoon of Saturday, November 29, 1969, at which time Ben tried to pick a fight with him. Later he left the Walker home in Sunshine in Dale's truck. At that time, Douglas put his shotgun, which had been in the Walker house, in the truck. He was taking it along to show it to Ben; also, Dale wanted to try it out. They went to the abandoned house. When Ben asked to see the shotgun, Dale went to the truck, brought it into the house where all looked at it. Later, all four (Howard, Ben, Dale and Douglas) left the abandoned house in Dale's truck and went to a place on Highway #18 where they got "some more beer and came back." Dale was driving. The shotgun was left in the house, lying on the table. On the way back to the old house, "Ben wanted to start a fight," and at one point Douglas got out of the truck and ran from him. All four had been drinking. Douglas had been drinking beer. Ben had been drinking "white" liquor. During the evening, on several occasions, Howard had stopped Ben from beating Douglas. Howard was on the porch when Douglas went into the abandoned house and told Dale he was leaving. About this time, Ben picked up a .22-caliber rifle, went to the front door with it and hit Howard over the head with it. While Ben was wrestling with Howard in the yard and beating him, Douglas started out the road towards the truck. Dale tried to stop Ben. Ben knocked Dale down. Dale called, "run, Doug, Ben is going to kill us." Ben was running towards Douglas saying that he was going to kill him. Douglas "hollered as loud as (he) could 3 times and said STOP and he didn't." When Douglas fired the gun, Ben was

coming on him. Douglas testified that Ben told him, "I'm going to kill you," and that he (Douglas) "had to do something." After the shooting, Douglas laid the shotgun on the bridge. Howard sent Douglas to Mr. Toney to request him to take Ben to the hospital. Douglas went to the home of Charles Greene, who lived some 200 yards from where Ben had fallen, "to see if (he) could get Ben a way to the hospital." Greene refused. After he returned, Mr. Toney drove his car out the road. The three brothers put Ben in the Toney car. Douglas, who was drunk or had been drinking, tried to get Mr. Toney from under the steering wheel so he could drive the Toney car. Mr. Toney refused and drove the car from the scene of the shooting towards Rutherfordton. Sue and Ben were in the back seat, Ben's head in Sue's lap. Douglas sat alone on Toney's porch until Dale returned in the truck with Betty and Judy.

Douglas testified he talked to a Mr. Russell Duncan who asked him if he shot Ben and that he (Douglas) told Duncan, "Yes, in self-defense." Douglas also testified that Duncan was in the courtroom while he (Douglas) was testifying.

Howard testified in substance as follows: Ben struck him across the top of his head with a rifle. The blow knocked him from the two-foot high porch. He fell to the ground, bloody and unconscious. He regained consciousness when he heard a gun fire. He heard Ben hollering, "Come over here and help me." Sue Toney, in response to Ben's call, came running to Ben. He (Howard) corded Ben's leg using a part of Sue's gown and twisting it with a stick. "It was so dark that (he) had to light (his) lighter to see where the bleeding was coming from." There was blood on his own face which he had to keep wiping off. Under these circumstances, he did the best he could to stop Ben's bleeding. He remained in the vicinity of the Toney home until Dale, accompanied by Betty and Judy, returned from the Walker house in Sunshine. He and Douglas got in the truck. The five were on their way to the hospital when stopped near Sunshine by Patrolman Davis, Sheriff Huskey and his deputies. The officers arrested Howard, Dale and Douglas and took them to the Rutherford County Jail.

The jury returned a verdict of guilty of manslaugher; and, upon this verdict, the court pronounced judgment that defendant be confined in the State's prison for not less than seven nor more than ten years.

Defendant, through his trial counsel, gave notice of appeal. On May 21, 1970, defendant executed an affidavit of indigency. The court, upon finding that defendant was an indigent, appointed Hollis M. Owens, Jr., Esq., to represent defendant and perfect his appeal to the Court of Appeals.

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

Hollis M. Owens, Jr., for defendant appellant.

BOBBITT, Chief Justice.

[1, 2] Assignments of error based on exceptions to the denial of defendant's motion(s) for judgment as in case of nonsuit are without merit. The evidence offered by the State was amply sufficient to support a finding that defendant intentionally shot Ben and that the shotgun wound so inflicted proximately caused Ben's death. If the jury so found from the evidence beyond a reasonable doubt, two presumptions arose: (1) That the killing was unlawful, and (2) that it was done with malice; and, nothing else appearing, defendant would be guilty of murder in the second degree. *State v. Propst,* 274 N.C. 62, 71, 161 S.E. 2d 560, 567, and cases cited. If and when these presumptions arise, it is incumbent upon the defendant to satisfy the jury of facts which justified or mitigated the killing in accordance with legal principles too well settled to warrant reiteration.

[3] It is noted that all *admitted* evidence is for consideration when passing upon a motion to dismiss as in case of nonsuit. *State v. Walker,* 266 N.C. 269, 272, 145 S.E. 2d 833, 835. Questions raised by defendant as to the competency of portions of admitted State's evidence are discussed below.

[4] Defendant assigns as error the admission of Sue Toney's testimony that, during their travel towards the hospital in Rutherfordton, Ben told her that Douglas had shot him. Upon objection to the admission of this testimony, the court, in the absence of the jury, conducted a *voir dire* hearing at which Sue Toney and Patrolman Davis testified. At the conclusion of the evidence, the court made the following factual findings: "1. The statement was made after Ben Crump had sustained a gunshot wound in his upper thigh and was en route to a hospital. 2. The deceased was, at the time, in actual danger of death. 3. The deceased stated that he knew he was dying and told the witness,

Sue Toney, to take care of their children. He also stated to Patrolman L. D. Davis of the Highway Patrol that he was dying. 4. The deceased had full apprehension of his danger. 5. Death, thereafter, ensued from the gunshot wound, the deceased being dead upon arrival at the Rutherford Hospital, as testified to by Dr. Hendricks." The evidence fully supports the quoted findings. Hence, the court properly admitted as dying declarations the testimony of Sue Toney as to statements made to her by Ben. *State v. Brown*, 263 N.C. 327, 332-333, 139 S.E. 2d 609, 612, and cases cited.

It is noted that, after Sue's testimony as to Ben's declaration had been admitted, Patrolman Davis testified, *without objection*, that when he stopped the Toney car, Ben was in the back seat, lying face up with his head in Sue's lap, at which time Ben said: "I'm dying, I'm dying, my brother shot me."

[5] Defendant assigns as error the admission of the testimony of Patrolman Davis that, when he stopped the pickup truck operated by Dale in which defendant and others were riding, defendant stated in substance he had shot Ben and identified the shotgun and the shell with which he had shot him. Upon defendant's objection to the admission of the testimony, the court, in the absence of the jury, conducted a *voir dire* hearing at which the only testimony was that of Patrolman Davis. At the conclusion of the evidence, the court made the following factual findings: "Before making any statement, the defendant was advised that he had a right to remain silent; that anything he said might be used against him; that he had a right to have a lawyer present before answering any questions; that if he could not afford a lawyer, one would be appointed for him; and if he started answering questions, he might stop at any time. He was then asked (if) he wanted a lawyer and stated that he understood his rights and he thereafter freely, voluntarily, without coercion made a statement to Trooper Davis." The sole ground on which defendant bases this assignment is that the evidence on *voir dire* did not support the court's finding that defendant "was advised that if he could not afford a lawyer, one would be appointed for him . . . ."

Unquestionably, the evidence at the *voir dire* hearing supports fully all of the court's factual findings other than the particular finding now challenged by defendant. With reference to the challenged finding, the record discloses: Defendant was advised of his constitutional rights by Sheriff Huskey. Huskey

so advised defendant by reading to him the statement of constitutional rights set forth on a card handed to him by Patrolman Davis. The court asked Davis, "Do you still have that same copy with you?" Davis answered, "Yes." The record is silent as to whether this card was shown to the court. When Davis was asked to "tell His Honor what Sheriff Huskey read to Mr. Douglas Crump on the morning of November 30th, 1969," the narration by Davis did not include a statement by Huskey to the effect that "if he (defendant) could not afford a lawyer, one would be appointed for him." According to Davis, defendant stated he understood his constitutional rights and proceeded voluntarily to make the statements attributed to him by Davis in his testimony before the jury.

Since the record does not disclose the contents of the card from which Sheriff Huskey read, it must be conceded the evidence was insufficient to support the challenged finding. Even so, for reasons stated below, error in that respect was insufficient to render incompetent the testimony of Davis as to statements made by defendant to the effect he had shot Ben with the identified shotgun and (spent) shell. Nor does it appear that such error was prejudicial to defendant.

[6] It does not appear that defendant was then an indigent and unable to compensate counsel of his choice. In fact, at the preliminary hearing on December 11, 1969, defendant was represented by privately-retained counsel. If, in fact, defendant was able to select and compensate counsel, it was unnecessary to advise defendant in respect of the rights of an indigent. *State v. Gray*, 268 N.C. 69, 81-83, 150 S.E. 2d 1, 10-12.

[5] Defendant was not under arrest or in custody when the statements attributed to him were made. Having been advised of the shooting and presumably of Ben's death, the officers, as was their duty, proceeded to investigate whether a crime had been committed and, if so, by whom. In their investigation, they undertook to find out what they could from the persons who were present when the shooting occurred. Obviously, they had reason to suspect that defendant had shot Ben. However, they knew nothing of the circumstances under which the shooting had occurred. The record does not indicate any question asked by any officer. Rather, it indicates that, after being advised of his constitutional rights, defendant voluntarily made the statements attributed to him. When the statements were made, defendant's two older brothers, Howard and Dale, and Dale's wife

and defendant's wife were present. The evidence is unclear as to whether defendant was under restraint when his statements were made. Nothing occurred that could be considered an "incommunicado interrogation of individuals in a police-dominated atmosphere." There is strong basis for the contention that, under the circumstances, it was not necessary to give any of the warnings listed in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694. *Cf. State v. Meadows,* 272 N.C. 327, 336-339, 158 S.E. 2d 638, 644-646.

Conceding, *arguendo,* that the circumstances required that defendant be warned of his constitutional rights in strict compliance with the specific warnings set forth in Miranda, the fact that the warnings given defendant were incomplete was not prejudicial to defendant. At trial, defendant testified that he shot Ben and testified to the circumstances under which he did so. His contention and testimony was that he did so in self-defense.

[7] "Exceptions by the defendant to evidence of a State's witness will not be sustained where the defendant or his witness testifies, without objection, to substantially the same facts. *S. v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590. Likewise, the admission of evidence as to facts which the defendant admitted in his own testimony, cannot be held prejudicial. *S. v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804." *State v. Adams,* 245 N.C. 344, 349, 95 S.E. 2d 902, 906; *State v. McDaniel,* 272 N.C. 556, 563, 158 S.E. 2d 874, 881, vacated 392 U.S. 665, 20 L. Ed. 2d 1359, 88 S.Ct. 2310, on remand 274 N.C. 574, 164 S.E. 2d 469.

It is noteworthy that, independent of the statements attributed to defendant on the occasion of his arrest, the State's evidence was sufficient to support a finding that defendant intentionally shot Ben and thereby proximately caused his death.

[8-12] Defendant assigns as error the responses of the court to the solicitor's objection to defendant's testimony that Dale hollered to him, saying, "run, Doug, Ben is going to kill us." This testimony was competent for consideration as to whether defendant shot Ben in self-defense under circumstances when it was or reasonably appeared to be necessary to do so to protect and defend himself from death or great bodily harm. The reasonable effect of Dale's statement upon defendant's apprehension of danger of death or great bodily harm rather than the truthfulness of what Dale said is the basis upon which the testimony as

to Dale's statement was competent. "If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay." Stansbury, North Carolina Evidence § 141 (2d ed. 1963). The plea of self-defense rests upon necessity, real or *apparent.* In passing upon whether defendant, when he shot Ben, believed it was necessary to do so to protect and defend himself from death or great bodily harm and had reasonable grounds for that belief, the reasonableness of defendant's belief or apprehension must be judged by the facts and circumstances as they appeared to him when the shooting occurred. *State v. Kirby,* 273 N.C. 306, 310-311, 160 S.E. 2d 24, 27. As stated by Justice Branch in *State v. Johnson,* 270 N.C. 215, 219, 154 S.E. 2d 48, 52: "(A) jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the same necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life." Dale's outcry was one of the circumstances for consideration by the jury in order to place them as far as possible in the position of defendant when the shooting occurred.

The record of the direct testimony of defendant includes the following:

". . . . When we got back to the house, Howard was sitting on the front porch and I went in the house and told my brother Dale 'Dale, I am leaving.'

(THE FOLLOWING IS GIVEN IN TRANSCRIPT FORM:)

"THE COURT: What brother are you talking about?

"A. Dale. He said, 'well—

"MR. LOWE: Objection to what Dale said now.

"THE COURT: Don't say what anybody else said.

"A. I told my brother, —well, I just told him and I went out the door and before I got out the door, my brother Ben picked up a .22 rifle and hit Howard over the head with it and him and Howard was wrestling in the yard, fighting. So I went out to the truck and I reckon—

"MR. LOWE: Objection to what he reckons.

"THE COURT: Just tell what you did.

"A. I went out to the truck and before I got to the truck, Dale hollered and told me—

"MR. LOWE: Objection to what Dale said.

"THE COURT: Don't say what Dale said.

"DEFENDANT'S EXCEPTION AND ASSIGNMENT OF ERROR NUMBER FIVE: Defendant excepts to and assigns as error the sustaining of the objection by the State to the testimony of the defendant that his brother Dale hollered and told him, 'run, Doug, Ben is going to kill us.' This is defendant's exception and assignment of error number 5.

"A. He said, 'run, Doug, Ben is going to kill us.'

"MR. LOWE: Objection.

"THE COURT: Ask him questions.

(RESUME NARRATIVE FORM:)

"I heard somebody say something to me. As a result of what I heard I started running. I ran out the road toward the truck. . . . I was running from Ben Crump, my brother. . . ."

[12] The record indicates that each time Solicitor Lowe objected the court's response was to direct the witness (defendant) not to tell what Dale had said. In disregard of the court's instruction, defendant proceeded to testify that Dale had said, "run, Doug, Ben is going to kill us." Again, when Solicitor Lowe objected, the court's response was a direction (presumably to defendant's counsel) to ask questions. So far as the record shows, Solicitor Lowe made no motion to strike the answer given by defendant. Nor does it appear that the court instructed the jury to disregard defendant's testimony with reference to what Dale had said. Moreover, the record leaves in doubt whether defendant's trial counsel interposed any objection whatever to the attempt by the court to prevent defendant from testifying to what Dale had said. The quoted language indicates that "DEFENDANT'S EXCEPTION AND ASSIGNMENT OF ERROR NUMBER FIVE" were incorporated simultaneously in the record when the case on appeal was prepared.

It seems probable the trial judge when he cautioned defendant not to tell what Dale had said was then unaware of the nature and content of any particular statement made by Dale. This would seem to explain why, after the testimony as

to Dale's statement was given, the court took no action to strike the statement and to instruct the jury to disregard it in their deliberations.

Since the testimony was given in the presence of the jury, and since the jury was given no instruction to disregard it, it seems clear that defendant was not prejudiced by the general cautions of the court to defendant to tell what happened rather than what somebody else said.

[13] Defendant assigns as error the court's failure to include involuntary manslaughter as a permissible verdict and to instruct the jury with reference to the distinction between manslaughter and involuntary manslaughter. This assignment is insubstantial. None of the evidence affords a basis for a verdict of guilty of involuntary manslaughter.

[14] Defendant excepted to and assigned as error the denial of his motion at May 1970 Session for a continuance until the August 1970 Session. According to the record before us, the motion and affidavit discussed below constitute the only matters before the court when the motion for continuance was under consideration.

The unverified motion by Mr. Walden, "(t)he undersigned attorney of record for the defendant," set forth *inter alia* that defendant's defense to the pending murder charge against him was "expected to be self-defense"; that defendant had recently told him that Dale Crump, defendant's brother, was an eyewitness; that defendant told him he did not know what Dale would testify but expected him to testify "that the deceased was advancing on the defendant with a knife"; that he (Walden) had not seen or heard from defendant since the March 1970 Session; that defendant had furnished him "no forwarding address or other information" as to how to contact him and prepare his defense; and that he (Walden) believed that Dale Crump was "a necessary witness to properly conduct the trial of this case in behalf of the defendant."

An affidavit of defendant set forth *inter alia* that his brother, Dale Crump, was an eyewitness to the shooting; that he had lived at 232 Putnam Street, Shelby, N. C., but had moved; that he did not know Dale's new address but believed he lived in Shelby and worked in Charlotte; that he had not contacted Mr. Walden since the March 1970 Session and did not inform him that Dale "was desired for his defense until approximately 3:30

p.m. on Tuesday, May 19, 1970"; that he expected Dale to testify that, "on the date of the alleged slaying," he heard Ben say "that he was going to kill this defendant"; that since the March 1970 Session he had resided at Linville Falls, North Carolina; and that he had not furnished Mr. Walden "any facts or other evidence about his defense since said time (March 1970 Session) and (had) not contacted him in any manner until the present session of this court commenced."

These additional facts are noted: (1) The May 1970 Session convened on May 11, 1970; and (2) it does not appear that a subpoena was issued for Dale Crump.

As stated by Justice Sharp in *State v. Phillip,* 261 N.C. 263, 267, 134 S.E. 2d 386, 390: "Employment of counsel does not excuse an accused from giving proper attention to his case; he has the duty to be diligent in his own behalf." Evidence of an unexplained failure to communicate with his counsel or to locate Dale Crump and arrange for him to be present for the trial shows an utter lack of diligence on the part of defendant.

[15] "A motion for a continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable in the absence of manifest abuse of discretion." 7 Strong, N. C. Index 2d, Trial § 3. Under the circumstances stated, there is no evidence that the denial of the motion for a continuance constituted an abuse of discretion.

[16] Lastly, defendant assigns as error the denial as a matter of law of his "MOTION FOR NEW TRIAL."

The verdict was returned, the judgment was pronounced and the appeal entries were made on May 21, 1970. On the same date, defendant was adjudged an indigent. On May 22, 1970, Mr. Owens, his present counsel, was appointed to represent defendant in perfecting his appeal.

On June 3, 1970, defendant, represented by Mr. Owens, filed in the Superior Court of Rutherford County a "MOTION FOR NEW TRIAL," supported by affidavits of Dale Crump and of Russell Duncan. The affidavit of Dale Crump sets forth with particularity the events preceding, at the time of and subsequent to the shooting. Suffice to say, the facts set forth, if accepted, were quite favorable to defendant. Russell Duncan, in his affidavit, states: "That he is a deputy sheriff of Rutherford County, North Carolina; that on November 30, 1969, he went to a house

located on the Duncan's Creek Road in Duncan's Creek Township, Rutherford County, North Carolina, about a quarter of a mile from Tom Toney's house, along with other officers and made an investigation of the shooting of Ben Crump; that he found a .22 automatic rifle near the steps of the house; that said rifle was twisted and bent; that there was blood on the porch of the house; and that there was blood on the rifle barrel and on the rifle stock. That the affiant has said rifle in his custody; that the said affiant was not called to testify on behalf of the defendant Douglas Crump when said defendant was tried at the May 1970 Term of Rutherford County Superior Court Division of the General Court of Justice." This affidavit of a deputy sheriff tends to corroborate strongly the testimony of defendant and of Howard Crump at trial and of Dale Crump's affidavit to the effect that Ben Crump, the deceased, a short time before the shooting occurred, had beaten Howard Crump with a rifle at or near the porch with such force as to leave a trail of blood on the porch and blood on the rifle barrel and rifle stock.

It was agreed by the solicitor and by Mr. Owens that the motion would be heard by Judge Snepp, the trial judge, at the June 1970 Session of the McDowell Superior Court.

On June 10, 1970, Judge Snepp denied defendant's motion as a matter of law on the ground "that notice of appeal . . . having been duly given, the Superior Court is now without jurisdiction to entertain a motion for a new trial on the grounds of newly discovered evidence."

We take judicial notice of the fact that the two-week session of Rutherford Superior Court which commenced on May 11, 1970, had terminated by limitation prior to the filing of the "MOTION FOR NEW TRIAL."

"Motion for new trial for newly discovered evidence may be made in the trial court only at the trial term, or, in case of appeal, at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court." 3 Strong, N. C. Index 2d, *Criminal Law* § 131. Decisions cited in support of this well-established rule include the following: *State v. Casey,* 201 N.C. 620, 161 S.E. 81; *State v. Edwards,* 205 N.C. 661, 172 S.E. 399; *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520; *State v. Morrow,* 262 N.C. 592, 138 S.E. 2d 245. Moreover, when the "MOTION FOR NEW TRIAL" was made, the May 1970 Session

had expired by limitation; and defendant's appeal from the judgment on the verdict had removed the case from the superior court and had transferred jurisdiction to the Supreme Court. 1 Strong, N. C. Index 2d, Appeal and Error § 16, p. 138, and cases cited.

Under the circumstances, Judge Snepp rightly denied the "MOTION FOR NEW TRIAL" as a matter of law on the ground that jurisdiction then vested in the Appellate Division. Of course, the matters set forth in the affidavits of Dale Crump, of Russell Duncan and of Mr. Walden (referred to below) will be for consideration by the presiding judge if a motion for new trial on the ground of newly discovered evidence is made at the next session of the Superior Court of Rutherford County subsequent to the filing of this opinion.

We take notice of the fact that the record also contains an affidavit by Mr. Walden. Although not dated, the record indicates it was sworn to on August 6, 1970. This affidavit, although not pertinent to the question before us, sets forth *inter alia* the following. Walden was employed by defendant to represent him at the preliminary hearing on December 11, 1969; that he did so and, pursuant to their agreement, was paid one hundred dollars for this appearance, which included his successful effort to obtain a reduction in defendant's appearance bond; that, under their agreement, this ended Walden's employment by defendant; that defendant was advised by Walden that Walden would not represent him in the trial in the superior court unless and until he was paid a fee of one thousand dollars; that defendant did not reemploy Walden and Walden received no additional compensation; that Walden had not seen defendant from the return of the indictment at March 1970 Session until the May 1970 Session; that he appeared for defendant at the May 1970 Session because the court, in the absence of an order permitting him to withdraw as counsel, required that he do so; and that, on account of his lack of contact with defendant and the fact that he had not been reemployed, Walden went to trial without opportunity and information to prepare defendant's defense.

Pertinent to defendant's seeming lack of responsibility and diligence in arranging and preparing for the defense of his case, it is noted that defendant testified at trial that, although he "went to the 7th grade in school," he "cannot read and . . . cannot write."

[17] In view of what appears now to have been a misunderstanding between attorney and client which resulted in inadequate preparation for trial, it seems appropriate to say: Independent of his obligations to his client, an attorney, having accepted employment by a defendant and having represented him before the court, is obligated *to the court* to continue to do so unless and until, after notice to the client, the court permits him to withdraw for cause or by reason of defendant's consent to the termination of his employment. If employment is accepted for a specific limited purpose, the facts in connection therewith should be fully disclosed (preferably in writing) to the court.

Since we find no legal error in the trial below, the verdict and judgment will not be disturbed. Whether defendant should be awarded a new trial on account of the facts set forth in the affidavits of Dale Crump, Russell Duncan and Mr. Walden, his original counsel, will be for consideration, together with all other evidence that may be adduced, by the presiding judge at the next session of superior court after the filing of this opinion if a motion therefor is made in apt time.

No error.

GARFIELD OLIVER AND RICHARD A. SUTTON v. FRED ERNUL, LUZZIE ERNUL, AND GRACE STAMPS

No. 61

(Filed 20 January 1971)

1. **Easements § 2— sufficiency of description**

While no particular words are necessary for the grant of an easement, the instrument must identify with reasonable certainty the easement created and the dominant and servient tenements.

2. **Easements § 2— grant by deed — insufficiency of description of right-of-way**

Purported "Rightaway Deed" is insufficient to grant to plaintiffs a twenty-foot right-of-way over the lands of defendants where the description of the intended easement is vague, indefinite and uncertain, the description contains no beginning and no ending, and the easement is incapable of being located on the ground.

3. **Easements § 2— creation by deed — description**

In order to create an easement by deed, either by express grant or by reservation, the description thereof must not be so uncertain,

vague and indefinite as to prevent identification with reasonable certainty.

4. **Easements § 2; Boundaries § 10— patent ambiguity in description — void conveyance**

If the ambiguity in the description in a deed is patent, it cannot be removed by parol evidence, and the attempted conveyance or reservation is void for uncertainty.

5. **Easements § 2; Boundaries § 10— patent ambiguity defined**

A patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to what land was to be conveyed.

6. **Dedication § 2— acceptance of dedication**

There was no dedication of a right-of-way easement to the perpetual use of the public where no duly constituted public authority accepted the dedication.

7. **Dedication § 2— acceptance of dedication — permissive use**

An acceptance of dedication cannot be established by permissive use.

8. **Dedication § 1— lots sold with reference to plat — streets and parks — rights of purchasers of lots**

Where lots are sold with reference to a plat or map, and the grantees rely upon the descriptions therein with respect to designated streets and parks, such grantees acquire from the owner the irrevocable right to use the streets and parks so designated and no governmental acceptance is necessary, the basis of this right being *estoppel in pais.*

9. **Dedication § 1; Easements § 3— right-of-way easement by estoppel — sales not made by reference to map or plat**

Purchasers of two land-locked lots did not acquire by estoppel a right-of-way across the remaining property of the seller where the record discloses no map or plat, nor any sale with reference to any preconceived plan or arrangement.

10. **Easements § 3— way of necessity**

A way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to the parcel except over the land retained by the grantor or the land of a stranger.

11. **Easements § 3— way of necessity**

When the enjoyment of one part of an estate is dependent of necessity on some use in the nature of an easement in the other part, and the owner conveys either part without express provision on the subject, the part so dependent carries with it an easement of such necessary use in the other part.

12. **Easements § 3— way of necessity — common ownership of both tracts**

While property owners cannot claim a way of necessity over the lands of a stranger to their title, it is not necessary that the person over whose land the way of necessity is sought be the immediate grantor, so long as there was at one time common ownership of both tracts.

13. **Easements § 3— establishment of way of necessity — intent that grantee should have right of access**

To establish the right to use a way of necessity, it is not necessary to show absolute necessity, but it is sufficient to show such physical conditions and such use as would reasonably lead one to believe that the grantor intended that the grantee should have the right of access.

14. **Easements § 3— conveyance of land-locked lots — way of necessity impliedly granted**

When the owners of a tract of land conveyed two land-locked lots from such tract, a way of necessity across the lands retained by the grantors was impliedly granted to the grantees.

15. **Easements § 3— way of necessity — location**

The right to select the location of a way of necessity generally belongs to the owner of the servient estate, provided he exercises the right in a reasonable manner with regard to the convenience and suitability of the way and to the rights and interests of the owner of the dominant estate; however, if at the time the way of necessity was impliedly granted there was in use on the land a way plainly visible and known to the parties, such way will be held to be the location of the way granted unless it is not a reasonable and convenient way for both parties.

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

Justice SHARP concurring.

Chief Justice BOBBITT joins in concurring opinion.

ON *certiorari* to the Court of Appeals to review its decision reversing the judgment of *Roberts, J.*, at the 15 December 1969 Session, CARTERET District Court.

Civil action to restrain and enjoin defendants from obstructing a right-of-way allegedly owned by plaintiffs over defendants' lands to the public road; and for a mandatory injunction compelling defendants to remove an obstruction from the right-of-way. In the alternative, plaintiffs assert they are entitled to a way of necessity over the lands of defendants.

Plaintiffs alleged and offered evidence tending to show the facts narrated in the following numbered paragraphs:

1. Defendant Fred Ernul acquired as one lot a rectangular shaped tract of land west of the town of Morehead City in Carteret County, more particularly described as Lots 1, 2 and 3 of the Mike Ebron Subdivision, fronting U. S. Highway 70 on the south, the A. & E.C. Railroad on the north, the lands of George Huntley (now Morehead Mobile Homes, Inc.) on the east and the lands of other strangers on the west. On 4 June 1954 Fred Ernul and wife conveyed to M. L. Mansfield, Jr., the northern portion of said tract of land; and on 31 March 1969 the said Mansfield and wife conveyed same to plaintiff Richard A. Sutton and wife Ida. On 4 June 1954 Fred Ernul and wife conveyed to plaintiff Garfield Oliver the center portion of said tract of land. Defendant Fred Ernul retained and now owns the southern portion of said tract which fronts on Highway 70. (The matters stated in this paragraph are admitted by defendants in their answer.)

2. At the time defendant Fred Ernul conveyed the northern and central portions of said tract to M. L. Mansfield and Garfield Oliver in 1954, a small dirt road provided access from U. S. 70 to the otherwise inaccessible Oliver and Mansfield (now Sutton) lots. This dirt road was located on the Fred Ernul property along its eastern edge, except for a small portion of the road which was located across the line on the adjoining property now owned by Morehead Mobile Homes, Inc. Plaintiffs used this road for ingress and egress until 1969 when it was blocked by defendants. This action ensued. Plaintiffs have no other access to their lots from a public road. (This paragraph is denied by defendants.)

3. On 19 December 1964 "Plaintiffs' Exhibit 1" was allegedly executed, acknowledged, and recorded in Book 259, page 386, Carteret County Registry. It reads as follows:

> STATE OF NORTH CAROLINA
> Carteret County
>
> This Rightaway Deed Made this 19th day of December, A.D. 1964 by and between Garfield Oliver and wife, Grace Oliver; Melvin Mansfield and wife, Edna Mansfield; Fred Ernul and wife, Luzie Ernul,
>
> We, the undersigned, do hereby give, grant, bargain and convey a 20-foot rightaway for public use for now and forevermore—

Described as follows:

In Morehead Township, in the Mansfield Section, lying between A and E.C. Railway on the North Hwy 70 on the South. The Mike Ebron Subdivision Running a Southerly direction Bounded on the East by George Huntley line and on the West, by Fred Ernul, Garfield Oliver and M. L. Mansfield line.

In Testimony Whereof, the said parties of the first part to these presents have hereunto set their hands and seals, the day and year above written.

Witness as to Mark

s/ X Garfield Oliver	(Seal)	Sworn To & Before Me
s/ Grace Oliver	(Seal)	This 19 Dec. 1964
s/ M. L. Mansfield	(Seal)	s/ Charlie M. Krouse
s/ Edna Mansfield	(Seal)	Notary Public
s/ Fred Ernul	(Seal)	My Commission Expires
s/ Luzzie Ernul	(Seal)	Feb. 28, '66
		(Seal)

North Carolina
Carteret County

I, Charlie M. Krouse, Notary Public in and for said State and County, do hereby certify that personally appeared before me this day, December 19th, 1964, and acknowledged the due execution of the foregoing instrument.

Witness my hand and notarial seal this 19 day of Dec., 1964.

s/ Charlie M. Krouse (Seal)
Notary Public

My commission expires: Feb. 28-1966

NORTH CAROLINA, Carteret County

The foregoing certificate of Charlie M. Krouse of Carteret County is adjudged to be correct. Let the instrument with this certificate be registered.

Witness my hand this (illegible) day of Feb., 1965.

s/ Martha B. James
Deputy Clerk Superior Court

RIGHT OF WAY AGREEMENT
MADE BY

Garfield Oliver and wife, Grace Oliver; Melvin Mansfield and wife, Edna Mansfield; Fred Ernul and wife, Luzie Ernul.

Filed for Registration on the 8th day of Feb., 1965 at 3:25 o'clock P.M., and registered in the office of Register of Deeds for Carteret County, N. C. ______ day of ____________________, 19______ at ______ o'clock ______, in Book 259 of Deeds, on page 385.

s/ Odell Merrill
Register of Deeds

M. L. Mansfield
M. City

(Fred Ernul denies the execution of this instrument.)

4. In 1969 Morehead Mobile Homes, Inc., owner of the adjoining property on the east (formerly owned by George Huntley), erected a chain link fence along its western boundary which narrowed somewhat the above mentioned dirt road, but plaintiffs Sutton and Oliver could still pass along the dirt road from their lots to Highway 70. Shortly thereafter, the remaining portion of the dirt road was blocked by a post which was placed in the center of the dirt road at the point where it passes the dwelling house owned by Fred Ernul and occupied by his tenant Grace Stamps. The distance between the house and the fence erected by Morehead Mobile Homes, Inc., is only fifteen feet and access was effectively blocked by the post. For a short time plaintiffs exited across the railroad tracks to the north but damaged their cars in so doing due to the crossties, ditches and other obstacles. They obtained a temporary injunction against Fred Ernul and wife and the tenant Grace Stamps restraining obstruction of the dirt road leading to U. S. 70. This order was continued in effect until the final hearing of the cause.

Upon the trial in district court, motion of defendants for nonsuit at the close of plaintiffs' evidence was allowed, the action dismissed, and the temporary injunction dissolved. Upon appeal to the Court of Appeals the judgment of nonsuit was reversed, that court holding that Plaintiffs' Exhibit 1, although poorly drafted, was sufficient as a deed creating a twenty-foot easement extending from Highway 70 on the south to the railroad

on the north and running adjacent to the eastern line of the land originally owned by Fred Ernul. See 9 N.C. App. 221, 175 S.E. 2d 618. We allowed *certiorari* to review that decision.

Thomas S. Bennett, Attorney for defendant appellants.

Boshamer and Graham, Attorneys for plaintiff appellees.

HUSKINS, Justice.

Does Plaintiffs' Exhibit 1, the "rightaway deed," expressly grant to plaintiffs a twenty-foot right-of-way over the lands of defendant Fred Ernul? If not, are plaintiffs entitled to a way of necessity over said lands? Answers to these questions are determinative of this controversy.

[1-5] Even if its execution by Fred Ernul is duly proven, the paperwriting designated Plaintiffs' Exhibit 1 is insufficient to expressly grant an easement. While no particular words are necessary for the grant of an easement, the instrument must identify with reasonable certainty the easement created and the dominant and servient tenements. *Borders v. Yarbrough,* 237 N.C. 540, 75 S.E. 2d 541 (1953); *Thompson v. Umberger,* 221, N.C. 178, 19 S.E. 2d 484 (1942); 2 Thompson on Real Property (Grimes Ed. 1961) § 332. Although one might conclude that the intended beneficiaries of the abortive easement are the owners of the Oliver and Mansfield tracts, the location of the "20-foot rightaway" on the ground is vague, indefinite and uncertain. The language of the instrument vaguely describes the intended easement in such manner that nothing can be located on the ground. The description contains no beginning and no ending. When an easement is created by deed, either by express grant or by reservation, "the description thereof must not be so uncertain, vague and indefinite as to prevent identification with reasonable certainty. . . . If the description is so vague and indefinite that effect cannot be given the instrument without writing new, material language into it, then it is void and ineffectual either as a grant or as a reservation. . . . The description must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers. . . . If the ambiguity in the description in a deed is patent the attempted conveyance or reservation, as the case may be, is void for uncertainty. And a patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the

language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to what land was to be conveyed. This type of ambiguity cannot be removed by parol evidence since that would necessitate inserting new language into the instrument which under the parol evidence rule is not permitted." *Thompson v. Umberger, supra* (221 N.C. 178, 19 S.E. 2d 484).

[6, 7] Nor was there a dedication to the perpetual use of the public. Even had the paperwriting been sufficient, there was never an acceptance by duly constituted governmental authority. A dedication without acceptance is merely a revocable offer and "is not complete until accepted, and neither burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to assume them." *Owens v. Elliot,* 258 N.C. 314, 128 S.E. 2d 583 (1962). An acceptance must be made by some competent public authority, and cannot be established by permissive use. *Gault v. Lake Waccamaw,* 200 N.C. 593, 158 S.E. 104 (1931) ; *Chesson v. Jordan,* 224 N.C. 289, 29 S.E. 2d 906 (1944) ; 2 Thompson on Real Property, *supra,* § 372. The record here is devoid of any such acceptance.

[8] The Court of Appeals, relying obliquely upon *Hine v. Blumenthal,* 239 N.C. 537, 80 S.E. 2d 458 (1954), held that, under the circumstances of this case, Plaintiffs' Exhibit 1 created an easement by grant. *Hine* holds only that where lots are sold with reference to a plat or map, and the grantees rely upon the descriptions therein with respect to designated streets and parks, such grantees acquire from the owner the irrevocable right to use the streets and parks so designated, and no governmental acceptance is necessary. The basis of this right is *estoppel in pais,* viz.: it would be fraudulent to allow the owner to resume private control over such streets and parks. See *Rives v. Dudley,* 56 N.C. 126 (1856) ; *Conrad v. Land Co.,* 126 N.C. 776 (1900) ; *Collins v. Land Co.,* 128 N.C. 563 (1901) ; *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664 (1951) ; *Hine v. Blumenthal, supra.* "The reason for the rule is that the grantor, by making such a conveyance of his property, induces the purchasers to believe that the streets and alleys, squares, courts, and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land and selling accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of

the easement thus created." *Green v. Miller,* 161 N.C. 24, 76 S.E. 505 (1912). *See also* 23 Am. Jur. 2d, Dedication § 56; *Cincinnati v. White,* 31 U.S. (6 Pet.) 431, 8 L. Ed. 452 (1832).

[9] The record here discloses no map or plat, nor any sale with reference to any preconceived plan or arrangement. No development plan is referred to in Plaintiffs' Exhibit 1. The simple fact is that Fred Ernul, the owner of a tract of land, sold two land-locked lots from it and the three owners later allegedly executed Plaintiffs' Exhibit 1. This is insufficient to create an easement by dedication, by grant, or by estoppel.

[10] Under the circumstances revealed by the record, our cases establish that plaintiffs have a *way of necessity* by operation of law. "A way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over grantor's other land or land of a stranger. In such cases, grantor impliedly grants a right-of-way over his land as an incident to purchaser's occupation and enjoyment of the grant." 2 Thompson on Real Property, *supra,* § 362; *Lumber Co. v. Cedar Works,* 158 N.C. 161, 73 S.E. 902 (1912) ; *Pritchard v. Scott,* 254 N.C. 277, 118 S.E. 2d 890 (1961) ; *Smith v. Moore,* 254 N.C. 186, 118 S.E. 2d 436. (1961).

[11-13] "When one part of an estate is dependent of necessity, for enjoyment, on some use in the nature of an easement in another part, and the owner conveys either part without express provision on the subject, the part so dependent carries or reserves with it an easement of such necessary use in the other part. . . . [P]roperty owners cannot claim a right-of-way of necessity over the lands of a stranger to their title. However, it is not necessary that the person over whose land the way of necessity is sought be the immediate grantor, so long as there was at one time common ownership of both tracts." 2 Thompson on Real Property, *supra,* § 362; 25 Am. Jur. 2d, Easements and Licenses §§ 34-38. Furthermore, to establish the right to use the way of necessity, it is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that the grantor intended the grantee should have the right of access. *Smith v. Moore, supra* (254 N.C. 186, 118 S.E. 2d 436).

[14] Viewed in light of these legal principles, we hold that when Fred Ernul and wife conveyed the two land-locked tracts to

M. L. Mansfield, Jr., and wife Edna, and to Garfield Oliver on 4 June 1954, a way of necessity across the lands retained by Fred Ernul was impliedly granted to said grantees—"a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances." 25 Am. Jur. 2d, Easements and Licenses § 64.

[15] With respect to its location on the ground, "[t]he rule applicable where a general (unlocated) right of way is granted . . . is applicable *to the location* of a way of necessity. 'As in the case of easements generally the rule has been established that the right to select the location of a way of necessity belongs to the owner of the servient estate, provided he exercises the right in a reasonable manner, with regard to the convenience and suitability of the way and to the rights and interests of the owner of the dominant estate.' 17A Am. Jur., Easements § 108." *Pritchard v. Scott, supra* (254 N.C. 277, 118 S.E. 2d 890). *Accord, Andrews v. Lovejoy,* 247 N.C. 554, 101 S.E. 2d 395 (1958); *Winston Brick Mfg. Co. v. Hodgin,* 192 N.C. 577, 135 S.E. 466 (1926). However, if at the time a way of necessity was impliedly granted on 4 June 1954 there was in use on the land a way plainly visible and known to the parties, "this way will be held to be the location of the way granted, unless it is not a reasonable and convenient way for both parties." 25 Am. Jur. 2d, Easements and Licenses § 65; 28 C.J.S., Easements § 80; *Eureka Land Co. v. Watts,* 119 Va. 506, 89 S.E. 968 (1916); *Labounty v. Vickers,* 352 Mass. 337, 225 N.E. 2d 333 (1967). If controverted at the next trial, whether such way was in use on the land at that time is a jury question.

Judgment of nonsuit was erroneously allowed by the trial court. For the reasons expressed in this opinion, the decision of the Court of Appeals reversing the nonsuit is

Affirmed.

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

Justice SHARP concurring:

In my view the decision of the Court of Appeals in this case should be affirmed, but not for the reasons advanced in the majority opinion. The instrument upon which plaintiffs base

their claim to an easement over defendants' lot is inartfully drawn; it is obviously the work of a layman, unlearned in the law of conveyancing. Notwithstanding, the purpose and intent of its signatories is clear, and the description of the "20-foot rightaway" they purported to establish is not so vague, indefinite and uncertain that it cannot be located on the ground.

The easement is over property situated in the Mike Ebron subdivision in the Mansfield Section of Morehead township in Carteret County. It is 20 feet wide. It is bounded on the north by the A. & E. C. Railroad; on the east by the line of George Huntley (now Mansfield Mobile Homes); on the south by highway No. 70; and "on the west by Fred Ernul, Garfield Oliver and M. L. Mansfield line." It is apparent that the three lot owners and their respective spouses, who signed the instrument under consideration, envisioned the western line of the 20-foot right-of-way as a new line for their property—an idea which regarded practicality rather than legal technicalities.

"The office of description is to furnish, and is sufficient when it does furnish, means of identifying the land intended to be conveyed." *Self Help Corp. v. Brinkley*, 215 N.C. 615, 620, 2 S.E. 2d 889, 892; *accord, Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269; *Light Co. v. Waters*, 260 N.C. 667, 133 S.E. 2d 450. To lay off the right-of-way in question a surveyor would need only to establish the Huntley line and the points where it intersects the rights-of-way of the railroad and the highway. Beginning at the latter point he would run westerly 20 feet with the highway; thence northerly, a line parallel with Huntley to the railroad's right-of-way; thence easterly, with the railroad 20 feet to Huntley's line; thence southerly, with Huntley to the beginning. *Prima facie*, this would be no insurmountable—or even difficult—surveying problem.

When Mansfield, plaintiff Sutton's predecessor in title, plaintiff Oliver, and defendants Ernul executed the instrument which they labeled a "Rightaway Deed" they had no thought of dedicating a 20-foot *public* thoroughfare. Far from it: Oliver and Mansfield were endeavoring to insure for themselves and their successors in title, and any members of the public who had business with them, "for now and forevermore," uninterrupted access to the landlocked lots which they had purchased from the Ernuls. At that time, 19 December 1964, defendants Ernul were acknowledging their obligation to provide means of access

to the landlocked lots which they had sold Oliver and Mansfield. In short, all parties to the agreement were attempting to forestall the very situation which has produced this lawsuit.

The statement in the ninth headnote of *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E. 2d 458, which is quoted in the opinion of the Court of Appeals (9 N.C. App. 221, 223, 175 S.E. 2d 618, 619), is a correct statement of the law applicable to this case. However, the excerpt from the *Hine* opinion, which the Court of Appeals also quoted, is completely irrelevant and confusing. It refers to the rule applicable to the sale of lots in a subdivision by reference to a map showing dedicated streets or highways. As the majority opinion points out, the record here discloses no map and no sales with reference to a map. According to my understanding, it was to clear up any confusion caused by the inclusion of the inapplicable excerpt from *Hine* that we allowed defendants' petition for *certiorari*.

I concur fully in the conclusion of the Court of Appeals that the right-of-way agreement "if proven over defendants' denial," is sufficient to establish a 20-foot easement extending along the Huntley line between the railroad and the highway. If the agreement be proven, any discussion of a way by necessity is beside the point. If it is not established, I agree that plaintiffs would be entitled to a way of necessity.

Chief Justice BOBBITT joins in this concurring opinion.

STATE OF NORTH CAROLINA v. JAMES PRESTON SWANEY, DEFENDANT APPELLANT HEREIN (CONSOLIDATED FOR TRIAL WITH CASES ENTITLED:
STATE OF NORTH CAROLINA v. WESLEY ST. ARNOLD
— AND —
STATE OF NORTH CAROLINA v. WILLIAM DALLAS FLETCHER)

No. 81

(Filed 20 January 1971)

1. Constitutional Law § 31— identity of informer — effect of nondisclosure on defendant

There is no merit to defendant's contention that the failure of the trial court to compel the State to disclose the identity of an informer deprived him of the right to assert the defense of entrapment, since the question of entrapment did not arise upon the defendant's evidence.

2. Constitutional Law § 31— disclosure of identity of informer — circumstances of the case

The propriety of disclosing the identity of an informer depends upon the circumstances of the case.

3. Criminal Law § 7— armed robbery prosecution — question of entrapment

Question of entrapment did not arise in an armed robbery prosecution in which the defendant denied knowledge of the robbery and any participation in it.

4. Robbery § 5— armed robbery prosecution — submission of lesser included offenses

Where the evidence for the State clearly showed an armed robbery and there was no evidence of a lesser offense, the trial court was not required to submit to the jury the lesser included offenses of common law robbery and assault.

5. Criminal Law § 115— submission of lesser included offenses to the jury

The trial court is not required to submit to the jury the question of a lesser offense included in that charged in the indictment, where there is no evidence to support such a verdict.

6. Criminal Law §§ 95, 169— joint trial of defendants — admission of statement implicating nontestifying codefendant — harmless error rule

In a joint trial of three defendants for armed robbery, it was error to admit in evidence a statement made by one defendant to the prosecuting witness, "We have nothing against you; we were broke and needed money," since the use of the word "we" tended to implicate a nontestifying codefendant and thereby deprived him of his right of confrontation on cross-examination; nevertheless, such error was harmless beyond a reasonable doubt when the evidence as to the codefendant's participation came from the testimony of the codefendant himself and from independent testimony not connected with the statement.

7. Robbery § 4— armed robbery prosecution — sufficiency of evidence — testimony that victim was not frightened

Testimony by an armed robbery victim that the defendants "didn't threaten me in any way" did not warrant dismissal of the prosecution, since the victim also testified that one defendant stuck a gun in his face and that "it scared me."

8. Robbery § 1— armed robbery — gist of the offense

The gist of the offense of armed robbery is not the taking but is the taking by force or putting in fear.

9. Robbery § 2— armed robbery indictment — use of "and" in charging the elements of the offense

The fact that an armed robbery indictment charged "endangered and threatened" rather than the statutory language "endangered or threatened" was not fatal. G.S. 14-87.

10. Indictment and Warrant § 9— charge of crime — use of the conjunctive "and"

The indictment should not charge a party disjunctively or alternatively in such a manner as to leave it uncertain what is relied on as the accusation against him; the proper way is to connect the various allegations in the indictment with the conjunctive term "and" and not with the word "or."

11. Robbery § 2— armed robbery indictment — conviction of lesser included offenses

An indictment for robbery with firearms will support a conviction of the lesser offenses of common law robbery, assault, larceny from the person, or simple larceny.

12. Indictment and Warrant § 9— purpose of indictment

One of the purposes of the indictment is to enable the defendant to prepare his defense.

13. Robbery § 2— armed robbery indictment — allegations of assault

The fact that the allegations in an armed robbery indictment included a charge of assault does not render the indictment invalid.

14. Criminal Law § 9; Robbery § 4— armed robbery prosecution — guilt of codefendant — sufficiency of evidence

The State's evidence in an armed robbery prosecution was ample to show that a codefendant was a participant in the robbery, either as the driver of the get-away car or as a lookout posted by the other defendants.

15. Criminal Law § 106— motion to nonsuit — sufficiency of evidence

If there is any evidence which reasonably tends to show guilt of the offense charged and from which a jury might legitimately convict, the nonsuit motion should be denied.

16. Jury § 8— impaneling of jury — absence of defendant from courtroom

Defendant in an armed robbery prosecution was not prejudiced by the fact that the jury was impaneled during his absence from the courtroom.

17. Criminal Law § 92— consolidation of cases

It is within the discretion of the judge to consolidate cases.

18. Criminal Law § 92; Robbery § 2— consolidation of armed robbery prosecutions

Armed robbery prosecution of a defendant who participated in the robbery as the driver of the get-away car or as a lookout was properly consolidated with the prosecutions of the two codefendants who actually perpetrated the robbery.

19. Criminal Law § 85— cross-examination of defendant

Trial court in an armed robbery prosecution properly allowed the solicitor to cross-examine defendant about his previous convictions.

APPEAL by defendant Swaney from judgment of *Beal, S.J.*, May 4, 1970 Criminal Session of DAVIDSON County Superior Court.

Defendants, James Preston Swaney (Swaney), Wesley St. Arnold (St. Arnold), and William Dallas Fletcher (Fletcher), in separate bills, were indicted for the armed robbery of Dalton Myers (Myers). The cases were consolidated for trial, and from verdicts of guilty as charged and sentences imposed, notice of appeal was given. Only Swaney perfected his appeal.

The evidence for the State tends to show that Myers operated a fuel business in Thomasville. On 28 February 1970 about 4 p.m. the defendants St. Arnold and Fletcher entered his place. One or both of them stated, "This is a hold up" or "This is a robbery," and each pulled a pistol from his pocket. Fletcher pointed his pistol directly in Myers' face and demanded his wallet, which Myers gave to him. The wallet contained $43. St. Arnold went to a place in the building where a metal money box was located. It was later found that some $105 had been taken from the money box. After Myers gave Fletcher his wallet, the defendants tied Myers' hands and placed him in a small room in the back of his place of business, wiring the door to this room shut. Defendants then left. As they went out the door, Myers heard someone shout "Halt" and heard several shots fired.

Several police officers testified for the State. In substance their testimony is to the effect that SBI Agent Poole had received information that there would be a robbery at Myers' home on Friday, February 27, 1970, or at his place of business on Saturday, February 28, 1970. On the 28th, Poole and Captain Stamey of the Thomasville police force stationed themselves in a diner near Myers' place of business, and other police officers stationed themselves in a boxcar across the street from the Myers Oil Company. About 4 p.m. a Mercury Comet car with an Indiana license parked near Myers' place of business; St. Arnold was driving, Swaney was in the middle, and Fletcher was on the right. St. Arnold and Fletcher got out of the parked car, leaving Swaney. After Fletcher and St. Arnold allegedly robbed Myers and came out the front door of the Oil Company, Agent Poole and Captain Stamey stepped from concealment and called to them to halt. Fletcher turned to run and fired a shot at Poole and Stamey; Poole and Stamey returned the fire. When he

saw the officers, St. Arnold dropped a brown paper sack containing money. Both Fletcher and St. Arnold were immediately arrested. St. Arnold had a pistol in his pocket; another pistol, with four live and two spent cartridges, was found near where Fletcher was arrested.

Officer Harris of the Thomasville police department testified that while the shooting was taking place between Fletcher and Officers Poole and Stamey, he jumped out of the boxcar and ran to the Comet car where he found Swaney sitting under the steering wheel with the motor running. Swaney was arrested and hastily searched. He was searched again at the police station and a .32 caliber pistol with four cartridges in it was found tucked under his belt in the back.

Swaney testified in his own behalf. His evidence tends to show that he was in the vicinity of Thomasville in his Pontiac car going from Greensboro to Lexington on a business trip when the car developed engine trouble. He stopped in Myers' place of business about 3 p.m. to get change to make a telephone call to his brother in Greensboro for assistance. No one answered his brother's telephone, so he parked his car about one-half mile from Myers Oil Company, leaving the keys in the car, and started to hitchhike back to Greensboro. St. Arnold and Fletcher stopped and picked him up. His evidence further tends to show that he did not know that Fletcher and St. Arnold planned to rob the Oil Company; they only told him they were stopping to see a man and would be back in just a few minutes. He remained in the middle of the front seat of the automobile until he heard shots, at which time he moved over to the driver's seat in order to see what was going on. He was not involved in any way with the robbery and had no gun prior to his arrest, but while he was in the back seat of the police car with defendant Fletcher, Fletcher pushed something down under his belt in the back, and this must have been the pistol which was later found by the officers. On cross-examination Swaney admitted that over a period of years from 1956 to 1968 he had been convicted a number of times for breaking and entering, and of larceny from the person, of housebreaking and larceny, unlawful assault and statutory burglary, and escape. He testified he had known Fletcher for about nine years and had served some time with him in the Virginia State Penitentiary. He further testified he met St. Arnold in Indiana, and that some three weeks before

February 28, 1970 he and the other two defendants came to North Carolina separately. About a week before February 28 he visited Fletcher and St. Arnold in a room in a Holiday Inn or Howard Johnson, and on Monday of that week around 6 a.m. he and Fletcher got a room in High Point where he stayed with Fletcher until Tuesday; that on the morning of February 28, 1970, in a Howard Johnson restaurant in Greensboro he saw Fletcher inject himself with a drug called Wyamine, as he had seen him do on several other occasions. These injections seemed to give Fletcher a feeling of well-being and caused him to become very excited. It took about 24 hours for the effect of this injection to wear off.

From a verdict of guilty as charged and judgment pronounced thereon, defendant Swaney appealed to the Court of Appeals. The case was transferred to this Court under its transferral order of 31 July 1970.

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

Ned A. Beeker for defendant appellant.

MOORE, Justice.

Defendant in his brief states the questions involved in the appeal in a somewhat general manner as follows:

> "The many questions to be determined in this Appeal are set out under each of the Exceptions hereinafter, and Appellant contends that there is no one question to be determined unless same would be the ultimate questions of whether or not the evidence of the State was insufficient to support the conviction of the defendant, and whether or not the Bill of Indictment upon which the Appellant was tried was insufficient and invalid as a matter of law, and whether or not prejudicial error was present in the trial of the case which would warrant a new trial for this appealing defendant."

[1] Defendant does make numerous assignments of error, the first of which is that the trial court erred in failing to grant his motion to disclose the identity of the informer in this case, thus denying him the right to assert the defense of entrapment. All the evidence for the State indicates that some of the police

officers received their information about the robbery in question from an unidentified informer. The State contends, however, that the motion to which Swaney referred, as the record shows, was submitted to the court by Jerry B. Grimes, court-appointed counsel for William Dallas Fletcher, and was not joined in by defendant Swaney or his attorney. Hence, the State contends Swaney cannot avail himself of this motion on appeal.

Conceding *arguendo* that the motion does apply to Swaney, none of the defendants have testified that any police officer or any other person at any time sought to induce, procure, or incite the defendants, or any of them, to commit a crime. The evidence to the contrary discloses that the officers only knew that there was a possibility that there would be a robbery. They did not know the exact time it would take place or the identity of the persons who might attempt it. Defendant Swaney testified at great length at the trial, but did not say that any officer or any other person tried to induce, incite, or procure the commission of this crime. His defense is not entrapment, but that he committed no crime. Under these circumstances, we hold that the trial court correctly denied the motion to require the officers to disclose the identity of the informer.

[2] "It is the general rule, subject to certain exceptions and limitations . . . that the prosecution is privileged to withhold from an accused disclosure of the identity of an informer." Annot., 76 A.L.R. 2d 262, 271. "The privilege is founded upon public policy, and seeks to further and protect the public interest in effective law enforcement. It recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officers, and by preserving their anonymity, encourages them to perform that obligation. The privilege is designed to protect the public interest, and not to protect the informer." *Id.* at 275; *Roviaro v. United States,* 353 U.S. 53, 1 L. Ed. 2d 639, 77 S.Ct. 623 (1957). The propriety of disclosing the identity of an informer depends on the circumstances of the case. *Roviaro v. United States, supra; State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53; *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476.

[3] Justice Higgins, in *State v. Caldwell,* 249 N.C. 56, 105 S.E. 2d 189, states:

> " . . . The courts generally hold that a verdict of not guilty should be returned if an officer or his agent, for the

purpose of prosecution, procures, induces or incites one to commit a crime he otherwise would not commit but for the persuasion, encouragement, inducement, and importunity of the officer or agent. If the officer or agent does nothing more than afford to the person charged an opportunity to commit the offense, such is not entrapment. The courts do not attempt to draw a definite line of demarcation between what is and what is not entrapment. Each case must be decided on its own facts. This Court, in two recent cases, has stated the rule as it prevails in this jurisdiction: *State v. Jackson,* 243 N.C. 216, 90 S.E. 2d 507; *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191. See also, *State v. Kilgore,* 246 N.C. 455, 98 S.E. 2d 346; *State v. Wallace,* 246 N.C. 445, 98 S.E. 2d 473; *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476; *State v. Nelson,* 232 N.C. 602, 61 S.E. 2d 626; *State v. Love,* 229 N.C. 99, 47 S.E. 2d 712; *State v. Godwin,* 227 N.C. 449, 42 S.E. 2d 617."

According to the defendant's evidence in the case at bar, he knew nothing about the robbery and did not participate in it. Therefore, the question of entrapment does not arise. *State v. Boles, supra.* See 36 N. C. L. Rev. 413; Annot., 61 A.L.R. 2d 677; 2 Strong's N. C. Index 2d, Criminal Law § 7.

[4, 5] The defendant next contends that the court erred in not submitting to the jury on its own motion the lesser included offenses of common law robbery and assault. The evidence for the State clearly shows an armed robbery; there is no evidence of a lesser offense. The defendant is guilty of armed robbery or not guilty. The trial court is not required to submit to the jury the question of a lesser offense, included in that charged in the indictment, where there is no evidence to support such a verdict. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481; *State v. Bridges,* 266 N.C. 354, 146 S.E. 2d 107; *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545. This assignment is without merit.

[6] Some hours after the robbery, Myers was allowed to go to the jail and in the presence of a Thomasville police officer asked the defendant St. Arnold, "What did they have against me to rob me?" Over objection, Myers was allowed to testify that St. Arnold replied, "We have nothing against you; we were broke and needed some money." The trial court sustained the objection as to defendant Swaney and Fletcher but admitted the statement

as to St. Arnold. St. Arnold did not testify at the trial. Defendant contends that under *Bruton v. United States,* 391 U.S. 123, 20 L. Ed. 2d 476, 88 S.Ct. 1620, and *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492, this was error. Prior to *Bruton,* limiting the statement to the defendant who made it would have been sufficient. However, Justice Sharp in *State v. Fox, supra,* states the post-*Bruton* rule to be as follows:

> "The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra* [250 N.C. 113, 108 S.E. 2d 128]), and (2) that the declarant will not take the stand. If the declarant can be cross-examined, a co-defendant has been accorded his right to confrontation. See *State v. Kerley, supra* [246 N.C. 157, 97 S.E. 2d 876], at 160, 97 S.E. 2d at 879."

Applying that rule to the facts here, it was error to admit that portion of St. Arnold's statement which, by the use of the word "we," might have implicated Swaney. Swaney was thereby denied his constitutional right of confrontation on cross-examination guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. Nevertheless, as stated by Justice Huskins in *State v. Brinson,* 277 N.C. 286, 295, 177 S.E. 2d 398, 404:

> " . . . [A]ll federal constitutional errors are not prejudicial. Some constitutional errors in the setting of a particular case 'are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction . . . [B]efore a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt.' *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824 (1967). In deciding what constituted harmless error in *Fahy v. Connecticut,* 375 U.S. 85, 11 L. Ed. 2d 171, 84 S.Ct. 229 (1963), the Court said: 'The question is whether there

is a reasonable possibility that the evidence complained of might have contributed to the conviction.' "

Accord, *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S.Ct. 1726 (1969).

The State's evidence as to the robbery itself is overwhelming and is not denied. The evidence as to Swaney's participation was from independent testimony not connected with the statement itself, and from the testimony of Swaney himself. The statement does not involve evidence in any sense "crucial" or "devastating." We therefore hold that the admission of St. Arnold's statement was harmless error beyond a reasonable doubt. *Harrington v. California, supra; Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824 (1967) ; *State v. Brinson, supra.* See also *Dutton v. Evans*, 400 U.S. 74, 27 L. Ed. 2d 213, 91 S.Ct. 210 (1970). This assignment is overruled.

[7, 8] The next assignment of error relates to the sufficiency of the evidence to prove the offense charged. The portion of the indictment involved reads, " . . . with the use and threatened use of a certain firearm, to-wit: a certain pistol, whereby the life of Dalton Myers was endangered and threatened. . . . " The defendant contends that since Myers testified, "They didn't threaten me in any way," that the State has failed to prove an essential element of armed robbery as charged in the indictment and as required by G.S. 14-87; and that this constitutes a fatal variance between the indictment and proof. Myers did, however, testify that one of the defendants stuck a gun in his face and that "it scared me." The gist of the offense of armed robbery is not the taking but the taking by force or putting in fear. *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525; *State v. Mull*, 224 N.C. 574, 31 S.E. 2d 764. The testimony by Myers that he was scared is sufficient to meet the requirements of the indictment and the statute.

[9, 10] Defendant further contends the indictment was defective since it charged "endangered and threatened," and G.S. 14-87 reads "endangered or threatened." "Where a statute sets forth disjunctively several means or ways by which the offense may be committed, a warrant thereunder correctly charges them conjunctively." 4 Strong's N. C. Index 2d, Indictment and Warrant § 9, p. 353; *State v. Chestnutt*, 241 N.C. 401, 85 S.E. 2d 297.

The indictment should not charge a party disjunctively or alternatively, in such a manner as to leave it uncertain what is relied on as the accusation against him. The proper way is to connect the various allegations in the indictment with the conjunctive term "and," and not with the word "or." *State v. Helms,* 247 N.C. 740, 102 S.E. 2d 241; *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129; *State v. Albarty,* 238 N.C. 130, 76 S.E. 2d 381. The indictment correctly charged the offense of armed robbery.

[11-13] Next, defendant contends that the indictment is invalid in that it alleged an assault, and G.S. 14-87 does not provide for allegations of assault. There is no merit to this contention. An indictment for robbery with firearms will support a conviction of the lesser offenses of common law robbery, assault, larceny from the person, or simple larceny. *State v. Wenrich,* 251 N.C. 460, 111 S.E. 2d 582; *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834. One of the purposes of the indictment is to enable the defendant to prepare his defense. *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318. The allegation in the indictment simply includes the charge for an assault which would be a lesser included charge in an indictment for robbery with firearms. If anything, the addition of the assault charge would be of aid to the defendant in preparing his defense and would not be harmful.

[14, 15] Defendant next contends that the evidence is not sufficient to support the conviction, arguing that this case is closely analogous to *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655. In *Aycoth* this Court reversed a conviction of codefendant Shadrick for aiding and abetting because of insufficient evidence. The evidence in that case, considered in the light most favorable to the State, tends to show: The robbery occurred inside the store. Aycoth was in the store "no more than two or three minutes." There is no evidence that Shadrick moved from where he was sitting on the right (passenger) side of the front seat of the car. He had no conversation with Mrs. Stevenson, the lady robbed. There is no evidence that he had a weapon of any kind. Mrs. Stevenson testified that she could see Shadrick and Shadrick could have seen her through the plate glass window but Shadrick "never did look around." There is no evidence that Shadrick could or did observe what was taking place inside the store. There is evidence that Aycoth concealed his pistol before he stepped out of the store. There is no evidence that Shadrick shared in the proceeds of the one hundred dollar robbery beyond

the fact that Shadrick, when arrested, had about fifteen dollars and some change on him. There were weapons under the seat of the car when Aycoth and Shadrick were arrested. However, there is no evidence that Shadrick owned or controlled the car; to the contrary, an officer testified Aycoth stated that he was the owner of the car. The case at bar is distinguishable. The evidence here is that defendant Swaney, with a long criminal record, had served time with Fletcher in the penitentiary in Virginia and that he had known Fletcher for about nine years; that some three weeks before this crime was committed he was in the State of Indiana with the defendants St. Arnold and Fletcher; that on their return to North Carolina he visited with St. Arnold and Fletcher in a motel, and that he and Fletcher occupied a motel room together on Monday and Tuesday of the week of the robbery; that the three defendants were together in Greensboro the morning of the robbery; that about one hour before the robbery Swaney was in Myers' place of business, and that he parked some one-half mile from Myers' fuel business, leaving the key in his car; that shortly before the robbery the defendants St. Arnold and Fletcher picked him up in a car with an Indiana license, and he went with them to the scene of the robbery; that St. Arnold and Fletcher left the car in which Swaney was sitting with caps pulled down and goggles over their eyes, and as St. Arnold left he secured a pistol from the car; that when the robbery was completed defendant Swaney was found under the steering wheel with the motor running, and when arrested and thoroughly searched he had a pistol under his belt in the back. This evidence is ample to show that he was in fact a participant in the robbery, either as the driver of the get-away car or as a lookout posted by the other defendants, standing by to lend assistance if and when it should become necessary. If there is any evidence which reasonably tends to show guilt of the offense charged and from which a jury might legitimately convict, the nonsuit motion should be denied. *State v. Bogan*, 266 N.C. 99, 145 S.E. 2d 374.

In *State v. Aycoth, supra*, this Court quotes with approval:

> " 'All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. (Citations.) An aider and abettor is one who advises, coun-

sels, procures, or encourages another to commit a crime. (Citations.) To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary. (Citations.)' *State v. Ham,* 238 N.C. 94, 97, 76 S.E. 2d 346, 348; *State v. Burgess,* 245 N.C. 304, 309, 96 S.E. 2d 54, 58; *State v. Horner,* 248 N.C. 342, 350, 103 S.E. 2d 694, 700; *State v. Hargett,* 255 N.C. 412, 415, 121 S.E. 2d 589, 592; *State v. Gaines,* 260 N.C. 228, 231, 132 S.E. 2d 485, 487."

Under the facts in the present case, the trial court correctly overruled defendant's motion for judgment as of nonsuit.

[16] After the selection of the jury, the record shows: "The Jury was impaneled (in the absence of the defendants but in the presence of counsel for defendants)." Defendant contends it was error to impanel the jury in his absence. Under the procedure in North Carolina, after the jurors have been selected and sworn, the clerk simply recites that the jurors having been duly selected and sworn are impaneled to try the case before them. This is a ministerial act done in this case in the presence of the defendant's counsel and without objection. We do not think any of Swaney's rights were affected or that he was prejudiced in any way by the fact that he was absent when the jury was impaneled. *State v. Arnold,* 258 N.C. 563, 573, 129 S.E. 2d 229, 235; Annot., 26 A.L.R. 2d 762, 770. Under these circumstances, no error is made to appear.

[17, 18] Defendant next contends that the court erred in consolidating the case of this defendant with those of St. Arnold and Fletcher for trial. It is within the discretion of the judge to consolidate cases, and no abuse of discretion is shown. *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506; *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1; *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128.

[19] Finally, the defendant contends that the trial judge erred in allowing the solicitor to cross-examine defendant Swaney about previous convictions. Where defendant testifies in his own behalf, it is common for the solicitor on cross-examination to

ask him, for the purpose of impeachment, if he had not theretofore been convicted and sentenced to prison for other crimes, and the affirmative answer of defendant is competent as affecting his credibility as a witness. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310; *State v. Sheffield,* 251 N.C. 309, 111 S.E. 2d 195; *State v. Holder,* 153 N.C. 606, 69 S.E. 66; Stansbury's N.C. Evidence § 112 (2d ed., 1963). This assignment is overruled.

We have carefully examined defendant's other assignments and find no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOHN RAYMOND DOZIER

No. 73

(Filed 20 January 1971)

1. **Criminal Law § 15— objection to the venue of the offense — time of objection**

   Defendant's objection that the State failed to establish the county or venue in which the alleged offense took place will not be considered on appeal when the objection was made only after the defendant entered a plea of not guilty.

2. **Criminal Law § 15— venue of offense — presumption**

   An offense is deemed to have been committed in the county alleged in the indictment.

3. **Criminal Law § 15— objection to the venue of offense — time of objection**

   A defendant who questions the venue of the offense must designate the proper county before the jury is empaneled.

4. **Criminal Law § 135; Rape § 7— rape prosecution — absolute discretion of jury to determine guilt and punishment**

   The Supreme Court upholds the procedure in this State which permits the trial jury in a rape prosecution to decide, within its absolute and uncontrolled discretion, the guilt of the defendant and at the same time and as a part of the verdict to fix his punishment at life imprisonment.

5. **Criminal Law § 76— admissibility of incriminating statements — sufficiency of findings on voir dire**

   Defendant's incriminating admissions to investigating officers subsequent to his arrest for rape were properly admitted in evidence, where

there were detailed findings of fact, fully supported by the evidence, that defendant's admissions were freely and voluntarily made.

APPEAL by defendant from *Fountain, J.*, June 22, 1970 Session, ONSLOW Superior Court.

The defendant, John Raymond Dozier, was first arrested on magistrates' warrants, waived preliminary hearing and was held for grand jury action. Thereafter the grand jury at the December 1969 Session returned indictments, proper in form, charging (1) the kidnapping of Shannon Elaine Canady, and (2) the rape of Shannon Elaine Canady. The offenses were alleged to have occurred in Onslow County on September 3, 1969.

The defendant, John Raymond Dozier, represented by counsel of his own selection, before pleading to the indictments, moved for a change of venue because of the unfavorable publicity in Onslow County. By consent of counsel for both parties, the court ordered a venire of 100 jurors drawn from the box in Craven County. Likewise before pleading to the indictments, the defendant moved to quash the indictment charging rape upon these grounds: (1) a death sentence for rape is cruel and unusual punishment forbidden by the Eigthth and Fourteenth Amendments to the Constitution of the United States; (2) the North Carolina Statute (G.S. 14-21) would subject the defendant to a trial by jury with absolute discretion, uncontrolled by any standards, to impose a death sentence in violation of the defendant's rights under the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 17, of the North Carolina Constitution; (3) the verdict procedure in capital cases under North Carolina law which permits one jury to determine both guilt and punishment violates the defendant's right under the Fifth Amendment to the Constitution of the United States; (4) both indictments were returned by a grand jury from which members of the defendant's race and economic class were systematically excluded in violation of the defendant's Fourteenth Amendment rights.

> "The court heard evidence on defendant's motion to quash and thereafter denied defendant's motion as to each ground alleged in the motion. To the denial of the motion, the defendant objected and excepted.
>
> EXCEPTION NO. 1"

The defendant was duly arraigned and entered pleas of not guilty. The court ascertained the charges involved one continuous episode; and without objection consolidated the indictments for purpose of trial. The trial jury was selected from the veniremen drawn from the jury box in Craven County. Neither party objected to any member of the trial panel.

The State's evidence discloses that Shannon Elaine Canady, an unmarried female twenty-one years of age, on and prior to September 2, 1969 was employed as a telephone operator in Jacksonville, Onslow County. Effective at the end of that day she was being transferred to New Bern in Craven County. The cities of Jacksonville and New Bern are connected by Highway 17, which passes through Jones County. Shannon Elaine Canady testified as a witness for the State. Her testimony is here summarized except when quoted.

Before going to work on the afternoon of September 2, 1969, she placed her clothing and some of her apartment furnishings in her DeSoto automobile intending to take them to New Bern. However, she had planned to spend the night with a relative in Maysville about halfway between Jacksonville and New Bern. She completed her last day's work about midnight and started alone on her way to Maysville. About five miles out of Jacksonville the automobile did not appear to be operating properly. She pulled to the side of the road in a lighted area in front of a motel, but examination failed to disclose any defect in the vehicle. As she re-entered the highway, an automobile with bright lights approached from the rear. Its front bumper was almost in contact with her rear bumper. She speeded up but the automobile passed her and slowed down. She passed and the following vehicle again passed. She became frightened, speeded up but the automobile kept closely behind. At one time as the race continued their speed exceeded one hundred miles per hour. The following vehicle finally came in contact with the side of her DeSoto, pushing it partially off the road. Her engine cut off and she was unable to start it. The following car had stopped first alongside, then pulled up in front. " . . . (T)wo colored men . . . got out of their car . . . came back to mine and tried to get in the door . . . they opened the hood and yanked the horn wire out so I couldn't blow the horn . . . . (O)ne of them came to the driver's door . . . and tried to kick the glass out. I was

sitting up in the seat and I had a broken mop handle that I was trying to keep them away with . . . . (T)hey both pulled me out and I was fighting and I was scratching and screaming . . . they picked me up. They told me that if I didn't shut up and cooperate that they were going to kill me."

The two men, later identified as John Raymond Dozier and Jesse High, forced Miss Canady to enter their automobile, take off all her clothes and each, while the other drove, forced her to have intercourse with him on two different occasions. They continued to drive for some time. Being short of gas, they began looking for a filling station. Before they stopped at a filling station, they forced Miss Canady to enter the trunk of the vehicle. After leaving the station they permitted her to get out of the trunk. Soon thereafter, they forced her to lie down in the ditch while they drove out of sight. Miss Canady then made her way to the nearby farm home of Odell Thomas. She reported to Mr. and Mrs. Thomas what had happened to her, called her parents and notified the officers.

Odell Thomas testified that about 3:15 on the morning of September 3, 1969 he heard a call for help at his door. He and his wife admitted Miss Canady. "She was crying and really hollering a little bit. She was really upset." Officers were called and Miss Canady taken to Craven County Hospital where Dr. Rodler made an examination, finding fresh blood and lacerations of "the vaginal entrance."

Robert Newman testified that on the morning of September 3, 1969 about 3 a.m. John Raymond Dozier and Jesse High drove up to his filling station and bought gas. They were driving a blue Pontiac. While the witness was pumping gas, Jesse High left his seat in the vehicle and sat on the car trunk.

Highway Patrolman Gregory found the DeSoto on Highway 17 on the Onslow side of the Jones County line. The lights were bright, the key was in the switch, but the engine would not ignite. Marks on the left side near the door indicated the vehicle had been in contact with some object. Miss Canady's pocketbook was lying on the front floorboard. A broken mop handle was near the front seat.

Mr. Ward, a fellow Marine, was the owner of the Pontiac. He testified that on the night of September 2, 1969 he permitted defendant Dozier and Jesse High, who were members of the

Marine Corps, to drive his Pontiac automobile. The vehicle was returned during the night. It had just a small dent on the right rear. "John Dozier told me he had a small accident."

The State undertook to offer in evidence incriminating admissions allegedly made by the defendant on September 3rd after his arrest by the Marine Corps authorities. Upon objection, the court excused the jury and conducted a *voir dire* at which the State's evidence disclosed incriminating admissions were made voluntarily after all required warnings were given. The defendant signed a written waiver of rights which was offered in evidence on the *voir dire*. The defendant did not testify; however, he called "as an adverse witness" one of the officers present at the time the warnings were given and the incriminating admissions were made at the Provost Marshal's office at the Marine Corps base. The adverse witness testified that during the time the interrogations of the defendant were underway, one of the investigating officers made notes, but after the defendant examined them he refused to sign. The officer was asked about the defendant's lack of sleep and lack of food. The officer's replies were negative and failed to disclose any lack of warning or lack of voluntariness or lack of defendant's understanding at the time he made the admissions.

The court made full findings of fact and concluded the admissions were freely and voluntarily made and were properly admissible in evidence. The court permitted the admissions to be relayed to the jury. These admissions followed closely Miss Canady's story as to the happenings between the time the defendant and High drove up behind her DeSoto as she re-entered the highway and the time they permitted her to leave their Pontiac near New Bern.

At the conclusion of the State's evidence, the court overruled motions for directed verdicts. The defendant testified in his own behalf. He denied or did not remember making any incriminating statements to the officers. He testified that after the race, Miss Canady voluntarily permitted him to carry her in his arms to the Pontiac, voluntarily undressed and permitted both him and High to have intercourse with her on two occasions. He further testified she voluntarily consented for them to seal her up in the trunk of the Pontiac, and later, voluntarily left their automobile at a place on the highway near New Bern at about 3 o'clock in the morning.

He further testified he had been up all night on September 2-3 and had had very little sleep before midnight at the time of his interrogation on September 3rd.

At the conclusion of all the evidence, the defendant renewed and the court overruled motions for directed verdicts of not guilty.

After the arguments and the charges of the court (not made a part of the record) the jury returned these verdicts. "Guilty of kidnapping and guilty of rape with a recommendation that his punishment be life imprisonment." The jurors were polled and verified the verdicts. The court imposed these judgments: "In each case the punishment of the court is that the defendant be confined in the State's prison for his natural life." The defendant gave notice of appeal.

Upon a finding of indigency, the court appointed Mr. Ferguson trial attorney to perfect the appeal.

Chambers, Stein, Ferguson & Lanning by James E. Ferguson II and Charles Becton for the defendant appellant.

Robert Morgan, Attorney General, William W. Melvin, Assistant Attorney General, T. Buie Costen, Assistant Attorney General for the State.

HIGGINS, Justice.

The capable and experienced counsel who represented the defendant in the trial and now represents him on this appeal argues the convictions of his client should be reversed on three grounds: (1) the State failed to establish the county or venue in which the alleged offenses took place; (2) the trial court committed error in overruling the defendant's pleas in abatement and motions to quash the indictments upon these grounds, (a) the trial jury in capital cases is given absolute, uncontrolled and standardless discretion to decide between death and life imprisonment, (b) the same jury is required to determine the issues of guilt and of punishment; and (3) the defendant conditionally contends if the convictions are not reversed for the reasons assigned, the defendant is entitled to a new trial because of the court's error in permitting the State to introduce the defendant's incriminating admissions made to the investigating officers subsequent to his arrest.

[1] It must be inferred from the record that the defendant's objection to the trial on the ground the evidence failed to show the county in which the offenses occurred was not made until after the plea of not guilty was entered. The motion appears in the record after the conclusion of the evidence, the argument of counsel, the charge of the court, and the return of the verdicts.

The indictments were returned by the grand jury in Onslow County. The incidents described in the evidence had their origin in Onslow County and continued on Highway 17 through Jones County and into Craven County. Miss Canady was kidnapped and transported by the defendant and his companion on Highway 17 beginning in Onslow, through Jones and into Craven where she was permitted to escape from their automobile about 3 o'clock on the morning of September 3rd.

[2] According to Miss Canady's story, and according to the defendant's confession, she was forced into their automobile, kept many hours during which four acts of rape were committed against her before she was released. If the defendant desired to question Onslow County as the proper venue, he should have raised the objection before plea and as part of the plea he should have designated the proper venue. (G.S. 15-134) "Indeed, the offense, if proven, 'shall be deemed and taken' as having been committed in the county laid in the charge, unless the defendant, by plea in abatement, under oath, shall allege the transaction took place in another county, whereupon the case may be removed thither for trial." *State v. Allen,* 107 N.C. 805, 11 S.E. 2d 1016. "An offense is deemed to have been committed in the county in which it is laid in the indictment unless the defendant shall deny the same by plea in abatement, which ordinarily must be filed not later than the arraignment." *State v. Ray,* 209 N.C. 772, 184 S.E. 836; *State v. Holder,* 133 N.C. 709, 45 S.E. 862; *State v. McKeon,* 223 N.C. 404, 26 S.E. 2d 914; *State v. Overman* 269 N.C. 453, 153 S.E. 2d 44.

[3] If a defendant questions the venue, he must designate the proper county before the jury is empaneled. This is so because after that important event, jeopardy has attacked and by keeping quiet on a matter in which he has superior knowledge, he could escape conviction and punishment altogether. The defendant did not challenge the venue at a time when he was entitled to be heard. The defendant's first assignment of error is not sustained.

[4] This court has repeatedly upheld the procedure which permits the trial jury in a capital case to decide guilt and at the same time and as a part of the verdict fix the punishment at life imprisonment. *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885; *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886. Failure to set up standards to govern the jury in the exercise of its discretion to reduce the punishment from death to life imprisonment is by no means prejudicial to the prisoner. Standards would tend to restrict the exercise of discretion. Without standards, the jury is left free to fix life imprisonment for any reason satisfactory to the jury. "A statute mitigating capital punishment is not essentially unfair to the wrongdoer for failure to specify standards for the exercise of that discretion." *In re Anderson,* 447 P. 2d, 117 (Cal.). The motion to quash and the plea in abatement were properly overruled.

[5] Although the defendant did not testify on the *voir dire* which Judge Fountain carefully conducted in the absence of the jury, he did call for "adverse examination" Mr. W. C. Jarman, investigating officer in the Onslow County sheriff's office. Mr. Jarman testified the Miranda warnings were given and the defendant signed a written consent to the interrogation which was conducted in the office of the Camp Lejeune Provost Marshal and at a time when the defendant was in the custody of Marine Corps authorities and before his release to the Onslow County sheriff. The witness testified the interrogation began about 11 p.m. on September 3, 1969 and continued "for about an hour or a little over." Further investigation occurred the following morning. Mr. Jarman testified the defendant was alert, sober and stated he was willing to tell the truth and gave a story of events which closely followed and corroborated the evidence Miss Canady gave before the jury. At the conclusion of the hearing Judge Fountain made detailed findings of fact which were fully supported by the evidence, ruled the defendant's admissions were freely and voluntarily made, and admitted them in evidence before the jury.

The defendant did not testify on the *voir dire;* nevertheless, he did testify before the jury after the State had concluded its evidence. He argues the reviewing court must determine from the entire record whether incriminating admissions were voluntary, citing *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492. However,

in Fox the new trial was awarded upon the ground that incriminating admissions were made by the defendant after inducements were offered by the officers which tainted them as involuntary. In this case the defendant offered nothing on the *voir dire* which tended to impeach his admissions. His testimony before the jury failed utterly to disclose any facts or permit any findings that his statements in the Provost Marshal's office were other than knowingly, voluntarily and responsibly made. If we assume the defendant had a right to remain silent on the *voir dire,* permit the court to pass on the voluntariness of his confession and admitted in evidence and by his later testimony again challenge admissibility, even so the later testimony falls far short of impeaching the confession. In passing on his claim that his admissions were involuntary, it should be noted that he was a high school graduate, he had spent one year in college and four years in the Marines. It is worthy of note also that the defendant did not include in the record and permit this court to see Judge Fountain's charge. We have a right to assume therefore, that his Honor omitted nothing from the charge which would have helped the defendant. The decisions of this court fully sustain the findings that the defendant's admissions were voluntary and were properly admissible in evidence. *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68. The defendant abandoned his challenge to the indictments on the ground the grand jury was improperly constituted.

A careful review of the record fails to disclose any error in the trial.

No error.

H. T. MULLEN, JR., ADMINISTRATOR C.T.A. OF THE ESTATE OF WALTER W. SAWYER, JR. v. GWENDOLYN B. SAWYER

No. 51

(Filed 20 January 1971)

1. Parent and Child § 7— father's duty to support children

At common law the father's duty to support his children did not survive the father's death; this rule obtained even though the children were minors.

2. **Parent and Child § 7— father's contractual obligation to support children**

The support of a child by a parent may be the subject of a contract; the father may by contract create an obligation to support his child which will survive his death and constitute a charge against his estate, in which case the ordinary rules of contract law are applicable.

3. **Judgments § 10— consent judgment — contract between the parties**

A consent judgment is a contract between the parties entered upon the records of the court with the approval and sanction of a court of competent jurisdiction, and it is construed as any other contract.

4. **Contracts § 12— construction of contract — intention of the parties**

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

5. **Executors and Administrators § 20— debt of the estate — father's consent judgment to pay for children's support and college education**

A consent judgment in which a father agreed to support the children of a prior marriage and to provide them with a four-year college education created a debt in the legal sense which survived the father's death and became an obligation of his estate, where the provisions of the consent judgment clearly showed the father's intent to provide for the children's support and education after his death.

6. **Judgments § 10; Parent and Child § 7— daughter's right to support and education under father's consent judgment — marriage of the daughter**

Under the terms of a consent judgment wherein a father agreed (1) to support the children of a prior marriage until they reached the age of eighteen and (2) to provide the children with a four-year college education at the college of his choice, a daughter who married prior to her eighteenth birthday did not forfeit her right under the judgment to receive support and a college education.

7. **Parent and Child § 7— son's right to education expenses under father's consent judgment**

Under the terms of a consent judgment wherein a father agreed to provide his children of a prior marriage with a four-year college education at the college of his choice, a son who refused to attend the college of his father's choice did not forfeit his right to recover under the judgment for the expenses of his college education, where (1) the father not only selected a college for the son but also required that the son reside with him and his second wife while the son attended the college; (2) the son's living conditions with his father and stepmother were those of harassment, humiliation, and general nagging; (3) the son, unable to continue satisfactorily his education while living in the strained environment of his father's home, subsequently withdrew from the college; and (4) the son entered a college in another state and completed his education without his father's support.

8. **Contracts § 20— performance of contract — excuse of nonperformance**

One who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance.

ON *certiorari* to review the decision of the Court of Appeals reported in 8 N. C. App. 458, 174 S.E. 2d 646.

On 3 December 1934 Dr. Walter W. Sawyer, Jr. (Dr. Sawyer) was married to his first wife, Miriam Sherlock (Miriam). To this union were born two children: a son, Walter Wesley Sawyer III (Walter), on 24 April 1944, and a daughter, Sarah Margaret (Sarah), on 13 September 1949. In 1951 Dr. Sawyer and Miriam entered into a separation agreement. They were divorced on 27 October 1954. The separation agreement provided for Dr. Sawyer to pay monthly support for the benefit of his children until they reached the age of 18. The agreement also provided that Dr. Sawyer would procure and keep in force policies of endowment life insurance payable to each child at age 18, the proceeds to be used to fund a college education for each child.

On 27 October 1954 Dr. Sawyer married his second wife, Gwendolyn B. Sawyer (Gwendolyn). Later, he defaulted in some of his payments under the separation agreement, and suit was instituted in the Superior Court of Camden County to collect the arrearages of $4,500. On 3 March 1958 a consent judgment was entered before Judge Henry L. Stevens, Jr., settling the arrearages for $1,600. The consent judgment, among other things, provided:

"It is further ORDERED that within three days following the execution of this judgment the said Walter W. Sawyer shall forward to the said Miriam Sawyer King, at an address furnished by her attorneys, LeRoy & Goodwin, a check for $100 for the use and support of the two said minor children for the month of February 1958, and on or prior to the 10th day of each succeeding month through the calendar year 1958, shall in like manner forward said plaintiff, Miriam Sawyer King, and for such purpose, an additional check in the sum of $100; that beginning in January 1959, and extending through December 1959, the said defendant will pay the said plaintiff for like purpose the sum of $125 per month on or before the 10th day of each month; that

beginning in January 1960, the said defendant will pay the said plaintiff, for like purpose the sum of $150 per month on or before the 10th day of each month through the calendar year 1960; that beginning in January 1961, the said defendant will pay the said plaintiff for like purpose the sum of $200 per month on or before the 10th day of each succeeding month, *which said payment shall continue monthly until the eldest child reaches the age of 18 years, at which time said payments shall be cut in half and shall continue until the younger of said children reaches the age of 18 years, at which time all such payments due hereunder shall cease.*

"It is further ORDERED that the defendant, Walter W. Sawyer, Jr., *assume the burden of a four year college education for each of said children at the college of his choosing* and that *(sic)* such time he shall deal directly with said minor children in supplying the necessary funds for their scholastic requirements, but in the event at any period during said four years of such college education aforementioned, either or both of said children should refuse to go or to continue with college at any interim period, or should either or both of said children fail to pass their work, or by misconduct be refused by the college authorities reentry thereto, then, in such event, the said defendant is relieved of further educational responsibilities." (Emphasis added.)

The consent judgment further provided that a prior conveyance of a farm in Camden County by Dr. Sawyer to the defendant be set aside, and that Dr. Sawyer would not mortgage or dispose of this farm until the youngest child became 18, unless he gave bond or retained sufficient property to satisfy the support provisions of the judgment.

Walter graduated from high school in the spring of 1962 and entered Old Dominion College, the college of Dr. Sawyer's choice, in the fall of 1962. He voluntarily withdrew that same fall and did not thereafter attend a college chosen by his father. He did attend St. Mary's College and Towson State College, from which he graduated in 1967.

Dr. Sawyer died on 8 October 1965. Prior to his death he made the support payments as required by the 1958 consent

judgment. It was stipulated that Sarah did not receive any support from Dr. Sawyer or his estate from the date of his death until she became 18 on 13 September 1967. Sarah graduated from high school in 1967 and shortly thereafter married.

It was also stipulated that neither of Dr. Sawyer's children received any money from him for their college education with the exception of the money paid for the benefit of Walter during the time he lived in his father's home in Virginia and attended Old Dominion College.

It was further stipulated, "that the Will of Walter Wesley Sawyer, Jr., has been duly filed and probated by the Clerk of Superior Court of Camden County, North Carolina, and that H. T. Mullen, Jr., has been duly qualified and is acting in his fiduciary capacity as Administrator, C.T.A. That there is no personal property of the estate of Walter Wesley Sawyer, Jr. to be found in the State of North Carolina."

Following Mullen's qualification as Administrator, c.t.a., on 9 June 1969, two claims were filed with him by Walter and Sarah. Walter asserted that his father's estate owed him the sum of $9,100 for educational expenses incurred. Sarah asserted that Dr. Sawyer's estate owed her $2,700, with interest, for "delinquent child support payments" and $16,000 for "future college education expenses." These claims were allowed by the Administrator, c.t.a. In order to pay these claims, a proceeding was instituted by the Administrator, c.t.a., for the purpose of selling certain real estate devised to the defendant herein by the will of Dr. Sawyer.

Other facts germane to the decision are set forth in the opinion.

By consent, the matter was transferred to the civil issue docket of the Superior Court of Camden County. The parties waived trial by jury, and the case was heard by Judge Rudolph Mintz at the December 1969 Session. He found the North Carolina real estate to have a fair market value of $60,250 and ordered its sale. His judgment ordered payment of $2,400 to Sarah for support payments incurred after Dr. Sawyer's death and $12,000 to her (of the $16,000 requested) for the payment of her college expenses at Old Dominion College, this payment conditioned upon her actually attending that college. The judg-

ment further provided that Walter be paid the sum of $8,950 for expenses incurred in obtaining his college education.

From this judgment the defendant appealed to the Court of Appeals. In an opinion by Chief Judge Mallard, concurred in by Judges Morris and Graham, the Court of Appeals reversed the judgment entered by Judge Mintz.

Prior to the filing of the petition for writ of *certiorari*, H. T. Mullen, Jr., Administrator, c.t.a., of the estate of Dr. Sawyer, resigned. The Camden County Clerk of Superior Court thereupon appointed Grafton G. Beaman, attorney, as substitute Administrator, c.t.a., of the estate of Dr. Sawyer. Beaman duly qualified on 16 July 1970 and filed petition for writ of *certiorari*, which we allowed on 1 September 1970.

Small, Small & Watts by Thomas S. Watts for petitioner appellant.

Forrest V. Dunstan for defendant appellee.

MOORE, Justice.

[1] At common law the father's duty to support his children did not survive the father's death. *Gray v. Gray,* 273 N.C. 319, 160 S.E. 2d 1. This rule obtained even though the children were minors. *Elliott v. Elliott,* 235 N.C. 153, 69 S.E. 2d 224. As was said in *Layton v. Layton,* 263 N.C. 453, 139 S.E. 2d 732:

> " 'The relationship of parent and child is a status, and not a property right.' 67 C.J.S., Parent and Child, § 2, p. 628. At common law it is the duty of a father to support his minor children. *Elliott v. Elliott,* 235 N.C. 153, 69 S.E. 2d 224; *Green v. Green,* 210 N.C. 147, 185 S.E. 651; *Blades v. Szatai,* 135 A. 841, 50 A.L.R. 232. . . . The common law obligation of a father to support his child is not 'a debt' in the legal sense, but an obligation imposed by law. *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414. It is not a property right of the child but is a personal duty of the father which is *terminated by his death. Elliott v. Elliott, supra; Lee v. Coffield,* 245 N.C. 570, 96 S.E. 2d 726; *Blades v. Szatai, supra. These* common law principles have not been abrogated or modified by statute and are in full force and effect in this jurisdiction. G.S. 4-1; *Elliott v. Elliott, supra.*"

[2] The support of a child by a parent may be the subject of a contract, and the father may by contract create an obliga-

tion to support his child which will survive his death and constitute a charge against his estate, in which case the ordinary rules of contract law are applicable. *Layton v. Layton, supra; Church v. Hancock,* 261 N.C. 764, 136 S.E. 2d 81; *Stone v. Bayley,* 75 Wash. 184, 134 P. 820; 6 Strong's N. C. Index 2d, Parent and Child § 7, p. 168.

[3] A consent judgment is a contract between the parties entered upon the records of the court with the approval and sanction of a court of competent jurisdiction. It is construed as any other contract. *Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826; 5 Strong's N.C. Index 2d, Judgments § 10.

[4, 5] "The heart of a contract is the intention of the parties, which is ascertained by the subject matter of the contract, the language used, the purpose sought, and the situation of the parties at the time." *Pike v. Trust Co.,* 274 N.C. 1, 161 S.E. 2d 453. In the present case we must examine the contract created by the consent judgment to determine whether or not Dr. Sawyer intended to create a debt in a legal sense which would survive his death and become an obligation of his estate. The defendant contends that under the decision in *Layton v. Layton, supra,* the contract entered into by the parties did not create such an obligation.

In *Layton* the wife's action for alimony and child support was terminated by a consent judgment in which the husband agreed to pay $50 a month for the support of two children and to provide a dwelling house. In holding that this consent judgment did not manifest an intention that the obligation survive the husband's death, this Court said:

> " . . . It is clear that the primary purpose of the consent order was to fix the amount of support. . . . There is no provision, express or clearly implied, that the payments were to be continued after defendant's death. The order creates no lien upon any of E. C. Layton's property. There is no special consideration running to him as was the case in *Church v. Hancock, supra* [261 N.C. 764, 136 S.E. 2d 81]. The contract is silent as to the time of termination of support payments. . . . It is clearly the intention of the father to meet his common law obligation to his children and nothing more, and it was the intent and purpose of plaintiff and defendant that this obligation be fixed and certain as to

amount. There is nothing in the contract which imposes upon E. C. Layton any obligation or debt over and beyond that required and limited by the common law principles stated above."

In *Layton* the Court does set out certain provisions or conditions in the contract which can be considered in determining the intent. These are: (1) Does the language create a lien upon the father's property? (2) Is there a special consideration in favor of the father? (3) Is there a specific termination time for the payments? (4) Is there an obligation in excess of the common law duty to support? These elements in themselves may not be conclusive, but in the present case they may assist in determining the intent of Dr. Sawyer at the time he signed the consent judgment.

[5] Applying the criteria of *Layton,* the consent judgment makes it clear that Dr. Sawyer intended the Camden County farm to be security for the support payments and that these payments were to terminate at age 18—a definite time. There was a "special consideration" for the obligations which Dr. Sawyer assumed in the consent judgment—his monthly payments were reduced, and an arrearage of $4,800 was cancelled for $1,600. The consent judgment obligated Dr. Sawyer to provide each child a four-year college education without limit as to time or amount. This clearly exceeded the requirements of the common law. *Church v. Hancock, supra; Lee v. Coffield,* 245 N.C. 570, 96 S.E. 2d 726. Considering these and other provisions of the consent judgment, we hold that Judge Mintz correctly decided that Dr. Sawyer intended his agreement to support Sarah and provide Sarah and Walter with a four-year college education should survive his death and become an obligation of his estate.

[6] Defendant contends, however, that Sarah forfeited her right to support and to a college education by marrying. Sarah testified that she never enrolled at any college or university because she was "financially unable to attend." She further testified: "I want to go to college now because . . . I would like to better myself as a person and should anything happen to my husband, college would insure me a job to support myself and my son." It was stipulated by counsel that Sarah had never received any money for her college education. The consent judgment contained

no provision that Sarah's support or education would be affected by her marriage.

In *Church v. Hancock, supra,* the husband and wife entered into a separation agreement. In consideration of her relinquishment of certain rents, he agreed to pay her a monthly sum for the support of herself and the children of the marriage. The agreement provided for a reduction if the wife remarried or in the event of the death of a child. Otherwise, the payments continued to a specific date. One of the children married. The Court held that the marriage of the child did not reduce the payments, stating:

> " . . . The terms of the contract under consideration are plain and unambiguous. The parties provided for those contingencies which would, upon occurrence, reduce Charles H. Hancock's stipulated monthly payments. They were the plaintiff's remarriage and the death of a child or children. The separation agreement contained no provision for a reduction in the event of a child's marriage. . . . "

While *Church* referred only to payments for support, the reasoning applies equally to the obligation to provide for a college education. In the present case, Dr. Sawyer agreed to assume the burden of a four-year college education for each of his children without any proviso as to marriage. We hold that Sarah's marriage did not relieve Dr. Sawyer's estate of the obligation to support her until she arrived at the age of 18 or of the obligation to provide her with a four-year college education.

[7] Defendant further contends that Walter forfeited his right to a college education by refusing to attend the college of his father's choice, as provided for in the consent judgment. His father selected Old Dominion in Norfolk, Virginia as the college for Walter to attend, but added an additional requirement, not provided for in the consent judgment, that Walter reside in the home of Dr. Sawyer. Walter entered Old Dominion in the fall of 1962. He testified he was apprehensive about living in his father's house since he felt he and his sister had not been treated properly when they last visited his father and stepmother in 1958. However, he and his father decided "to give it a try, and if it didn't work out, other provisions would be made." From Walter's standpoint, it did not work out. He testified in substance that his living conditions with his father and stepmother

were ones of harassment, humiliation, and general nagging. His stepmother constantly referred to the financial sacrifices they were making to send him to college. She nagged him about lack of social graces and manners as well as inadequate background and training which his mother had given him. On one occasion he had a severe toothache and on visiting the dentist found numerous cavities which required attention. He was refused further dental care because his stepmother said this condition was due to his or his mother's neglect. Every time he violated one of the rules of conduct which his stepmother had laid down for him, she took 25¢ out of his weekly allowance of $3, which was provided him for lunches and other incidentals. If he used the wrong stairway, stepped on the living room rug, forgot to take out the garbage, etc., he was fined a quarter. He was not allowed to go to the ice box between meals, and he lived in a bedroom which had been fixed in the attic. He was not allowed to use the main stairway, but had to use the maid's entrance and the back way. Because of these conditions, Walter testified that he was unable to do college work and withdrew from Old Dominion about Thanksgiving in 1962. He later enrolled at St. Mary's College (a junior college) and after two and one-half years graduated from there and entered Towson State College in Baltimore as a junior. In 1967 he graduated from Towson with an A.B. degree. He received no financial support of any kind from his father after leaving Old Dominion.

Judge Mintz found as facts:

> "13. Said son had not visited in the home of his father and stepmother since 1957, prior to his enrollment in college in 1962. The lack of communication over the years between the son, Dr. Sawyer and Gwendolyn combined with the constant association during the period he attended Old Dominion College [and] resulted in a relationship between the individuals that was incompatible. Said son could not reasonably have been expected to procure a satisfactory college education while living in the strained environment produced by this situation. It was reasonably necessary for the son to extricate himself from this environment and to seek enrollment in a college where this environment did not exist. It was reasonable for the son to enroll in another college where the cost would be reasonable and comparable to the cost of the college education contemplated at the time

of the consent judgment. The withdrawal of said son from Old Dominion College did not constitute an abandonment or waiver of his rights to a college education pursuant to the consent judgment.

"14. Except for certain visitation rights of Dr. Sawyer with his son, the custody of the son was awarded by the separation agreement and the consent judgment to the mother and neither the consent judgment nor any other instrument required the son to live with Dr. Sawyer in order to obtain a college education. Requiring the son to submit to this additional condition was not contemplated at the time of the consent judgment by any party to that proceeding. By this additional condition Dr. Sawyer unilaterally altered the terms and provisions of said consent judgment; thus forcing his son to seek a college education at another, comparable institution."

Upon waiver of jury trial, the court's findings of fact, if supported by competent evidence, have the force and effect of a jury verdict. *MacKay v. McIntosh,* 270 N.C. 69, 153 S.E. 2d 800; *Priddy v. Lumber Co.,* 258 N.C. 653, 129 S.E. 2d 256; *Insurance Co. v. Lambeth,* 250 N.C. 1, 108 S.E. 2d 36.

There was ample competent evidence to support Judge Mintz's findings that the requirement that Walter live in the Sawyer home while he was attending college, and the "strained environment" created therein by the attitude and conduct of Dr. Sawyer and his wife, forced Walter to seek his college education at another institution. Judge Mintz then properly concluded that Walter did not abandon or waive his right to a college education by leaving Old Dominion.

[8] "It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance." *Harwood v. Shoe,* 141 N.C. 161, 163, 53 S.E. 616. Accord: *Bank v. Supply Co.,* 226 N.C. 416, 38 S.E. 2d 503; *Morrison v. Walker,* 179 N.C. 587, 103 S.E. 139; *Whitlock v. Lumber Co.,* 145 N.C. 120, 58 S.E. 909; 2 Strong's N. C. Index 2d, Contracts § 20.

5 Williston on Contracts, 3d ed., § 667A, p. 233, states the rule:

"It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he

has actually prevented it. Although the early decisions are to the contrary, it seems evident that the same principle of justice which precludes a promisor from taking advantage of a condition, the performance of which he himself has prevented, precludes him also from setting up a condition the performance of which he has made more difficult."

See 17 Am. Jur. 2d, Contracts § 427, p. 882; Restatement, Contracts § 295 (1932).

The indignities heaped upon Walter in the Sawyer household, and the utter disregard for his feelings, made it more difficult if not impossible for him to do satisfactory college work at Old Dominion. His leaving was justified and in no way affected his right to reasonable payment for a four-year college education from his father's estate.

For the reasons stated above, the decision of the Court of Appeals is reversed, and the case is remanded to that court with directions to enter a judgment affirming the judgment of the Superior Court.

Reversed and Remanded.

REDEVELOPMENT COMMISSION OF THE CITY OF WASHINGTON, NORTH CAROLINA v. BRYAN GRIMES AND WIFE, BOBBY H. GRIMES; AND JUNIUS D. GRIMES, JR. AND WIFE, LILY G. GRIMES

No. 48

(Filed 20 January 1971)

1. **Eminent Domain § 10; Municipal Corporations § 4— condemnation for urban redevelopment — duties of clerk — appointment of appraisers**

When the pleadings in a proceeding to condemn land for urban renewal present issuable matter, the cause is not transferred to the civil issue docket, but the clerk first passes on the questions presented after hearing evidence from all the parties; if the clerk decides in favor of petitioner, exceptions may be noted, and the clerk appoints commissioners to assess damages due the landowners.

2. **Eminent Domain § 11; Municipal Corporations § 4— condemnation for urban renewal — exceptions to commissioners' report — appeal to superior court**

In a proceeding to condemn land for urban renewal, it is only after the clerk of superior court confirms or fails to confirm the report of

the commissioners that either party aggrieved by the ruling of the clerk may appeal, and such appeal carries the entire record up for review by the trial judge upon the questions of fact. G.S. 40-16; G.S. 40-17; G.S. 40-18; G.S. 40-19.

3. **Courts § 6— proceedings before clerk brought before superior court judge — jurisdiction of judge to hear all matters in controversy**

The clerk is but a part of the superior court, and when a proceeding before the clerk is brought before the superior court judge in any manner, the judge's jurisdiction is not derivative but he has jurisdiction to hear and determine all matters in controversy as if the case was originally before him; however, the superior court judge may in his discretion remand the cause to the clerk for further proceedings.

4. **Eminent Domain § 11; Courts § 6— premature appeal to superior court from commissioners' report — jurisdiction of judge of superior court**

Although a proceeding to condemn property for urban renewal was erroneously transferred from the clerk to the superior court before the clerk had acted on the exceptions to the commissioners' report, the judge of superior court had full power to consider and determine all matters in controversy as if the cause was originally before him.

5. **Eminent Domain § 9; Municipal Corporations § 4— sufficiency of petition to condemn land for urban renewal**

The trial court erred in dismissing an action to condemn land for urban renewal where there was no finding that the redevelopment commission failed to comply with the statutory procedures prerequisite to an exercise of the power of eminent domain by it, and there was no allegation, proof or finding that the redevelopment commission arbitrarily abused its discretion or acted in bad faith in selecting the area in question, the court's findings that the property of respondents does not lie within a blighted area as defined in G.S. 160-456(2) or within a nonresidential redevelopment area as defined in G.S. 160-456(10) being an insufficient basis for dismissal of the action.

6. **Municipal Corporations § 4— condemnation of land for urban renewal — absence of jurisdictional defect on face of record.**

In this proceeding to condemn land for urban renewal, no jurisdictional defect appears on the face of the record which requires the Supreme Court, *ex mero motu,* to dismiss the action.

7. **Eminent Domain § 9; Municipal Corporations § 4— sufficiency of petition to condemn land for urban renewal — new Rules of Civil Procedure**

Petition to condemn land for urban renewal, although not a model one, *held* sufficient under the new Rules of Civil Procedure to state a claim for relief, where it gives notice of the nature and basis of petitioners' claim and the type of case brought, and alleges generally the occurrence or performance of the conditions precedent required by Ch. 160, Art. 37 and Ch. 40, Art. 2. Rules of Civil Procedure Nos. 9(c) and 12(e).

ON writ of *certiorari* to North Carolina Court of Appeals to review its decision (8 N.C. App. 376, 174 S.E. 2d 839) remand-

ing the cause to the Clerk of Superior Court of BEAUFORT County for further proceedings.

Redevelopment Commission of the City of Washington, North Carolina, in a petition to condemn respondents' property for an urban redevelopment project, alleged, *inter alia,* the following:

Redevelopment Commission was duly created and had the power of eminent domain. Respondents were the owners of the property therein described, subject to liens and encumbrances shown on attached exhibit. The Planning Commission of the City of Washington had certified an area within the City to be a blighted redevelopment area, non-residential in character, as defined in G.S. 160-456 (10). Thereafter the Redevelopment Commission prepared an urban renewal plan, and after due notice the Redevelopment Commission held a public hearing on said urban renewal plan. After the hearing, the City of Washington Planning Board reaffirmed that the area qualified under the provisions of G.S. 160-457. The real property, as shown on the map attached to the petition as Exhibit D, is an integral part of the project, and it is necessary that the real property be taken in order to accomplish the urban renewal plan previously adopted. The Redevelopment Commission had attempted by good faith bargaining to acquire the various pieces of property platted and shown on the map attached as Exhibit D. Petitioner alleged finally that the Redevelopment Commission proposed to carry out said plan for urban renewal.

Respondents filed answers denying all the allegations of the petition except for allegations of ownership and location of the land sought to be condemned.

On 1 May 1969 the Clerk of Superior Court of Beaufort County entered an order appointing commissioners of appraisal pursuant to G.S. 40-11, *et seq.* Respondents objected and excepted to the signing and entry of the order.

On 28 July 1969, the Commissioners filed their report. Petitioner filed exceptions to the report in due time, and respondents also filed exceptions and gave "notice of appeal."

The cause was heard by Judge Joseph W. Parker at the 3 November 1969 session of Beaufort Superior Court, and judgment was entered dismissing the action. Petitioner appealed to

the North Carolina Court of Appeals. North Carolina Court of Appeals remanded the cause to the Clerk of Superior Court of Beaufort County on the ground that the appeal to the Judge of Superior Court was premature. Respondents' petition for writ of *certiorari* to the North Carolina Court of Appeals was granted by this Court on 28 August 1970.

Mayo & Mayo, by William P. Mayo, and LeRoy Scott for plaintiff petitioner.

Wilkinson & Vosburgh, by John A. Wilkinson, for Bryan Grimes and wife, defendant respondents.

Carter & Ross, by W. B. Carter, for Junius D. Grimes, Jr. and wife, defendant respondents.

BRANCH, Justice.

[1] The power of eminent domain is exercised by a redevelopment commission pursuant to G.S. Chapter 40, Article 2, and Chapter 160, Article 37. Therefore, when the pleadings present issuable matter, the cause is *not* transferred to the Civil Issue Docket, but the clerk first passes on the questions presented after hearing evidence from all parties. If the clerk decides that petitioners cannot proceed with condemnation, then the petitioner may except and appeal. However, if the clerk decides in favor of the petitioner, exceptions may be noted, and the clerk appoints commissioners to assess damages due the landowners. The Commissioners, after viewing the premises and after due notice, hear the evidence of all interested parties and thereafter file their report. Within twenty days after the filing of the report, the parties to the proceeding may file exceptions, and the clerk decides the exceptions after all parties have received due notice and have been afforded opportunity to be heard.

[2] It is only after the clerk of superior court confirms or fails to confirm the report of commissioners that either party aggrieved by the ruling of the clerk may appeal, and such appeal carries the entire record up for review by the trial judge upon the questions of fact. G.S. 40-16, 40-17, 40-18, 40-19; *Railroad v. Railroad,* 148 N.C. 59, 61 S.E. 683; *Selma v. Nobles,* 183 N.C. 322, 111 S.E. 543.

Applying the above principles, we agree with the conclusion of the Court of Appeals that the attempted appeal from "Report

of Commissioners" was premature. However, we do not agree with the action of the Court of Appeals in directing the Judge holding Superior Court of Beaufort County "to remand this matter to the Clerk of Superior Court of Beaufort County in order that he might proceed herein as provided by law." In this connection we quote pertinent statutes:

> G.S. 1-272: Appeal from clerk to judge.—Appeals lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within ten days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof.

> G.S. 1-276: Judge determines entire controversy; may recommit.—Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so.

[3] The clerk is but a part of the superior court, and when a proceeding before the clerk is brought before the judge in any manner, the superior court's jurisdiction is not derivative but it has jurisdiction to hear and determine all matters in controversy as if the case was originally before him. *Potts v. Howser,* 267 N.C. 484, 148 S.E. 2d 836; *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602. However, the judge of superior court may in

his discretion remand the cause to the clerk for further proceedings. *York v. McCall,* 160 N.C. 276, 76 S.E. 84.

Selma v. Nobles, supra, is strikingly similar to instant case. There the court held that even when a proceeding is *erroneously* transferred to the superior court, and the judge takes "jurisdiction" pursuant to C.S. 637 (now G.S. 1-276), he may in his discretion make new parties, allow them to answer, and hold the case for jury determination before further proceedings are held.

[4] We conclude that in instant case the cause was erroneously transferred to the superior court; nevertheless, the judge of superior court had full power to consider and determine all matters in controversy as if the cause was originally before him.

[5] The crucial question is whether the judge of superior court correctly dismissed the action.

27 Am. Jur. 2d, Eminent Domain, Section 404, p. 284, contains the following:

> NECESSITY AND EXPEDIENCY OF TAKING.—
>
> It is ordinarily the rule that if the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment, or § 10 of Article 1, of the Federal Constitution. . . . While many courts have used sweeping expressions in the decisions in which they have disclaimed the power of supervising the selection of the site of public improvements, it may be safely said that the courts of the various states would feel bound to interfere to prevent an abuse of the discretion delegated by the legislature by an attempted appropriation of land in utter disregard of the possible necessity of its use, or when the alleged purpose is to cloak some sinister scheme.

In the case of *Board of Education v. Allen,* 243 N.C. 520, 91 S.E. 2d 180, the Alamance County Board of Education served notice as required by statute on respondents of its intention to appropriate land for public school use. Petition was filed with the clerk of superior court on the return date of the notice, and in accordance with G.S. 115-125, 1955 Supplement. Respond-

ents made a special appearance and moved to dismiss on the ground that they had not been properly made parties to the proceeding. The clerk denied the motion and respondents appealed to superior court. The judge of superior court affirmed the clerk's order and remanded for further proceedings before the clerk. The respondents appealed. The court, dismissing the appeal, stated:

> "The advisability of taking the property for public school use is a matter committed to the sound discretion of the petitioner with the exercise of which neither the respondents nor the courts can interfere. 'It is a political and administrative measure of which the defendants are not even entitled to notice or to be heard. (Authorities cited.), except as provided by statute. *Durham v. Rigsbee, supra; Selma v. Nobles,* 183 N.C. 322, 111 S.E. 543; *S. v. Jones,* 139 N.C. 613.
>
> "The action of the petitioner in selecting the site (not to exceed thirty acres) and in condemning the land so selected is not even subject to review by the courts except for arbitrary abuse of discretion or disregard of law. *Selma v. Nobles, supra; Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896."

See Anno. 44 A.L.R. 2d 1414. At page 1437 of this Annotation we find the folowing:

> In determining whether a particular area may legally be selected for redevelopment, either under the terms of the statute, or in terms of the requirement that the particular project serve a "public use," the role of judicial review is severally limited by the rule that the finding of the redevelopment authority, or similar administrative agency, that a particular area is "blighted," that redevelopment serves a "public use," or the like, is not generally reviewable, unless fraudulent or capricious, or, in some instances, unless the evidence against the finding is overwhelming.

And at page 1439:

> It has been repeatedly held or stated that the fact that some of the lands in an area to be redeveloped under redevelopment laws are vacant lands or contain structures in themselves inoffensive or innocuous does not invalidate the taking of the property, or invalidate the statute so permit-

ting, according to the form of the contention in the particular case, usually on the ground that the action was justified as a necessary concomitant of area, as compared to structure-by-structure, rehabilitation.

The case of *Selma v. Nobles, supra,* is a proceeding in which a municipality sought to condemn lands for cemetery purposes. There, referring to the statutes granting the power of eminent domain, the Court said:

> "In construing this legislation, the Court has held that where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation, and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by the law. *Power Co. v. Wissler,* 160 N.C. 269."

None of respondents' answers allege facts tending to show bad faith on the part of petitioner or an arbitrary abuse of the discretion granted to petitioner by statute. The answer of respondents Bryan Grimes and wife Bobby H. Grimes contains an allegation that the "Planning Commission of the City of Washington exceeded its authority in designating the Area." This conclusory statement concerning the action of the Planning Commission does not allege bad faith or such arbitrary abuse of discretion as will permit review by the court. Nevertheless, the trial court heard conflicting evidence on the question of whether the property in the area sought to be condemned—and more particularly the property of respondents—was of the character described in G.S. 160-456. The court, *inter alia,* found the following facts:

> The witnesses all agreed that it (Grimes property) was structurally sound and with repair was adequate for the purposes for which it was being used. The respondents testified that it had not been recently painted or minor repairs made for the reason that since about 1961 they had been advised that it would likely be acquired over their protest by the petitioner and that, consequently, they were reluctant to invest money in it that they might not be able to retrieve.

Upon this evidence the court is of the opinion and finds as a fact that the building is ideally located for its use as a law office and that there is a shortage of presently available sites for use as law offices in the Town of Washington near the site of the existing courthouse and of the new courthouse which will be built soon. The court further finds as a fact and based upon the evidence that with painting and minor repair the building is adequate for such use and that such use may be the highest and best use for which it is suitable. The court further finds that the building is not blighted, dilapidated, poorly ventilated or unsanitary. On the contrary, it has adequate sanitary facilities, adequate ventilation and is safely constructed and that it does not constitute a detriment to the sound growth of the community but, on the other hand, it serves a useful purpose as a law office used by an old and established firm and is a landmark having been used by it and other firms for approximately half a century. That its continued use for such purpose is advantageous to the people of the community and the county.

. . . .

No evidence was presented upon the question of whether or not the respondents had failed in good faith to bargain for the acquisition of this property by the petitioner for the reason that the court was of the opinion that it needed first to determine the questions hereinbefore discussed before proceeding to the determination of the question of fact raised by the portion of the petition and reply dealing with the subject of bargaining.

Based upon the above findings of fact, the court holds as a matter of law that the petitioner has failed to establish that the individual tract sought to be condemned is of the character as described in Subsection Two or Subsection Ten of G.S. 150-457 [160-456] and does not substantially contribute to the conditions allegedly endangering the area.

Based upon the facts above, the court is of the opinion as a matter of law that the petitioner has failed to show that the property sought to be condemned lies within a blighted area as such area is described in G.S. 160-456, Subsection Two or is within a non-residential development area, which is subject to be condemned under the provisions set out in General Statutes 160-456, Subsection Ten. In conse-

quence the question of fact, is the property belonging to the respondents described in the petition within a blighted area or a non-residential area in such sense that it is subject to condemnation in this proceeding must be answered, no, and the court does hereby answer said question of fact, no.

[5] Based on his findings of fact the trial judge dismissed the action. It is apparent from the findings of fact that the judgment was not founded on failure of petitioner to comply with the statutory procedures prerequisite to exercise of eminent domain. There was no finding of fact that the redevelopment commission arbitrarily abused its discretion or acted in bad faith in selecting the area; nor was there allegation or proof of facts sufficient to justify such a finding. Therefore, the facts found constitute no basis for dismissal of the action. *Selma v. Nobles, supra; Board of Education v. Allen, supra.*

[6] The respondents have not contended that there should be a dismissal of this proceeding because of petitioner's failure to allege or prove that it had followed the statutory procedures prerequisite to the exercise of eminent domain by it. We find no jurisdictional defect on the face of the record which requires us, *ex mero motu,* to dismiss the action. *Thornton v. Brady,* 100 N.C. 38, 5 S.E. 910; *State v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311; *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391.

The case of *Redevelopment Commission v. Hagins, supra,* holds that a redevelopment commission must exercise the power of eminent domain pursuant to Chapter 160, Article 37, and Chapter 40, Article 2, and that in order to invoke this power the redevelopment commission must affirmatively allege compliance with the statutory requirements.

G.S. 160-463, in part, provides:

> (g) Upon receipt of the planning commission's recommendation, or at the expiration of forty-five days, if no recommendation is made by the planning commission, the commission shall submit to the governing body the redevelopment plan with the recommendation, if any, of the planning commission thereon. . . .
>
> (h) The governing body, upon receipt of the redevelopment plan and the recommendation (if any) of the planning

> commission, shall hold a public hearing upon said plan. Notice of such hearing shall be given once a week for two successive weeks in a newspaper published in the municipality, or, if there be no newspaper published in the municipality, by posting such notice at four public places in the municipality, said notice to be published the first time or posted not less than fifteen days prior to the date fixed for said hearing. The notice shall describe the redevelopment area by boundaries, in a manner designed to be understandable by the general public. The redevelopment plan, including such maps, plans, contracts, or other documents as form a part of it, together with the recommendation (if any) of the planning commission and supporting data, shall be available for public inspection at a location specified in the notice for at least ten days prior to the hearing.
>
> At the hearing the governing body shall afford an opportunity to all persons or agencies interested to be heard and shall receive, make known, and consider recommendations in writing with reference to the redevelopment plan.
>
> (i) The governing body shall approve, amend, or reject the redevelopment plan as submitted.

Since decision in *Hagins* the legislature by Session Laws of 1965, c. 679, s. 3; c. 1132; 1967, c. 932, ss. 2, 3, rewrote G.S. 160-465. However, we do not deem it necessary to discuss the amendments since we conclude that the changes do not affect the holding in *Hagins*.

[7] The petitioner in instant case has alleged with particularity the essential requirements of G.S. 40-12. Its only attempt to allege compliance with subsections (g), (h) and (i) of G.S. 160-463 is by the following allegation: "That the petitioner is now exercising the powers of eminent domain granted to it pursuant to Chapter 160 and is proceeding pursuant to the provisions of Chapter 40 in the exercise of such powers of eminent domain and has met all requirements thereunder."

The rules of civil procedure became effective 1 January 1970, and apply to "all actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date." N. C. Sess. L. ch. 803 (1969).

In the case of *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161, this Court considered the action of Hubbard, J., in sustaining a demurrer and dismissing the action on the ground that the complaint failed to state a cause of action. The Court of Appeals by its opinion filed 31 December 1969 reversed the trial judge, and this Court allowed *certiorari* on 28 August 1970. In affirming the opinion of the Court of Appeals, this Court applied the North Carolina Rules of Civil Procedure and treated the demurrer as a motion to dismiss under Rule 12(b)(6) and, *inter alia*, stated:

> "By repealing G.S. 1-122, which required a complaint to state 'the facts constituting a cause of action,' and substituting in lieu thereof the requirement that a 'claim for relief' shall be stated with sufficient particularity to give *notice* of the events intended to be proved showing that the pleader is entitled to relief, the legislature obviously intended to change our prior law. We do not assume its choice of 'new semantics' was either accidental or casual. Considering the inspiration, origin, and legislative history of the NCRCP and the absence from it of the words 'facts' and the phrase 'facts constituting a cause of action' we conclude that the legislature intended to relax somewhat the strict requirements of detailed *fact* pleading and to adopt the concept of 'notice pleading.' . . .
>
> . . . .
>
> "Under the 'notice theory of pleading' a statement of claim is adequate if it gives sufficient notice of the claim asserted, 'to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought . . . . ' Moore § 8.13. 'Mere vagueness or lack of detail is not ground for a motion to dismiss.' Such a deficiency 'should be attacked by a motion for a more definite statement.' Moore § 12.08 and cases cited therein.

Rule 9(c) states: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."

[7] Although this petition is not a model, it appears to give notice of the nature and basis of petitioner's claim, the type of

the case brought, and generally to allege the occurrence or performance of the conditions precedent required by Ch. 160, Art. 37, and Ch. 40, Art. 2. Respondents' denials were general and lacked particularity and specifity. If respondents desire, they may move for a more definite statement. Rule 12(e).

The rights of the parties can be fully preserved with economy and dispatch by remanding this cause to the superior court of Beaufort County to the end that the judge holding courts may allow such amendments to the pleadings as he may deem proper, hear evidence, and enter judgment consistent with this opinion, or in his discretion remand to the Clerk of Superior Court of Beaufort County for like action.

This cause is remanded to the Court of Appeals with direction that it be remanded to the Superior Court of Beaufort County for further proceedings consistent with this opinion and existing law.

Error and Remanded.

STATE OF NORTH CAROLINA v. ROBERT LEE WOODY

No. 93

(Filed 20 January 1971)

1. **Arrest and Bail § 3; Criminal Law § 84; Searches and Seizures § 1— arrest without warrant — search incident to arrest**

   The arrest of defendant without a warrant for the armed robbery of an ABC store was lawful, where a clerk in the store told officers of the robbery just perpetrated, described the car in which the robber, a Negro, had fled with a white man, and gave officers the license number of the car, some seven or eight minutes after the robbery the officers observed a car fitting the description given and bearing the designated license number, with a white man and a Negro therein, and the officers approached the car and were told by the white man that defendant had robbed the store and had the money and a pistol on him; consequently, it was lawful for the officers, as an incident of the arrest, to search defendant then and there for weapons and for the fruits of the robbery. G.S. 15-41(2).

2. **Criminal Law § 84—testimony concerning search of defendant — necessity for voir dire**

   In this armed robbery prosecution, the trial court did not err in failing to conduct a *voir dire* examination to determine the legality of

defendant's arrest when defendant objected to testimony by the arresting officer as to what he found on the person of defendant where, at the time of defendant's objection to the solicitor's question concerning the result of the search, the testimony already received without objection showed a lawful arrest and a lawful search.

3. **Robbery § 4— armed robbery — sufficiency of evidence**

The trial court did not err in the denial of defendant's motion for judgment of nonsuit in this prosecution for robbery with firearms of an ABC store, the defendant's testimony that he was under the influence of alcohol and a tranquilizer pill not being considered in passing on the motion for nonsuit.

4. **Kidnapping § 1— elements of offense**

The offense of kidnapping consists of the unlawful taking and carrying away of a person by force and against his will.

5. **Kidnapping § 1— sufficiency of evidence**

The trial court did not err in the denial of defendant's motion for nonsuit on a charge of kidnapping, where the State's evidence tended to show that defendant, after robbing an ABC store, forced a bystander at gunpoint to drive him from the robbery scene to the point of defendant's arrest, defendant's testimony that the bystander went willingly, in response to defendant's offer to pay him for doing so, not being considered upon the motion for nonsuit.

6. **Kidnapping § 1— instructions — unlawfulness of taking and carrying away**

In this kidnapping prosecution, the trial court did not fail to instruct the jury that the taking and carrying away of the victim must be done unlawfully or without lawful authority.

7. **Kidnapping § 1— instructions — consent by victim**

In this kidnapping prosecution, the trial court did not fail to instruct the jury on the significance of defendant's contention that the alleged victim had consented, for a sum of money, to drive defendant from the scene of a robbery defendant had committed.

8. **Criminal Law § 6— instructions — defendant under influence of drugs**

In this prosecution for armed robbery and kidnapping, the trial court did not fail to instruct fully upon the defense that defendant was under the influence of drugs.

APPEAL by defendant from *Armtrong J.*, at the 22 June 1970 Criminal Session of FORSYTH, heard prior to determination by the Court of Appeals.

By indictments, proper in form, the defendant was charged with robbery with firearms and with kidnapping. He was found guilty as charged under each indictment. He was sentenced to imprisonment for a term of not less than 10 nor more than 15

years for the robbery and for a term of not less than 10 nor more than 30 years for the kidnapping, the latter sentence to commence at the termination of the former.

The evidence for the State was to the following effect:

At approximately 2 p.m. on 14 May 1970, the defendant entered Winston-Salem ABC store No. 3, in which there were then two clerks on duty and one customer. One of the clerks had known the defendant previously. After the departure of the customer, the defendant walked over to this clerk, pulled out a pistol, pointed it at the clerk's head and said, "Give it to me, Sammy," this being the name of the clerk's brother whom the clerk resembled. The clerk thereupon removed the drawer from the cash register and set it on the store counter. The defendant took the paper money from it, along with a package of silver half dollars and silver certificates which the clerk had separated from the other money. The other clerk having remarked that he did not believe the defendant meant "business," the defendant fired his pistol into the floor of the store and said to that clerk, "Pop, you'll be the next." He then walked over and removed all the paper money from that clerk's cash register drawer, putting into his pocket all the money taken from both clerks. The amount so taken from the cash registers was slightly more than $400.

A package containing silver coins and silver certificates, taken by the arresting officers from the defendant, was identified by the first clerk as the one taken from him and was introduced in evidence. The clerk likewise identified a .22 caliber pistol so taken by the officers as the one pointed at him by the defendant and it was offered in evidence.

While the defendant was in the act of removing the money from the second clerk's cash register drawer, Wesley C. Wooten entered the store to make a purchase, having his billfold in his hand. The defendant instructed Wooten to leave his billfold on the store counter, which Wooten did. Another customer then entered the store and, seeing what was in progress, went over to the wall.

After removing the money from the cash registers, the defendant told Wooten, "I'm not going to take your money." He then instructed one of the clerks to give him a bottle of whiskey

and also to give Wooten a bottle, saying Wooten was going to carry him away from there. The clerk so delivered the two bottles of whiskey, Wooten giving the clerk money for the bottle handed to him. The bottle so handed to the defendant was taken from him by the arresting officers and, after identification by the clerk was introduced in evidence.

Thereupon, Wooten and the defendant left the store, Wooten preceding the defendant. Wooten had never seen the defendant before. As he preceded the defendant out of the door, the defendant, having said to Wooten, "You are going to carry me where I want to go," stuck his pistol into Wooten's back, saying, "Let's go." Wooten turned away from the parking lot where his automobile was parked, but the defendant directed him back to it, again pushing the pistol into Wooten's back. Upon reaching Wooten's car, a brown and white 1958 Ford, they got in and drove away. The car choked down and the defendant pointed the pistol at Wooten, saying, "You had better get this thing rolling," which Wooten did. The defendant directed Wooten to drive to East Winston-Salem, but to no specific address therein. As they proceeded in a direction in which Wooten would not have gone but for the defendant's instruction and pistol, the defendant observed a woman on the sidewalk. He said she was his sister and directed Wooten to stop so he could give her some money. At this point, the clerks at the store having given the alarm in the meanwhile, two police cars came up. The officers directed Wooten and the defendant to get out of Wooten's car, which they did, some seven or eight minutes having elapsed since they left the store.

As Wooten's car left the parking lot, one of the clerks in the store wrote its license number upon a paper which he handed to the police officers upon their arrival at the store in response to the alarm. He also described the vehicle to the officers as a 1958 brown and white Ford, in which there were one white man and one Negro. The officers thereupon drove off in pursuit of the car and broadcast its description over the radio. When they observed a car fitting the description and bearing the designated license number, one white man and one Negro being therein, the officers approached it and directed the men (Wooten and the defendant) to get out, which they did. The officers immediately searched the defendant and took the pistol from his pocket, together with a quantity of paper money and the package con-

taining silver coins and silver certificates, and took the bottle of whiskey from the car. Prior to searching the defendant, the officers were also informed by Wooten that the defendant had robbed the store and had the money and the pistol on him. The pistol was loaded with four live rounds of ammunition and three empty shells.

The defendant was taken immediately to the police station and warrants charging him with robbery with firearms and with kidnapping were served upon him the same day.

Neither of the clerks in the store, nor the arresting officers, detected any odor of alcohol on the defendant's breath. His speech appeared normal. His actions were unhurried. One of the clerks noted that he seemed dazed, when he entered the store, so that the clerk's first reaction was to question whether any alcoholic beverage should be sold to him.

The defendant testified in his own behalf to the following effect:

On the day of the robbery he had had "something to drink" and had taken two pills called Cecco, which he said were tranquilizers. (There was no other evidence as to the nature of these pills.) He had been "on Ceccos" for five days preceding the robbery. On the occasion of the robbery, he "had mostly a happy mood and everything looked beautiful, and [he] felt that [he] was what you might say invulnerable; that [he] could do anything and just couldn't nothing happen to [him]."

Entering the store he walked up to the clerk, who was known to him, and said, "Fred, I want some money," pointing the pistol at the cash register and, when the clerk said, "That thing won't shoot," he demonstrated the clerk's error by shooting into the floor of the store. Thereupon, the clerk took the drawer out of the cash register and put it on the store counter. The other clerk then did the same with the drawer from his cash register. As the defendant was taking the bills out of the drawers, Mr. Wooten entered the store. He declined to take Wooten's money and requested Wooten to drive him across town. Upon Wooten's refusal he offered to pay Wooten to do so and Wooten said, "All right." They then left the store and drove away in Wooten's car. Passing his sister, as they drove along, he instructed Wooten to turn around and stop so that he might talk to his sister. Then seeing the police car coming behind them, he said, "Well, looks

like this is it." The officers came up and ordered him to get out of the car, which he did. The officer then reached in his pocket and got the money. The defendant then suggested to the officers that they divide it. Thereupon, the officers put handcuffs on him and put him in the police car. On the ride to the police station, the defendant remarked that it looked like he was a celebrity.

It was his intention to borrow some money from the clerk in the store.

The defendant finished the 12th grade in school, including schooling received while serving in the Army.

The defendant had previously been convicted of "strong-arm robbery," of carrying a concealed weapon and of discharging a firearm within the city. He denied that he was charged and convicted in 1968 of breaking and entering, asserting that he was charged rather with receiving stolen goods, saying, "I was buying a lot of hot stuff and selling it."

Attorney General Morgan, Assistant Attorney General Costen and Assistant Attorney General Melvin for the State.

White, Crumpler and Pfefferkorn by Joe P. McCollum, Jr., for the defendant.

LAKE, Justice.

[2] Relying upon *State v. Pike*, 273 N.C. 102, 159 S.E. 2d 334, the defendant assigns as error the failure of the trial judge to conduct a *voir dire* examination to determine the legality of the defendant's arrest when the defendant objected to the arresting officer's testifying as to what he found upon the defendant's person, no reason for such objection having been stated. This assignment of error is without merit.

[1] The question to which the objection was made was, "What did you find on his person?" Prior to this question, the officer had testified, without objection, that the clerk at the ABC store had told him of the robbery just perpetrated and that the robber had fled from the scene in a brown and white 1958 Ford with two occupants, one a white man and one a Negro, the car bearing a specified license number; that the car in which the defendant, a Negro, was riding with a white man met this description

and carried a license tag with the specified number; the officer approached this car and instructed the defendant to get out and put his hands on the top of the car, which the defendant did; and the officer then searched him. Previously, Mr. Wooten, the white man who was in the vehicle with the defendant, had testified, without objection, that this occurred seven or eight minutes after they left the ABC store, and that he told the officers the defendant had robbed the store and had the money and the pistol.

Under these circumstances, the arrest of the defendant without a warrant was clearly lawful. G.S. 15-41(2). Having every reason to believe that the defendant was an armed robber, fleeing from the scene of the crime just perpetrated, it was lawful for the officer, as an incident of the arrest, to search him then and there for weapons and for the fruits of the robbery. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889; *State v. Tippett,* 270 N.C. 588, 595, 155 S.E. 2d 269.

[2] At the time of the defendant's objection to the solicitor's question concerning the result of the search, the testimony already received, without objection, showed a lawful arrest and a lawful search. The defendant did not request an inquiry in the absence of the jury into these matters and did not suggest that he desired to offer testimony contradicting that of the State on these points. *State v. Pike, supra,* on the other hand, was a case in which there was no search of the defendant, but the officer was asked what items the defendant, himself, removed from his pocket in the presence of the officers. Upon objection, the jury was excused and, while the jury was out, the defendant requested the court to hear his testimony with reference to the admissibility of the self-incriminating evidence. This request was denied and the officer was thereupon permitted to testify, in the presence of the jury, concerning the items so removed by the defendant from his own pocket. The Pike case is clearly distinguishable from the present one.

[3-5] The assignment of error for the failure of the trial court to grant the defendant's motion for judgment of nonsuit in both cases is overruled. It would be difficult to imagine clearer evidence of robbery with firearms than that presented by the State in this case. Upon this motion, the defendant's testimony as to his being under the influence of alcohol and a tranquilizer pill would not be considered. On the motion of judgment of nonsuit, the evidence of the State must be taken to be true and interpreted

in the light most favorable to the State's contentions. The offense of kidnapping consists in the unlawful taking and carrying away of a person by force and against his will. *State v. Bruce,* 268 N.C. 174, 182, 150 S.E. 2d 216; *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 541, 139 S.E. 2d 870. The evidence of the State is ample to show the defendant so took Wooten and carried him from the scene of the robbery to the point of the defendant's arrest. The defendant's testimony that Wooten went willingly, in response to the defendant's offer to pay him for doing so, is not to be considered upon the motion for judgment of nonsuit.

[6] The defendant's third assignment of error is that the judge, in instructing the jury as to the elements of the offense of kidnapping, did not state that the taking and carrying away of the victim must be done unlawfully or without lawful authority. In the present case, there was no evidence to suggest and no contention to the effect that the defendant took and carried Wooten away from the ABC store by lawful authority. Furthermore, the court expressly instructed the jury that it would return a verdict of not guilty if the State has failed to satisfy it from the evidence and beyond a reasonable doubt that the defendant "*unlawfully,* wilfully and feloniously, by the use of a pistol * * * forcibly and against his will took and carried Wooten away by making Wooten drive him from the ABC store * * * ." (Emphasis added.) Immediately prior to this statement, the court instructed the jury, "And kidnapping * * * means the *unlawful* taking and carrying away of a person by force against his will." (Emphasis added.) This assignment of error is overruled.

[7] The fourth assignment of error is that the judge "failed to instruct on the significance of Mr. Wooten's consenting to driving the defendant." On the contrary, the court stated four times in its charge that to constitute the offense of kidnapping, the taking and carrying away of the alleged victim must be "against his will." In addition, the court, in reviewing the defendant's contentions, instructed the jury that the defendant contended that he did not kidnap Wooten, but Wooten agreed to drive the defendant for a sum of money. There is no merit in this assignment of error.

[8] The fifth and last assignment of error is that the judge failed to instruct fully upon the defense that the defendant was under the influence of drugs. It is also without merit.

The sentences imposed upon the defendant for these offenses were severe, but neither exceeded the maximum permitted by the statute applicable to the offense in question. It was in the discretion of the trial judge to provide that they should run consecutively and not concurrently. With his exercise of this discretion, we are not authorized to interfere.

No error.

S. S. KRESGE COMPANY, SKY CITY STORES, INC., AND ZAYRE OF HIGH POINT, INC. v. ROBERT D. DAVIS, MAYOR OF THE CITY OF HIGH POINT, PAUL CLAPP, WILLIAM BENCINI, FRED M. YODER, FRED SWARTZBERG, J. COY PUTMAN, JAMES R. SHELTON, O. ARTHUR KIRKMAN, AND JOHN W. THOMAS, JR., MEMBERS OF THE CITY COUNCIL FOR THE CITY OF HIGH POINT, NORTH CAROLINA; LAURIE PRITCHETT, CHIEF OF POLICE OF THE CITY OF HIGH POINT; DOUGLAS ALBRIGHT, SOLICITOR OF THE SUPERIOR COURT; AND ROSS STRANGE, DISTRICT COURT PROSECUTOR

No. 34

(Filed 20 January 1971)

1. **Constitutional Law § 14; Municipal Corporations § 32; Sundays and Holidays— validity of High Point blue law**

   Sunday observance ordinance of the City of High Point is valid on its face.

2. **Municipal Corporations § 32— constitutionality of Sunday observance ordinance — unequal enforcement — sufficiency of pleadings**

   In an action by retailers of general merchandise seeking to challenge the constitutionality of a municipal Sunday observance ordinance and the unequal enforcement thereof, the plaintiff's allegations that the municipal executive and law-enforcement authorities have intentionally and illegally discriminated between the plaintiffs and their competitors by selective enforcement against the plaintiffs while openly permitting violations of the ordinance by their competitors, both in permitting other nonexempt business establishments to open for operation on Sunday and in permitting exempt and nonexempt establishments to sell forbidden types of merchandise on Sunday, *held* sufficient to state a cause of action.

3. **Constitutional Law § 20— equal protection of the law — state constitution**

   The principle of the equal protection of the law has been expressly incorporated in Art. I, § 19, of the Constitution of North Carolina, effective 1 July 1971.

4. **Constitutional Law § 20— equal protection of the law — administration and enforcement of the law**

The constitutional protection against unreasonable discrimination under color of law is not limited to the enactment of legislation, but it also extends to the administration and execution of laws valid on their face.

5. **Constitutional Law § 20— establishing unequal administration of the law — proof that other violators have not been prosecuted**

One who violates a law valid on its face does not bring himself within the protection of the rule against unequal administration of the law merely by showing that numerous persons have also violated the law and have not been arrested and prosecuted therefor.

6. **Constitutional Law § 20— equal enforcement of the laws — delay or laxity in enforcement**

Mere laxity, delay or inefficiency of the police department, or of the prosecutor, in the enforcement of an otherwise valid statute or ordinance does not destroy the law or render it invalid and unenforceable.

7. **Constitutional Law § 20— selective enforcement of a law — effect on the validity**

The selective enforcement of a law does not destroy the law if such enforcement has a reasonable relation to the purpose of the legislation.

8. **Constitutional Law § 20— equal enforcement of the laws — presumption**

It will not be presumed that an unlawful administration of the laws results from intentional or purposeful discrimination by state officers.

9. **Injunctions § 5— enjoining the enforcement of a criminal statute — general rule**

Nothing else appearing, the enforcement of an ordinance by the criminal prosecution of those who violate it will not be enjoined in a suit brought by an acknowledged violator, whose contention is that the ordinance is invalid or that it is administered or enforced in a discriminatory manner.

10. **Injunctions § 5— enjoining the enforcement of a statute — grounds for injunctive relief**

Where a plaintiff's legitimate business is threatened with destruction through an announced purpose of making repeated arrests of his employees or customers and charging them with the violation of an allegedly invalid law, a suit for injunctive relief is an appropriate procedure for testing the constitutionality of the law or of the contemplated enforcement program.

11. **Pleadings § 26— demurrer for failure of complaint to allege facts constituting a cause of action**

Where plaintiffs alleged in their complaint facts which, if true, entitle them to injunctive relief, it is error to sustain defendants' de-

murrer to the complaint on the ground that the complaint did not allege facts constituting a cause of action.

12. **Municipal Corporations § 8— prior discriminatory enforcement of ordinance — effect on present enforceability**

The past discriminatory enforcement of a valid ordinance does not render the ordinance presently void or unenforceable.

13. **Municipal Corporations §§ 8, 32; Injunctions § 5—municipal blue law — scope of injunctive relief**

In an action by general retailers challenging the discriminatory enforcement of a municipal Sunday observance ordinance, a restraining order which enjoined the municipality from enforcing or giving any effect whatever to the ordinance is vacated by the Supreme Court on the ground that the selective enforcement of the ordinance in the past, even if discriminatory, did not estop the city from inaugurating and carrying out a nondiscriminatory enforcement policy.

APPEAL by plaintiffs from the decision of the Court of Appeals, reported in 8 N.C. App. 595, affirming a judgment of *Exum, J.*, in the Superior Court of GUILFORD.

The appeal is from a judgment sustaining a demurrer *ore tenus* to the complaint for the reason that it fails to state facts sufficient to constitute a cause of action. Pending this appeal the Superior Court continued in effect a restraining order entered contemporaneously with the filing of the complaint.

The complaint alleges in substance (numbering revised):

1. The plaintiffs are retailers of general merchandise, operating business establishments within the corporate limits of the City of High Point and offering for sale therein a wide variety of merchandise.

2. On 19 August 1965, the City Council of High Point adopted § 15 35 of the Code of Ordinances of the city, which section regulates the business of merchandising within the city. A copy of this ordinance is attached to and made part of the complaint. It prohibits from midnight Saturday to midnight Sunday the offering, exposing for sale and sale of merchandise and the opening of a place of business for such sale, unless such place of business is expressly exempted in the ordinance. It further prohibits such exempt business establishments from selling, exposing or offering for sale to the public specified types of merchandise, all of which are customarily sold by the plaintiffs in their respective places of business.

3. Types of business establishments exempted by the ordinance include drug stores, curb markets, garages, filling stations and newsstands. Since the adoption of the ordinance, numerous establishments of these exempted types, with the acquiescence of the executive authorities of the city, charged with the duty of enforcing the ordinance, have regularly offered for sale and sold on Sunday in their respective establishments merchandise of the types forbidden to be sold even in exempted establishments. Numerous other establishments, not exempted by the ordinance, including the "Pro Shop" maintained upon a golf course owned by the city, pet shops, camping trailer dealers and sporting goods stores, have, with the acquiescence of the city authorities, charged with the duty of enforcing the ordinance, regularly opened their establishments for business on Sunday and have offered for sale therein types of merchandise, the sale of which is prohibited even in exempt establishments.

4. Notwithstanding frequent and regular violations of the ordinance, as above set forth, since the adoption of the ordinance on 19 August 1965, warrants have been issued for not more than "approximately three" persons for violating the ordinance by illegal opening of their business establishments or by sale therein of merchandise forbidden to be sold on Sunday.

5. On Sunday, 30 November 1969, plaintiffs opened their respective business establishments and offered therein for sale to the public, between the hours of 1 p.m. and 6 p.m., all types of merchandise generally carried for sale therein. On that occasion, 42 employees of the plaintiffs were arrested by police officers in a massive deployment of police personnel and were charged with violating the ordinance either by opening the establishment for business or by selling items of merchandise of types prohibited by the ordinance to be sold on Sunday. By this "invidiously discriminatory" action of the law enforcement authorities of the city, the plaintiffs were compelled to close their business establishments or "face the threat of financial ruin, imprisonment and loss of employees."

6. The ordinance makes each separate sale or offer to sell a separate violation of the ordinance. No specific penalty being provided in the ordinance for its violation, § 1-4 of the City Code of Ordinances applies and under it any violation is a misdemeanor, the penalty for which shall not exceed a fine of $50.00

or imprisonment for 30 days. Each of the plaintiffs carries for sale an inventory of more than 100,000 items of merchandise prohibited by the ordinance to be sold on Sunday. By opening for business, contrary to the prohibition of the ordinance, the plaintiffs and their employees risk penalties of 30 days imprisonment for sale of each item of merchandise, so that the cumulative penalties which could be imposed under the ordinance are "so enormous and severe as to prohibit plaintiffs from doing business on Sunday pending a judicial construction of the ordinance." The enforcement provisions of the ordinance are unconstitutional upon their face, being violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Art. I, § 17, of the Constitution of North Carolina.

7. The ordinance does not define "drug store." Drug stores in the City of High Point are, in fact, general merchandise stores, as are the stores of the plaintiffs. They sell regularly, including sales on Sunday, hardware, electrical appliances, articles of clothing, housewares and tools. The plaintiffs, in their stores, also offer for sale these types of articles. The classification which the ordinance attempts to make is unreasonable, arbitrary, not consistent with the facts, and oppressive in that it discriminates within a class between competitors similarly situated. The ordinance permits, by its failure to prohibit the same, cosmetics, firearms and ammunition to be sold on Sunday in exempt stores. Permitting the sale of these articles has no reasonable relation to the public peace, welfare, safety and morals and discriminates against the plaintiffs who, as general retailers, sell the same types of merchandise.

8. From the date of the adoption of the ordinance to the present time, the city authorities, charged with the enforcement of the ordinance, have intentionally, purposely, unjustly and illegally discriminated between plaintiffs and their competitors by selective enforcement of the referenced Sunday closing ordinance against plaintiffs and their employees while openly permitting violations of said ordinance by competitors and their employees, both as said ordinance applies to non-exempt businesses and as it applies to exempt businesses selling items, the sale of which is prohibited on Sundays. This is a violation of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States

and a violation of the Constitution of North Carolina, Art. I, § 17.

9. The damage and injury done to the plaintiffs by reason of such deprivation of their rights is continuing and irreparable due to the existence of the ordinance and the discriminatory enforcement thereof.

The prayer of the complaint is that the ordinance be declared in violation of the Constitution of the United States and of the Constitution of North Carolina and void, and that a preliminary and a permanent injunction be issued restraining the defendants and their employees from enforcing the ordinance.

Rossie G. Gardner and Jerry C. Wilson for plaintiff appellants.

Knox Walker, Attorney for City of High Point; Morgan, Byerly, Post and Keziah, by J. V. Morgan; Smith and Patterson, by Norman B. Smith for defendant appellees.

LAKE, Justice.

[1] In all respects material to this appeal the ordinance of the City of High Point here in question is identical with the ordinances of the cities of Raleigh, Winston-Salem and Charlotte held valid by this Court in *Kresge Co. v. Tomlinson* and *Arlan's Dept. Store v. Tomlinson,* 275 N.C. 1, 165 S.E. 2d 236; *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. The businesses operated by the plaintiffs in the City of High Point, as described in their complaint, are substantially the same as those operated by the plaintiffs in each of the above cases. Upon the authority of those decisions, we hold that the ordinance now before us, on its face, is a valid enactment, does not discriminate unlawfully against these plaintiffs, either in its classification of business establishments which may and may not be operated on Sunday or in its classification of types of merchandise which may and may not be sold in establishments permitted to remain open on Sunday, and does not violate any constitutional right of the plaintiffs asserted by them herein. See also: *Raleigh Mobile Home Sales, Inc. v. Tomlinson,* 276 N.C. 661, 174 S.E. 2d 542; *Clark's v. West,* 268 N.C. 527, 151 S.E. 2d 5; *State v. Towery,* 239 N.C. 274, 79 S.E. 2d 513; *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783; *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198.

Decisions of the Supreme Court of the United States make it clear that it does not, on its face, violate the provisions of the Fourteenth Amendment to the Constitution of the United States. *Two Guys v. McGinley,* 366 U.S. 582, 81 S.Ct. 1135, 6 L. Ed. 2d 551, *rehear. den.,* 368 U.S. 869, 82 S.Ct. 21, 7 L. Ed. 2d 69; *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L. Ed. 2d 393; *Silver v. Silver,* 280 U.S. 117, 50 S.Ct. 57, 74 L. Ed 221; *Dominion Hotel v. Arizona,* 249 U.S. 265, 268, 39 S.Ct. 273, 63 L. Ed. 597; *Patsone v. Commonwealth of Pennsylvania,* 232 U.S. 138, 144, 34 S.Ct. 281, 58 L. Ed. 539.

[2] The plaintiffs contend that notwithstanding the validity of the ordinance, upon its face, it has been rendered void and they are entitled to an injunction against its enforcement because the city officials have discriminated against the plaintiffs in its enforcement. They allege that, from the date of the adoption of the ordinance to the present time, the city executives and law enforcement authorities have "intentionally, purposely, unjustly and illegally discriminated between plaintiffs and their competitors by selective enforcement * * * against plaintiffs and their employees while openly permitting violations of said ordinance by competitors and their employees," both by permitting other non-exempt business establishments to open for operation on Sunday and by permitting exempt and non-exempt establishments to sell on Sunday types of merchandise which the ordinance forbids to be sold on Sunday in any establishment. The truth of this allegation is admitted, for the purpose of this appeal, by the demurrer.

[3] This Court has said that the principle of the equal protection of the law, made explicit in the Fourteenth Amendment to the Constitution of the United States, was also inherent in the Constitution of this State even prior to the revision thereof at the General Election of 1970. *State v. Glidden Co.,* 228 N.C. 664, 46 S.E. 2d 860; *State v. Fowler,* 193 N.C. 290, 136 S.E. 709. By the above mentioned revision, it has now been expressly incorporated in Art. I, § 19, of the Constitution of North Carolina, effective 1 July 1971.

[4] This constitutional protection against unreasonable discrimination under color of law is not limited to the enactment of legislation. It extends also to the administration and the execution of laws valid on their face. *Yick Wo v. Hopkins,* 118 U.S.

356, 6 S.Ct. 1064, 30 L. Ed. 220; *Ex Parte* Virginia, 100 U.S. 339, 25 L. Ed. 676.

In the Yick Wo case the Court said, "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." That was a *habeas corpus* proceeding brought by a Chinese, imprisoned because he operated a laundry in a wooden building in the City of San Francisco in violation of a city ordinance. The ordinance prohibited operation of a laundry, except in a brick or stone building, without a permit granted by the city's Board of Supervisors. It was admitted that the petitioner, and 200 of his countrymen similarly situated, had petitioned the board for permission to continue their businesses in the same houses in which they had been operating laundries for many years, in accordance with health and fire regulations, and that all petitions from Chinese applicants had been denied, whereas all, save one, of the applications for permits from persons not Chinese had been granted. The Supreme Court of the United States noted that the ordinance provided no standards for the guidance of the board and, therefore, conferred upon it the power to give or withhold permits arbitrarily. However, as above noted, the Court declared that the discriminatory administration of the ordinance was a denial of the equal protection of the law and required the discharge of the prisoner from state custody.

[5-7] One who violates a law, valid upon its face, does not bring himself within the protection of the Yick Wo rule merely by showing that numerous other persons have also violated the law and have not been arrested and prosecuted therefor. Mere laxity, delay or inefficiency of the police department, or of the prosecutor, in the enforcement of a statute or ordinance, otherwise valid, does not destroy the law or render it invalid and unenforceable. Even selective enforcement does not have that effect if it has a reasonable relation to the purpose of the legislation, such as making efficient use of police manpower by concentrating upon the major sources of the criminal activity. 16 AM. JUR. 2d, Constitutional Law, § 541; Comment, "The Right to Nondiscriminatory Enforcement of State Penal Laws," 61

Columbia L. Rev. 1103, 1113. The writer of this law review comment observes, at p. 1119, "A long line of decisions in many jurisdictions has established the prosecutor's broad power to choose whom to prosecute after weighing such factors as the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the state, and his own sense of the justice in the particular case."

In *Snowden v. Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L. Ed. 497, *rehear. den.,* 321 U.S. 804, the Supreme Court of the United States, speaking through Chief Justice Stone, said:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

[8] Such discriminatory purpose is not presumed. *Tarrance v. Florida,* 188 U.S. 519, 23 S.Ct. 402, 47 L. Ed. 572. The good faith of the officers is presumed and the burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies. See: *Mackay Telegraph Co. v. Little Rock,* 250 U.S. 94, 39 S.Ct. 428, 63 L. Ed. 863; *Sunday Lake Iron Co. v. Wakefield,* 247 U.S. 350, 38 S.Ct. 495, 62 L. Ed. 1154; *Snowden v. Hughes, supra.* For the purposes of this appeal, however, the requisite purposeful, intentional discriminatory enforcement is admitted by the demurrer to the complaint and must, therefore, be taken as established.

[9-10] Nothing else appearing, the enforcement of an ordinance, by the criminal prosecution of those who violate it, will not be enjoined in a suit brought by an acknowledged violator, whose contention is that the ordinance is invalid or that it is administered or enforced in a discriminatory manner. His right to present this defense at his trial on the criminal charge, or to maintain a civil action for damages, is deemed to constitute an adequate remedy at law. See: *Jarrell v. Snow,* 225 N.C. 430, 35 S.E. 2d 273; *McCormick v. Proctor,* 217 N.C. 23, 6 S.E. 2d 870; *Cohen v. Commissioners,* 77 N.C. 2. Where, however, a plaintiff's legitimate business is threatened with destruction, through an announced purpose of making repeated arrests of his employees or customers and charging them with the violation of an alleged-

ly invalid law, a suit for injunctive relief is an appropriate procedure for testing the constitutionality of the law, or of the contemplated enforcement program. See, *Advertising Co. v. Asheville*, 189 N.C. 737, 128 S.E. 149. See also, the above cited comment in 61 Columbia L. Rev. 1103, 1133, 1136.

[2, 11] We hold that the plaintiffs have alleged in their complaint facts which, if true, entitle them to injunctive relief. It was, therefore, error to sustain the defendants' demurrer to the complaint on the ground that the complaint did not allege facts constituting a cause of action.

[12] We further hold that the City of High Point has the authority to enforce, in a constitutional manner, the ordinance in question. The past discriminatory enforcement practices alleged in the complaint, if true, do not render the ordinance presently void or unenforceable.

[13] We further hold that the restraining order entered in the Superior Court was improvidently granted and the defendants' motion in this Court to vacate the same is hereby allowed. The restraining order enjoined the defendants from enforcing or giving any effect whatever to the ordinance. Assuming the truth of all allegations of the complaint, with reference to past discrimination in the enforcement of the ordinance, the restraining order went far beyond the relief to which the plaintiffs were entitled. It left no way for a new, or a repentant, city administration to begin a general, nondiscriminatory enforcement of this valid ordinance. Past selective enforcement, even though purposefully and intentionally discriminatory, does not estop the city from inaugurating and carrying out a nondiscriminatory enforcement policy and program. At the most, the plaintiffs would be entitled to no more than an order restraining the defendants from enforcing the ordinance against these plaintiffs so long as they continue the discriminatory practices alleged in the complaint.

The judgment of the Court of Appeals is, therefore, reversed, the restraining order is vacated and the matter is remanded to that Court with direction to enter a judgment further remanding it to the Superior Court for the entry of a judgment overruling the demurrer to the complaint and allowing the defendants to file their answer.

Reversed and remanded.

KENNETTE FRAZIER PANHORST v. GEORGE M. PANHORST, JR.

No. 60

(Filed 20 January 1971)

1. **Trial § 33; Rules of Civil Procedure § 51— application of law to evidence — duty of court**

The trial court has the duty to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence. Rule of Civil Procedure No. 51(a), formerly G.S. 1-180.

2. **Divorce and Alimony §§ 8, 16— abandonment defined**

One spouse abandons the other, within the meaning of G.S. 50-16.2(4), where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it.

3. **Divorce and Alimony §§ 8, 16— constructive abandonment**

One spouse may abandon the other without physically leaving the home; in that event, the physical departure of the other spouse from the home is not an abandonment by that spouse.

4. **Divorce and Alimony §§ 8, 16— constructive abandonment**

A constructive abandonment by the defaulting spouse may consist of either affirmative acts of cruelty or of a wilful failure, as by a wilful failure to provide adequate support.

5. **Divorce and Alimony §§ 8, 16— constructive abandonment — defect due to illness or physical disability**

There is no wilful failure, and so no constructive abandonment, where the defect of which the departing spouse complains is due to the illness or physical disability of the remaining spouse and his or her consequent inability to act.

6. **Divorce and Alimony §§ 8, 16— alimony without divorce — defense of constructive abandonment**

In an action by a wife for alimony without divorce, G.S. 50-16.2 does not preclude the husband, who has left the home, from proving as a defense that it was actually the wife who separated herself from him, though she did not leave the home.

7. **Divorce and Alimony § 16— defense of constructive abandonment — wife's failure due to physical condition — instructions**

In this action by the wife for alimony without divorce on the ground of abandonment wherein the husband asserted the failure of the wife to engage in sexual relations with him as justification for his departure from the home, the evidence required the trial court to instruct the jury that if the failure of the wife was not wilful but was due to her health and physical condition, such failure would not consti-

tute a constructive abandonment of the husband by the wife and would not be justification for his departure from the home.

ON *certiorari* to the Court of Appeals to review its decision reported in 9 N.C. App. 258.

This is a suit for alimony without divorce. The plaintiff alleges that she and the defendant were married and lived together for 33 years until 9 October 1968, when the defendant abandoned and deserted her without just cause. No children were born of the marriage. She further alleges that the defendant, over a period of six months prior to the abandonment, committed adultery with one Billie Woodby Wyatt and that by reason of the abandonment she is entitled to alimony without divorce and counsel fees. She alleges that she is dependent upon the defendant, her total income being insufficient for her living expenses and that she and the defendant own a home as tenants by the entireties, in the purchase of which home a substantial part of her individual funds was invested. Prayer for relief was for an order allotting to the plaintiff reasonable subsistence and counsel fees pending the final determination of the action, for an injunction restraining the defendant from disposing of any of his property pending the final determination of this action, that she be given the sole possession of the home and for such further relief as may be just and proper.

The defendant by his answer denied the alleged abandonment and the alleged adultery. He further denied that the plaintiff is a dependent spouse and her allegations concerning her investment in the home. For a further answer he alleged that throughout their marriage the plaintiff was unresponsive to his overtures of affection and refused to engage in sexual relations with him except on rare occasions, for which reason he finally left the home which they had previously occupied together, he having at all times throughout the marriage been a dutiful and faithful husband and having done nothing to bring about the unaffectionate attitude of the plaintiff toward him. He also alleged as a further answer that he and the plaintiff own as tenants by the entireties a home, reasonably worth $45,000 and encumbered by mortgages for approximately $22,000, on which he is paying interest.

The matter came on for trial before a jury in the General County Court. The following issues were submitted:

1. Did the defendant abandon the plaintiff, as alleged *in the complaint?*

2. If so, was such abandonment without adequate cause or provocation on the part of the plaintiff, as alleged in the complaint?

The jury answered the first question "no" and, consequently, did not answer the second issue. Upon this verdict, the court entered judgment that the plaintiff recover nothing of the defendent and that the costs of the action be taxed against the plaintiff.

The plaintiff appealed to the Superior Court, making nine assignments of error. The matter was heard upon the record by Judge McLean who allowed seven of the assignments of error, vacated the judgment of the General County Court, and remanded the matter to that court for a new trial. The defendant appealed to the Court of Appeals, which reversed the judgment of the Superior Court and remanded the matter to that court for the entry of a judgment affirming the judgment of the General County Court. Thereupon, the plaintiff petitioned for *certiorari* to review the decision of the Court of Appeals, which petition was allowed.

At the trial in the General County Court, the plaintiff testified:

She and the defendant were married in 1935 and lived together until he left the home on 9 October 1968, since which time they have lived separate and apart. He told her he was going to leave the night before he did so. He packed his suitcase and left before daylight, saying only as he left, "I am sorry." Throughout the marriage, including the parting, there was little "bickering and fussing." The plaintiff did everything she could to keep the defendant from leaving the home. She begged him not to leave and did nothing to provoke him to do so.

During most of the years of their marriage, the plaintiff worked as a school teacher and in related employments. She presently has a position with the Asheville Day Nursery. Her salary, plus a small amount of income received from stocks and rental property owned by her, is not sufficient for her living expenses, doctors' bills, taxes and payments on the home. The major portion of their equity in the home is attributable to the

investment therein of funds derived from the sale of certain properties which she had inherited. When the defendant left the home his salary was $9,500 per year, plus an expense account. Since his departure she has continued to live in the home, which is worth about $45,000.

Both the plaintiff and the defendant put their earnings into their support and the purchase of the home. The only problem they had in their marriage was with reference to their sexual relations and the defendant's feeling that the plaintiff was cold and unaffectionate toward him. This difficulty was due to her physical condition, for which she had for many years consulted physicians and received medical treatment. She was doing her best to bring about the correction of her physical disability.

Since the separation, the defendant has not paid the household expenses. He has left her alone in the house. He is 58 years of age and is employed as an inspector for an insurance company. The plaintiff is also 58 years of age and her general health is "fairly good." She owns a few shares of stock and some low grade rental property in Alabama and has a small savings account. Her take home pay from her job is $132 a month.

The defendant, called as a witness by the plaintiff, testified that his salary is $9,500 per year. He is obligated to pay notes secured by a mortgage on the home in which the plaintiff lives. He is keeping those notes current. When he left the home he left the furniture and personal belongings therein and left an automobile for the use of the plaintiff. The cause of his leaving the home was the plaintiff's rejection of his sexual desires and advances except at very infrequent intervals. When he left the home he knew that she had sought medical attention and had seen several doctors about the matter in an effort to correct her physical disability. This had continued for several years.

Billie Woodby Wyatt, called as a witness by the plaintiff, testified that she is 38 years of age and not presently married. She lives with her four year old daughter and works at the Social Security office in Asheville. She has known the defendant for a number of years. He is just an acquaintance. Prior to the institution of this action, she had seen the defendant at the restaurant where she generally eats. Occasionally they had lunch together but he did not come to her apartment. On one occasion, while she and her little daughter and one of the girls with whom

she works were in Charlotte, she picked the defendant up at the Charlotte airport upon his arrival from Boston and took him to the motel where she and her daughter were staying and where he also had a reservation. They did not spend any time together in his room or in hers on this occasion. They returned to Asheville together two days later. The court sustained the defendant's objection to the question as to whether she had seen the defendant on a date after the institution of this action.

The plaintiff also called as a witness Julius Cauble, a licensed private investigator. On a date after this action was instituted he observed Mrs. Wyatt. The court sustained the defendant's objection to testimony by this witness as to what he observed on that occasion. Had the witness been permitted to testify, he would have said that on that date and on a later date he observed Mrs. Wyatt enter her residence in the afternoon or early evening and observed the defendant leave the residence at 2 a.m. on one occasion and at 3 a.m. on another occasion, he not having observed Mrs. Wyatt leave it in the meantime.

The defendant offered no evidence, he having testified, as above stated, when called as a witness by the plaintiff.

Thomas Walton and William J. Cocke for plaintiff appellant.

Robert E. Riddle for defendant appellee.

LAKE, Justice.

The jury was instructed, "If you answer the first issue No, and thereby find that the defendant did not abandon the plaintiff, *as the Court has instructed you with reference to that issue,* then you would not come to consider the second issue * * * ." (Emphasis added.) That is, in that event, the jury would not consider the issue of whether such abandonment was or was not without adequate cause or provocation on the part of the plaintiff.

The verdict on the first issue was reached in the light of this instruction:

> "Abandonment, within the meaning of the law, means that there is a separation of the parties one from the

other. It also means that the separation is without the consent of the party from whom the separation is had and that the separation is without the intention of renewing the marital relationship and that the separation is willful, that is without adequate cause, excuse or justification.

* * *

"Ordinarily, * * * the spouse who separates or leaves is not justified in leaving the other spouse unless the conduct of the spouse who is left is such as would likely render it impossible for the withdrawing spouse to continue the marital relationship with safety, health and self-respect, and so, members of the jury, the Court instructs you that when you come to consider the first issue, the burden of proof, as the Court has told you, is upon the plaintiff upon this issue and when you come to consider this first issue the Court instructs you that if the plaintiff has satisfied you from the evidence and by its greater weight that in October, 1968, the defendant separated himself from the plaintiff and that this separation was without the consent of the plaintiff and that this separation was without the intention on the part of the defendant of renewing the marital relationship and that this separation was brought about without the existence of circumstances which would justify the defendant in withdrawing, that is, was absent such circumstances as would make it impossible for the withdrawing spouse, the defendant, to continue the marital relations with safety, health and self-respect; if the plaintiff has satisfied you of each of these elements from the evidence and by its greater weight, then it would be your duty to answer the first issue YES.

"On the other hand, * * * if the plaintiff has failed to satisfy you from the evidence by its greater weight as to each of these elements, then it would be your duty to answer the first issue NO."

The plaintiff assigned this instruction as error and also assigned as error that the court had failed to declare and explain the law arising upon the evidence, as required under G.S. 1-180. (See, Rule 51(a), Rules of Civil Procedure.) Both of these assignments of error were allowed by the Superior Court in ordering a new trial. The Court of Appeals reversed on the ground

that the plaintiff did not set out in her exception and assignment of error her contention as to what the court should have charged.

[7] It is alleged in the complaint and admitted in the answer that the plaintiff and defendant were married and lived together until 9 October 1968, when the defendant left the home. The defendant's own testimony makes it clear that he left with no intent to return, though the plaintiff begged him not to do so. The sole question presented by the pleadings and the evidence related to whether he was legally justified in leaving and thus was absolved from the duty of paying alimony pursuant to G.S. 50-16.2(4). The plaintiff's testimony, if believed by the jury, is sufficient to establish that the cause of the condition, which the defendant assigns as the only reason for leaving, was her affliction with a physical ailment for which she was and had been for a long time undergoing medical treatment. The defendant's testimony was to the effect that he, when leaving, was aware that she had some physical difficulty for which she was undergoing medical treatment. Nowhere in the charge, except in reviewing the testimony, is there any specific reference to the physical condition or health of the plaintiff. The jury was not given any direction as to the bearing of the plaintiff's condition, if the jury believed it to be as the plaintiff had testified, upon the legal right of the defendant to leave her as he admits that he did. In this there was error requiring a new trial as ordered by the Superior Court.

[1] "It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence." Strong, N.C. Index 2d, Trial, § 33. Rule 51(a) of the Rules of Civil Procedure, formerly G.S. 1-180, "requires the judge 'to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.' 53 AM. JUR., Trial, Section 509." *Conference v. Miles,* etc., 259 N.C. 1, 9, 129 S.E. 2d 600; *Lewis v. Watson,* 229 N.C. 20, 23, 47 S.E. 2d 484.

[2-5] G.S. 50-16.2 provides that a dependent spouse is entitled to an order for alimony when "(4) the supporting spouse abandons the dependent spouse." The statute does not define abandonment. One spouse abandons the other, within the meaning of this stat-

ute, where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it. See, *Richardson v. Richardson,* 268 N.C. 538, 151 S.E. 2d 12. One spouse may bandon the other without physically leaving the home. *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *McDowell v. McDowell,* 243 N.C. 286, 90 S.E. 2d 544; *Blanchard v. Blanchard,* 226 N.C. 152, 36 S.E. 2d 919. In that event, the physical departure of the other spouse from the home is not an abandonment by that spouse. The constructive abandonment by the defaulting spouse may consist of either affirmative acts of cruelty or of a wilful failure, as by a wilful failure to provide adequate support. *McDowell v. McDowell, supra; Blanchard v. Blanchard, supra.* There is, however, no wilful failure, and so no constructive abandonment, where the defect of which the departing spouse complains is due to the illness or physical disability of the remaining spouse and his or her consequent inability to act.

[6, 7] In an action by a wife for alimony without divorce, G.S. 50-16.2, like its predecessor, does not preclude the husband, who has left the home, from proving as a defense that it was actually the wife who separated herself from him, though she did not leave the home. *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923. If, however, the failure of the wife, asserted by the husband as justification for his departure from the home, was not wilful but was due to her health and physical condition, such failure would not constitute a constructive abandonment of the husband by the wife and would not be justification for his departure from the home. The jury should have been so instructed.

The judgment of the Court of Appeals is hereby reversed, and the matter is remanded to that court for the entry of a judgment by it further remanding it to the Superior Court for entry therein of a judgment granting the plaintiff a new trial on the ground of the above mentioned error in the charge of the judge of the General County Court.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CHARLIE WADE POWELL

No. 85

(Filed 20 January 1971)

1. **Constitutional Law § 32— indigent defendant — appointment of counsel**

An indigent defendant is not entitled to select the counsel to be appointed to represent him, but he cannot be compelled to accept the appointment of an attorney not satisfactory to him.

2. **Criminal Law § 91— motion for continuance — denial of motion**

Defendant's motion for the continuance of his trial, which was made after defendant had discharged his court-appointed counsel and had elected to represent himself, was properly denied by the trial court in its discretion.

3. **Criminal Law § 102— defendant's argument to the jury — restrictions by trial court**

In an attempted armed robbery prosecution in which the defendant elected to represent himself, the trial court acted properly (1) in directing the defendant to omit from his argument to the jury any recital of facts not in evidence and (2) in telling the defendant that he could only argue to the jury "what you think the evidence that has already been offered tends to show and how you think they should find in this case."

4. **Robbery § 5— attempted armed robbery prosecution — instructions on lesser included offenses — sufficiency of evidence**

In a prosecution for attempted armed robbery, the State's evidence that the male defendant, wearing a woman's wig and carrying a woman's purse, entered an ABC store, ordered a bottle of whiskey, opened the purse and pulled a loaded pistol therefrom, *held* sufficient to support a verdict of guilty of attempted armed robbery or not guilty; the evidence was insufficient to support instructions as to defendant's guilt of attempted common law robbery, assault, attempted larceny from the person, or attempted simple larceny.

5. **Criminal Law § 115— instructions on lesser included offenses**

The trial judge is not required to submit to the jury the question of a lesser offense included in the offense charged in the indictment, where there is no evidence to support such a verdict.

6. **Indictment and Warrant § 18; Robbery § 5; Concealed Weapons § 1 — attempted armed robbery prosecution — conviction of carrying concealed weapons**

An indictment alleging attempted armed robbery will not support a conviction of the offense of carrying a concealed weapon, since a conviction of the latter offense requires proof that the weapon was concealed, which is not an essential element of the crime of attempted armed robbery.

7. **Criminal Law § 3— attempt to commit a crime — elements**

The two elements of an attempt to commit a crime are: (1) an intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense.

8. **Robbery § 5— attempted armed robbery — instructions**

In a prosecution for attempted armed robbery, an instruction that "taking a thirty-eight caliber pistol out of a purse would be such an overt act as would satisfy this element of the offense" cannot be construed as an instruction that the intent with which the pistol was taken from the purse was immaterial, and the defendant's contention to the contrary is without merit.

9. **Criminal Law § 168— *review of the charge to the jury***

A charge must be construed contextually and not in disjointed fragments.

Justice HUSKINS concurring.

APPEAL by defendant from *Exum, J.*, at the 3 December 1969 Criminal Session of FORSYTH, heard prior to determination by the Court of Appeals.

Upon an indictment, proper in form, the defendant was tried upon the charge of attempt to commit armed robbery and was found guilty as charged. He was sentenced to imprisonment for a term of not less than 12 nor more than 20 years.

A former trial upon the same charge resulted in a conviction which was set aside on appeal. At that trial the defendant was represented by his voluntarily employed counsel. After its conclusion, the defendant was found to be an indigent and the same counsel was appointed by the court to represent him upon the appeal. He continued to do so until immediately prior to the commencement of the new trial, out of which the present appeal arises. At that time, in the absence of the jury, the defendant advised the court that he was dissatisfied with the services of his court appointed counsel and wished to discontinue those services but refused to state the reason for his dissatisfaction. The court advised the defendant that he was not entitled to have the court appoint counsel of the defendant's own choice, that the previously appointed counsel had successfully represented the defendant on appeal, was ready and willing to represent him at the trial then due to commence, was competent and experienced in criminal practice and had apparently done "a good job" for the defendant up to that time. The court advised the

defendant that the trial would proceed as scheduled and gave him the option of continuing to be represented by the same court appointed counsel or of representing himself. The defendant elected to represent himself, signing a written waiver of counsel. The court thereupon relieved the then appointed counsel of his assignment, but requested him to remain throughout the trial near the defendant's table and to advise the defendant on any question as to which the defendant requested his advice. The attorney did so, but it does not appear that the defendant conferred with him during the trial. Upon the conclusion of the trial and entry of judgment, the defendant having stated his desire to appeal, the court appointed his present counsel to represent him on this appeal.

The evidence for the State is to the following effect:

On 4 January 1969, the defendant entered Winston-Salem ABC store No. 5 just prior to 9 p.m., the closing hour. He was wearing a woman's wig, dark glasses and black gloves and was carrying a woman's purse, but was dressed in a man's clothing. Three clerks and two customers were then in the store. The defendant remained for a moment or two, looking at duplicate price lists posted on the walls.

When one of the clerks had pulled the window blind, preparatory to closing the store, the defendant walked over to the cash register of another clerk and asked for a bottle of Bourbon, which the clerk obtained and placed on the counter. The defendant then looked around at the clerk and the two customers standing at the door and asked for a bottle of Rock and Rye, which the clerk obtained. He then asked for a bottle of gin, which was also obtained. As the clerk was preparing to put the bottles in a bag, he observed that the defendant had taken off his gloves, had placed the purse on the counter and opened it and had his hand on a pistol in the purse and was bringing it out. The clerk, scared by the sight of the gun, reached out, seized the defendant's wrist with one hand and with the other took the pistol from the defendant. By that time, the third clerk in the store had produced his own pistol, which he pointed at the defendant. The defendant said, "No, man, no," and raised his other hand.

Police promptly arrived and arrested the defendant. The pistol carried by the defendant was fully loaded. There was no

money in the purse and the officer, who searched the defendant immediately, found none. The defendant tendered none to the clerk.

The store cash register then contained a little over $6,000 and another $7,000 was elsewhere in the store. The defendant made no demand for money, having said nothing prior to being disarmed, except his requests for the three bottles of liquor.

The wig, dark glasses, gloves, purse, pistol and ammunition were all introduced in evidence after proper identification.

The defendant did not testify but offered witnesses who testified to the effect that the defendant was the manager of a club at which male employees impersonated women and dressed in women's clothing and wigs for their performances, after which they sometimes went out partying.

For the purpose of showing that at the time of his arrest he did have some money on his person, the defendant offered another witness who testified that, while the two of them were in jail, the defendant purchased a sweater from the witness. However, upon the inability of the witness to relate this transaction to the time of the defendant's arrest upon the present charge, the testimony of this witness was stricken. The defendant offered no other evidence.

At the conclusion of the evidence, the court stated to the defendant that he could present his argument to the jury, but that, in so doing, he could not recite to the jury any facts to which witnesses had not testified, he being entitled to argue to the jury "what you think the evidence that has already been offered tends to show and how you think they should find in this case."

Attorney General Morgan, Assistant Attorney General Melvin and Assistant Attorney General Costen for the State.

Jimmy H. Barnhill and James C. Frenzel for defendant.

LAKE, Justice.

Simultaneously with filing his brief in this Court, the defendant moved for permission to present an additional assignment of error not set forth in his case on appeal. The proposed assignment was the failure of the trial judge to conduct an

inquiry into the competency of the original court appointed counsel when the defendant asserted his desire to dispense with his further services. This point is presented in the defendant's brief with the statement, "No cases on point have been found." The motion is denied. No question of counsel's competency was then or is now raised.

[1] An indigent defendant is not entitled to select the counsel to be appointed to represent him, but he cannot be compelled to accept the appointment of an attorney not satisfactory to him. *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667. There was no error in the release of court appointed counsel from his assignment and the failure to appoint another.

[2] There was no error in the denial of the defendant's motion to continue the trial, following the discharge of his court appointed counsel. The granting of this motion was in the discretion of the trial judge. *State v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666; Strong, N.C. Index 2d, Criminal Law, § 91. This being the second trial of the case, the defendant was well aware of the nature of the charge and of the evidence for the State. The record shows that when the motion was made, the case was scheduled for trial immediately and that the State, at considerable expense, had brought its principal witness from Florida for this trial. The defendant's previously court appointed counsel had acted with diligence to inform the defendant several days earlier that the case was set for trial. Such delay as there was in bringing this to the defendant's attention was due to his own lack of cooperation with his then court appointed counsel. Subpoenas were issued promptly for the witnesses whom the defendant stated he wanted to call in his behalf. Some of them testified and it appears from the record that others, possibly all of them, were in the courtroom at the trial and the defendant elected not to put them on the stand. He rejected the court's offer of time to confer with witnesses before calling them to the stand.

Following the verdict, the defendant addressed the court with reference to the sentence to be imposed. His remarks disclose that he was not inexperienced in the ways of the criminal courtroom. He stated to the judge that the "long record," which the judge was examining, contained probably "no more than about twenty times" when he was guilty and "about forty times" when he had "been just snatched up and carried to jail

for nothing." There is nothing in this record to indicate an abuse of discretion in the denial of the motion for continuance, or that the defendant was prejudiced by being required to proceed with the trial.

[3] There was no error in the court's directing the defendant to omit from his argument to the jury any recital of facts not in evidence and telling him that he could only argue to the jury "what you think the evidence that has already been offered tends to show and how you think they should find in this case." The contention in the defendant's brief that this precluded the defendant from arguing applicable law to the jury is without merit. It is obvious that the remarks of the judge were not so intended and could not reasonably have been so construed. It is not suggested that but for this direction he would have read or referred to any legal authority in his argument.

[4] The court instructed the jury: "You may return one of two verdicts in the case: Guilty as charged, that is, guilty of attempted armed robbery; or, not guilty." The defendant contends that it was error not to instruct the jury that it could return a verdict of guilty of attempted common law robbery, assault, attempted larceny from the person or attempted simple larceny. There is no merit in his contention. Apart from the defendant's possession and handling of the pistol, there was no evidence of any criminal offense by him on this occasion. There is nothing in the record to indicate an assault for any purpose other than to rob. There is no evidence to indicate an intent to rob anyone or to steal anything without the use of the pistol.

[5] The trial judge is not required to submit to the jury the question of a lesser offense, included in that charged in the indictment, where there is no evidence to support such a verdict. *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481; *State v. Lentz*, 270 N.C. 122, 153 S.E. 2d 864, *cert. den.* 389 U.S. 866, 88 S.Ct. 133, 19 L. Ed. 2d 139; *State v. Bridges*, 266 N.C. 354, 146 S.E. 2d 107; *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545. If, as the defendant contends in his brief, the jury might have believed from the evidence that the defendant's sole purpose in lifting the pistol from the purse was to enable him to search in the purse for money with which to pay for the whiskey, then the defendant was guilty of no crime for which he could lawfully have been convicted under this indictment, and the jury, so believing, should have returned a verdict of not guilty.

[6] Under this indictment he could not have been convicted of the offense of carrying a concealed weapon, as the defendant suggests in his brief. Conviction of that offense required proof of the fact of concealment of the weapon, which is not an essential element of the crime of attempt to commit armed robbery and is not alleged in the bill of indictment. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. Rorie,* 252 N.C. 579, 114 S.E. 2d 233; 27 AM. JUR. 2d, Indictment and Informations, § 97.

[7] The two elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense. *State v. McNeely,* 244 N.C. 737, 94 S.E. 2d 583; *State v. Surles,* 230 N.C. 272, 52 S.E. 2d 880. The court so instructed the jury in the present case.

[8] The trial judge closed his charge to the jury as follows:

> "I instruct you finally that if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant * * * entered this store with the intent to commit armed robbery [again defining armed robbery] and that he not only intended to commit the offense but that he did some overt act, that is, some visible act, which went beyond mere preparation to commit the offense but which fell short of the actual commission of the offense.
>
> "Now, members of the jury, I instruct you that taking a thirty-eight caliber pistol out of a purse would be such an overt act as would satisfy this element of the offense.
>
> "If you so find, members of the jury, beyond a reasonable doubt, then it would be your duty to return a verdict of guilty as charged against the defendant.
>
> "If you fail to so find, or, if upon a fair and impartial consideration of all the evidence in the case you have a reasonable doubt either that the defendant did not intend to commit the crime of armed robbery, or, if he intended to do so he did not commit the overt act necessary to constitute an offense, then, members of the jury, it would be your duty to give the defendant the benefit of that doubt and to find him not guilty."

[8, 9] A charge must be construed contextually and not in disjointed fragments. *State v. Shaw,* 263 N.C. 99, 138 S.E. 2d 772;

State v. Lee, 192 N.C. 225, 134 S.E. 458. So construed, it is obvious that the statement that taking the pistol from the purse would be "such an overt act as would satisfy this element of the offense" was not an instruction that the intent with which the pistol was taken from the purse was immaterial. The jury could not reasonably have so construed this charge. Obviously, this was a parenthetical statement relating only to the second element of the offense charged. As such, it was not error. The defendant's contention that the sentence following this statement in the charge could have led the jury to believe that proof of this act, irrespective of the defendant's intent, would require a verdict of guilty is completely without merit. No jury could reasonably have so understood the instruction given by the court. The contention that this instruction violates G.S. 1-180 by putting unequal stress upon the contentions of the State and of the defendant is likewise without merit.

The defendant's counsel, in his brief, states that six other assignments of error appear to be without merit but, mindful no doubt of the defendant's dissatisfaction with his predecessor, he requests us to examine them. We have done so and concur in his appraisal thereof. He has searched diligently through the record for some basis for granting a new trial to the defendant but unsuccessfully.

No error.

Justice HUSKINS concurring:

It is noted that defendant's court-appointed trial counsel was the same lawyer defendant himself had employed before indigency overtook him. Despite the fact that this lawyer won a new trial for defendant on a former appeal, defendant requested his dismissal because his services, for reasons unknown, had become unsatisfactory. He sought to assign as error in this Court the fact that the trial judge refused to conduct a *voir dire* inquiry into the alleged incompetency of his dismissed counsel.

Defendant's present counsel were appointed to perfect his appeal. They have prepared his case well and presented it ably. Yet defendant will no doubt attack them and question their competency in some future post conviction or *habeas corpus* proceeding. Seemingly, it has become fashionable for those who enjoy the benefits of assigned counsel to try their lawyer instead

of their case. I fully concur in the majority opinion and, at the same time, reject defendant's attempt to discredit his trial counsel. Competent lawyers are entitled to some protection from the slings and arrows of unappreciative clients.

STATE OF NORTH CAROLINA v. ROBERT LEE McWILLIAMS

No. 77

(Filed 20 January 1971)

1. **Homicide § 24— instructions — verdict of not guilty**

In this prosecution for second degree murder, the trial court did not err in its charge, when considered as a whole, with respect to the circumstances under which the jury might return a verdict of not guilty.

2. **Criminal Law § 168— construction of charge as a whole**

A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct.

3. **Criminal Law § 167— harmless and prejudicial error**

Insubstantial technical errors which could not have affected the result of the trial will not be held prejudicial.

4. **Criminal Law § 168— harmless error in instructions**

The judge's words may not be detached from the context and incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred.

5. **Criminal Law §§ 24, 32— plea of not guilty — burden of proof**

Defendant's plea of not guilty puts in issue every essential element of the crime charged.

6. **Homicide § 14— second degree murder or manslaughter — proximate cause**

To warrant defendant's conviction of second degree murder or manslaughter, the State must prove beyond a reasonable doubt that the victim's death proximately resulted from defendant's unlawful act.

7. **Criminal Law § 78— stipulations**

A stipulation of fact is an adequate substitute for proof in both criminal and civil cases.

8. **Criminal Law § 78— judicial admissions**

A judicial admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence; it prevents the party who makes it from introducing evidence to dispute it and relieves the opponent of the necessity of producing evidence to establish the admitted fact.

9. **Criminal Law § 78; Homicide § 24— testimony and stipulation constituting admission — cause of death — instructions**

In this homicide prosecution, defendant's testimony that he split the victim's head open with a stick of wood and defendant's stipulation that the victim's death was caused by a skull fracture resulting from a blow to the head constituted an admission that the head wound inflicted by defendant was fatal and removed the cause of death from contention; consequently, the trial court did not err in failing to charge specifically on the element of proximate cause, the court's general instructions on proximate cause being sufficient.

10. **Robbery § 1— common law robbery defined**

Robbery at common law is the taking of money or goods of any value from the person of another or in his presence, against his will, by violence or putting him in fear, with the felonious intent to deprive the owner of his property permanently and to convert it to the use of the taker.

11. **Criminal Law § 176— review of nonsuit motion — evidence introduced by defendant**

While defendant, by introducing evidence at the trial, waived his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence, his later exception to the denial of his motion for nonsuit made at the close of all the evidence draws into question the sufficiency of all the evidence to go to the jury.

12. **Criminal Law § 106— nonsuit — evidence exculpates defendant**

When all the evidence, that of the State and that of defendant, is to the same effect and tends only to exculpate the defendant, his motion for nonsuit should be allowed, but if there is any evidence which reasonably tends to show guilt of the offense charged and from which a jury might legitimately convict, the nonsuit motion should be denied.

13. **Robbery § 4— common law robbery of murder victim — formation of intent to take victim's money**

In this prosecution of defendant for second degree murder and common law robbery of the murder victim, there is no merit in defendant's contention that the charge of common law robbery should have been nonsuited for the reason that the evidence showed that defendant formed the intent to take decedent's money only after the assault had been completed, the evidence as a whole, including conflicting statements by defendant that he struck deceased only in self-defense and also that the victim was on the ground unconscious when he split the victim's head with a pole and took his wallets because he needed money, being sufficient to support a legitimate conclusion by the jury that defendant formed the intent to rob his victim prior to the violent assault.

APPEAL by defendant from *Copeland, S.J.*, 3 June 1970 Criminal Session of NASH Superior Court.

Defendant was charged in separate bills of indictment with

(1) murder and (2) common-law robbery. When the cases were called for trial, the State elected to waive the first-degree murder charge and in that case placed defendant on trial for murder in the second degree "or any lesser included offense." The cases were consolidated for trial, and appointed counsel represented defendant.

The State offered evidence which, in brief summary, tends to show that William Henry Manning, known as "Bloss" Manning, age 70, was found about 7:30 a.m. on the morning of 25 April 1970 beside his pickup truck on a path at the edge of some woods. The body was lying face down on the ground, gagged, both hands and feet tied, and with the head to one side. There was a long gash over one ear.

Dorothy Manning, wife of the deceased, had seen the defendant walking down the road about a mile from the path where the body was found. "I saw Robert McWilliams go down the road walking slow and come back walking fast." She later identified two wallets that were found in the possession of the defendant as belonging to her late husband. Bonnie Hendricks had seen defendant on that same morning walking toward the path where the body was found and within fifty yards of it.

Acting upon the foregoing information, Deputy Sheriff Perry apprehended the defendant, Robert Lee McWilliams, age 22, walking along a paved road about one and one-half miles from the spot where Bloss Manning's body was found. Officer Perry took defendant to the scene of the crime where Sheriff Womble met them. While there the Sheriff compared shoe tracks in the mud with the ridged shoes worn by defendant. "You could see plainly the little ridges in the shoe tracks. The ridges were in the instep of the shoe track. . . . And I asked him if he minded my taking his shoes and comparing them with the tracks. He said, 'No, sir' and pulled them right off and handed them to me. . . . I put them in the tracks and they fitted perfectly."

Defendant was advised of his rights and relieved of the wallet and money which Mrs. Manning later identified as belonging to her husband. He then made a statement to the sheriff that Bloss Manning picked him up as he walked down the road and asked him to help load some wood; that a controversy arose when Bloss called the defendant "no good"; that Bloss bragged

about the hogs he owned and defendant replied that the hogs did not belong to Bloss but to someone else; that Bloss then flew into a rage and tried to strike defendant; that defendant blocked the blow, knocked Bloss down with his left fist, then got a post and hit Bloss in the head three or four times with it. When the sheriff indicated that he had not seen this post, defendant said: "If you go back and look on the truck you will find a piece of wood that one end of it is bloody. That's what I used." The sheriff returned to the truck and found the bloody stick of wood referred to by defendant. The sheriff further testified that defendant said he took two billfolds from Bloss, threw the identification from one of them by the side of the road, kept one wallet containing three twenty-dollar bills, and put the other wallet in a trunk in his room at the house where he stayed. All these items were later recovered from the exact places where defendant said they would be found. He had on his person one of the wallets containing the three twenty-dollar bills.

Defendant judicially admitted by way of stipulation that the cause of Bloss Manning's death was an acute skull fracture with cerebral contusions caused by a blow to the head of the deceased.

Against the advice of his counsel, defendant took the stand as a witness in his own behalf and testified substantially to the same facts related by the sheriff. He further stated that he was afraid Bloss Manning would kill him; that he knew Bloss had a bad temper and believed that he had a gun that morning; that he hit Bloss with the post to protect himself; that he intended to run away and go to Alabama but was apprehended by Officer Perry; that he had heard of an incident between Bloss and a man named L. T. McClain and knew Bloss had a bad temper; "I was really afraid he was going to shoot me because I had heard of the incident between him and L. T. and also because I knew Mr. Bloss from last summer and what his attitude was. He had a pretty bad temper."

The jury found defendant guilty of murder in the second degree in one case and guilty of common-law robbery in the other. The Court thereupon sentenced defendant to prison for a term of twenty-eight to thirty years on the second-degree murder conviction and eight to ten years on the common-law robbery conviction, to run consecutively. Defendant appealed

to the Court of Appeals and the case was transferred to the Supreme Court under its general order dated July 31, 1970.

Moore & Diedrick, by Lawrence G. Diedrick, Attorneys for defendant appellant.

Robert Morgan, Attorney General, by Eugene Hafer, Assistand Attorney General for the State.

HUSKINS, Justice.

Defendant brings forward three assignments of error, which will be discussed in the order in which they appear in his brief.

[1] Defendant contends the court erred in its charge with respect to the circumstances under which the jury might return a verdict of not guilty, and quotes isolated portions of the charge in connection therewith. This assignment is without merit. At one point the court charged: "If from all the evidence you have a reasonable doubt that he did hit and kill the deceased with malice, you will acquit the defendant of the charge of murder in the second degree and consider whether or not he is guilty of manslaughter." At another point the court charged: "In order to be guilty at all, the defendant must have fought willingly but wrongfully. If he fought willingly but rightfully, that is, exclusively in his own self-defense, no excessive force being used, he should be acquitted, but he is entitled to have the jury judge his conduct by circumstances as they reasonably appeared to him at the time of the homicide." Again the court said in its charge: "Gentlemen, it is your duty to determine by your verdict whether the defendant is guilty of murder in the second degree, manslaughter or not guilty, and you will return one of three verdicts depending upon how you find. You will find the defendant guilty of murder in the second degree or you will find the defendant guilty of manslaughter or you will find him not guilty."

[2-4] The foregoing instructions were given in connection with the portions of the charge which defined, explained, and applied the law to second-degree murder, manslaughter, and defendant's plea of self-defense. We think the jury clearly understood the circumstances under which it should return a verdict of not guilty. A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a

whole is correct. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965) ; *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1964) ; *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169 (1962). If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966). Furthermore, insubstantial technical errors which could not have affected the result will not be held prejudicial. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916 (1955). The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred. *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969) ; *State v. Jones,* 67 N.C. 285 (1872).

[9] Defendant says the trial judge erroneously assumed that the proximate cause of Bloss Manning's death was admitted and therefore erred in failing to charge on the element of proximate cause. This constitutes his second assignment of error.

[5, 6] Defendant's plea of not guilty put in issue every essential element of the crime charged. *State v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537 (1951) ; *State v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861 (1958). To warrant defendant's conviction upon the charge of second-degree murder or manslaughter, the State must produce evidence sufficient to establish beyond a reasonable doubt that the death of Bloss Manning proximately resulted from defendant's unlawful act. *State v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349 (1950) ; *State v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908 (1949). Defendant insists that he made no admission or statement that he killed the deceased and that the cause of death should have been submitted to the jury under proper instructions.

[9] The record discloses that defendant, in open court, judicially admitted that "the cause of death was an acute skull fracture with cerebral contusions caused by a blow to the head of the deceased." In his own testimony defendant swore that he struck Bloss Manning in the mouth with his fist and knocked him down; that while Bloss was lying on the ground "not moving" he picked up a stick of wood from the bed of the truck and struck Bloss once or twice "beside the head" with it; that he split his head open with the stick and saw blood all over the

place; that he took two wallets from the victim's pockets, tied his hands and feet and placed a gag in his mouth; that he then left the scene. All the evidence shows he was picked up by Officer Perry within an hour. Meanwhile, Bloss Manning had already been found—bound hand and foot, gagged, and with a big gash four inches long across the side of his head. *He was dead.*

[7-9] This evidence and defendant's judicial admission establish beyond a reasonable doubt that death was caused by the vicious blows to the victim's head administered by defendant. Defendant swore he split the victim's head open *with the blows he struck* and stipulated that death was caused by a skull fracture resulting from a blow to the head. This is sufficient to remove the cause of death from contention and constitutes an admission that the head wound inflicted by defendant was fatal. Certainly there is no suggestion and no evidence that anyone else inflicted a head wound on Bloss Manning. A stipulation of fact is an adequate substitute for proof in both criminal and civil cases. *State v. Powell,* 254 N.C. 231, 118 S.E. 2d 617 (1961). "Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent of the necessity of producing evidence to establish the admitted fact. In short the subject matter of the admission ceases to be an issue in the case. . . . " Stansbury, North Carolina Evidence (2d Ed. 1963), § 166.

[9] *State v. Ramey,* 273 N.C. 325, 160 S.E. 2d 56 (1968), and *State v. Redman,* 217 N.C. 483, 8 S.E. 2d 623 (1940), relied on by defendant, are readily distinguishable. In each of those cases the defendant admitted that he shot the deceased, but not that he inflicted a fatal wound. Here, defendant testifies that he struck the deceased in the head and judicially admits that an acute skull fracture caused by a blow to the head was fatal. Under all the facts of the case this is tantamount to an admission that defendant's conduct was the proximate cause of death; hence, the court's general instructions on proximate cause were sufficient. This assignment of error is overruled.

[13] Finally, defendant assigns as error the denial of his motion for nonsuit on the common-law robbery charge. He

argues in his brief that "[t]he record is void of any evidence from which the jury could find that the violence used in this case was simultaneous with and for the purpose of feloniously taking the goods of Bloss Manning. The items of personal property were taken from the deceased only after he had fallen to the ground unconscious. The taking of the wallets and money was merely an afterthought of the defendant."

[10] "Robbery at common law is the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear." *State v. McNeely*, 244 N.C. 737, 94 S.E. 2d 853 (1956); *State v. Bell*, 228 N.C. 659, 46 S.E. 2d 834 (1948). As an essential element of the offense the taking must be done with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker. *State v. Lawrence*, 262 N.C. 162, 136 S.E. 2d 595 (1964); *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966).

[11, 12] By introducing testimony at the trial, defendant waived his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. His later exception to the denial of his motion for nonsuit made at the close of *all* the evidence, however, draws into question the sufficiency of all the evidence to go to the jury. *State v. Norris, supra* (242 N.C. 47, 86 S.E. 2d 916); *State v. Gay*, 251 N.C. 78, 110 S.E. 2d 458 (1959); *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969); G.S. 15-173. And when all the evidence, that of the State and that of the defendant, is to the same effect and tends only to exculpate the defendant, his motion for judgment as of nonsuit should be allowed. *State v. Fulcher*, 184 N.C. 663, 113 S.E. 769 (1922); *State v. Hamby*, 276 N.C. 674, 174 S.E. 2d 385 (1970). But if there is any evidence which reasonably tends to show guilt of the offense charged and from which a jury might legitimately convict, the nonsuit motion should be denied. *State v. Bogan*, 266 N.C. 99, 145 S.E. 2d 374 (1965). Our inquiry is thus limited to whether there is sufficient evidence to support the conviction. *State v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620 (1946).

[13] Here, defendant's own statement is inculpatory as well as exculpatory. He says on the one hand that he struck deceased only in self-defense and, on the other hand, he told the sheriff

that his victim was on the ground unconscious when he split his head open with the stick or pole and took both wallets "because he didn't have any money, needed money . . . . " In addition to his statement, circumstantial evidence belies the truth of that portion of his statement exonerating him and from which the jury might legitimately conclude that he formed the intent to rob his victim prior to the violent assault. The evidence as a whole and the conflicting inferences arising from defendant's statement itself were sufficient to make his guilt a question for the jury. *State v. Mitchum,* 258 N.C. 337, 128 S.E. 2d 665 (1962). Nonsuit of the robbery charge was properly denied.

No error.

B. D. JOHNSON, NORMAN V. JOHNSON, NASH JOHNSON AND WIFE, MARY SUE JOHNSON, MAUDE JOHNSON HODGES AND HUSBAND, GEORGE HODGES, EMMA C. JOHNSON, OPHELIA JOHNSON CARLTON, VIRGINIA JOHNSON SCARBOROUGH, MAYE JOHNSON SORRELL AND HUSBAND, JOHN SORRELL, FLETCHER JOHNSON, CORA JANE JOHNSON BOSTIC AND HUSBAND, RAEFORD BOSTIC, CARSON JOHNSON, DOROTHY JOHNSON, A MINOR, REPRESENTED IN THIS ACTION BY HER NEXT FRIEND, C. E. STEPHENS, EX PARTE

No. 49

(Filed 20 January 1971)

1. **Appeal and Error § 2— appeal from Court of Appeals — scope of review**

On appeal to the Supreme Court from the Court of Appeals, the inquiry of the Supreme Court is restricted to rulings of the Court of Appeals which are assigned as error and which are preserved in appellants' brief by arguments or by the citation of authorities.

2. **Appeal and Error § 45— abandonment of questions on appeal**

A question on appeal for which no argument was advanced and no citation of authority was made will be deemed abandoned.

3. **Judgments § 21— attack on consent judgment — fraud — mutual mistake — burden of proof**

A judgment entered by the consent of the parties cannot be changed or altered without the consent of the parties to it or be set aside except on proper allegations and proof and a finding by the court that it was obtained by fraud or a mutual mistake or that consent in fact was not given, the burden being on the party attacking the judgment.

4. **Judgments § 21— attack on consent judgment — motion in the cause**

The proper procedure to attack a consent judgment on the ground of want of consent at the time it was entered is by motion in the cause.

5. **Judgments § 10; Attorney and Client § 3— consent judgment signed by attorneys — presumption of validity**

A consent judgment signed by the attorneys for the parties is presumed to be valid, and the burden of proof is upon the one who challenges its invalidity.

6. **Partition § 2; Attorney and Client § 3— agreement for division of lands — binding effect on party to the agreement**

A petitioner in a partitioning proceeding who, through his attorney, consented to an agreement for the division of lands and thereafter ratified the agreement by making an election of land as provided in the agreement *is held* bound by the agreement.

7. **Partition §§ 3, 9; Judgments § 21; Attorney and Client § 3— partitioning proceeding — attack on consent judgment — order of sale**

Petitioners in a partitioning proceeding who consented, through their attorneys, to a superior court judgment dismissing their appeal from an order of sale entered in the proceeding by the clerk of superior court, *are held* bound by the consent judgment in a subsequent action to have the clerk's order declared null and void, where (1) there was no allegation or proof of fraud or mutual mistake, (2) there was no motion in the cause to set the judgment aside, and (3) there was no allegation or proof that the attorneys signed the consent judgment without the approval of the petitioners.

8. **Judgments § 10; Partition § 5— partitioning order — effect as consent judgment**

A clerk's order of sale and distribution in a partitioning proceeding, although not a consent order *per se,* will be treated by the Supreme Court as having the effect of a consent order, where the petitioners in the proceeding had entered into a consent judgment providing (1) that their appeal from the order would be withdrawn and (2) that the proceeding would be remanded to the clerk for such supplemental orders as were necessary to effect the sale and distribution contemplated in the order.

9. **Clerks of Court § 2— ex parte proceeding — filing of written authorization of attorney to act**

In an *ex parte* proceeding before the clerk of superior court, G.S. 1-401 requires the filing of a written authorization for an attorney to act only when the attorney signs for a petitioner in the original petition; the statute does not apply when the original petition is signed by the petitioner himself.

10. **Clerks of Court § 2; Partition § 3— partitioning proceeding — presumption of clerk's jurisdiction**

It is presumed that the clerk of court had jurisdiction in a partitioning proceeding; the burden is on the movants asserting the clerk's lack of jurisdiction to establish their assertion.

APPEAL by Bruce Carlton, Executor of Ophelia J. Carlton, Bruce Carlton, individually, Nash Johnson, Mary Sue Johnson, William T. Blanchard and Margaret B. Cooper, under G.S. 7A-30(2), from a decision of the Court of Appeals reported in 9 N. C. App. 102, 176 S.E. 2d 31.

This is an *ex parte* petition for partition which has been pending since 1948. The appeal before us is from a decision of the Court of Appeals reversing an order entered by *Judge Cowper* at the September 1969 Civil Session of DUPLIN County Superior Court.

On 20 October 1948 and for some time prior thereto, the heirs of E. M. Johnson were owners as tenants in common of numerous tracts of land in Duplin and Pender Counties, including the lands described in the *ex parte* petition for partition filed on 20 October 1948 in Duplin County. This proceeding was titled S.P. #2282.

Commissioners were appointed to partition the lands. Their report was filed on 28 September 1950 and confirmed 11 November 1950. As requested in the petition, the commissioners' report provided that timber which "will measure ten (10) inches or more in diameter measured across the stump twelve (12) inches above the ground" was to be cut and sold in accordance with a power of attorney vested in Nash Johnson and B. D. Johnson, two of the petitioners. The report prescribes the manner in which the proceeds shall be distributed among the tenants in common and in which parties the land and remaining timber will vest.

On 13 November 1950, two days after the commissioners' report was confirmed, B. D. Johnson died intestate. Nash Johnson was given a new power of attorney and proceeded to sell the timber on the five tracts allotted to himself and B. D. Johnson.

B. D. Johnson's heirs were his brothers and sisters, all of whom were parties in the original petition. In June 1954 Norman V. Johnson, a petitioner in the original petition, died intestate and subsequent thereto a special proceeding was filed to effect partition of the interests of his heirs. Thereafter, the power of attorney to Nash Johnson was revoked by certain parties to the proceeding. In 1960 petitioner Maude Johnson Hodges died. Seven other special proceedings were filed to effect a division of

rights, either between some of the remaining parties and other parties, or *inter se*. No timber was sold after 31 December 1952 although some of the parties had conveyed their undivided interest in the land and timber.

On 7 February 1964 a motion was filed in S. P. #2282 by attorneys for all the interested parties at that time with the exception of Virginia Johnson Scarborough. The motion sets out the series of events which had transpired with respect to the lands and timber involved in the proceeding and prayed that "the Court enter such orders as may be proper and appropriate for carrying out the judgment heretofore entered in this proceeding." Paragraph 14 of the motion states the following:

> "Movants are unable to determine their respective rights under the Report of Commissioners and Judgment heretofore rendered in this proceeding, as to what timber should now be cut and from what tracts, and as to the manner in which the proceeds of the sale of such timber should be distributed, and as to by whom and in what manner the timber should be sold, and desire the advice and instruction of the court as to these matters."

On 7 February 1964 an order was issued finding Virginia Johnson Scarborough to be a necessary party and setting a hearing for 28 February 1964. The order was served upon her on 12 February 1964. She made no appearance.

On 22 April 1964, following a hearing, the clerk entered an order appointing commissioners who were to sell timber growing on those lands which had not been cut over. The order further provided that the appraisal value of certain timber on specified lands allotted to B. D. Johnson and Nash Johnson shall be added to the net proceeds received from the sale, that the sum so arrived at shall be the fund available for distribution, and that the appraisal value shall be set off in determining Nash Johnson's distributive share. All the parties, except Virgina Johnson Scarborough, appealed from this order.

On 5 August 1964 and before the cause came on to be heard in Superior Court, a document entitled "Agreement for Division" was prepared. Its first paragraph states the following:

> "WHEREAS, the parties to Special Proceedings Numbers 3437, 3472, 3740, 3743, 3738, 3384, 3362, and 2282, as filed

in the Superior Court of Duplin County (except Virginia Johnson Scarborough), are anxious to effectuate a just and equitable division of lands described in such proceedings; and WHEREAS, said parties and their attorneys of record (except Virginia Johnson Scarborough) realize and appreciate the problems presented by the pleadings as filed, and are now desirous of resolving their minor differences and effectually dividing said property; and to this end they have agreed and do now agree as follows: * * * "

The Agreement provides for a distribution of the lands involved in all proceedings except S.P. #2282, and regarding S.P. #2282 provides that " * * * appeals shall be withdrawn by proper order and the case remanded to the Clerk of Superior Court of Duplin County for such supplementary orders as may be necessary to effectuate the sales and division thereby contemplated."

The Agreement further provides that Nash Johnson shall have a right of election to take either the Newkirk tract in S.P. #3740 or the Norman Johnson tract in S.P. #3384. This Agreement was signed by attorneys representing all parties, and on 10 August 1964 Nash Johnson, through his attorney H. E. Phillips, elected to take the Newkirk tract as provided in the Agreement.

On 7 October 1964 Judge Henry L. Stevens, Jr., with the consent of the attorneys for the parties and pursuant to the Agreement of 5 August 1964, dismissed the appeal from the order entered by the clerk on 22 April 1964 and remanded the cause to the clerk of the Superior Court of Duplin County for further proceedings in conformity with that order. No question was raised with respect to the order entered by Judge Stevens or the Agreement entered into on 5 August 1964 by the parties until 25 January 1968 when William T. Simpson, attorney for Nash Johnson and his co-movants, filed a motion in the cause requesting an order: (1) restraining the commissioners appointed by the 22 April 1964 order from taking any action, and (2) directing all parties in interest to appear and show cause "why the order dated 22 April 1964 should not be rescinded and dissolved." This motion was denied by the clerk, and the movants appealed to the Superior Court.

On 14 December 1969, after making extensive findings of fact and entering conclusions of law thereon, Judge Cowper entered the following order:

> "It is NOW, THEREFORE, ORDERED that the motion of January 25, 1968 be and the same is hereby allowed.
>
> "The Court does further ORDER that the motion filed February 7, 1964 be and the same is hereby denied.
>
> "It is further ORDERED that the order of the Honorable R. V. Wells, Clerk, Superior Court, dated April 22, 1964, is hereby set aside and declared null and void."

W. A. Johnson; Wells, Blossom & Burrows; and Venters & Dotson for W. Victor Venters and wife, Katherine C. Venters, Mae J. Sorrell, Cora Jane J. Bostic and husband, Raeford Bostic, Carson Johnson, Fletcher Johnson, and Dorothy J. Lane and husband, Lester Lane, appellees.

Wheatly & Mason and William F. Simpson for Bruce Carlton, Executor of Ophelia J. Carlton, Bruce Carlton, individually, Nash Johnson, Mary Sue Johnson, William T. Blanchard and Margaret B. Cooper, appellants.

MOORE, Justice.

Virginia Johnson Scarborough was a party to the original petition and was a party and ordered to appear at the hearing on 22 April 1964. She made no appearance and did not appeal from the 22 April 1964 order entered by the clerk. She was not a party to the Agreement of 5 August 1964 or the consent order entered by Judge Stevens on 7 October 1964. She did join in as a movant in the motion of 25 January 1968, but withdrew and is not now a party to this appeal.

[1] Only the decision of the Court of Appeals is before us for review. Our inquiry is restricted to rulings of the Court of Appeals which are assigned as error and which are preserved by arguments or by the citation of authorities with reference thereto in the brief filed by the appellants in this Court. In their brief the appellants state that the questions involved in this appeal are:

"1. Was the Court of Appeals correct in finding that the Clerk had jurisdiction over the parties, lands and timber encompassed in his order of 22 April 1964?

"2. Was the Court of Appeals correct in setting forth that the movants had failed in showing that certain lands before the Clerk were not involved in the 1948 petition because the Court of Appeals was 'unable to determine this from the record'?

"3. Was the Court of Appeals correct in asserting that where the judgment is void as to Virginia Johnson Scarborough, it is effective as against the other tenants in common?

"4. Was Judge Cowper in error in the entry of his order?"

[2] No argument was advanced and no citation of authority was made in connection with question No. 3. This is deemed abandoned and is not before us. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353.

The real question involved is: Was Judge Cowper in error in declaring the order entered by the clerk on 22 April 1964 null and void? The Court of Appeals answered this question in the affirmative. We agree.

On 7 February 1964 all the parties in interest (except Virginia Johnson Scarborough) requested the clerk to hold a hearing and enter such order as appropriate for carrying out the judgment entered by the court on 13 November 1950 confirming the report of the commissioners in *ex parte* proceeding #2282. In compliance with this motion the clerk entered his order of 22 April 1964. All the parties appealed from this order, but on 5 August 1964 while the appeal was pending all the parties entered into an Agreement to divide certain lands involved in S.P. #2282, as well as other lands owned by the parties, and further agreed that by proper order their appeal from the clerk's order of 22 April 1964 would be withdrawn.

On 7 October 1964 Judge Stevens, with the consent of the attorneys for all the parties (except Virginia Johnson Scarborough) entered the following order:

"This cause coming on to be heard and the same being heard before his Honor, Henry L. Stevens, Jr., Judge presiding at the October, 1964, term of Civil Superior Court of Duplin County; and it appearing to the Court that the above matter has been duly calendared for trial; and it further appearing to the Court from inspection of the records that on April 22, 1964, His Honor, R. V. Wells, Clerk of Superior Court of Duplin County, entered an order in the above entitled cause, making certain findings of fact and conclusions of law and it further appearing to the Court that the movants excepted to the findings of fact, conclusions of law and to the order entered in this cause and appealed from said order, and that Virginia Johnson Scarborough did not appeal;

"And it further appearing to the Court that the attorneys for the movants in the above entitled cause now move the Court that the appeal from the order and conclusions of law and findings of fact in this cause be dismissed and that this matter be remanded to the Clerk of Superior Court of Duplin County for further proceedings in conformance with said order;

"IT IS NOW, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the appeal filed in this cause by the movants be and the same is hereby dismissed and IT IS FURTHER ORDERED that this cause be remanded to the Clerk of Superior Court of Duplin County for further proceedings in conformance with the order entered on April 22, 1964, by the Clerk of Superior Court of Duplin County."

[3-7] The Agreement entered into by the parties on 5 August 1964 also provided, among other things, that Nash Johnson should have a right of election to take either the Newkirk or Norman Johnson tract as set out in the Agreement, and on 10 August 1964 Nash Johnson, through his attorney H. E. Phillips, filed with the clerk notice of his election to take the Newkirk tract. Nash Johnson having first consented to and then having ratified the Agreement of 5 August 1964 by making the election provided for in the Agreement cannot now attack that Agreement. Neither he nor his co-movants, all of whom consented through their attorneys to the judgment signed by Judge Stevens withdrawing their appeal from the clerk's entry of the order of 22 April 1964, can attack that order by motion in the cause

some four years later. A judgment entered by the consent of the parties cannot be changed or altered without the consent of the parties to it or set aside except on proper allegations and proof and a finding by the court that it was obtained by fraud or a mutual mistake or that consent in fact was not given, the burden being on the party attacking the judgment. *Owens v. Voncannon,* 251 N.C. 351, 111 S.E. 2d 700; *Armstrong v. Insurance Co.,* 249 N.C. 352, 106 S.E. 2d 515; *Boucher v. Trust Co.,* 211 N.C. 377, 190 S.E. 226; 5 Strong's N. C. Index 2d, Judgments § 21. The proper procedure to attack a consent judgment on the ground of want of consent at the time it was entered is by motion in the cause. *Overton v. Overton,* 259 N.C. 31, 129 S.E. 2d 593; *Brown v. Owens,* 251 N.C. 348, 111 S.E. 2d 705; 5 Strong's N. C. Index 2d, *ibid.* A consent judgment signed by the attorneys for the parties is presumed to be valid and the burden of proof is upon the one who challenges its invalidity. *Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897; *Chemical Co. v. Bass,* 175 N.C. 426, 95 S.E. 766; *Chavis v. Brown,* 174 N.C. 122, 93 S.E. 471; *Gardiner v. May,* 172 N.C. 192, 89 S.E. 955; 1 Strong's N. C. Index 2d, Attorney and Client § 3. In this case, there was no allegation or proof of fraud or mutual mistake. There was no motion in the cause to set the judgment aside, and neither Nash Johnson nor his co-movants alleged or offered proof that the attorneys signed the Agreement or the consent judgment before Judge Stevens without their approval. Under these circumstances, the Agreement and the consent judgment are binding on the parties.

[8] While the order of 22 April 1964 is not a consent order *per se,* by consenting in the Agreement for Division that the appeal from that order be withdrawn and that the case be remanded to the clerk for *such supplementary orders as necessary to effectuate the sales and division contemplated in the 22 April 1964 order,* and by consenting to the judgment of Judge Stevens that the cause be remanded for *proceedings in conformance with that order (22 April 1964),* the parties clearly indicated that they did in fact agree to the terms of the clerk's order of 22 April 1964, and for the purposes of this decision we hold that the order has the same effect as if actually entered by consent of the parties thereto.

[9] Movants contend that under G.S. 1-401 a written authorization for the attorney to act must be filed with the clerk. This

statute only requires written authorization when the attorney signs for a petitioner in the original petition. It does not apply here as the original petition in S. P. #2282 was signed by the parties themselves.

[10] Finally, the movants contend that the clerk lacked jurisdiction in the order of 22 April 1964 due to the fact that certain lands were before the clerk in 1964 which were not included in the 1948 petition. The Court of Appeals correctly held that the burden was on the movants to establish this assertion as a matter of fact. This they failed to do, and as jurisdiction is presumed, the record on its face does not reveal a want of jurisdiction. *Jackson v. Bobbitt,* 253 N.C. 670, 117 S.E. 2d 806.

For the reasons stated, we hold that the Court of Appeals correctly held that Judge Cowper erred in the entry of the order appealed from, and the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. WILLIAM TRACY OWENS

No. 78

(Filed 20 January 1971)

1. **Robbery § 1— attempted armed robbery — element of the offense**

The main element of attempted armed robbery is the force or intimidation occasioned by the use or threatened use of firearms.

2. **Robbery § 1— attempted armed robbery — description of the property**

In a prosecution for attempted armed robbery, it is not necessary or material to describe accurately or prove the particular identity or value of the property, provided the indictment shows that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value.

3. **Robbery § 2— attempted armed robbery — indictment — description of property**

An indictment for attempted armed robbery which describes the property involved as "U. S. currency" alleges a sufficient description of the property.

4. **Larceny § 2; Robbery § 1— money as subject to larceny and robbery**

Money is recognized by law as property which may be the subject of larceny, and hence of robbery.

5. **Criminal Law § 162— admission of evidence — waiver of objection**

When evidence is admitted over objection but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost.

6. **Robbery § 3; Criminal Law § 162— attempted armed robbery — wounds of victim — admissibility of evidence — waiver of objection**

In a prosecution for attempted armed robbery, testimony relating to the wounds received by the victim and to the victim's physical condition and appearance at the hospital *is held* admissible in evidence over the defendant's objection, where the defendant permitted similar testimony to be admitted without objection.

7. **Criminal Law § 168; Robbery § 5— instructions in attempted armed robbery prosecution — lapsus linguae**

In a prosecution for attempted armed robbery, trial court's inadvertent use of the word "intent" rather than "attempt" in portion of the charge defining "an attempt" was no more than a *lapsus linguae* and could not have misled the jury to defendant's prejudice.

8. **Criminal Law § 115— instructions on lesser included offenses**

The trial court is not required to submit to the jury the question of a lesser offense, included in that charged in the indictment, where there is no evidence to support such a verdict.

9. **Robbery § 5— attempted armed robbery prosecution — submission of possible verdicts**

The trial court in an attempted armed robbery prosecution was not required to submit an issue of defendant's guilt of attempted common law robbery, where neither the State nor the defendant offered any evidence indicating an intent to rob or steal without the use of the pistol.

APPEAL by defendant from judgment of *Copeland, J.*, June 3, 1970 Session of NASH County Superior Court.

Criminal prosecution on a bill of indictment charging the defendant with " . . . having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a .22 cal. revolver, a firearm, whereby the life of one Harvey I. Stevens was endangered and threatened, did then and there unlawfully, willfully, forcibly, violently and feloniously attempt to take, steal, and carry away U. S. currency of the value of .... from the presence, person, place of business, and residence of Harvey I. Stevens. . . . "

Upon the call of the case for trial, defendant moved to quash the bill of indictment. This motion was denied.

The State's evidence tends to show that H. I. Stevens (Stevens) operates a clothing store in Rocky Mount, North Carolina. On 18 February 1970 defendant entered the store and purchased a pair of socks. After some conversation about renting formal wear for the week end, defendant drew a gun, pointed it at Stevens, and ordered him to the rear of the store where a safe was located. Defendant directed Stevens to open the safe and told him that he had only 30 seconds to do so. Defendant then fired a shot in the opposite direction from Stevens. Stevens opened the safe and removed a money box containing approximately $350 and placed it on a counter. The defendant then ordered Stevens to turn around and raise his hands. When he did so, defendant struck Stevens over the head with a Coca-Cola bottle, shattering the bottle. Although groggy from the effect of the blow and almost blinded by the blood running from the wound on his head, Stevens struggled with the defendant, and as they were struggling Stevens heard something hit the floor and slide. Ralph Wallace (Wallace), who had an office next door, heard a loud noise in the Stevens' store and came to investigate. When he arrived, the defendant was on top of Stevens. Wallace pulled him off Stevens and as Wallace and defendant scuffled, Stevens got a .32 caliber pistol which he had behind the cash register and hit the defendant in the forehead. Defendant was finally subdued by Wallace and by officers who arrived and placed him under arrest. No money was taken by defendant. A .22 caliber pistol with one discharged round and seven live shells, admitted by defendant to be his, was found in the rear of the store. A paring knife was found in defendant's pocket, and one lady's bloody white glove was on defendant's left hand. After being treated for head injuries, Stevens remained in the hospital for about a week.

Defendant testified in his own behalf. His testimony tends to show that he went to Stevens' store to buy some socks; that he had a pistol, which he had purchased to take with him to Washington, D. C. for his protection, stuck down in his pants underneath his coat; that as he pulled back his coat to get the money to pay for the socks, Stevens apparently saw the pistol and became nervous. He did not draw the pistol or point it at Stevens, but as he was trying to conceal it, Stevens hit him on the back of his head with a bottle. He and Stevens then scuffled, and he obtained a bottle and struck Stevens. As the scuffle continued, he pulled his pistol out to protect himself and it

accidentally fired. Stevens then knocked the gun from his hand. At no time did he attempt to rob Stevens, but he was only attempting to defend himself against the assaults being made upon him and trying to escape.

In rebuttal, Stevens testified that he did not hit defendant on the back of the head with a bottle, and Detective Walter Mullen testified that he examined the top of defendant's head, looked at him closely, and found no blood on top of his head; he did have some lacerations on his forehead on which he put Merthiolate and band-aids. Defendant did not ask to be taken to the hospital.

From a verdict of guilty as charged and judgment pronounced thereon, defendant appealed to the Court of Appeals. The case was transferred to this Court under its transferral order dated 31 July 1970.

Attorney General Robert Morgan and Assistant Attorneys General William W. Melvin and T. Buie Costen for the State.

Vernon F. Daughtridge for defendant appellant.

MOORE, Justice.

[1, 2] Defendant first contends that under the decision in *State v. Guffey*, 265 N.C. 331, 144 S.E. 2d 14, the bill of indictment in this case is fatally defective in that it did not specify the value of the property involved. The gist of the offense as described in this indictment is the attempt to commit robbery by the use or threatened use of firearms. The force or intimidation occasioned by the use or threatened use of firearms is the main element of the offense. In such a case, it is not necessary or material to describe accurately or prove the particular identity or value of the property, provided the indictment shows that the property was that of the person assaulted or under his care, and that such property is the *subject of robbery* and that it had *some* value. *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525; *State v. Mull*, 224 N.C. 574, 31 S.E. 2d 764; G.S. 14-87; 6 Strong's N. C. Index 2d, Robbery § 2; 77 C.J.S. Robbery § 37.

[3, 4] In *State v. Guffey, supra*, the indictment did not describe the property which the defendant was charged with taking but only that the defendant robbed the prosecuting witness "of the value of one thousand dollars." This Court held that such an

indictment was defective since it did not describe any property sufficiently to show that it was the subject of robbery, and although the indictment stated a value, what property had the value did not appear. In the present case the property involved is described as "U. S. currency." This is the subject of robbery and some value can be inferred from the description of the property itself. "In an indictment or information for robbery by taking money, the term 'money' itself imports some value, of which fact the court will take judicial notice." 77 C.J.S. Robbery § 37. Money is recognized by law as property which may be the subject of larceny, and hence of robbery. *State v. Rogers, supra;* 50 Am. Jur. 2d, Larceny § 59. The fact that the indictment in *Guffey* fails to describe any property distinguishes that case from the case at bar. Moreover, *Guffey* is further distinguishable in that it involved a completed robbery. Here, we have an attempted robbery, and it is impossible to charge the exact value of the property involved, because no property was, in fact, taken.

We hold the indictment here is sufficient and Judge Copeland was correct in overruling defendant's motion to quash.

[5, 6] Defendant next contends that the trial court erred in permitting Stevens to testify over objection that about 20 stitches were placed in his head as a result of the wound received by him when defendant struck him over the head with the Coca-Cola bottle, and that he remained in the hospital for about one week; and in permitting Detective Mullen to testify over objection that when he went to the hospital to discuss the case with Stevens, Stevens was in bed, unable to sit up, and that he had a large bandage on the top part of his head and the left side of his face. Prior to the objection to the testimony of Stevens as to the wound on his head and his stay in the hospital, Stevens testified without objection that defendant "busted a ten ounce Coca-Cola bottle over my head," "blood was both all over my face and all the way down my clothes," "I could not see right . . . because there was so much blood in my face and on my glasses," "I was getting very groggy, I was almost out, I could hardly walk," "I don't recall anything else that happened then because I was losing more blood all the time and I wanted to get to a doctor." Detective Mullen was allowed to testify without objection: "He [Stevens] had a large bandage on the top part of his head and also on I believe it was the left side of his

head and a laceration over here and a long laceration on the top part of his head. I talked to Dr. Kornegay also. Mr. Stevens was in the hospital that day and he stayed in the hospital for approximately a week after I talked to him." It is the well-established rule that when evidence is admitted over objection but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost. *Davis v. Vaughn,* 243 N.C. 486, 91 S.E. 2d 165; *Price v. Whisnant,* 232 N.C. 653, 62 S.E. 2d 56; *State v. Godwin,* 224 N.C. 846, 32 S.E. 2d 609; Stansbury's N. C. Evidence, 2d Ed., § 30. This assignment of error is without merit.

[7] Defendant next assigns as error that portion of the trial court's charge to the jury wherein the court was defining "an attempt." The court said: "An intent in criminal jurisprudence is an effort to accomplish a crime amounting to more than mere preparation or planning for it and which if not prevented would have resulted in the full consummation of the act attempted." It is obvious that the court here inadvertently used the word "intent" when he meant "attempt." In the paragraphs immediately preceding and immediately following that portion of the charge excepted to, and also in the paragraph which is the subject of this exception, the correct word "attempt" is used. Clearly, the court was defining "attempt." "Intent" is correctly defined in another portion of the charge. This is no more than a *lapsus linguae* and could not have been misunderstood by the jury and is not prejudicial. *State v. Smith,* 237 N.C. 1, 74 S.E. 2d 291; *State v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460.

[8, 9] Defendant next assigns as error the failure of the court to submit an issue of his guilt of attempted common law robbery.

"It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. 42 C.J.S., Indictments and Information, §§ 275, 283, 293; *S. v. Jones, supra* [227 N.C. 402, 42 S.E. 2d 465]; *S. v. Moore,* 211 N.C. 748, 191 S.E. 840; *S. v. Holt,* 192 N.C. 490, 135 S.E. 324; *S. v. Cody,* 60 N.C. 197." *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496. However, the trial

court is not required to submit to the jury the question of a lesser offense, included in that charged in the indictment, where there is no evidence to support such a verdict. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481; *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545. In the case under review, the State's evidence clearly indicates an attempted armed robbery by the use or threatened use of a .22 caliber pistol. The defendant contends that he did not use the pistol to rob or attempt to rob Stevens, but to the contrary he only defended himself against an unjustified assault made upon him. He further contends the pistol was knocked from his hand by Stevens and was not actually used for any purpose. There is no evidence to indicate an intent to rob anyone or to steal anything without the use of the pistol. Under the State's evidence, the defendant would be guilty of attempted armed robbery. Under the defendant's evidence, he would not be guilty of attempted armed robbery or attempted common law robbery. Therefore, the judge was not, as defendant contends, required to instruct the jury that it might return a verdict of guilty of attempted common law robbery. *State v. Bridges,* 266 N.C. 354, 146 S.E. 2d 107; *State v. Parker, supra; State v. Bell, supra.*

The judge did properly charge that the jury could bring in one of several verdicts: guilty as charged in the indictment, guilty of an assault with a deadly weapon, guilty of a simple assault, or not guilty. The jury accepted the State's evidence and returned the verdict of guilty as charged.

Other exceptions to the judge's charge have been carefully considered, but when read contextually the charge presents the law fairly and clearly to the jury.

We find no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JERRY PENLEY

No. 88

(Filed 20 January 1971)

1. **Kidnapping § 1— failure of statute to define kidnapping**

The failure of G.S. 14-39 to define kidnapping does not render the statute vague or uncertain, the common law definition being incorporated in the statute by construction.

2. **Kidnapping § 1— definition of "kidnap"**

At common law and as used in G.S. 14-39, the word "kidnap" means the unlawful taking and carrying away of a person by force and against his will.

3. **Kidnapping § 1— threats and intimidation amounting to force**

The use of actual physical force or violence is not essential to the commission of the offense of kidnapping, it being sufficient if there are threats and intimidation and appeals to the fear of the victim which are sufficient to put an ordinary prudent person in fear for his life or personal safety and to overcome the will of the victim and secure control of his person without his consent and against his will.

4. **Indictment and Warrant § 9— charge of crime**

An indictment is sufficient if it charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense.

5. **Indictment and Warrant § 9— charge in language of statute**

An indictment for a statutory offense is sufficient, as a general rule, when it charges the offense in the language of the statute.

6. **Kidnapping § 1— sufficiency of indictment**

Bill of indictment charging that defendant "did unlawfully, wilfully, feloniously and forcibly kidnap" a named person, *held* sufficient to withstand a motion to quash, since the word "kidnap" has a definite legal meaning.

7. **Criminal Law § 88— cross-examination for impeachment of witnesses' credibility**

In this prosecution for the kidnapping of the driver of a prison bus during an escape of prisoners from the bus, cross-examination of defendant's witnesses, prisoners who had participated in the escape, as to how many times they had talked with each other about the case, who planned the escape, and whether one witness had told police he knew nothing about the matter, *held* competent for the purpose of impeaching the credibility of the witnesses.

8. **Criminal Law § 88— scope of cross-examination**

In North Carolina the scope of inquiry on cross-examination is not confined to those matters testified to on direct examination, but

questions are permissible to impeach, diminish or impair the credit of the witness.

9. **Criminal Law § 88— interest or credibility of witness**

Questions and answers which directly challenge the interest or credibility of a witness are competent.

10. **Criminal Law § 88— cross-examination to show bias**

Both the State and the defendant have a right to cross-examine a witness to show his bias or interest.

11. **Criminal Law § 89— impeachment — prior inconsistent statements**

Prior inconsistent statements of a witness are always admissible for the purpose of impeachment.

12. **Kidnapping § 1— distance traveled**

The distance traveled is not material in a kidnapping prosecution.

13. **Kidnapping § 1— prison bus driver — sufficiency of evidence to support verdict**

Evidence that defendant prisoner held a rifle pointed at the prosecuting witness, who had been driving a bus loaded with prisoners, while another prisoner drove the bus for a distance of one to one and one-half miles, and that the prosecuting witness wanted to get off the bus but was refused permission to do so by defendant, *held* sufficient to support a verdict finding defendant guilty of kidnapping.

APPEAL by defendant from judgment of *Tillery, J.*, August 1970 Criminal Session HALIFAX Superior Court.

Criminal prosecution upon a bill of indictment charging that defendant on 9 June 1970, with force and arms, at and in the County of Halifax, did unlawfully, willfully, feloniously and forcibly kidnap Wyatt H. Carter, a violation of G.S. 14-39.

Upon the call of the case for trial in superior court, defendant moved to quash the bill of indictment "for insufficient wording to allege kidnapping." This motion was denied.

The State's evidence tends to show that on 9 June 1970 Officer Wyatt H. Carter was the driver of a prison bus which transported a work detail of about thirty-five prisoners, including defendant, from Odom Prison to Caledonia Farm. At approximately 3:30 p.m. the prisoners were loaded on the bus for the return trip to Odom. Officer Carter was unarmed, but two armed guards were riding in the cab with him—Officer Callahan with a 223 Remington high-powered rifle and Officer Smith with a double-barreled shotgun and a .38 pistol. Between the driver's section and the prisoners' compartment in the rear of

the bus there was a heavy gauge steel mesh wire containing a small sliding door with a padlock on the driver's side. The prisoners knew the padlock was missing on this return trip and, when the bus choked down as it approached an intersection, they rushed through the sliding door. Officers Callahan and Smith, one of whom was standing up in the steps and the other sitting in a chair nearby, and one inmate were carried out of the bus "in a pile on top of each other and a chair went out along with them." Officer Callahan's rifle was standing in a corner behind the driver's seat. Defendant got it and told Officer Carter to sit down in a chair and shut up or he would kill him. A pistol shot was fired inside the bus by another prisoner. Defendant held the rifle on Officer Carter while another prisoner drove the bus a distance of one to one and one-half miles, stopping four times for prisoners to depart into the woods. Defendant Penley left at the third stop. Officer Carter begged defendant not to hurt him, asked them to put him off and take the bus, but defendant held the rifle on Carter and kept him on the bus until defendant left it and fled into the woods, taking the rifle with him. When the bus stopped the last time the prisoner-driver left and took the switch keys with him. At that time Officer Carter left. He was not harmed.

Defendant did not testify but offered the testimony of four prisoners who participated in the escape. They testified that defendant at no time had a weapon of any kind, did not hold a rifle on Officer Carter and did not threaten him.

From a verdict of guilty and judgment pronounced thereon, defendant appealed to the Court of Appeals. The case was transferred to this Court under its general referral order dated July 31, 1970.

Parker & Dickens by William F. Dickens, Jr., Attorneys for defendant appellant.

Robert Morgan, Attorney General, by Millard R. Rich, Jr., and Andrew A. Vanore, Jr., Assistant Attorneys General for the State.

HUSKINS, Justice.

[6] Defendant contends the trial court erred in denying his motion to quash the bill of indictment, arguing that the common law definition of kidnapping must be used in a kidnapping in-

dictment in order to inform the defendant of the charges against him. No authority is cited for his position.

G.S. 14-39 provides in pertinent part: "It shall be unlawful for any person . . . , male or female . . . to kidnap . . . any human being. . . . Any person . . . violating . . . any provisions of this section shall be guilty of a felony. . . . "

[1] We held in *State v. Lowry and Mallory,* 263 N.C. 536, 139 S.E. 2d 870 (1965), that the failure of G.S. 14-39 to define kidnapping did not render the statute vague or uncertain and that the common law definition of the offense is incorporated in the statute by construction. " . . . [W]hen a statute punishes an act giving it a name known to the common law, without otherwise defining it, the statute is construed according to the common law definition." 22 C.J.S., Criminal Law, § 21; *Johnson v. Commonwealth,* 209 Va. 291, 163 S.E. 2d 570 (1968); *State v. McLarty,* 414 S.W. 2d 315 (Mo. 1967); *State v. Taylor,* 46 N.J. 316, 217 A. 2d 1 (1966).

[2, 3] At common law and as used in G.S. 14-39, the word "kidnap" means the unlawful taking and carrying away of a person by force and against his will. *State v. Lowry and Mallory, supra.* "The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping. . . . The crime of kidnapping is frequently committed by threats and intimidation and appeals to the fears of the victim which are sufficient to put an ordinarily prudent person in fear for his life or personal safety, and to overcome the will of the victim and secure control of his person without his consent and against his will, and are equivalent to the use of actual force or violence." *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966).

[4-6] Here, the bill of indictment is drafted in the language of the statute. It charges defendant with kidnapping without defining the word. This is sufficient. If an indictment charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. *State v. Anderson,* 259 N.C. 499, 130 S.E. 2d 857 (1963); *State v. Daniel,* 255 N.C. 717, 122 S.E. 2d 704 (1961). An indictment for a statutory offense is sufficient, as a general rule, when it charges the offense in the language of the statute. *State v. Hord,* 264 N.C. 149, 141 S.E. 2d 241 (1965); *State v.*

Sossamon, 259 N.C. 374, 130 S.E. 2d 638 (1963); *State v. Wells*, 259 N.C. 173, 130 S.E. 2d 299 (1963).

In *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966), a bill of indictment charging that defendant "unlawfully, wilfully, feloniously and forcibly did kidnap" a named person was held sufficient to withstand a motion to quash, since the word "kidnap" has a definite legal meaning. It follows, therefore, that defendant's challenge to the sufficiency of the bill of indictment in this case is without merit and is overruled. We think the bill adequately informed defendant of the charge against him and that he understood it.

[7] On cross-examination of a defense witness, the solicitor, over defendant's objection, asked: "How many times have you and Mr. Penley and Mr. Shores and Mr. Pope and anyone else talked about this case?" Again over objection, the solicitor asked another defense witness: "Who planned the whole escape?" A third time, over objection, the solicitor asked the witness on cross-examination: "I ask you if you have not talked to . . . police officers and told them you didn't know anything or did not see anything?" Defendant contends the solicitor was permitted in this manner to create the impression before the jury that defendant had conspired with his witnesses concerning their testimony and that defendant planned the escape, all of which was collateral to the main issue and had no relevancy to the kidnap charge against him.

[8] This assignment of error has no merit. North Carolina adheres to the "wide-open" rule of cross-examination, so called because the scope of inquiry is not confined to those matters testified to on direct examination. Note, 45 N. C. L. Rev. 1030 (1967). In *State v. Dickerson*, 189 N.C. 327, 127 S.E. 256 (1925), the Court said: "The cross-examination is not confined to matters brought out on the direct examination, but questions are permissible to impeach, diminish or impair the credit of the witness. These questions often take a wide range, but should be confined to questions within the bounds of reason—the materiality is largely left to the discretion of the court." *See also State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970); *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970); *State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195 (1959); Stansbury, North Carolina Evidence (2d Ed., 1963) §§ 56-57; Jones on Evidence, (5th Ed., 1958) §§ 928-929.

[9-11] Questions and answers which directly challenge the interest or credibility of a witness are competent. *State v. Hart,* 239 N.C. 709, 80 S.E. 2d 901 (1954). Both the State and the defendant have a right to cross-examine a witness to show his bias or interest. *State v. Wilson,* 269 N.C. 297, 152 S.E. 2d 223 (1967); *State v. Creech,* 229 N.C. 662, 51 S.E. 2d 348 (1949). And for the purpose of impeachment, prior inconsistent statements of a witness are always admissible. *State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773 (1954).

[12, 13] The evidence in this case shows that the prosecuting witness wanted to get off the bus and requested permission to do so. This request was refused by defendant, who held a rifle pointed at Carter while the bus continued to travel. The distance traveled is not material, *State v. Lowry and Mallory, supra,* although the evidence shows Carter was held captive for a mile or more. The defendant by force and threat of violence took Carter and carried him where he did not consent to go. This constitutes kidnapping under our statute. The verdict was proper and will be upheld.

No error.

SOUTHERN RAILWAY COMPANY v. CITY OF RALEIGH

No. 56

(Filed 20 January 1971)

1. **Municipal Corporations § 24— purpose of street assessment**

   The dominant purpose of a street assessment is not to require a property owner to pay the cost of a public improvement, but rather to require the owner to reimburse the city for an expenditure which enhanced the value of his property.

2. **Municipal Corporations § 24— local improvement assessments — exemption of vacant railroad right-of-way property — conflicting city charter provisions**

   The purpose of Ch. 839, Session Laws of 1965, was to withdraw from municipalities the right to levy an assessment against vacant city lots over which railroads operate their trains, and municipal charter provisions which authorize such an assessment must yield to Chapter 839.

3. **Municipal Corporations § 24— property benefited by local improvements — legislative determination**

The right of the Legislature to determine what property is benefited by a street improvement includes the right to determine what property is not benefited thereby.

4. **Municipal Corporations § 24— exemption of vacant railroad right-of-way property from local improvement assessments — power of legislature**

The General Assembly acted within its constitutional power in providing that a municipality shall not assess railroad right-of-way property for local improvements "unless there is a building on such right-of-way." G.S. 160-521.

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

APPEAL by defendant from *Bailey, J.*, February 2, 1970 Session, WAKE Superior Court.

This proceeding involves the validity of a street assessment in the sum of $6,713.32 levied by the City of Raleigh against the Southern Railway Company for the cost of paving that part of Blount Street which borders on plaintiff's lots Nos. 4, 12 and 13 in the City of Raleigh. The Southern Railway Company appealed from the assessment. The parties stipulated certain facts, waived a jury trial and consented for the Court to try the case.

After hearing, Judge Bailey on March 3, 1970 found these facts:

"1. The railroad right-of-way property of the plaintiff, not having a building on it nor used for any purpose other than a right-of-way for the track running through the property as stipulated to by the parties, is not benefited by the paving done by the defendant, City of Raleigh.

2. Article 42 of Chapter 160 of the General Statutes of North Carolina applies to the paving assessments in this case; and

3. Said Article is not unconstitutional or otherwise invalid."

Based on the findings the Court concluded:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the paving assessments by the defendant, City of Raleigh, against the plaintiff, Southern Railway Com-

pany, in this case are unauthorized, illegal and unlawful and and that the assessments be and they hereby are cancelled."

The North Carolina Court of Appeals affirmed the judgment. The defendant, as provided in G.S. 7A-30(1), appealed to the Supreme Court.

Donald L. Smith and Broxie J. Nelson by Donald L. Smith Attorney for the City of Raleigh for the defendant appellant.

Joyner & Howison by W. T. Joyner, W. T. Joyner, Jr., James M. Kimzey for the plaintiff appellee.

HIGGINS, Justice

The pertinent facts and the rules of law applicable to them are accurately stated in the opinion of the Court of Appeals. (9 N.C. App. 305). On the appeal here, the City of Raleigh has urgently contended: (1) Chapter 839, Session Laws of 1965 is a general law and does not repeal Raleigh's Charter provisions which authorize the City to assess against plaintiff's right-of-way lots Nos. 4, 12 and 13 the cost of paving South Blount Street; and (2) the Legislature is without constitutional authority to exempt the plaintiff's right-of-way property from the paving assessment, citing as authority the case of *Cemetery Association v. Raleigh,* 235 N.C. 509, 70 S.E. 2d 506.

Prior to the enactment of Chapter 839, Raleigh's Charter provisions authorized the assessment. Chapter 839 provides:

> "No municipality shall assess any railroad company on account of any local improvement made on or abutting railroad right of way unless there is a building on such right of way owned, leased or controlled by the railroad, in which event the front footage to be used as a basis for such assessment against the railroad shall be the actual front footage occupied by such building plus 25 feet on each side thereof, but not to exceed the amount of land owned, leased or controlled by the railroad. In the event a building is placed on such property by the railroad subsequent to the time a local improvement is made, then the railroad company shall be subject to an assessment without interest on the same basis as if the building had been located on the property at the time the local improvement was made." Session Laws of 1965, page 1129.

[1] The dominant purpose of a street assessment is not to require a property owner to pay the cost of a public improvement, but rather to require the owner to reimburse the city for an expenditure which enhanced the value of his property.

[2] A street pavement adjacent to a railroad right-of-way ordinarily would not increase the value of the right-of-way for railway purposes. A street pavement would increase the value of a building by adding to its availability for profitable uses. Hence the municipality may assess the cost of paving frontage occupied by a building, as provided in Chapter 839. The only purpose of the Act was to withdraw from municipalities the right to levy an assessment against vacant city lots over which railroads operate their trains. The language of the Act is plain, and does not require interpretation. Raleigh's Charter provisions must give way to Chapter 839.

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language . . . used . . . . The courts have no function of legislation and simply seek to ascertain the will of the Legislature." *Unemployment Compensation Commission v. Insurance Company,* 215 N.C. 479, 2 S.E. 2d 584. "A general legislative enactment will not ordinarily be construed by the court to repeal by implication an existing particular Statute or one local in its application; but where it is plainly manifest from the terms of the general law that such was the intention of the Legislature, the intent so found will prevail and effect a repeal of the special statute, when in conflict therewith." *State v. Johnson,* 170 N.C. 685, 86 S.E. 788. See also *Felmet v. Commissioner,* 186 N.C. 251, 119 S.E. 353. "As a rule, apparent inconsistencies . . . should be reconciled so as to make all effective, if possible . . . . Of course if a later is so repugnant to a prior act that the two cannot be reconciled the later act prevails . . . . " *Hammond v. Charlotte,* 205 N.C. 469, 171 S.E. 612.

The authorities in this State held that "local assessments may be a species of tax . . . but they are not taxes within the meaning of the term as generally understood in constitutional restrictions and exemptions. . . . These assessments . . . proceed upon the theory that when a local improvement enhances the value of neighboring property, it is reasonable and competent

for the Legislature to provide that such property shall pay for the improvement." *Tarboro v. Forbes* 185 N.C. 59 (citing many authorities).

> "§ 21. The general rule is that a special or local assessment is justified and authorized by, and is unconstitutional and invalid without, a special benefit to the property assessed, resulting from a special or local public improvement. The assessment is regarded as compensation for such special benefit . . . "
>
> "§ 29. The question of the existence and extent of special benefit resulting from a public improvement for which a special assessment is made is one of fact, legislative or administrative rather than judicial in character, and the determination of such question by the legislature or by the body authorized to act in the premises is conclusive on the property owners and on the courts, unless it is palpably arbitrary or grossly unequal and confiscatory, in which case judicial relief may be had against its enforcement." 48 Am. Jur. SPECIAL OR LOCAL ASSESSMENTS § 21 and § 29. See also *Raleigh v. Mercer,* 271 N.C. 114 (citing many cases).

[3, 4] The right of the Legislature to determine what property is benefited by a street improvement includes the right to determine what property is not benefited thereby. The right to include involves the right to exclude. The General Assembly by providing that a municipality shall not assess railroad right-of-way property for local improvement "unless there is a building on such right-of-way" acted within its power. Neither *Cemetery Association v. Raleigh, supra,* nor the cases therein cited, mitigate against this conclusion.

The decision of the Court of Appeals is

Affirmed.

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

STATE OF NORTH CAROLINA v. CARL JAMES BALL

No. 89

(Filed 20 January 1971)

1. **Constitutional Law § 30— right to speedy trial**

The fundamental law of this State reserves to each defendant the right to a speedy trial.

2. **Constitutional Law § 30— denial of speedy trial — factors for consideration**

The length of the delay, the cause of the delay, prejudice to defendant and waiver by defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed.

3. **Constitutional Law § 30— denial of speedy trial — burden of proof**

The burden is on the accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution.

4. **Constitutional Law § 30— speedy trial — delay of 145 days between indictment and trial**

The trial court properly denied defendant's motion that the charges against him be dismissed on the ground that he had been denied the right of a speedy trial by a delay of 145 days between indictment and trial, where the court found that the delay was caused by a crowded docket and by lack of a sufficient number of courtrooms and terms of court, that the case had been calendared for trial on one or more occasions but had not been reached because of the press of other business, and that the delay was partially to permit the prosecution of other criminal cases in which defendants had been in jail longer than this defendant, the record does not disclose that defendant has been prejudiced by the delay, and defendant has failed to show that the delay was due to the neglect or willfulness of the State.

5. **Criminal Law §§ 34, 128— evidence of defendant's involvement in another offense — testimony admitted without objection — objection sustained to one question — mistrial**

In this prosecution for felonious breaking and entering, felonious larceny and safecracking, the trial court did not err in failing to declare a mistrial on its own motion when defendant's accomplice in the crimes testified, without objection, that defendant was also charged in another safecracking for which the accomplice was then in prison, and when the solicitor asked a police officer whether defendant was being held for return to another county after this case was closed, to which objection was sustained.

6. **Criminal Law § 128— mistrial — discretion of court**

Whether a mistrial should be ordered is a matter of discretion, and the judge's action is not reviewable unless there are circumstances establishing gross abuse.

APPEAL by defendant from judgment of *McKinnon, J.*, July 6, 1970 Special Criminal Session of CUMBERLAND County Superior Court.

Criminal prosecution on separate bills of indictment consolidated for trial, charging defendant with felonious breaking and entering, felonious larceny, and safecracking.

The facts concerning the commission of the crimes charged are not germane to the questions raised by this appeal, but are briefly summarized as follows: James McLean is manager and part owner of the Hope Mills Tire Sales Company. On 22 December 1969, when he came to work, he found that an unbarred window in the rear of the store was broken open and that a safe containing account books, ledgers, and about $25 in silver was missing. Telford Oxendine testified that on 21 December 1969 he agreed to help defendant steal the safe, and that on 22 December 1969, about 1:30 a.m., they went to McLean's store where Oxendine watched as defendant broke open the rear window and entered the store. The two then loaded the safe into Oxendine's car, drove to defendant's home, and cut the safe open. Oxendine later showed police Officer Frye where the safe was buried, approximately 400 yards from defendant's home. The back of the safe had been ripped open and some $15 was missing.

Defendant's defense is an alibi. Two witnesses testified that they saw the defendant between 8:00 and 8:30 in the evening of 21 December 1969, and his wife testified that on the night of 21 December 1969 defendant came home about 8:30 or 9:00 p.m. and did not leave the house until the next morning. Defendant did not testify.

From a verdict of guilty as charged and sentence imposed, defendant appealed. The case was transferred to this Court under its transferral order of 31 July 1970.

Attorney General Robert Morgan, Deputy Attorney General R. Bruce White, Jr., and Staff Attorney Richard N. League for the State.

William S. Geimer, Assistant Public Defender, for defendant appellant.

MOORE, Justice.

Defendant first assigns as error the court's denial of his motion that he be discharged because he had not been given a speedy trial. In support of this motion, defendant's counsel made a statement to the court, and the solicitor for the State made a statement in reply. From these statements the court made the following findings of fact:

> "1. That the defendant was arrested on or about the 9th day of January, 1970, and remained in the Cumberland County Jail since that time except for a period of about two days, beginning on March 31, 1970, when he escaped from the Cumberland County Jail.
>
> "2. That preliminary hearing in the District Court was had on January 23, 1970, at which time he was represented by employed counsel and bond for his appearance was then set at $5,000.00. That shortly thereafter the Public Defender's office was assigned as counsel for the defendant and has represented him since. That a true bill of indictment was returned by the grand jury on February 16, 1970. That by letter dated April 7, 1970, from Mr. William S. Geimer, Assistant Public Defender, to the Solicitor demand was made for the trial of defendant as third in priority for those for whom demand was made at that time and that on June 8, 1970, a similar demand was made by Mr. Geimer, in which the defendant was listed as the first of those demanding trial. That the case has been calendared on one or more occasions for trial and that it has not been continued either at the request of the state or of the defendant, but that it has not been reached during any week calendared because of other business of the court.
>
> "3. That since the February 16, 1970, Session there have been .... weeks of Superior Court for the trial of Criminal Cases of which in .... weeks two sessions of Superior Court for the trial of criminal cases were held; that those weeks of court have been fully utilized for the trial of criminal cases and that a majority of the jury trials for the time in which the defendant was in jail have been cases in which the defendants have been in jail longer than this defendant.

"4. That the solicitor has available to him by law, himself and two assistant solicitors for the prosecution of the docket; that there are available in the Cumberland County Courthouse only two courtrooms suitable for the trial of jury cases and that these have been regularly in use.

"5. That no showing has been made in behalf of the State for any reason for the delay of this case other than the press of other business and no showing has been made by the defendant of any special prejudice to his defense by reason of the delay."

[1-3] The fundamental law of this State reserves to each defendant the right to a speedy trial. *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892; *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274; *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891; *State v. Webb,* 155 N.C. 426, 70 S.E. 1064. This was true long before the decision in *Klopfer v. North Carolina,* 386 U.S. 213, 18 L. Ed. 2d 1, 87 S.Ct. 988 (1967), in which the Supreme Court of the United States held that the right to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States was made applicable to the states by the Fourteenth Amendment. The circumstances of each particular case determines whether a speedy trial has been afforded. Undue delay cannot be defined in terms of days, months, or even years. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by the defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed. The burden is on the accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. *State v. Hatcher, supra; State v. Johnson, supra; State v. Hollars, supra;* Note, *Pre-indictment Delay and the Question of When the Right to a Speedy Trial First Attaches,* 6 Wake Forest Intra. L. Rev. 139 (1969).

Defendant relies upon *Dickey v. Florida,* 398 U.S. 30, 26 L. Ed. 2d 26, 90 S.Ct. 1564 (1970), contending that under that case he is entitled to his discharge. In *Dickey* the Court held that a delay of seven years was unwarranted and ordered defendant released. However, Mr. Chief Justice Burger, speaking for the Court in that case, said: "Crowded dockets, the lack of judges or lawyers, and other factors no doubt make some

delays inevitable," and in the same case Mr. Justice Brennan, in a concurring opinion, said:

> "What are the criteria to be used in judging the constitutionality of those delays to which the safeguard applies? This Court has stated that '[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' *Beavers v. Haubert, supra* [198 U.S. 77, 49 L. Ed. 950, 25 S.Ct. 573 (1905)], at 87, 49 L. Ed. at 954. We have also observed that '[w]hile justice should be administered with dispatch, the essential ingredient is orderly expedition and not mere speed.' *Smith v. United States,* 360 U.S. 1, 10, 3 L. Ed. 2d 1041, 1048, 79 S.Ct. 991 (1959). It appears that consideration must be given to at least three basic factors in judging the reasonableness of a particular delay: the source of the delay, the reasons for it, and whether the delay prejudiced interests protected by the Speedy Trial Clause."

And in another portion of this same opinion, Mr. Justice Brennan continues:

> " . . . Perhaps the most important reason for the delay of one criminal prosecution is to permit the prosecution of other criminal cases which have been in process longer than the case delayed. . . . "

Dickey is clearly distinguishable from the case now under review. That case involved a delay of seven years; the case at bar involved a delay of 145 days from indictment to trial. In *Dickey,* Mr. Chief Justice Burger noted that actual prejudice to Dickey was shown by the fact that police records were lost, two of his witnesses had died, and another witness was unavailable.

[4] Judge McKinnon found that the delay in the present case was caused by a crowded docket, and by lack of a sufficient number of courtrooms and terms of court. Judge McKinnon further found that the case had been calendared for trial on one or more occasions but had not been reached because of the press of other business, and that the delay was partially to permit the prosecution of other criminal cases in which the defendants had been in jail longer than this defendant. The

record does not disclose that defendant has been prejudiced in any manner by the delay, and defendant has failed to show that the delay was due to the neglect or willfulness of the State. Under these facts, we hold that the trial court correctly denied defendant's motion that he be discharged because he had not been given a speedy trial.

[5] Defendant next assigns as error the trial court's failure to declare a mistrial on its own motion because the following occurred at the instance of the solicitor:

Telford Oxendine (Recalled), testified, without objection:

"That Carl James Ball was also charged in the safecracking for which Telford is now in prison."

Sergeant Frye (Recalled):

"Sgt. Frye was recalled to the stand and asked by the solicitor whether the sheriff's department in Cumberland County was holding Carl James Ball to return him to Robeson County after this case is closed.

"Objection by defense counsel. Sustained."

[6] Ordering a mistrial is a matter of discretion. *State v. Brown*, 266 N.C. 55, 145 S.E. 2d 297; *State v. Humbles*, 241 N.C. 47, 84 S.E. 2d 264; *State v. Dove*, 222 N.C. 162, 22 S.E. 2d 231; *State v. Guice*, 201 N.C. 761, 161 S.E. 533. The judge's action is not reviewable unless there are circumstances establishing gross abuse. *State v. Humbles, supra; State v. Guice, supra; State v. Andrews*, 166 N.C. 349, 81 S.E. 416. No such abuse appears here. There was no objection to Oxendine's testimony, and the objection to Frye's testimony was sustained.

Justice Lake, in *State v. Williams*, 274 N.C. 328, 334, 163 S.E. 2d 353, 357, states:

"Nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered. *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341; *State v. Camp*, 266 N.C. 626, 146 S.E. 2d 643; *Lambros v. Zrakas*, 234 N.C. 287, 66 S.E. 2d 895; *State v. Fuqua*, 234 N.C. 168, 66 S.E. 2d 667; *State v. Hunt*, 223 N.C. 173, 25 S.E. 2d 598; Stansbury, North Carolina Evidence, 2d Ed., § 27; Wigmore on Evidence, 3d Ed., § 18."

[5] The defendant contends, however, that this case is controlled by *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762. There is no merit to this contention. In *Phillips* the solicitor asked defense witnesses a long series of questions which assumed facts not in evidence or misrepresented facts actually in evidence, or which were argumentative and called for answers which were objectionable. This Court allowed a new trial in *Phillips,* stating that the solicitor, by asking insinuating questions, was seeking to place before the jury incompetent and prejudicial matter not legally admissible. In the present case, the answer to only one question, without objection to that question or without motion to strike the answer, and the asking of one question to Sergeant Frye, to which objection was sustained, presents a factual situation entirely different from *Phillips.*

In the two assignments brought forward by the defendant, we find no error.

No error.

WILLIAM CLINTON BRADY v. TOWN OF CHAPEL HILL AND HAROLD P. SMITH

No. 76

(Filed 20 January 1971)

1. **Courts § 11.1— personal injury action — jurisdiction of district court**

The district court division was the proper division to try a personal injury action for recovery of damages in the amount of $5000.

2. **Courts § 11.1; Rules of Civil Procedure § 60— jurisdiction of personal injury action — judgment dismissing action for failure to prosecute — relief from judgment**

Although the plaintiff's personal injury action for $5000 was improperly calendared for trial in the superior court division instead of the district court division to which it had been allocated, a judgment by a superior court judge dismissing the action for failure of plaintiff to appear and prosecute the action was not void; plaintiff's relief, if any, from the judgment of dismissal is by a motion in the cause and not by appeal. G.S. 1A-1, Rule 60(b); G.S. 7A-240; G.S. 7A-242; G.S. 7A-243.

3. **Appeal and Error § 14— dismissal of appeal**

The Court of Appeals properly dismissed an appeal when (1) the appeal was not taken within ten days of the rendition of the judgment

and (2) the plaintiff failed to give notice to defendants. G.S. 1-279; G.S. 1-280.

ON *certiorari* to review the order of the Court of Appeals dismissing plaintiff's appeal from a judgment entered at the 8 June 1970 Session of ORANGE by *Ragsdale, J.* dismissing plaintiff's action with prejudice because of his failure to prosecute.

On 13 June 1968, plaintiff instituted this action in the Superior Court of Randolph County to recover damages in the amount of $5,000.00 for personal injuries. Upon defendants' motion, the cause was removed to Orange County. There, on 2 December 1968, the presiding judge, Honorable Leo Carr, entered an order transferring the case to the district court division for trial because of the amount involved. The clerk, apparently overlooking the order of transfer, calendared the case for trial in the Superior Court on the first day of the session which convened 8 June 1970.

When the case was called for trial on the day it was calendared plaintiff's attorney, Mr. Ottway Burton, was not present. During the day, upon orders of the presiding judge, Mr. Burton was twice notified that the case would be called for trial at 9:30 o'clock on the following morning. When the case was called on Tuesday, 9 June 1970, counsel for defendants were present in court, but Mr. Burton was not. The court had plaintiff called and, when he did not answer, the action was dismissed with prejudice because of his failure to prosecute.

The record shows that Judge Ragsdale signed the judgment on 9 June 1970. Thirteen days later, on 22 June 1970, plaintiff filed exceptions and notice of appeal. He gave defendants no notice of his appeal. However, on 22 June 1970, plaintiff served upon counsel for defendants "statement of plaintiff's record and statement of case on appeal to the North Carolina Court of Appeals."

In the Court of Appeals defendants moved to dismiss the appeal upon the grounds that plaintiff had neither taken his appeal within the time required by G.S. 1-279 nor given defendants notice thereof as required by G.S. 1-280. On 22 September 1970, the Court of Appeals allowed the motion and ordered the appeal dismissed. In apt time plaintiff petitioned us for a writ of *certiorari.*

Ottway Burton for plantiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellees.

SHARP, Justice.

[1] Except in certain instances not material here, "original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice." G.S. 7A-240. In general, the district court division is the proper division for the trial of all civil actions in which the amount in controversy is $5,000.00 or less; and the superior court division is the proper division for the trial of all civil actions in which the amount in controversy exceeds $5,000.00. G.S. 7A-243. The respective divisions are constituted proper or improper for the trial of specific actions in accordance with the provisions of N.C. Gen. Stats. Ch. 7A, art. 20. However, it is specifically provided by G.S. 7A-242 that "no judgment rendered by any court of the trial divisions in any civil action or proceeding as to which the trial divisions have concurrent original jurisdiction is void or voidable *for the sole reason* that it was rendered by the court of a trial division which by such allocation is improper for the trial and determination of the civil action or proceeding." (Emphasis added.)

[2] The foregoing statutes make it clear that after Judge Carr entered his order transferring this cause from the superior court division of the General Court of Justice to the district court division, the latter was the *proper* division in which to try this case. Nothing else appearing, disposition of the case thereafter in the Superior Court was irregular and contrary to the course and practice in the General Court of Justice. However, the judgment of the Superior Court dismissing the action was not, as plaintiff's counsel contends, void.

From the record it is apparent that Judge Ragsdale was unaware of Judge Carr's order transferring the action to the district court. The judgment of dismissal in this case was a mischance, which need not, and should not, have occurred. The clerk erred when he calendared the case for trial in the superior court division; plaintiff's counsel erred when he failed

to respond to the notice from the court. Had he appeared and informed the judge of the transfer, the dismissal from which he has attempted to appeal would not have occurred. After the judgment of dismissal was entered in his absence, however, plaintiff's remedy—if any—was by a motion in the cause under G.S. 1A-1, Rule 60(b), and not by appeal. Rule 60(b) provides:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

"(1) Mistake, inadvertence, surprise, or excusable neglect;

. . .

"(6) Any other reason justifying relief from the operation of the judgment."

(For a succinct discussion of corresponding Fed. R. Civ. P. 60(b) (1) and (6) see 3 Barron and Holtzoff, Federal Practice and Procedure (Wright Ed. 1958) §§ 1325, 1329.)

Motions under Rule 60(b) must be made "within a reasonable time." When the motion is based on reason (1) the rule requires it to be made not later than one year after the judgment is taken or entered. If movant is uncertain whether to proceed under clause (1) or (6) of Rule 60(b) he need not specify if his "motion is timely and the reason justifies relief." 7 Moore's Federal Practice § 60.27(2) (2d ed. 1970). The broad language of clause (6) "gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice." 3 Barron and Holtzoff, Federal Practice and Procedure (Wright Ed.) § 1329.

[3] The Court of Appeals dismissed this appeal because (1) it was not taken within ten days of the rendition of a judgment as required by G.S. 1-279 and (2) plaintiff failed to give notice to defendants as required by G.S. 1-280. Plaintiff's failure to comply with the requirements of these two statutes would have required the dismissal of the appeal had it been authorized by law. *Teague v. Teague,* 266 N.C. 320, 146 S.E. 2d 87; *Walter Corporation v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313; 1 N. C. Index 2d *Appeal and Error* § 14 (1967). However, under the circumstances here disclosed, if plaintiff is to have relief from the judgment of dismissal entered because of his failure to prosecute the action, he must seek it by motion in the cause

in the Superior Court of Orange County, where the judgment was rendered. The procedure under Rule 60(b) is analogous to the former practice under G.S. 1-220 and under motions to set aside an irregular judgment. *See Walker v. Story,* 262 N.C. 707, 138 S.E. 2d 535; *Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897; *Menzel v. Menzel* and *Williams v. Blades,* 250 N.C. 649, 110 S.E. 2d 333; *Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460; *Duffer v. Brunson,* 188 N.C. 789, 125 S.E. 619, 5 N. C. Index 2d *Judgments* §§ 19 and 24; McIntosh, North Carolina Practice and Procedure §§ 653, 655 (1929). If, upon timely motion made in the Superior Court, plaintiff is able to show that he has a meritorious cause of action and that he himself has acted with proper diligence throughout, the judge may, upon such terms as are just, relieve him from the judgment of dismissal.

The order of the Court of Appeals dismissing plaintiff's appeal is

Affirmed.

BLAND v. CITY OF WILMINGTON

No. 64 PC.

Case below: 10 N.C. App. 163.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 2 February 1971.

DAVIS v. PEACOCK

No. 2 PC.

Case below: 10 N.C. App. 256.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 9 February 1971.

DOTSON v. CHEMICAL CORP.

No. 62 PC.

Case below: 10 N.C. App. 123.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 2 February, 1971.

FARR v. CITY OF ROCKY MOUNT

No. 66 PC.

Case below: 10 N.C. App. 128.

Petition for writ of *certiorari* to North Carolina Court of Appeal denied 2 February 1971.

IN RE ALSTON

No. 21.

Case below: 10 N.C. App. 46.

Motion to dismiss the appeal for lack of substantial constitution question allowed 29 January 1971.

JOHNSON v. SIMMONS

No. 67 PC.

Case below: 10 N.C. App. 113.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 9 February 1971.

OWENS v. MINERAL CO.

No. 65 PC.

Case below: 10 N.C. App. 84.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 2 February 1971.

STATE v. BUSH

No. 24.

Case below: 10 N.C. App. 185.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 February 1971.

STATE v. BUSH

No. 31.

Case below: 10 N.C. App. 247.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 February 1971.

STATE v. GRANT

No. 61 PC.

Case below: 9 N.C. App. 704.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 20 January 1971.

STATE v. MOORE

No. 60 PC.

Case below: 9 N.C. App. 699.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied and appeal dismissed *ex mero motu* 20 January 1971.

STATE v. MURPHY

No. 17.

Case below: 10 N.C. App. 11.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 February 1971.

STATE v. WINGARD

No. 22.

Case below: 10 N.C. App. 101.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 20 January 1971.

TOWN OF HILLSBOROUGH v. SMITH

No. 68 PC.

Case below: 10 N.C. App. 70.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 2 February 1971.

APPENDIXES

RULES GOVERNING ADMISSION TO
THE PRACTICE OF LAW

AMENDMENT TO
STATE BAR RULES

PRESENTATION OF
WINBORNE PORTRAIT

RULES GOVERNING ADMISSION TO PRACTICE OF LAW

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that at the regular quarterly meeting of the Council of The North Carolina State Bar in October, 1970, upon motion duly made and seconded, the following Resolution was passed.

BE IT RESOLVED that the Rules Governing Admission to the Practice of Law in the State of North Carolina as the same appears printed in the North Carolina Reports in 275 N.C. 692-700 and as amended in 276 N.C. 733 be and the same are hereby amended by rewriting the Rules Governing Admission to the Practice of Law in the State of North Carolina as the same appears attached hereto.

BE IT FURTHER RESOLVED that the Secretary-Treasurer of The North Carolina State Bar is directed to certify the same to the North Carolina Supreme Court.

Given over my hand and the Seal of The North Carolina State Bar, this the 26th day of October, 1970.

B. E. JAMES, *Secretary-Treasurer*
The North Carolina State Bar

RULE I

Compliance Necessary

Section 1. No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the State.

RULE II

Definitions

Section 1. The term "Board" as herein used refers to the "Board of Law Examiners of North Carolina."

Section 2. The term "Secretary" as herein used refers to the Secretary of the Board of Law Examiners of North Carolina.

RULE III

Applicants

Section 1. For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule VI hereof. To be classified as a "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule VII hereof.

Section 2. As soon as possible after the filing date for applications, the Secretary shall make public a list of both general and comity applicants for the ensuing examination.

RULE IV

Registration

Section 1. Every person seeking admission to practice law in the State of North Carolina as a general applicant shall register, by filing with the Secretary, upon forms prescribed by the Board.

Section 2. Each registration form shall be complete in every detail and must be accompanied by such other evidence or documents as may be prescribed by the Board.

Section 3. Registrations shall be filed with the Secretary at least eighteen (18) months prior to August 1 of the year in which the applicant expects to take the bar examination.

Section 4. Each registration by a resident of the State of North Carolina must be accompanied by a fee of $10.00 and each registration by a non-resident shall be accompanied by a fee of $25.00. An additional fee of $25.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the Board. No part of a registration fee shall be refunded for any reason whatsoever.

RULE V

Applications of General Applicants

Section 1. After complying with the registration provisions of Rule IV, applications for admission to an examination must be made upon forms supplied by the Board and must

be complete in every detail. Every supporting document required by the application form must be submitted with each application.

Section 2. Applications must be received and filed with the Secretary not later than 12:00 o'clock noon, Eastern Standard Time, *on the 10th day of January* in the year the applicant applies to take the bar examination.

Section 3. Every application by a general applicant who is a resident of the State of North Carolina shall be accompanied by a fee of $65.00. Every application by a general applicant who is not a resident of the State of North Carolina shall be accompanied by a fee of $65.00 plus such fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a non-resident.

Section 4. No part of the fee required by Section 3 of this Rule V shall be refunded to the applicant unless the applicant shall file with the Secretary a written request to withdraw as an applicant, not later than the 15th day of June before the next examination, in which event not more than one-half (½) of the fee may be refunded to the applicant in the discretion of the Board; provided, however, no part of any fee paid to the National Conference of Bar Examiners or its successor shall be refunded.

RULE VI

Requirements for General Applicants

Section 1. Before being certified (licensed) by the Board to practice law in the State of North Carolina, a general applicant shall:

(1) Be of good moral character and have satisfied the requirements of Rule VIII hereof;

(2) Have registered as a general applicant in accordance with the provisions of Rule IV hereof;

(3) Possess the legal educational qualifications as prescribed in Rule IX hereof;

(4) Be a citizen of the United States;

(5) Be of the age of at least twenty-one (21) years;

(6) Be and continuously have been domiciled and physi-

cally present in the State of North Carolina from the 15th day of June to the 15th day of August of the year in which the applicant takes the bar examination.

(7) If a non-resident, file with the Board a declaration of the applicant's intent in good faith, in the form prescribed by the Board, to become a citizen and resident of the State of North Carolina.

(8) Have filed formal application as a general applicant in accordance with Rule V hereof;

(9) Stand and pass a written bar examination as prescribed in Rule XI hereof.

RULE VII

Requirements for Comity Applicants

Section 1. Any attorney at law immigrating or who has heretofore immigrated to North Carolina from a sister state or from the District of Columbia or a territory of the United States, upon written application, may be certified (licensed) by the Board to practice law in the State of North Carolina, without written examination, in the discretion of the Board, provided each such applicant shall:

(1) Be a citizen of the United States;

(2) File written application with the Secretary, upon such form as may be prescribed by the Board, six (6) months before the application shall be considered by the Board.

(3) Pay to the Board with each written application a fee of $250.00, not more than $125.00 of which may be refunded to the applicant in the discretion of the Board, if admission to practice law in the State of North Carolina is denied;

(4) Be and continuously have been a bona fide citizen and resident of the State of North Carolina for a period of at least sixty (60) days immediately prior to the consideration of his application to practice law in the State of North Carolina.

(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;

(6) Satisfy the Board that the state or states of the applicant's former residence in which he practiced law will admit attorneys to the practice of law in said states, who are licensed to practice law in the State of North Carolina without a written examination;

(7) Be in good professional standing in the state of his former residence;

(8) Furnish to the Board such evidence as may be necessary to satisfy the Board of his good moral character;

(9) Applicants admitted to the practice of law in another state after August 1971 must meet the educational requirements of Rule IX as hereinafter set out.

Section 2. Every person filing an application under this rule for admission by comity shall be bound by the actions and decisions of the Board, which actions and decisions shall be in the sole discretion of the Board, and the Board's actions on such applications under this rule shall be final.

Section 3. No license shall be issued to any applicant for admission under this Rule VII except at the time of the annual examination of the general applicants, provided the Board, when in session at any other time, may in its discretion grant an interim permission to such comity applicants to practice law until license shall be issued.

RULE VIII

Moral Character

Section 1. Every applicant shall be of good moral character, and the applicant shall have the burden of proving that he

is possessed of good moral character, or removing any and all reasonable suspicion of moral unfitness; and that he is entitled to the high regard and confidence of the public.

Section 2. All information furnished to the Board by an applicant, and all answers and questions upon forms furnished by the Board, shall be deemed material and such forms and information shall be and become a permanent record of the Board.

Section 3. No one shall be certified (licensed) to practice law in this State by examination or comity:

(1) Who fails to disclose fully to the Board whether requested to do so or not the facts relating to any disciplinary proceedings or charges, as to his professional conduct, whether same have been terminated or not, in this or any other state, or any Federal Court or other jurisdiction, or

(2) Who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges, or investigations, whether the same have been terminated or not in this or any other state or in any of the Federal Courts or other jurisdictions.

Section 4. Every applicant shall appear before a Bar Candidate Committee appointed by the Chairman of the Board in the Judicial District in which he resides, or in such other judicial district as the Board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. The applicant shall give such information to the Committee as may be required on such forms as may be provided by the Board. A Bar Candidate Committee may require the applicant to make more than one appearance before the Committee and to furnish to the Committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be certified (licensed) to practice law in North Carolina. Each applicant will be advised by the Secretary or the Chairman of such Committee of the time and place of the applicant's appearance before the Bar Candidate Committee.

Section 5. All investigations in reference to the moral character of an applicant may be informal, but shall be thorough,

with the object of ascertaining the truth. Neither the hearsay rule, nor any other technical rule of evidence need be observed.

Section 6. Every applicant may be required to appear before the Board to be examined about any matter pertaining to his moral character.

Section 7. No new application, or petition for reconsideration of a previous application, from an applicant who has been denied permission to take the bar examination by the Board on the grounds of failure to prove good moral character shall be considered by the Board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for reapplication or petition for a reconsideration is granted by the Board at the time of such denial. If, after consideration of the new application or a petition for reconsideration, the decision of the Board again is adverse, no further applications or petitions from such applicant shall be considered by the Board more often than once in any twelve (12) month period.

RULE IX

Educational Requirements

Section 1. General Education. Each applicant to take the examination, prior to beginning the study of law, must have completed, at an accredited college or university an amount of academic work equal to ¾ of the work required for a bachelor's degree at the university of the State in which the college is located. With his application he shall file an affidavit from such college furnishing all information that the Board shall require.

Section 2. Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a certificate (license) to practice law, commencing with the examination in August 1971, shall file with the Secretary a certificate from the President, Dean or other proper official of the Law School approved by the Council of The North Carolina State Bar, a list of which is available in the office of the Secretary, or shall otherwise show to the satisfaction of the Board of Law Examiners that the applicant has received a law degree or that the applicant has successfully completed the courses required by the Council of The North Carolina State Bar, being the same courses as those set out in Rule XI, Sec. 3, hereof.

RULE X

Protest

Section 1. Any person may protest the application of any applicant to be admitted to the practice of law either by examination or as a matter of comity.

Section 2. Such protest shall be made in writing, signed by the person making the protest and bearing his home and business address, and shall be filed with the Secretary prior to the date on which the applicant is to be examined.

Section 3. The Secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

Section 4. In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the Board at a time and place to be designated by the Board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination; however, if the applicant passes the written examination, no certificate (license) to practice law shall be issued to him as provided by Rule XII until final disposition of the protest in favor of the applicant.

Section 5. Nothing herein contained shall prevent the Board on its own motion from withholding its certificate (license) to practice law until it has been fully satisfied as to the moral fitness of the applicant as provided by Rule VIII.

RULE XI

Examinations

Section 1. One written examination shall be held each year for those applying to be admitted to the practice of law in North Carolina as general applicants.

Section 2. The examination shall be held in the City of Raleigh and shall commence on the first Tuesday in August.

Section 3. The examination shall deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional

Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

Section 4. The Board shall determine what shall constitute the passing of an examination.

Section 5. No person shall be permitted to take the examination more than five (5) times within any ten (10) year period.

RULE XII

Certificate or License

Section 1. Upon compliance with the rules of the Board, and all orders of the Board, the Secretary, upon order of the Board shall issue a certificate (license) to practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

RULE XIII

Appeals

Section 1. Any applicant may appeal from an adverse ruling or determination of the Board of Law Examiners as to his eligibility to take the bar examination.

After an applicant has successfully passed the bar examination, he may appeal from any adverse ruling or determination withholding his certificate (license) to practice law from him.

Section 2. Any appealing applicant within ten (10) days after notice of such ruling or determination, shall give notice of appeal in writing and file with the Secretary his written exceptions to the ruling or determination, which exceptions shall state the grounds of objection to such ruling or determination.

Section 3. The record on appeal to the Superior Court shall consist of the following.

(a) The papers filed by the applicant with the Board under its rules.

(b) A certified copy of the evidence taken by the Board upon the question or questions appealed.

(c) The rulings and determinations of the Board.

(d) The notice of appeal.

(e) The exceptions.

Within sixty days of receipt of the exceptions filed by the applicant with the Board, the Secretary shall certify such record at the expense of the applicant.

Section 4. Such appeal shall lie to the Superior Court of Wake County and shall be heard by the Presiding Judge, without a jury. The findings of fact by the Board, when supported by evidence or reliable information, shall be conclusive and binding upon the Court. If the Court is of the opinion that the Board was in error, it shall so specify and remand the matter to the Board, which may appeal as hereinafter provided. Such appeal shall operate as a supersedeas. In case no appeal is taken by the Board, it shall proceed in accordance with the judgment of the Court.

Section 5. The said applicant or the Board of Law Examiners, may appeal to the Supreme Court from any order or judgment of the Superior Court. If the said cause is remanded by the Supreme Court to the Superior Court, then the Superior Court shall remand the same to the Board of Law Examiners, to be proceeded with in accordance with the opinion of the Supreme Court.

ORDER

Upon the foregoing certificate of the Secretary of The North Carolina State Bar, it is ordered that the Rules Governing *Admission to the Practice of Law in the State of North Carolina* as amended and rewritten by the Council of The North Carolina State Bar at its regular quarterly meeting in October, 1970, be entered upon the minutes of the Supreme Court of North Carolina and published in the next volume of the North Carolina Reports.

This the 4th day of November, 1970.

WILLIAM H. BOBBITT
Chief Justice

AMENDMENT TO STATE BAR RULES

The following amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar. Article VI, Section 5, of the Certificate of Organization of The North Carolina State Bar as appears in 221 N.C. 587 and as amended in 268 N.C. 734 and in 274 N.C. 608 is hereby amended by adding a new paragraph to be designated as "h" to said Article, as follows:

ARTICLE VI. — Meetings of the Council

"5. Standing Committees of the Council. —

"h. Committee on Professional Corporations of not less than five nor more than seven Councilors to be selected by the President."

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 7th day of January, 1970.

B. E. JAMES, *Secretary*
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 30th day of January, 1970.

WILLIAM H. BOBBITT, *Chief Justice*
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 30th day of January, 1970.

HUSKINS, J.
For the Court

PRESENTATION OF THE PORTRAIT OF THE LATE CHIEF JUSTICE JOHN WALLACE WINBORNE FEBRUARY 9, 1970 BY EMERY B. DENNY EMERGENCY JUSTICE, SUPREME COURT OF NORTH CAROLINA

May it please the Court:

On behalf of the family of the late Chief Justice Winborne, I have the honor and privilege of presenting his portrait to this Court. The portrait was painted by the distinguished New York artist, Everett Raymond Kinstler.

My acquaintance with Chief Justice Winborne covered a period of approximately forty years; and for more than twenty years of that time, I knew him intimately as a close personal friend and colleague on this Court.

John Wallace Winborne was born on the 12th day of July, 1884, on the old plantation of his maternal ancestors on Indian Creek in Chowan County, North Carolina, the son of Dr. Robert H. and Annie F. (Parker) Winborne. He received his early educational training from his sister, Miss Pattie W. Winborne, in a private school conducted by her on the Winborne farm near Holly's Wharf on the Chowan River. He attended Horner Military School at Oxford, North Carolina, and then entered the University of North Carolina, graduating in June, 1906, with the degree of Bachelor of Arts.

While a student at the University, Winborne distinguished himself in athletics as a member of the track, baseball and football teams. Of medium stature and sturdy build he was a halfback on the football team. On the athletic field he learned the value of thorough training, teamwork and sportsmanship. Again and again, as a young man, he saw that victory came most often not to those who relied upon natural adeptness and brilliance, but to those who were willing to make the necessary effort and sacrifice in long and grueling training. Perhaps the outstanding achievement of his college career was his election to the Golden Fleece, the honorary student order which, even today as then, selects for membership only those students who have achieved the rank of outstanding leadership in the student life of the University. Wallace Winborne never lost his affection for the University nor his interest in athletics. He was a regular and faithful attendant at the football games played at Chapel Hill down through the years so long as his health would permit.

Winborne began the study of law during his junior year at the University, receiving his license to practice law and being admitted to the bar in 1906. After teaching in Bingham Military School in Asheville during the school year 1906-07, he located in Marion, North Carolina, and became a member of the law firm of Pless and Winborne from 1907 until 1919, at which time J. W. Pless, Jr., was admitted as a partner in the firm. In 1926, Robert W. Proctor was admitted to the firm, which then consisted of Pless, Winborne, Pless and Proctor. With J. W. Pless, Jr., having been appointed Solicitor of the Eighteenth Solicitorial District and J. W. Pless, Sr., having moved to Asheville where he continued to practice, Messrs. Winborne and Proctor continued the firm's practice in McDowell and adjacent counties from 1928 until July 1, 1937, under the firm name of Winborne and Proctor.

During the 30 years Wallace Winborne practiced law, he enjoyed a wide practice in his section of the State and was known and recognized as one of the outstanding lawyers of the State. His sound practical judgment and his background of experience in the general practice of law, coupled with his talents as a diligent and careful student of the law, qualified him as an able and valued legal adviser. He appeared in many important cases of wide interest. He served as Special Attorney for the State of North Carolina in connection with the condemnation of lands for the Great Smoky Mountain National Park. He served as Attorney for McDowell County and for the Town of Marion from 1918 until July 1, 1937. He was a member of the North Carolina and American Bar Associations and a Fellow of the American Bar Foundation.

When our State Constitution was amended in 1936, authorizing an increase in the membership of this Court from five to seven members, the General Assembly, pursuant to the amendment, authorized the appointment of two additional Associate Justices of the Court, as of July 1, 1937. Governor Hoey appointed Judge M. V. Barnhill, resident judge of the Second Judicial District, and the Honorable J. Wallace Winborne to fill these newly created positions. Since Justice Winborne was appointed directly from the bar and was without previous judicial experience, Governor Hoey signed the commission appointing Judge Barnhill first, thereby making Justice Winborne the junior Justice of the Court. Justice Winborne was elected for terms of eight years in November of 1938, 1946 and 1954. He was appointed Chief Justice by Governor Hodges upon the retirement of Chief Justice Barnhill on August 21, 1956. In

November of that year Chief Justice Winborne was elected to fill the term expiring on December 31, 1958. In November, 1958, he was elected to a full term of eight years. Because of ill health, he retired on March 8, 1962, and returned to his home in Marion, where he died on July 9, 1966.

In my opinion, when we undertake to evaluate the services and achievements of an individual, in order to ascertain just what manner of man he was, we need to know something of the type and character of the organizations and institutions with which he was affiliated and to which he gave his support and leadership, in addition to his accomplishments in his trade or profession.

Justice Winborne was not without experience in the civic, social, business, political and religious life of his community and State before he became a member of this Court. He was a member of the Board of Aldermen of Marion, North Carolina, from 1913 until 1921. He served as a member of the Local Selective Service Board during World War I, as well as being Chairman of the local committee of the American Red Cross and Chairman of the Council of Defense in McDowell County. He was also Chairman of the McDowell County Food Administration and a First Lieutenant in the Marion Company of the North Carolina Reserve Militia, the North Carolina National Guard having been called into service in the United States Army in World War I for the duration of the conflict.

Winborne was Chairman of the Democratic Executive Committee of McDowell County from 1910-1912. He also served as a member of the State Democratic Executive Committee for 21 years from 1916 until 1937. He was a member of the Local Government Commission for two years from 1931-1933. Winborne was Chairman of the State Democratic Executive Committee from 1932 until July 1, 1937.

The Kiwanis Club of Marion was organized in February, 1923. Winborne was a charter member and its first president. He was one of the moving spirits in organizing and building the Marion General Hospital and was one of its incorporators as well as one of the original directors. He continued to serve as a member of the Board of Directors of that institution until his appointment as an Associate Justice of this Court.

Winborne was, for many years, a director of Clinchfield Manufacturing Company and was Chairman of its Board of Directors for several years prior to the time this large textile

plant was merged with Burlington Industries, Inc. He was also one of the organizers of Marion Manufacturing Company and one of the founders of the Marion Lake Club which is now the Country Club of Marion. For many years he was a director of the State Capital Life Insurance Company. He also served as a director of and attorney for the First National Bank of Marion from 1929 until his appointment as a member of this Court. He was an honorary member of the North Carolina Society of the Cincinnati; and in 1946, the University of North Carolina conferred on him the honorary degree of Doctor of Laws.

Justice Winborne was a faithful and devoted member of St. John's Episcopal Church in Marion and served for many years as a vestryman and, from time to time, as Senior Warden. He also served for several years as Superintendent and for many years as a teacher in the Church School. He was a licensed lay reader and frequently held services in his church in the absence of the rector.

Justice Winborne had a distinguished career in the Masonic fraternity. He was active for many years in the local Masonic lodge in Marion and was Master of his Lodge in 1920-21. The Grand Lodge of Ancient, Free and Accepted Masons of North Carolina elected him Grand Master of Masons in North Carolina in 1931. As typical of the man and his keen interest in the care and welfare of the children who were supported and educated at the Masonic Orphanage at Oxford, North Carolina, he served as a member of the Board of Directors of that institution for 32 years from April, 1930 until April, 1962.

Justice Winborne was married to Miss Charlie May Blanton of Marion on the 30th day of March, 1910. To this union, two children were born, Charlotte Blanton, now Mrs. Charles M. Shaffer of Chapel Hill, North Carolina, and John Wallace Winborne, Jr., of Atlanta, Georgia, both of whom are with us today. Mrs. Winborne died on November 4, 1940. On June 14, 1947, Justice Winborne married Mrs. Lalage Oates Rorison, whom we are also delighted to have with us on this occasion. In addition to those just mentioned, he was survived by one stepson, Brainard Blanton Rorison, who is also with us today, and by ten grandchildren, three of whom are the children of his stepson. Justice Winborne was deeply devoted to all the members of his family.

Chief Justice Winborne was inherently a modest man, but that does not mean that he was timid or lacked courage. He was a man of deep convictions and stood staunchly for the things

in which he believed. However, he was not a prima donna nor a publicity seeker in any sense of the word. He worked quietly and assiduously on whatever task he undertook and was perfectly willing to be judged by the result of his labors. In his opinion-writing over a period of almost twenty-five years, he never sought to substitute his own personal views for the law as he construed it to be under our Constitution and laws and in the well-reasoned opinions of the Court. He was a believer in the doctrine of *stare decisis,* particularly with respect to those well-reasoned opinions of the Court which had been accepted as authoritative for a long period of time. He was also firm in his conviction that the enactment of our laws was the exclusive prerogative of the General Assembly; and he was equally firm in his conviction that it was the prerogative of this Court to interpret the law, according to its true intent and meaning as the Court construed it to be, regardless of the status of those involved in the litigation. His written opinions appear first in Volume 212 of our *North Carolina Supreme Court Reports* and end with Volume 256.

In writing his opinions there were two requirements Justice Winborne imposed upon himself with consistency. He would prepare what he considered to be an accurate and comprehensive statement of the facts. He wanted the litigants to know that this Court knew the facts involved in the case, and then he sought to support his conclusions with respect to the applicable law with an abundance of cases in point. He seemed to take a delight in tracing the origin of pertinent statutes and the intervening modifications thereof down through the years.

In 1947 the General Assembly of North Carolina created a commission for the purpose of making a study and submitting recommendations to the 1949 Session of the General Assembly for the improvement of the administration of justice in the State of North Carolina. Among the recommendations made pursuant to this study was the following: "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes."

The General Assembly of 1949 did amend all four of our statutes covering capital crimes by making an integral part of these statutes the following: "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 first appeal involving the amendment was in State vs. McMillan, 233 N.C. 630, in which no recommendation was made by the jury and the death penalty was imposed. The pertinent part of the court's charge assigned as error was " . . . the court instructs you that if you return a verdict of guilty of murder in the first degree as charged in the bill of indictment against the defendant, then you have the right and the power in the exercise of your discretion to accompany that verdict with a recommendation of life imprisonment for the defendant, and the statute giving that right and authority and discretion to the jury, also instructs or provides that it is the duty of the court to instruct the jury that they do have the authority, the right and the power to accompany their verdict of first degree murder with a recommendation of that sort if they feel that under the facts and circumstances of the crime alleged to have been committed by the defendant, they are warranted and justified in making that recommendation." Winborne, J., in writing the opinion for the Court, among other things, said: "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning—a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature.

"It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison. No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right. Therefore, any instruction, charge or suggestion as to the causes for which the jury could or ought to recommend is error."

The second opinion written by Winborne, J., involving this amendment was in State vs. Simmons, 234 N.C. 290, in which the jury made no recommendation in the trial below and the

death penalty was imposed. On appeal the exception, assigned as error, was to the following portion of the charge: " . . . and in the event, if you should return a verdict of guilty of murder in the first degree, it would be your duty to consider whether or not under the statute, you desire and feel that it is your *duty to recommend that the punishment of the* defendant shall be imprisonment for life in the State's prison."

Justice Winborne, in his opinion, granting a new trial, said: " . . . any *instruction, charge or suggestion* as to the cause or causes for which the jury could or ought to recommend is error sufficient to set aside a verdict when no recommendation is made. . . . the statute prescribes no rule for the guidance of the jury in coming to decision as to whether or not the verdict should carry the recommendation. Thus any attempt by the trial judge to give a rule in this respect must necessarily read into the statute something the language of the Legislature does not encompass. The suggestion that any cause or reason is necessary to support the recommendation would violate the intent and purpose of the statute. True, the statute expressly requires the judge to instruct the jury that in the event a verdict of guilty of murder in the first degree shall have been reached, it has the right to recommend that the punishment therefor shall be imprisonment for life in the State's prison. No more and no less would be accordant with the intent of the amendment to the statute."

During the decade following the enactment of the proviso involved in the McMillan case, twelve other death cases were appealed, in which error was assigned with respect to the charge relating to the proviso or with respect to the argument of counsel to the effect that the jury should not make any recommendation in connection with its verdict. Of these twelve appeals, Winborne, J., or Winborne, C.J., wrote the opinions in six of them. In 1961, the General Assembly did enact a statute to the effect that: "In a 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." G.S. 15-176.1. The General Assembly has, however, never raised any question about the law with respect to the untrammeled right of the jury in capital cases to recommend life imprisonment as laid down by Justice Winborne in the McMillan case and succeeding cases.

In Biblical times, we are told that the children of Israel, under the leadership of Nehemiah, re-built the wall around Je-

rusalem in fifty-two days. An insight as to how it was possible to complete such a great undertaking in so short a time was revealed to us by Nehemiah, when he said: "So built we the wall . . . for the people had a mind to work." (Nehemiah 4:6) One cannot recount the services and accomplishment of Chief Justice Winborne and consider the vast volume of work he did as a private citizen and as a lawyer for 30 years and as a member of this Court for nearly 25 years without concluding that he, too, "had a mind to work."

May I now in conclusion be permitted to summarize briefly what I have tried to say about our friend and longtime member of this Court. John Wallace Winborne was a good man, an active and valuable citizen of his State, a kind and devoted husband and father, a successful and highly respected lawyer, a distinguished and dedicated jurist and, above all, a Christian gentleman.

His portrait will be unveiled by his youngest granddaughter, Miss Eleanor Blanton Winborne, age 9, of Atlanta, Georgia.

REMARKS OF CHIEF JUSTICE WILLIAM H. BOBBITT IN ACCEPTING THE PORTRAIT OF JOHN WALLACE WINBORNE

We are grateful to our beloved friend and former Chief Justice for this informative and impressive memorial address. In addition to bringing to our attention significant events and relationships in the life of former Chief Justice Winborne, he has portrayed him rightly as a man of integrity and compassion and as a jurist who has contributed greatly to the high standards of the Court. All of us knew Judge Winborne as a jurist and as a friend. Two of us (Justice Higgins and I) served with him as members of the Court from 1954 until his retirement in 1962. Incidents come to mind that impressed us and endeared him to us. It is with difficulty that we refrain from speaking of them. However, since Justice Denny has expressed our sentiments so well, the members of the Court will content themselves by saying, in legal parlance, all of us *concur*.

The Court wishes to express appreciation to the Winborne family for the gift of this handsome portrait. When I view it, I sense the presence of our former Chief Justice and friend. It portrays him well during the years we knew him best. The portrait will be a source of inspiration to us and to our successors across the years.

The Marshal will see that the portrait is hung in an appropriate place on the wall of this chamber as directed by the Court, and these proceedings will be spread upon the minutes of the Court and printed in the next volume of the North Carolina Reports.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers *in this index,* e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

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ANIMALS

§ 3. Injury Caused by Animals Roaming at Large

One who fails to close the gate to a pony enclosure can reasonably foresee that the pony will escape and go upon a nearby highway. *Sutton v. Duke,* 94.

Complaint held sufficient under new Rules of Civil Procedure in an action for personal injuries received when escaped pony caused escape of mule which collided with plaintiff's automobile. *Ibid.*

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

On appeal to the Supreme Court from the Court of Appeals, the Supreme Court is restricted to rulings which are assigned as error and are presented in appellant's brief. *In re Johnson,* 688.

§ 3. Review of Constitutional Questions

Supreme Court will undertake to determine constitutionality of a statute only with reference to ground on which it is attacked by the pleadings. *Martin v. Housing Corp.,* 29.

§ 4. Theory of Trial in Lower Court

The Supreme Court will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *S. v. Dobbins,* 484.

§ 9. Moot Questions

Appeal by plaintiff executor is dismissed as moot where Supreme Court in another case vacated letters testamentary issued to plaintiff. *Bank v. Bank,* 148.

§ 14. Appeal and Appeal Entries

The Court of Appeals properly dismissed an appeal when plaintiff failed to give notice thereof to defendant. *Brady v. Chapel Hill,* 720.

§ 41. Form and Requisites of Transcript

Judgment and affidavits which were not before the Court of Appeals are not properly before the Supreme Court for consideration. *Supply Co. v. Motor Lodge,* 312.

§ 45. Form and Contents of Brief

A question on appeal for which no argument was advanced and no citation of authority was made will be deemed abandoned. *In re Johnson,* 688.

§ 57. Findings

Findings of fact by the trial judge are conclusive if supported by competent evidence. *Goldman v. Parkland,* 223; *Insurance Co. v. Insurance Co.,* 216.

§ 58. Injunctions

The Supreme Court is not bound by the findings of fact of the trial court in an order granting or refusing an interlocutory injunction but may review the evidence and make its own findings of fact. *Styers v. Phillips,* 460.

ARREST AND BAIL

§ 3. Right of Officer to Arrest Without Warrant

Police officers had probable cause to arrest defendant without a warrant on a charge of rape where the license tag numbers on defendant's car matched the numbers given the police by the prosecuting witness. *S. v. Jacobs*, 151.

Arrest of defendant without a warrant for the violation of a municipal curfew ordinance was lawful. *S. v. Dobbins*, 484.

Arrest of defendant without a warrant for armed robbery of an ABC store was lawful. *S. v. Woody*, 646.

Arrest of defendant without a warrant for the offense of drunken driving was illegal where defendant had not operated the vehicle in the arresting officer's presence. *S. v. Hill*, 547.

§ 7. Right of Person Arrested to Communicate With Friends or Counsel

A defendant's constitutional and statutory right to have communications and contacts with the outside world is not limited to receiving professional advice from his attorney, but he is also entitled to consult with friends and relatives and to have them make observations of his person. *S. v. Hill*, 547.

Defendant charged with driving while intoxicated was denied his constitutional and statutory right to communicate with both counsel and friends at a time when the denial deprived him of any opportunity to confront the State's witnesses with other testimony, where he was not permitted to telephone his attorney until after breathalyzer testing and photographic procedures were completed and the warrant served, and the jailer refused to allow his attorney to see him until the morning after his arrest. *Ibid.*

One who is detained by police officers under a charge of driving while intoxicated has the same constitutional and statutory rights as any other accused. *Ibid.*

ATTORNEY AND CLIENT

§ 3. Scope of Attorney's Authority

A consent judgment signed by the attorneys for the parties is presumed to be valid. *In re Johnson*, 688.

§ 5. Representation of and Liabilities to Client

An attorney who accepted employment by a defendant and who represented him before the court is obligated to the court to continue to represent the defendant unless the court permits him to withdraw. *S. v. Crump*, 573.

AUTOMOBILES

§ 50.5. Driving While Intoxicated

An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking; however, an odor, standing alone, is no evidence that he is under the influence of an intoxicant. *Atkins v. Moye*, 179.

Mere proof that a motorist involved in a collision was under the influence of an intoxicant does not establish a casual relation between his condition and the collision. *Ibid.*

AUTOMOBILES—Continued

§ 88. Sufficiency of Evidence of Contributory Negligence

Evidence failed to disclose contributory negligence as a matter of law but required submission of that issue to jury. *Meeks v. Atkeson,* 250.

Issue of plaintiff's contributory negligence in driving while under the influence of intoxicating liquor at the time of an accident was properly submitted to the jury. *Atkins v. Moye,* 179.

§ 89. Sufficiency of Evidence of Last Clear Chance

Evidence was insufficient to require submission of issue of last clear chance to the jury in an action to recover damages for the death of plaintiff's intestate which occurred when he was struck by defendant's car while lying prone on the highway at night. *Williamson v. McNeill,* 447.

§ 90. Instructions in Accident Cases

Trial court in automobile accident case erred in failing to instruct the jury what effect a finding of plaintiff's intoxication at the time of the accident would have upon the issue of plaintiff's contributory negligence. *Atkins v. Moye,* 179.

Instructions on duty of driver entering an intersection on a green light held deficient in failing to charge that in the absence of anything that gives or should give notice to the contrary, a motorist has a right to assume and to act on the assumption that opposing drivers will observe rules of the road and stop in obedience to a traffic signal. *Wrenn v. Waters,* 337.

§ 127. Sufficiency of Evidence of Driving Under the Influence

An odor of alcohol on the breath of the driver is evidence that he has been drinking, but the odor, standing alone, is no evidence that he is under the influence of an intoxicant. *Atkins v. Moye,* 179.

BANKRUPTCY

§ 2. Title and Rights of Trustee

The cash surrender value of a life insurance policy issued on the life of a bankrupt for the benefit of his wife is not an asset of the bankrupt's estate and is therefore exempt from the claims of the trustee in bankruptcy. *Insurance Co. v. McDonald,* 275.

BANKS AND BANKING

§ 10. Paying Checks of Depositor

Drawer of check has authority to order drawee bank to stop payment of check at any time before drawee bank has paid the check. *Supply Co. v. Motor Lodge,* 312.

BASTARDS

§ 1. Wilful Refusal to Support

The death of the child does not abate or prevent a prosecution against the father of an illegitimate child for his wilful failure to support and maintain the child prior to its death. *S. v. Fowler,* 305.

In a prosecution for willful failure to support an illegitimate child, the support payments that a convicted defendant may be required to make to his illegitimate children are not a part of the punishment and are there-

BASTARDS—Continued

fore irrelevant to the question of defendant's right to counsel. *S. v. Green,* 188.

The offense of willful failure to support an illegitimate child is not a serious misdemeanor requiring the appointment of counsel or an intelligent waiver thereof. *Ibid.*

§ 6. Sufficiency of Evidence and Nonsuit

In a bastardy prosecution, the fact that the death of the child deprived the putative father of his statutory right to a blood grouping test does not warrant dismissal of the prosecution. *S. v. Fowler,* 305.

§ 9. Judgment and Sentence

The authorized punishment for the willful failure or neglect to support an illegitimate child is limited at most to six months in prison. *S. v. Green,* 188.

BILLS AND NOTES

§ 11. Presentment and Acceptance

Drawer of check has authority to order drawee bank to stop payment of check at any time before drawee bank has paid the check. *Supply Co. v. Motor Lodge,* 312.

BOUNDARIES

§ 10. Sufficiency of Description

Patent ambiguity in the description in a deed cannot be removed by parol evidence. *Oliver v. Ernul,* 591.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence

In first degree burglary prosecution the State's evidence was sufficient to support jury finding that defendants broke and entered the home with intent to take and carry away personal property of the occupants, notwithstanding there was no evidence that defendants actually took or carried away anything. *S. v. Accor,* 65.

§ 8. Sentence and Punishment

A motion to quash which purported to raise the question of validity of capital punishment in first degree burglary prosecution was properly overruled. *S. v. Accor,* 65.

CLERKS OF COURT

§ 2. Jurisdiction to Enter Judgments

It is presumed that the clerk of court had jurisdiction in a partitioning proceeding. *In re Johnson,* 688.

CONCEALED WEAPONS

§ 1. Elements of the Offense

An indictment alleging attempted armed robbery will not support a conviction of the offense of carrying a concealed weapon. *S. v. Powell,* 672.

CONSPIRACY

§ 5. Competency of Evidence

Acts and declarations of each party to a conspiracy are admissible against the other members. *S. v. Lee,* 205.

CONSTITUTIONAL LAW

§ 1. Supremacy of Federal Constitution and Statutes

Decisions of the U. S. Supreme Court construing the due process clause of the 14th Amendment do not control the N. C. Supreme Court's interpretation of the law of the land clause in the State Constitution. *Horton v. Gulledge,* 353.

§ 2. Construction of Constitutional Provisions

Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. *Insurance Co. v. McDonald,* 275.

§ 4. Persons Entitled to Raise Constitutional Questions

Taxpayer may maintain an action to restrain payment of appropriation to N. C. Housing Corporation on ground that the Housing Corporation Act is unconstitutional because not created for a public purpose. *Martin v. Housing Corp.,* 29.

A homeowner who was faced with a municipal housing inspector's order giving him no alternative but to demolish his home was not required to propose an alternative remedy before asserting his constitutional rights in the courts. *Horton v. Gulledge,* 353.

§ 6. Legislative Powers

Questions of public policy are for legislative determination. *Insurance Co. v. McDonald,* 275.

§ 7. Delegation of Powers by General Assembly

The N. C. Housing Corporation Act does not delegate legislative authority to the Corporation in violation of the N. C. Constitution. *Martin v. Housing Corp.,* 29.

§ 11. Police Power in General

The General Assembly may exercise the police power of the State by legislating for the protection of the public health, safety and welfare of the people. *Whitney Stores v. Clark,* 322.

The delegable police power of the State prohibits the use of private property which will threaten the public health and welfare. *Horton v. Gulledge,* 353.

The police power of the State extends to all the compelling needs of the public health, safety and welfare. *S. v. Dobbins,* 484.

A municipality may impose restrictions upon travel in times of emergency. *Ibid.*

§ 13. Safety, Sanitation & Health

Action by a municipality in ordering the demolition of a dwelling house without compensation to the owner thereof is violative of the law of the land clause of the State Constitution. *Horton v. Gulledge,* 353.

§ 20. Equal Protection and Enforcement of Laws

The constitutional protection against unreasonable discrimination un-

CONSTITUTIONAL LAW—Continued

der color of law extends to the administration and execution of laws valid on their face. *Kresge Co. v. Davis*, 654.

The selective enforcement of a law does not destroy the law if such enforcement has a reasonable relation to the purpose of the legislation. *Ibid.*

§ 23. Scope of Due Process

The liberty protected by Due Process extends to all fundamental rights of the citizen. *S. v. Dobbins*, 484.

The expression "the law of the land" as used in the N. C. Constitution has the same meaning as "due process of law." *Horton v. Gulledge*, 353.

§ 24. Requisites of Due Process

A contract between a N. C. resident and a nonresident manufacturer of dresses met the due process requirement of "substantial connection" with this State so as to subject the manufacturer to the *in personam* jurisdiction of the State courts. *Goldman v. Parkland*, 223.

§ 26. Full Faith and Credit to Foreign Judgment

If the court of another state which rendered judgment *in personam* against defendant did not have jurisdiction over the person of defendant, the judgment is void even in such other state. *Marketing Systems v. Realty Co.*, 230.

Validity and effect of a judgment of another state must be determined by reference to the laws of the state wherein the judgment was rendered. *Ibid.*

District court erred in giving full faith and credit to judgment rendered against defendant in Missouri where transcript shows upon its face that service of summons upon defendant was attempted by a method not authorized by Missouri statute or by rules of court of that state. *Ibid.*

§ 29. Right to Trial by Jury

Any crime whose maximum authorized punishment does not exceed six months in prison is a petty offense for which the offender may be tried without a jury and without the assistance of counsel. *S. v. Green*, 188.

§ 30. Due Process in Trial in General

Photographs by which defendants were identified as perpetrators of first degree burglary, and testimony of the circumstances surrounding the photographic identification by victims of the burglary, held inadmissible when the photographs were taken in violation of defendants' Fourth Amendment rights. *S. v. Accor*, 65.

G.S. 14-17 is not unconstitutional in requiring trial court to submit to the jury question of defendant's guilt or innocence of first degree murder and, at the same time, the question of punishment. *S. v. Lee*, 205.

Constitutional requirements with respect to speedy trial apply to a preliminary hearing. *S. v. Hatcher*, 380.

One who is detained by police officers under a charge of driving while intoxicated has the same constitutional and statutory rights as any other accused. *S. v. Hill*, 547.

Defendant was not denied right of speedy trial by delay of 145 days between indictment and trial. *S. v. Ball*, 714.

CONSTITUTIONAL LAW—Continued

§ 31. Right of Confrontation

Right of confrontation and cross-examination is guaranteed to an accused in a criminal action by the North Carolina Constitution. *S. v. Gaiten,* 236.

Defendant was not denied the right of confrontation and right of cross-examination as to prior inconsistent statements when trial judge, in the absence of the jury, stated that testimony concerning another person presumably involved in another criminal charge was "irrelevant to the issue here." *Ibid.*

A defendant was not entitled to know the identity of the State's informer. *S. v. Swaney,* 602.

Defendant charged with driving while intoxicated was denied his constitutional and statutory right to communicate with both counsel and friends at a time when the denial deprived him of any opportunity to confront the State's witnesses with other testimony, where he was not permitted to telephone his attorney until after breathalyzer testing and photographic procedures were completed and the warrant served, and the jailer refused to allow his attorney to see him until the morning after his arrest. *S. v. Hill,* 547.

§ 32. Right to Counsel

Defendant did not have a constitutional right to counsel during the out-of-court identification of defendant from police photographs. *S. v. Jacobs,* 151.

The offense of willful failure to support an illegitimate child is not a serious misdemeanor requiring the appointment of counsel or an intelligent waiver thereof. *S. v. Green,* 188.

Any crime whose maximum authorized punishment does not exceed six months in prison is a petty offense for which the offender may be tried without a jury and without the assistance of counsel. *Ibid.*

The decisions in Gilbert and Wade which relate to right to counsel at police identification lineup will not be extended to out-of-court examination of photographs of suspects. *S. v. Accor,* 65.

Defendants' Sixth Amendment rights were not violated by the absence of counsel when photographic identifications were made by armed robbery victim after defendants had been interrogated about a murder, photographed and released without charge. *S. v. McVay,* 410.

An indigent defendant is not entitled to select counsel to be appointed to represent him. *S. v. Powell,* 672.

§ 36. Cruel and Unusual Punishment

Sentence of 12 to 15 years' imprisonment imposed upon defendant's conviction of assault with intent to commit rape does not constitute cruel and unusual punishment. *S. v. Harris,* 435.

§ 37. Waiver of Constitutional Guaranties

The State's evidence failed to show that defendant waived his Fourth Amendment rights in consenting to be photographed at police station. *State v. Accor,* 65.

Defendant may waive benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *S. v. Gaiten,* 236.

CONTRACTS

§ 2. Offer and Acceptance

A letter from a dress manufacturer to a N. C. resident constituted an offer of employment, and the acceptance took place when the resident signed the letter and deposited it in the U. S. mail. *Goldman v. Parkland*, 223.

§ 6. Contracts Against Public Policy

The rule that contracts in contravention of public policy are not enforceable is based on the premise that no one can rightfully do that which tends to injure the public or is detrimental to the public good. *Vogel v. Supply Co.*, 119.

A subcontractor who undertook to furnish materials to a general contractor for the construction of apartment houses was not a "general contractor" within the meaning of the contractors' licensing statute and was therefore not required to be licensed; the unlicensed contractor could maintain an action against the general contractor for breach of the contract. *Ibid.*

An unlicensed general contractor is not prevented by the contractors' licensing statute from maintaining a counterclaim against an unlicensed subcontractor in the latter's action for breach of the subcontract. *Ibid.*

§ 14. Contracts for Benefit of Third Persons

A landowner was not entitled to maintain an action, as third-party beneficiary, against a subcontractor for the subcontractor's breach of the subcontract with the general contractor to furnish materials for an apartment house on the land. *Vogel v. Supply Co.*, 119.

§ 20. Impossibility of Performance as Excusing Breach of Nonperformance

One who prevents the performance of a condition will not be permitted to take advantage of its nonperformance. *Mullen v. Sawyer*, 623.

CORPORATIONS

§ 1. Corporate Existence

The doctrine of the corporate entity may not be used as a means for defeating the public interest and circumventing public policy; in order to prevent such a result, a parent corporation and its wholly owned subsidiaries may be treated as one. *Utilities Comm. v. Morgan*, 255.

COUNTIES

§ 2. Governmental Powers

A 1969 Home Rule statute that enables the county commissioners of every county in the State to enact ordinances, including Sunday observance ordinances, is a general law and does not violate the constitutional prohibition against local legislation regulating trade. *Whitney Stores v. Clark*, 322.

§ 5. County Zoning

The board of county commissioners acted arbitrarily in denying application for a permit to establish a mobile home park as a special exception under a county zoning ordinance. *In re Application of Ellis*, 364.

Neither the board of adjustment nor the board of county commissioners can deny a special-exception permit for a mobile home park in its un-

COUNTIES—Continued

bridled discretion or refuse the permit solely because in its view a mobile home park would "adversely affect the public interest." *Ibid.*

COURTS

§ 6. Appeals to Superior Court from the Clerk

Although a proceeding to condemn property for urban renewal was erroneously transferred from the clerk to the superior court before the clerk had acted on the exceptions to the commissioners' report, the judge of superior court had full power to consider and determine all matters in controversy as if the cause was originally before him. *Redevelopment Comm. v. Grimes,* 634.

§ 11.1. Practice and Procedure in District Court

The district court division was the proper division to try a personal injury action for recovery of damages in the amount of $5000. *Brady v. Chapel Hill,* 720.

Although plaintiff's personal injury action for $5000 was improperly calendared for trial in superior court, a judgment by a superior court judge dismissing the action for failure of plaintiff to appear and prosecute the action was not void; plaintiff's relief is by motion in the cause and not by appeal. *Ibid.*

CRIMINAL LAW

§ 1. Nature of Crime

Whether an act, or a wilful failure to act, constitutes a crime is determined as of the time the act is committed or omitted. *S. v. Fowler,* 305.

§ 9. Principals in the First or Second Degree

The State's evidence in an armed robbery prosecution was ample to show that a codefendant was a participant in the robbery either as the driver of the get-away car or as a lookout. *S. v. Swaney,* 602.

§ 15. Venue

Defendant's motion for change of venue on ground of prejudicial pretrial publicity was properly denied. *S. v. Brinson,* 286.

A defendant who questions the venue of the offense must designate the proper county before the jury is empaneled. *S. v. Dozier,* 615.

§ 21. Preliminary Proceedings

Defendant's contention that he was denied a speedy trial in that he was detained in jail for 41 days without preliminary hearing was without merit. *S. v. Hatcher,* 380.

§ 25. Plea of Nolo Contendere

Defendant's plea of *nolo contendere* to second degree murder was voluntarily and intelligently made and was not coerced by fear of the death penalty. *S. v. Adams,* 427.

§ 26. Plea of Former Jeopardy

A defendant who was convicted of armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the assault conviction when both offenses arose out of the same occurrence. *S. v. Hatcher,* 380.

CRIMINAL LAW—Continued

§ 32. Burden of Proof and Presumptions

Defendant's plea of not guilty puts in issue every essential element of the crime charged. *S. v. McWilliams,* 680.

§ 33. Relevancy of Facts in Issue

It was proper for a sheriff to testify that the arrest sheet in his office showed that defendant was arrested at a certain date and hour. *State v. Fox,* 1.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Trial court did not err in failing to declare a mistrial on its own motion when defendant's accomplice testified, without objection, that defendant was also charged in another safecracking for which the accomplice was then in prison, and when objection was sustained to the solicitor's question to a police officer as to whether defendant was being held for return to another county. *S. v. Ball,* 714.

§ 40. Evidence at Former Trial

The official stenographic report of testimony given at a former trial by a witness who has since died may be introduced in evidence upon a subsequent trial of the case. *S. v. Fox,* 1.

§ 42. Articles and Clothing Connected with the Crime

Various exhibits connected with first degree murder and armed robbery were properly admitted in evidence to identify the perpetrators of the crime. *S. v. Fox,* 1.

§ 66. Evidence of Identity by Sight

In a rape prosecution, the trial court properly found that the victim's identification of defendant, an Indian, from a group of photographs of white males supplied by the police "was made without intimidation, suggestion or coercion on the part of anyone, and was made independent of and free from outside influences." *S. v. Jacobs,* 151.

Defendant did not have a constitutional right to counsel during the out-of-court identification of defendant from police photographs. *Ibid.*

Rape victim's in-court identification of defendant was not tainted by her prior identification of defendant at a school house. *S. v. McNeil,* 162.

The State's evidence failed to show that defendant waived his Fourth Amendment rights in consenting to be photographed at police station. *S. v. Accor,* 65.

The decisions in Gilbert and Wade which relate to right to counsel at police identification lineup will not be extended to out-of-court examination of photographs of suspects. *Ibid.*

Evidence was sufficient to support a finding that the procedure by which two defendants were identified from photographs was not impermissibly suggestive. *Ibid.*

Statute prohibiting law enforcement officers from taking photographs of persons charged with a misdemeanor does not create an exclusionary rule of evidence. *Ibid.*

Photographs by which defendants were identified as perpetrators of first degree burglary and testimony of the circumstances surrounding the photographic identification by victims of the burglary held inadmissible when photographs were taken in violation of defendants' Fourth Amendment rights. *Ibid.*

CRIMINAL LAW—Continued

Defendant's argument that his arrest was based on an illegal photographic identification by the prosecuting witness and that the evidence obtained as a result of the arrest was consequently inadmissible is without merit. S. v. *Hatcher,* 380.

A police department "mug shot" of defendant was properly admitted to illustrate testimony relating to defendant's identity. *Ibid.*

Defendants' Sixth Amendment rights were not violated by the absence of counsel when photographic identifications were made by armed robbery victims after defendants had been interrogated about a murder, photographed and released without charge. S. v. *McVay,* 410.

In armed robbery prosecution wherein defendants had been identified by robbery victim from photographs taken of them at police station during investigation of a murder for which defendants were not charged, trial court properly admitted the in-court identification of defendants by one of the robbery victims. *Ibid.*

§ 73. Hearsay Testimony in General

In a prosecution charging defendant with the shotgun slaying of his brother, defendant's testimony that another brother shouted to him, "Run, Doug, Ben is going to kill us," is admissible to establish defendant's plea of self-defense, notwithstanding such testimony was hearsay. S. v. *Crump,* 573.

§ 75. Test of Voluntariness of Confession and Admissibility

The Miranda standards do not apply to post-Miranda retrials of cases originally tried prior to that decision. S. v. *Fox,* 1.

In prosecution charging a 16-year-old defendant with rape of an 11-year-old girl, defendant's incriminating statements were not rendered inadmissible because of his youthful age, nor because the statements were made in the presence of several police officers. S. v. *Murry,* 197.

§ 76. Determination and Effect of Admissibility of Confession

Voir dire procedure to determine the admissibility of a confession. S. v. *Fox,* 1.

On *voir dire* to determine the admissibility of defendant's confession, the trial court was not bound by the defendant's testimony but could consider the testimony of law enforcement officers. *Ibid.*

The transcript of defendant's confession to the sheriff was competent to corroborate the sheriff's statement of defendant's confession. *Ibid.*

Trial court properly found that defendant's in-custody statements were voluntarily made. S. v. *Jacobs,* 151; S. v. *Dozier,* 615.

Although it was error to admit statements from the confession of each defendant which implicated his co-defendant, neither defendant having taken the stand in his own behalf, such error was nonetheless harmless where the objectionable statements were merely cumulative of other evidence of defendants' guilt. S. v. *Brinson,* 286.

Defendant's incriminating statement to officers was properly admitted in evidence notwithstanding there was no evidence on *voir dire* to support

CRIMINAL LAW—Continued

the trial court's finding of fact that defendant was advised of his right to a lawyer if he could not afford one. S. v. Crump, 573.

§ 78. **Stipulations**

Defendant's testimony in homicide prosecution that he split the victim's head open with a stick of wood and defendant's stipulation that the victim's death was caused by a skull fracture resulting from a blow to the head constituted an admission that the head wound inflicted by defendant was fatal and removed the cause of death from contention; consequently, trial court did not err in failing to charge specifically on the element of proximate cause. *S. v. McWilliams,* 680.

§ 80. **Books, Records and Private Writings**

It was proper for a sheriff to testify that the arrest sheet in his office showed that defendant was arrested at a certain date and hour. *S. v. Fox,* 1.

§ 81. **Best Evidence**

The best evidence rule did not preclude the admission of a transcript of defendant's confession to the sheriff. *S. v. Fox,* 1.

§ 84. **Evidence Obtained by Unlawful Means**

The warrantless seizure of burglary tools, stolen money and other articles from defendant's car was lawful and such evidence was properly admitted in the trial of defendant for breaking and entering, larceny and safecracking. *S. v. Jordan,* 341.

Arrest of defendant without a warrant for armed robbery of an ABC store was lawful, and officers lawfully searched defendant as an incident of the arrest for weapons and fruits of the robbery. *S. v. Woody,* 646.

Trial court did not err in failing to conduct *voir dire* examination to determine legality of arrest and search of defendant where, at the time of defendant's objection to the solicitor's question concerning the result of the search, the testimony already received without objection showed a lawful arrest and lawful search. *Ibid.*

A highway patrolman lawfully seized a gun butt that was protruding from papers on the back seat of defendant's car; the gun butt, and a gun barrel which was wholly under the papers, were properly admitted in evidence. *S. v. Dobbins,* 484.

There was no search within the constitutional prohibition against unreasonable searches and seizures when defendant's wife displayed to officers at their request a shotgun which she had told them defendant had, or when she later delivered the shotgun to an officer in defendant's home after telling another officer that he could "come by and get it." *S. v. Reams,* 391.

§ 85. **Character Evidence Relating to Defendant**

A defendant may be cross-examined by the solicitor as to his previous convictions. *S. v. Swaney,* 602.

§ 86. **Credibility of Defendant**

Where defendant on cross-examination admitted three past convictions and then stated "and that's all," the State was not precluded from further cross-examination of defendant concerning other prior unrelated criminal convictions. *S. v. Gaiten,* 236.

CRIMINAL LAW—Continued

While it is permissible for the trial court to hold a *voir dire* and find facts as to whether questions asked defendant on cross-examination by the solicitor concerning prior convictions were based on information and asked in good faith, such procedure is not required. *Ibid.*

Where record fails to show questions asked defendant concerning prior convictions were not based on information and asked in good faith, action of trial judge in allowing such questions is presumed correct. *Ibid.*

§ 88. **Cross-examination**

By cross-examination a witness may be questioned as to prior inconsistent statements or as to any act inconsistent with his testimony in order to impeach him or cast doubt upon his credibility. *S. v. Gaiten,* 236.

In prosecution for kidnapping prison bus driver during escape of prisoners from the bus, cross-examination of defendant's witnesses, prisoners who participated in the escape, held competent for the purpose of impeaching their credibility. *S. v. Penley,* 704.

In North Carolina the scope of inquiry on cross-examination is not confined to those matters testified to on direct examination. *Ibid.*

Both the State and defendant have a right to cross-examine a witness to show his bias or interest, and prior inconsistent statements are admissible for the purpose of impeachment. *Ibid.*

Trial court properly denied defendant's request that if he elected to take the stand the State be limited in its cross-examination of him. *S. v. Dobbins,* 484.

§ 89. **Credibility of Witness; Corroboration**

Testimony by police officers as to statements made to them by a robbery victim on the night the victim's wife was murdered was competent to corroborate the testimony of the victim. *S. v. Fox,* 1.

§ 91. **Continuance**

Defendant's motion for continuance that was made after discharging his court-appointed counsel and electing to represent himself was properly denied. *S. v. Powell,* 672.

Defendant's motion for continuance on the ground that he was unable to locate the whereabouts of his brother, who was expected to testify in support of defendant's plea of self-defense, was properly denied by the trial court. *S. v. Crump,* 573.

§ 92. **Consolidation of Counts**

When two or more indictments are founded on one criminal transaction, it is contemplated that the court will consolidate them for trial. *S. v. Fox,* 1.

Trial court properly consolidated for trial four indictments charging each of two defendants with armed robbery of a husband and wife. *S. v. McVay,* 410.

Warrants charging defendant with the violation of a municipal curfew and the unlawful possession of a dangerous weapon in an area in which a declared state of emergency existed were properly consolidated for trial. *S. v. Dobbins,* 484.

Armed robbery prosecution of a defendant who participated in the robbery as the driver of the get-away car or as a lookout was properly consolidated with the prosecutions of two co-defendants who actually perpetrated the robbery. *S. v. Swaney,* 602.

CRIMINAL LAW—Continued

§ 95. Admission of Evidence Competent for Restricted Purpose

Although it was error to admit statements from the confession of each defendant which implicated his co-defendant, neither defendant having taken the stand in his own behalf, such error was nonetheless harmless where the objectionable statements were merely cumulative of other evidence of defendants' guilt. *S. v. Brinson,* 286.

In a joint trial of three defendants for armed robbery, it was error to admit in evidence a statement made by one defendant tending to implicate a nontestifying co-defendant; but such error was harmless beyond a reasonable doubt in this case. *S. v. Swaney,* 602.

§ 98. Custody of Witnesses

Defendant's motion for the sequestration of the witnesses is addressed to the discretion of the court. *S. v. Fox,* 1.

§ 102. Argument of Counsel

Where one of two defendants in a joint trial offered evidence, trial court properly denied defendant who offered no evidence the closing argument to the jury. *S. v. Lee,* 205.

In a trial in which the defendant elected to represent himself, the trial court acted properly in placing restrictions on defendant's argument to the jury. *S. v. Powell,* 672.

§ 112. Instructions on Burden of Proof and Presumptions

Trial court did not err in failing to instruct jury that a reasonable doubt could arise from the lack or insufficiency of the evidence. *S. v. Gaiten,* 236.

§ 113. Statement of Evidence and Application of Law Thereto

A charge that referred to defendant's defense of alibi only in the statement of defendant's contentions and that failed to apply the law to the evidence of alibi is reversible error. *S. v. Vance,* 345.

Trial court sufficiently instructed the jury that it should separately consider the guilt or innocence of each defendant. *S. v. McVay,* 410.

§ 115. Instructions on Lesser Degrees of Crime

Trial court is not required to submit to the jury the question of lesser offenses of the offense charged where there is no evidence to support such a verdict. *S. v. Jacobs,* 151; *S. v. Swaney,* 602; *S. v. Powell,* 672; *S. v. Owens,* 697.

§ 117. Charge on Character Evidence and Credibility of Witness

Failure of the court to caution the jury to scrutinize testimony of defendant's accomplice was not erroneous where defendant made no request for such instruction. *S. v. Brinson,* 286.

Instructions as to how the jury should consider the testimony of defendant's wife as an interested witness *held* without error. *S. v. Vance,* 345.

§ 118. Charge on Contentions of the Parties

Trial court's instruction that defendant who offered no evidence contended by his plea of not guilty that the testimony of the State's witnesses should not be believed held not to constitute a fundamental misconstruction of defendant's contentions. *S. v. Lee,* 205.

CRIMINAL LAW—Continued

§ 120. Instruction on Right of Jury to Recommend Life Imprisonment

Failure of the trial court in a rape prosecution to instruct the jury that a guilty verdict with recommendation of life imprisonment requires the court to pronounce a judgment of life imprisonment held erroneous. *S. v. Vance,* 345.

§ 127. Arrest of Judgment

Judgment may be arrested in a criminal prosecution only when some fatal error or defect appears on the face of the record proper. *S. v. Hatcher,* 380.

§ 128. Discretion of Trial Court to Order Mistrial

Judge's refusal to declare a mistrial is not reviewable unless there is a showing of gross abuse of discretion. *S. v. Ball,* 714.

§ 131. New Trial for Newly Discovered Evidence

Defendant's motion for new trial for newly discovered evidence, which was made after the expiration of the session of court in which he was tried, was properly denied by the trial court on the ground that it lacked jurisdiction. *S. v. Crump,* 573.

§ 135. Judgment and Sentence in Capital Cases

A motion to quash which purported to raise the question of validity of capital punishment in first degree burglary prosecution was properly overruled. *S. v. Accor,* 65.

Defendant's plea of *nolo contendere* to second degree murder was voluntarily and intelligently made and was not coerced by fear of the death penalty. *S. v. Adams,* 427.

Procedure whereby the jury in a capital case determines the guilt or innocence of defendant and as part of the same verdict fixes the punishment at death or life imprisonment is constitutional. *S. v. Lee,* 205; *S. v. Dozier,* 615.

§ 138. Severity and Determination of Sentence

A defendant was not entitled to receive credit on his sentence for the 60 days he was required to spend under observation in a State hospital for the purpose of determining whether he was mentally competent to stand trial. *S. v. Walker,* 403.

A defendant whose conviction on a felony charge was reversed by the Court of Appeals was not entitled to deduct the time spent in custody under the felony charge from the sentence of imprisonment received in his subsequent trial on a lesser included offense of the felony. *Ibid.*

§ 154. Case on Appeal

The solicitor has responsibility to see that the record and case on appeal are properly made up. *S. v. Fox,* 1.

§ 157. Necessary Parts of Record Proper

The bill of indictment and the verdict are essential parts of the record. *S. v. Fox,* 1.

§ 158. Presumptions as to Matters Omitted

Where the charge was not included in the case on appeal, it is presumed that the court correctly instructed the jury on every phase of the case. *S. v. Fox,* 1.

CRIMINAL LAW—Continued

§ 161. Form and Requisites of Assignments of Error

An assignment of error unsupported by an exception presents no question of law for the Supreme Court. *S. v. Fox,* 1.

§ 162. Objections and Assignments of Error to Evidence

When the assignment of error is that the court erred in the admission or rejection of evidence, the evidence itself must be set out in the assignment. *S. v. Fox,* 1

Where there was a broadside objection to the introduction of a transcript of testimony given at a previous trial, the transcript was properly admitted in evidence if any part of it was competent. *Ibid.*

Testimony relating to the wounds received by attempted armed robbery victim is admissible over defendant's objection where defendant permitted similar testimony to be admitted without objection. *S. v. Owens,* 697.

§ 167. Harmless and Prejudicial Error in General

Not all federal constitutional errors are prejudicial. *S. v. Brinson,* 286.

§ 168. Harmless and Prejudicial Error in Instructions

Statement by the court in its instructions that "he who hunts with the pack is responsible for the kill," intended as an illustrative statement of the law of conspiracy, held not prejudicial. *S. v. Lee,* 205.

If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal. *Ibid.*

Trial court's inadvertent use of the word "intent" rather than "attempt" in armed robbery charge was no more than a *lapsus linguae*. *S. v. Owens,* 697.

A charge must be construed contextually. *S. v. Powell,* 672; *S. v. McWilliams,* 680.

§ 169. Harmless and Prejudicial Error in Admission of Evidence

The admission of testimony over objection is harmless when the facts sought to be established are admitted by the defendant. *S. v. Jacobs,* 151.

Exceptions by the defendant to evidence of a State's witness will not be sustained when the defendant or his witness testified, without objection, to substantially the same facts. *S. v. Crump,* 573.

In a joint trial of three defendants for armed robbery, it was error to admit in evidence a statement made by one defendant tending to implicate a nontestifying co-defendant; but such error was harmless beyond a reasonable doubt in this case. *S. v. Swaney,* 602.

§ 170. Harmless and Prejudicial Error in Remarks of Court

Defendant's testimony, which was competent on the question of self-defense, that someone had told him that his brother was going to kill him, *held* not prejudiced by the trial court's responses directing the defendant not to tell what another person said. *S. v. Crump,* 573.

§ 176. Review of Judgments on Motion to Nonsuit

Admitted evidence, whether competent or incompetent, must be considered in passing upon defendant's motion for nonsuit. *S. v. Accor,* 65; *S. v. Crump,* 573.

CRIMINAL LAW—Continued

By introducing evidence at the trial, defendant waived his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. *S. v. McWilliams,* 680.

§ 177. Determination and Disposition of Cause

In a bastardy prosecution, judgment which required the convicted defendant to pay $2,857.49 to the mother for unpaid hospital and doctor expenses resulting from the illness of the illegitimate child is remanded with direction that the money be paid directly to the doctors and hospitals entitled to receive it. *S. v. Fowler,* 305.

§ 180. Writ of Coram Nobis

Application for writ of *coram nobis* must be made to the Supreme Court and will be granted only upon a *prima facie* showing of substantiality. *S. v. Green,* 188.

Although the writ of *coram nobis* has been supplanted by statute with reference to any person imprisoned, the writ remains available to challenge the validity of a conviction by reason of matters extraneous to the record. *Ibid.*

DEDICATION

§ 1. Methods of Dedication

Where lots are sold with reference to a plat or map, and the grantees rely upon the descriptions therein with respect to designated streets and parks, such grantees acquire from the owner the irrevocable right to use the streets and parks so designated and no governmental acceptance is necessary, the basis of this right being *estoppel in pais. Oliver v. Ernul,* 591.

§ 2. Acceptance

There was no dedication of a right-of-way easement to the perpetual use of the public where no duly constituted public authority accepted the dedication. *Oliver v. Ernul,* 591.

DEEDS

§ 20. Restrictive Covenants in Subdivision Developments

Plaintiffs were not entitled to enforce restrictive covenants in their deeds against defendants who had subsequently purchased land from plaintiff's grantors. *Marrone v. Long,* 246.

DIVORCE AND ALIMONY

§ 8. Abandonment

The evidence required the trial court to instruct the jury that if the failure of the wife to engage in sexual relations with the husband was not wilful but was due to her health and physical condition, such failure would not constitute a constructive abandonment of the husband by the wife and would not be justification for his departure from the home. *Panhorst v. Panhorst,* 664.

EASEMENTS

§ 2. Creation of Easement by Deed

Description in purported "Rightaway Deed" was insufficient to grant plaintiffs a 20 foot right-of-way over the lands of defendants. *Oliver v. Ernul,* 591.

Patent ambiguity in the description of an easement in a deed cannot be removed by parol evidence. *Ibid.*

§ 3. Creation of Easement by Necessity

Purchasers of two land-locked lots did not acquire by estoppel a right-of-way across the remaining property of the seller where the record discloses no map, plat, preconceived plan or arrangement. *Oliver v. Ernul,* 591.

Where the owners of a tract of land conveyed two land-locked lots from such tract, a way of necessity over the lands retained by the grantors was impliedly granted to the grantees. *Ibid.*

While property owners cannot claim a way of necessity over the lands of a stranger to their title, it is not necessary that the person over whose land the way of necessity is sought be the immediate grantor, so long as there was at one time common ownership of both tracts. *Ibid.*

While the right to select a way of necessity generally belongs to the owner of the servient estate, if at the time the way of necessity was impliedly granted there was in use on the land a way plainly visible and known to the parties, such way will be held to be the location of the way granted unless it is not a reasonable and convenient way for both parties. *Ibid.*

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

A fishing pier operator whose seashore lots had been completely eroded by the Atlantic Ocean was not entitled to recover compensation from a municipality on the theory that the municipality's construction of a 15-foot beach erosion seawall constituted a taking of his lots for a public purpose without just compensation. *Fishing Pier v. Town of Carolina Beach,* 297.

§ 9. Condemnation by Housing Authority

Petition to condemn land for urban renewal held sufficient under the new Rules of Civil Procedure to state a claim for relief. *Redevelopment Comm. v. Grimes,* 634.

Trial court erred in dismissing an action to condemn land for urban renewal where there was no finding that the redevelopment commission failed to comply with statutory procedures or that the commission arbitrarily abused its discretion or acted in bad faith to condemn the area in question. *Ibid.*

§ 11. Report of Appraisers and Trial Upon Exceptions

Although a proceeding to condemn property for urban renewal was erroneously transferred from the clerk to the superior court before the clerk had acted on the exceptions to the commissioners' report, the judge of superior court had full power to consider and determine all matters in

EMINENT DOMAIN—Continued

controversy as if the cause was originally before him. *Redevelopment Comm. v. Grimes,* 634.

§ 13. Actions by Owner for Compensation or Damages

A fishing pier owner who sought compensation from a municipality on the theory that the municipality's construction of a beach erosion seawall constituted a taking of the lots on which the pier was located, *held* not entitled to offer evidence of the costs of a new ramp and of a 180-foot extension to the fishing pier. *Fishing Pier v. Town of Carolina Beach,* 297.

ESTOPPEL

§ 5. Parties Estopped

Neither the wife nor her heirs was estopped from contending that the contract between the wife and her husband to execute a joint will was void as to the wife because it was not executed by her in accordance with G. S. 52-6. *Mansour v. Rabil,* 364.

EVIDENCE

§ 4. Presumptions

Stipulation that notice of claim of lien was mailed by regular mail to a contractor establishes *prima facie* that the notice was received by the contractor in the regular course of the mail but raises no presumption as to time of receipt of the notice. *Supply Co. v. Motor Lodge,* 312.

EXECUTORS AND ADMINISTRATORS

§ 20. Claims on Contracts

A consent judgment in which a father agreed to support the children of a prior marriage and to provide them with a four-year college education created a debt in the legal sense which survived the father's death and became an obligation of his estate. *Mullen v. Sawyer,* 623.

EXTRADITION

Trial court properly denied defendant's motion to quash indictments on ground that he was wrongfully returned to this State from another state. *S. v. Teal,* 349.

FRAUDS, STATUTE OF

§ 7. Contracts to Devise

A joint will executed by husband and wife was itself sufficient memorandum of their contract for the disposition of their estates to satisfy the statute of frauds. *Mansour v. Rabil,* 364.

GRAND JURY

§ 3. Challenge to Composition

Negro defendants in a first degree murder prosecution failed to make out a *prima facie* case that members of their race had been systematically excluded from the grand jury. *S. v. Brinson,* 286.

HOMESTEAD AND PERSONAL PROPERTY EXEMPTION

§ 6. Personal Property Exemptions

The cash surrender value of a life insurance policy issued on the life of a bankrupt for the benefit of his wife is not an asset of the bankrupt's estate and is therefore exempt from the claims of the trustee in bankruptcy. *Insurance Co. v. McDonald,* 275.

HOMICIDE

§ 2. Parties and Offenses

Each and every conspirator is guilty of a murder committed during the perpetration of a conspiracy to commit robbery. *S. v. Fox,* 1.

§ 4. Murder in the First Degree

Murder committed in the perpetration or attempted perpetration of any felony is murder in the first degree. *S. v. Fox,* 1.

A murder committed in the perpetration or attempt to perpetrate a felonious escape is murder in the first degree. *S. v. Lee,* 205.

Premeditation and deliberation may be inferred from a vicious and brutal slaying. *S. v. Reams,* 391.

§ 9. Self-Defense

A plea of self-defense rests upon necessity, real or apparent. *S. v. Crump.* 573.

§ 12. Indictment

A felony murder may be proven by the State although the bill of indictment charges murder in the statutory language of G.S. 15-144. *S. v. Lee,* 205.

§ 13. Pleas

Defendant's plea of *nolo contendere* to second degree murder was voluntarily and intelligently made and was not coerced by fear of the death penalty. *S. v. Adams,* 427.

§ 14. Presumptions and Burden of Proof

The State must prove in a homicide prosecution that victim's death proximately resulted from defendant's unlawful act. *S. v. McWilliams,* 680.

Presumptions arising from the intentional shooting with a shotgun. *S. v. Crump,* 573.

§ 15. Relevancy and Competency of Evidence

In joint trial of two defendants for first degree murder of a prison guard, it was permissible for the State to prove a conspiracy to escape while defendants were serving felony sentences and that the murder was committed in the escape attempt. *S. v. Lee,* 205.

§ 16. Dying Declarations

Dying declaration of the victim of a gunshot wound was properly admitted in evidence. *S. v. Crump,* 573.

§ 18. Evidence of Premeditation and Deliberation

Want of provocation, absence of excuse and defendant's statement that

HOMICIDE—Continued

he shot deceased "to prove a point" permit legitimate inference of premeditation and deliberation. *S. v. Rich,* 333.

Evidence of threats against the victim are admissible to show premeditation and deliberation. *S. v. Reams,* 391.

§ 19. Evidence Competent on Question of Self-Defense

In a prosecution charging defendant with the shotgun slaying of his brother, defendant's testimony that another brother shouted to him, "Run, Doug, Ben is going to kill us," is admissible to establish defendant's plea of self-defense nowithstanding such testimony was hearsay. *S. v. Crump,* 573.

§ 20. Demonstrative Evidence

Various exhibits connected with first degree murder and armed robbery were properly admitted in evidence to identify the perpetrators of the crime. *S. v. Fox,* 1.

§ 21. Sufficiency of Evidence

Trial court properly submitted issue of first degree murder to the jury. *S. v. Reams,* 391.

Issue of defendant's guilt of the shotgun homicide of his brother was properly submitted to the jury. *S. v. Crump,* 573.

§ 23. Instructions in General

Statement by the court in its instructions that "he who hunts with the pack is responsible for the kill," intended as an illustrative statement of the law of conspiracy, held not prejudicial. *S. v. Lee,* 205.

§ 24. Instructions on Presumptions and Burden of Proof

Defendant's testimony in homicide prosecution that he split the victim's head open with a stick of wood and defendant's stipulation that the victim's death was caused by a skull fracture resulting from a blow to the head constituted an admission that the head wound inflicted by defendant was fatal and removed the cause of death from contention; consequently, trial court did not err in failing to charge specifically on the element of proximate cause. *S. v. McWilliams,* 680.

§ 25. Instructions on First Degree Murder

Court's instructions in prosecution for murder of a prison guard during an escape could not have been understood by the jury to mean that defendant could be found guilty of first degree murder on the theory of conspiracy if he joined the codefendant in an escape scheme after the codefendant had already murdered the guard. *S. v. Lee,* 205.

State's evidence held sufficient to support court's instructions on murder committed during perpetration of a robbery. *S. v. Rich,* 333.

§ 31. Verdict and Sentence

Defendant's plea of *nolo contendere* to second degree murder was voluntarily and intelligently made and was not coerced by fear of the death penalty. *S. v. Adams,* 427.

HUSBAND AND WIFE

§ 4. Contracts Between Husband and Wife

A contract between a husband and wife to make a joint will was void as to the wife because not executed by her in accordance with G.S. 52-6, and its validity was not affected by the curative statutes. *Mansour v. Rabil*, 364.

§ 17. Survivorship in Estate by Entireties

Husband had no descendible or devisable estate in land owned by husband and wife by the entirety. *Mansour v. Rabil*, 364.

INDICTMENT AND WARRANT

§ 6. Issuance of Warrant

Defendant's argument that his arrest was based on an illegal photographic identification by the prosecuting witness and that the evidence obtained as a result of the arrest was consequently inadmissible is without merit. *S. v. Hatcher*, 380.

§ 7. Sufficiency of Indictment

In a retrial of defendant for first degree murder it was proper to try defendant upon the original indictment. *S. v. Fox*, 1.

§ 9. Charge of Crime

In indictments charging the defendant with first degree burglary and with first degree murder committed during an armed robbery, it was proper to allege the names of the four persons who had conspired with defendant to commit the robbery. *S. v. Fox*, 1.

The indictment should not charge a party disjunctively or alternatively so as to leave it uncertain what the State relied on. *S. v. Swaney*, 602.

An indictment for a statutory offense is generally sufficient when it charges the offense in the language of the statute. *S. v. Penley*, 704.

§ 14. Grounds and Procedure on Motion to Quash

In ruling on a motion to quash, the court is not permitted to consider evidence outside the record. *S. v. Lee*, 242.

Trial court properly denied defendant's motion to quash indictments on ground that he was wrongfully returned to this State from another state. *S. v. Teal*, 349.

§ 18. Sufficiency of Indictment for Conviction of Other Degrees of Crime

An indictment alleging attempted armed robbery will not support a conviction of the offense of carrying a concealed weapon. *S. v. Powell*, 672.

INJUNCTIONS

§ 5. Injunction to Restrain Enforcement of Ordinance

A restraining order which enjoined a municipality from enforcing or giving any effect whatever to a Sunday observance ordinance is vacated by the Supreme Court. *Kresge Co. v. Davis*, 654.

A suit for injunctive relief is an appropriate procedure for testing the constitutionality of a law where plaintiff's legitimate business interests are threatened. *Ibid.*

INSURANCE

§ 99. Settlement by Insurer

Insured motorists failed to prove that their automobile liability insurer was guilty of negligence or bad faith in not accepting injured party's offer to settle her claim against the motorists for $10,000. *Thomas v. Insurance Co.*, 329.

§ 100. Duty of Insurer to Defend

Where an automobile liability insurer wrongfully refused to defend its insured against claims arising out of an automobile accident, a garage liability insurer that undertook the insured's defense is entitled to recover from the automobile insurer the sums paid out in the defense and settlement of the claims. *Ins. Co. v. Ins. Co.*, 216.

§ 108. Defenses Available to Insurer

In an action by a garage liability insurer to recover sums expended in defense of a motorist whose own liability insurer had wrongfully refused to defend him, the garage liability insurer was barred from recovering those sums which were paid more than three years prior to the institution of the action. *Ins. Co. v. Ins. Co.*, 216.

§ 112. Subrogation of Insurer

Where an automobile liability insurer wrongfully refused to defend its insured against claims arising out of an automobile accident, a garage liability insurer that undertook the insured's defense is entitled to recover from the automobile insurer the sums paid out in the defense and settlement of the claims. *Ins. Co. v. Ins. Co.* 216.

INTOXICATING LIQUOR

§ 2. Suspension of Beer Permits

Superior court erred in setting aside an order of the State Board of Alcoholic Control suspending petitioner's beer permit for 60 days. *Keg, Inc. v. Board of Alcoholic Control*, 450.

JUDGMENTS

§ 10. Construction and Operation of Consent Judgment

Consent judgment defined. *Mullen v. Sawyer*, 623.

A clerk's order of sale and distribution in a partitioning proceeding, although not a consent order *per se*, will be treated by the Supreme Court as having the effect of a consent order. *In re Johnson*, 688.

§ 17. Void Judgments

Unless one named as a defendant has been brought into court in some way sanctioned by law or makes a voluntary appearance, court has no jurisdiction of the person and judgment rendered against him is void. *Marketing Systems v. Realty Co.*, 230.

§ 21. Setting Aside Consent Judgment

Petitioners in a partitioning proceeding who consented through their attorneys to a superior court judgment dismissing their appeal from an

JUDGMENTS—Continued

order of sale entered in the proceeding by the clerk are held bound by the consent judgment in a subsequent action to have the clerk's order declared null and void. *In re Johnson*, 688.

§ 51. Actions on Foreign Judgments

When suit is brought in a court of this State upon a judgment rendered by a court of another state, the court of this State must first determine whether summons was served in accordance with the laws of the state in which the judgment was rendered. *Marketing Systems v. Realty Co.*, 230.

Validity and effect of a judgment of another state must be determined by reference to the laws of the state wherein the judgment was rendered. *Ibid.*

District court erred in giving full faith and credit to judgment rendered against defendant in Missouri where transcript shows upon its face that service of summons upon defendant was attempted by a method not approved by Missouri statute or by rules of court of that state. *Ibid.*

JURY

§ 5. Selection Generally

There was no error in the method of jury selection in a rape prosecution whereby 12 veniremen were placed together in the jury box and examined by the State and then by the defendant. *S. v. McNeil*, 162; *S. v. Perry*, 174.

§ 7. Challenges

Ruling of the trial court which allowed defendant two peremptory challenges for each alternate juror was proper. *S. v. Fox*, 1.

§ 8. Impaneling Jury

Defendant in an armed robbery prosecution was not prejudiced by the fact that the jury was impaneled during his absence from the courtroom. *S. v. Swaney*, 602.

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions

Trial court properly denied defendant's motion for nonsuit on a charge of kidnapping a witness to defendant's robbery of an ABC store who was forced by defendant to drive him from the robbery scene. *S. v. Woody*, 646.

Trial court did not fail to instruct jury on significance of defendant's contention that the alleged victim had consented for a sum of money to drive defendant from the robbery scene. *Ibid.*

Failure of G.S. 14-39 to define kidnapping does not render the statute vague or uncertain. *S. v. Penley*, 704.

Indictment charging that defendant "did unlawfully, wilfully, feloniously and forcibly kidnap" a named person held sufficient. *Ibid.*

The distance traveled is not material in a kidnapping prosecution. *Ibid.*

Evidence held sufficient to support verdict finding defendant guilty of kidnapping driver of a prison bus. *Ibid.*

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Lien of Subcontractor or Material Furnisher

The law requires the owner to apply the unexpended contract price due the contractor toward payment of the claims of subcontractors and materialmen who have given the required notice. *Supply Co. v. Motor Lodge,* 312.

Where statutory notice of materialman's claim of lien for materials furnished subcontractor was delivered to owner after owner had given check to principal contractor in final payment of the contract price but prior to payment of the check by the drawee bank, owner was under no legal duty to stop payment on the check given the contractor. *Ibid.*

G.S. 44-8 and G.S. 44-12 create no liability on the part of the owner when a contractor fails to furnish to the owner an itemized statement of sums due materialmen as required by G.S. 44-8. *Ibid.*

§ 4. Sufficiency of Notice of Claim

Stipulation that notice of claim of lien was mailed by regular mail to a contractor establishes *prima facie* that the notice was received by the contractor in the regular course of the mail but raises no presumption as to time of receipt of the notice. *Supply Co. v. Motor Lodge,* 312.

§ 8. Enforcement of Lien

Materialman's evidence was insufficient for jury in action against principal contractor based on alleged failure of contractor to notify owner of sums due plaintiff materialman for materials furnished a subcontractor. *Supply Co. v. Motor Lodge,* 312.

In action against motel owner, principal contractor and subcontractor to recover for materials furnished by plaintiff to the subcontractor for use in the construction of the motel, plaintiff was not prejudiced by continuance of the case as to the subcontractor. *Ibid.*

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action

In an action by a garage liability insurer to recover sums expended in defense of a motorist whose own liability insurer had wrongfully refused to defend him, the garage liability insurer was barred from recovering those sums which were paid more than three years prior to the institution of the action. *Ins. Co. v. Ins. Co.,* 216.

MASTER AND SERVANT

§ 56. Causal Relation Between Employment and Injury

An apprentice electrician who was dragged to immediate death between the rollers of a conveyor belt died in an accident arising in the course of his employment with an electrical contracting firm, where at the time of the death the employee was waiting for further instructions from his foreman. *Stubblefield v. Construction Co.,* 444.

§ 58. Negligent Act of Injured Employee

An act of negligence by an employee while he was in the performance of his duty of waiting for his foreman did not bar the employee's right to compensation for the accident resulting from the negligence. *Stubblefield v. Construction Co.,* 444.

MUNICIPAL CORPORATIONS

§ 4. Legislative Control and Powers of Municipalities in General

Trial court erred in dismissing an action to condemn land for urban renewal where there was no finding that the redevelopment commission failed to comply with statutory procedures or that the commission arbitrarily abused its discretion or acted in bad faith in condemning the area in question. *Redevelopment Comm. v. Grimes,* 634.

Petition to condemn land for urban renewal held sufficient under the new Rules of Civil Procedure to state a claim for relief. *Ibid.*

Action by a municipality in ordering the demolition of a dwelling house without compensation to the owner thereof is violative of the law of the land clause of the State Constitution. *Horton v. Gulledge,* 353.

§ 8. Validity and Enforcement of, and Attack on, Ordinances

The past discriminatory enforcement of a valid ordinance does not render the ordinance presently void or unenforceable. *Kresge Co. v. Davis.* 654.

A restraining order which enjoined a municipality from enforcing or giving any effect whatever to a Sunday observance ordinance is vacated by the Supreme Court. *Ibid.*

§ 24. Power of Municipality to Make Improvements and Levy Assessments Therefor

The General Assembly acted within its constitutional power in providing that a municipality shall not access railroad right-of-way property for local improvements "unless there is a building on such right-of-way." *R. R. Co. v. Raleigh,* 709.

§ 29. Nature and Extent of Municipal Police Power

Action by a municipality in ordering the demolition of a dwelling house without compensation to the owner thereof is violative of the law of the land clause of the State Constitution. *Horton v. Gulledge,* 353.

§ 30. Zoning Ordinances and Building Permits

Three-fourths favorable vote of the city council was not required for the adoption of the zoning amendment in this case. *Heaton v. Charlotte,* 506.

No additional notice or public hearing was required in this case for the adoption of an amendment to a municipal zoning ordinance containing alterations of the original proposal made after a public hearing on the proposal had been held. *Ibid.*

As used in G.S. 160-176, the words "immediately adjacent" mean "adjoining" or "abutting" and the words "extending one hundred feet therefrom" refer to the distance to be measured from the zoned property in establishing the ownership of the area of lots referred to in the statute. *Ibid.*

Even if a buffer zone was created for the sole purpose of avoiding the ¾ vote required by G.S. 160-176, such action would be valid and effective to avoid such a vote. *Ibid.*

Municipal ordinance rezoning a 9.26-acre tract of land from one residential classification to a less restrictive residential classification is invalid where the city council did not determine that the tract and the existing circumstances justified rezoning the tract so as to permit all uses per-

MUNICIPAL CORPORATIONS—Continued

missible under the new classification, but the council's action was based on its approval of the specific plans of the applicant to construct luxury apartments on the property. *Allred v. Raleigh,* 530.

A special exception within the meaning of a zoning ordinance is one which is expressly permitted in a given zone upon proof that certain facts and conditions detailed in the ordinance exist. *In re Application of Ellis,* 364.

The Town of Conover has no authority to enact an ordinance prohibiting the use anywhere within its limits of a single mobile home as a permanent residence. *Town of Conover v. Jolly,* 439.

§ 32. Regulations Relating to Public Morals

Sunday observance ordinance for the City of High Point is valid. *Kresge Co. v. Davis,* 654.

In an action by retailers seeking to challenge the constitutionality of the High Point Sunday observance ordinance and the unequal enforcement of the ordinance, plaintiff's allegations that the municipality has intentionally discriminated in the enforcement of the ordinance were sufficient to state a cause of action. *Ibid.*

§ 33. Authority Over Public Streets

Statute authorizing a municipality to enact an ordinance giving the mayor authority to proclaim a state of emergency and impose restrictions upon travel is not unconstitutional for vagueness. *S. v. Dobbins,* 484.

The right of an individual to travel upon the public streets of a city is not absolute. *Ibid.*

A municipality that was faced with a clear and present danger of violent upheaval was not prevented by either the State or Federal Constitutions from imposing a temporary ban on travel. *Ibid.*

PARENT AND CHILD

§ 7. Duty to Support Children

The support of a child by a parent may be the subject of a contract. *Mullen v. Sawyer,* 623.

Son and daughter did not forfeit their right to a college education under a consent judgment entered into by their divorced father. *Ibid.*

PARTITION

§ 2. Agreements Affecting Rights in Partition

A petitioner in a partitioning proceeding who through his attorney consented to an agreement for the division of lands and thereafter ratified the agreement is held bound thereby. *In re Johnson,* 688.

§ 3. Petition, Parties and Jurisdiction

Petitioners in a partitioning proceeding who consented through their attorneys to a superior court judgment dismissing their appeal from an order of sale entered in the proceeding by the clerk are held bound by the consent judgment in a subsequent action to have the clerk's order declared null and void. *In re Johnson,* 688.

PAYMENT

§ 1. Transactions Constituting Payment

Delivery of a check by a debtor to a creditor and acceptance of the check by the creditor does not constitute payment until the check is paid by the drawee bank, but if the check is paid upon presentation, the payment is deemed to have been made at the time the check was given. *Supply Co. v. Motor Lodge,* 312.

PLEADINGS

§ 19. Office and Effect of Demurrer

The demurrer has been abolished by the new Rules of Civil Procedure. *Sutton v. Duke,* 94.

§ 37. Necessity for Proof of Issues Raised by Pleadings

Plaintiff's cause of action cannot be submitted to the jury on a theory of liability not supported by allegation and evidence. *Fishing Pier v. Town of Carolina Beach,* 297.

PROCESS

§ 14. Service on Foreign Corporations

A contract between a N. C. resident and a nonresident manufacturer whereby the resident undertook to act as the manufacturer's representative in this and other states was made in this State and met the due process requirement of "substantial connection" with this State thereby subjecting the manufacturer to the *in personam* jurisdiction of the courts of this State. *Goldman v. Parkland,* 223.

PUBLIC OFFICERS

§ 8. Performance of Official Duties

It is presumed that public officials have discharged their duties in good faith and have exercised their powers in accord with the spirit and purpose of the law. *Styers v. Phillips,* 460.

RAPE

§ 4. Relevancy and Competency of Evidence

Trial court did not err in admission of medical testimony that tests made disclosed presence of male sperm in the victim's vagina shortly after the assault. *S. v. McNeil,* 162.

Trial court did not err in allowing prosecutrix to testify that as result of the unlawful act of intercourse she became pregnant. *Ibid.*

§ 5. Sufficiency of Evidence

Evidence held sufficient for jury in rape prosecution. *S. v. McNeil,* 162.

§ 6. Instructions and Submission of Question of Guilt of Lesser Degree of Crime

Trial court in rape prosecution did not err in failing to submit lesser included offenses of assault with intent to commit rape and assault on a female. *S. v. McNeil,* 162.

RAPE—Continued

Failure of the trial court in a rape prosecution to instruct the jury that a guilty verdict with recommendation of life imprisonment required the court to pronounce a judgment of life imprisonment was erroneous. *S. v. Vance,* 345.

§ 7. Verdict and Judgment

There was no error in jury verdict in rape prosecution finding defendant "guilty as charged with a recommendation of life imprisonment" and judgment of life imprisonment pronounced thereon. *S. v. McNeil,* 162.

The Supreme Court upholds the procedure in this State which permits the trial jury in a rape prosecution to decide the guilt of the defendant and at the same time and as part of the verdict to fix his punishment at life imprisonment. *S. v. Dozier,* 615.

§ 8. Carnal Knowledge of Female Under Twelve

The terms "carnal knowledge" and "sexual intercourse" are synonymous. *S. v. Murry,* 197.

The act of carnally knowing and abusing any female child under the age of 12 years is rape; neither force nor intent is an element of this offense. *Ibid.*

§ 11. Sufficiency of Evidence of Carnal Knowledge of Female Under Twelve

In a prosecution charging defendant with carnal knowledge of an 11-year-old girl, the State's evidence was positive as to each and every element of the crime. *S. v. Murry,* 197.

In a prosecution charging a 16-year-old defendant with rape of an 11-year-old girl, the fact that the trial court submitted to the jury an issue of defendant's guilt of assault upon a female by a male person over the age of 18 years was not prejudicial to defendant but rather was in his favor. *Ibid.*

§ 16. Instructions on Carnal Knowledge of Female Between Twelve and Sixteen

In a prosecution charging a 16-year-old defendant with the rape of an 11-year-old girl, the fact that the trial court submitted to the jury an issue of defendant's guilt of an assault upon a female by a male person *over the age of eighteen years, held* not prejudicial to the defendant. *S. v. Murry,* 197.

§ 18. Assault With Intent to Commit Rape

Sentence of 12 to 15 years' imprisonment imposed upon defendant's conviction of assault with intent to commit rape does not constitute cruel and unusual punishment. *S. v. Harris,* 435.

RIOT AND INCITING TO RIOT

§ 1. Nature and Elements

Statute authorizing a municipality to enact an ordinance giving the mayor authority to proclaim a state of emergency and impose restrictions upon travel is not unconstitutional for vagueness. *S. v. Dobbins,* 484.

RIOT AND INCITING TO RIOT—Continued

§ 2. Prosecutions

In a prosecution charging defendant with the violation of a municipal curfew ordinance, evidence of defendant's unexplained presence on the streets was sufficient to establish proof of his violation of the ordinance. *S. v. Dobbins,* 484.

ROBBERY

§ 1. Elements

The main element of attempted armed robbery is the force or intimidation occasioned by the use of firearms. *S. v. Swaney,* 602; *S. v. Owens,* 697.

§ 2. Indictment

The fact that an armed robbery indictment charged "endangered and threatened" rather than the statutory language "endangered or threatened" was not fatal. *S. v. Swaney,* 602.

An indictment for attempted armed robbery which describes the property involved as "U. S. currency" alleges a sufficient description of the property. *S. v. Owens,* 697.

§ 3. Competency of Evidence

Testimony describing wounds received by victim of armed robbery was competent to corroborate the victim's testimony and to show the felonious purpose of the robbery. *S. v. Fox,* 1.

Testimony relating to the wounds received by attempted armed robbery victim is admissible over defendant's objection, where defendant permitted similar testimony to be admitted without objection. *S. v. Owens,* 697.

§ 4. Sufficiency of Evidence and Nonsuit

Testimony by armed robbery victim that defendants did not threaten him in any way did not warrant judgment of nonsuit. *S. v. Swaney,* 602.

The State's evidence in an armed robbery prosecution was ample to show that a codefendant was a participant in the robbery either as the driver of the get-away car or as a lookout. *Ibid.*

In prosecution for second degree murder and common law robbery of the murder victim, the evidence did not conclusively show that defendant formed the intent to take deceased's money only after the assault had been completed. *S. v. McWilliams,* 680.

Defendant's testimony that he was under the influence of alcohol and a tranquilizer pill should not be considered in passing on motion for nonsuit in robbery prosecution. *S. v. Woody,* 646.

§ 5. Instructions and Submission of Lesser Degree of Crime

Trial court was not required to submit the issue of defendant's guilt of the lesser included offenses of armed robbery. *S. v. Swaney,* 602.

State's evidence that the male defendant, wearing a woman's wig and carrying a woman's purse, entered an ABC store, opened the purse and pulled a loaded pistol therefrom held sufficient to support a verdict of guilty of attempted armed robbery or not guilty. *S. v. Powell,* 672.

ROBBERY—Continued

Trial court's inadvertent use of the word "intent" rather than "attempt" in armed robbery charge was no more than a *lapsus linguae*. *S. v. Owens,* 697.

Evidence in an attempted armed robbery prosecution did not justify the submission of an issue of defendant's guilt of common law robbery. *S. v. Powell,* 672; *S. v. Owens,* 697.

§ 6. Verdict and Sentence

A defendant who was convicted of armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the assault conviction when both offenses arose out of the same occurrence. *S. v. Hatcher,* 380.

RULES OF CIVIL PROCEDURE

§ 8. General Rules of Pleading

Under the "notice theory of pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata,* and to show the type of case brought. *Sutton v. Duke,* 94.

Complaint should not be dismissed for failure to state a claim unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of his claim. *Ibid.*

Complaint held sufficient under new Rules of Civil Procedure in an action for personal injuries received when escaped pony caused escape of mule which collided with plaintiff's automobile. *Ibid.*

§ 12. Motion to Dismiss for Failure to State Claim for Relief

The demurrer has been abolished by Rule 7(c), and has been replaced by the motion to dismiss under Rule 12. *Sutton v. Duke,* 94.

Motion to dismiss under Rule 12 may be successfully interposed to a complaint which states a defective claim or cause of action but not to one which was formerly labeled a "defective statement of a good cause of action." *Ibid.*

Mere vagueness or lack of detail is not ground for a motion to dismiss, but such a deficiency should be attacked by a motion for a more definite statement. *Ibid.*

§ 51. Instructions

The trial court has the duty to charge the law applicable to the substantive features of the case arising on the evidence without special request, and to apply the law to the various factual situations presented by the conflicting evidence. *Panhorst v. Panhorst,* 664.

§ 60. Relief from Judgment

Although plaintiff's personal injury action for $5000 was improperly calendared for trial in superior court, a judgment by a superior court judge dismissing the action for failure of plaintiff to appear and prosecute the action was not void; plaintiff's relief from the judgment was by motion in the cause and not by appeal. *Brady v. Chapel Hill,* 720.

SCHOOLS

§ 16. Transportation of Pupils

Whether any school board shall operate a bus transportation system is a matter in its sole discretion. *Styers v. Phillips,* 460.

Neither testimony by a former member of the legislature nor bills which were introduced in the legislature and died in committee were competent to show the legislature's intention in making an appropriation for transportation of public school pupils. *Ibid.*

The State Board of Education had authority under G.S. 115-181(f) to make an allocation for the intra-city transportation of public school pupils from the funds appropriated by the General Assembly for transportation purposes during the school year 1970-71, and to accelerate the allocation and expenditure of such funds even though such acceleration will exhaust the appropriation by April 1971. *Ibid.*

The Supreme Court has assumed, without deciding, that three taxpayers have standing to maintain an action to enjoin the expenditure of state funds for the intra-city transportation of public school pupils. *Ibid.*

SEALS

Where signatures on a contract to make a joint will were under seal, the seals are conclusive evidence of the existence of consideration for the contract. *Mansour v. Rabil,* 364.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

The warrantless seizure of burglary tools, stolen money and other articles from defendant's car was lawful and such evidence was properly admitted in the trial of defendant for breaking and entering, larceny and safecracking. *S. v. Jordan,* 341.

There was no search within the constitutional prohibition against unreasonable searches and seizures when defendant's wife displayed to officers at their request a shotgun which she had told them defendant had, or when she later delivered the shotgun to an officer in defendant's home after telling another officer that he could "come by and get it." *S. v. Reams,* 391.

Arrest of defendant without a warrant for armed robbery of an ABC store was lawful, and officers lawfully searched defendant as an incident of the arrest for weapons and fruits of the robbery. *S. v. Woody,* 646.

A highway patrolman lawfully seized a gun butt that was protruding from papers on the back seat of defendant's car; the gun butt and a gun barrel which was wholly under the papers were properly admitted in evidence. *S. v. Dobbins,* 484.

STATE

§ 2. State Lands

The lands beneath coastal waters belong to the states and not to the federal government. *Fishing Pier v. Town of Carolina Beach,* 297.

STATE—Continued

In North Carolina, private property ends at the high-water mark, and the foreshore is the property of the State. *Ibid.*

Statute which granted municipality title in reclaimed seashore lands down to the *low-water* mark controls over inconsistent provision in another statute which provided that State land under navigable waters cannot be conveyed in fee. *Ibid.*

A fishing pier operator whose seashore lots had been completely eroded by the Atlantic Ocean was not entitled to recover compensation from a municipality on the theory that the municipality's construction of a 15-foot beach erosion seawall constituted a taking of his lots for a public purpose without just compensation. *Ibid.*

§ 4. Actions Against the State

The Supreme Court has assumed, without deciding, that three taxpayers have standing to maintain an action to enjoin the expenditure of state funds for the intra-city transportation of public school pupils. *Styers v. Phillips,* 460.

STATUTES

§ 2. Constitutional Prohibition Against Enactment of Local Acts

A 1969 Home Rule statute that enables the county commissioners of every county in the State to enact ordinances, including Sunday observance ordinances, is a general law and does not violate the constitutional prohibition against local legislation regulating trade. *Whitney Stores v. Clark,* 322.

§ 4. Procedures to Test Validity; Construction in Regard to Constitutionality

Every presumption is to be indulged in favor of the constitutionality of a statute. *Martin v. Housing Corp.,* 29.

Supreme Court will undertake to determine constitutionality of a statute only with reference to ground on which it is attacked and definitely drawn into focus by the attacker's pleadings. *Martin v. Housing Corp.,* 29.

§ 5. General Rules of Construction

Words and phrases of a statute must be construed as part of the composite whole. *Vogel v. Supply Co.,* 119.

The *ejusdem generis* rule. *S. v. Lee,* 242.

Where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject matter, they are to be understood in the same sense unless by qualifying or explanatory addition the contrary intent of the Legislature is made clear. *Insurance Co. v. McDonald,* 275.

The intention of the legislature cannot be shown by the testimony of a member or by its failure to act. *Styers v. Phillips,* 460.

§ 10. Construction of Criminal Statutes

The rule requiring a statute to be construed to effectuate the legislative intent applies also to criminal statutes. *Vogel v. Supply Co.,* 119.

SUBROGATION

A garage liability insurer that undertook the defense of a motorist whose own automobile liability insurer had wrongfully refused to defend him was not such a pure volunteer as to be deprived of the right of subrogation against the automobile insurer. *Ins. Co. v. Ins. Co.*, 216.

SUNDAYS AND HOLIDAYS

A 1969 Home Rule statute that enables the county commissioners of every county in the State to enact ordinances in the exercise of the police power, including Sunday observance ordinances, is a general law and does not violate the constitutional prohibition against local legislation regulating trade. *Whitney Stores v. Clark*, 322.

Sunday observance ordinance for the City of High Point is valid. *Kresge Co. v. Davis*, 654.

TAXATION

§ 2. Uniform Rules and Discrimination

Since the Constitution does not permit a state to levy any tax which discriminates in favor of or against taxpayers in the same classification, the State cannot levy a tax in 25 counties and exempt 75 counties or set up a valid scheme by which that result is accomplished. *Hajoca Corp. v. Clayton*, 560.

§ 4. Limitation on Increase of Public Debt

Bonds and notes authorized to be issued by the N. C. Housing Corporation Act which are payable solely from the revenue or assets of the Corporation will not create a debt within the meaning of the Constitution. *Martin v. Housing Corp.*, 29.

§ 6. Necessary Expenses and Necessity for Vote

Legislation authorizing the N. C. Housing Corporation to issue bonds and notes without a vote of the people does not violate the N. C. Constitution. *Martin v. Housing Corp.*, 29.

§ 7. Public Purpose

Money may not be appropriated from the public treasury for a nonpublic purpose. *Martin v. Housing Corp.*, 29.

Legislative declaration that a statute was enacted for a public purpose, although entitled to great weight, is not conclusive. *Ibid.*

For a use to be public it must benefit the public in common and not particular persons, interests or estates. *Ibid.*

The North Carolina Housing Corporation Act was enacted for a public purpose. *Ibid.*

§ 15. Definition of Sales and Use Taxes

The additional 1% sales and use tax authorized by the "Local Option Sales and Use Tax Act" is a State tax, not a county tax, and is unconstitutional. *Hajoca Corp. v. Clayton*, 560.

TAXATION—Continued

§ 21. Exemption of Property of State and Political Subdivisions

Provisions of N. C. Housing Corporation Act which exempt from taxation property of the Corporation and bonds and notes issued by the Corporation to effectuate its public purpose do not violate the N. C. Constitution. *Martin v. Housing Corp.*, 29.

§ 31. Sales, Use and Excise Taxes

The additional 1% sales and use tax authorized by the "Local Option Sales and Use Tax Act" is a State tax, not a county tax, and is unconstitutional. *Hajoca Corp. v. Clayton*, 560.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation Generally

The order of the Utilities Commission granting a telephone company a portion of the rate increase requested is reversed and remanded by the Supreme Court, since the Commission considered substandard quality of the company's existing services but failed to make specific findings showing what effect the substandard services had upon the decision to increase the company's rates. *Utilities Comm. v. Morgan*, 255.

In determining the local rates for a telephone company, it was improper for the Utilities Commission to include in its rate base the value of the company's telephone plant that was under construction at the end of the test period but was not yet in operation. *Ibid.*

The amounts paid to a telephone company by its customers as a result of the company's billing the customers one month in advance is not creditable to the company's working capital requirements. *Ibid.*

The identity of a telephone company seeking a rate increase was not changed by the transfer of its stock from the former stockholders to the present stockholders. *Ibid.*

The Utilities Commission lawfully concluded (1) that an increase in local telephone rates was warranted, notwithstanding existing service inadequacy due to the telephone company's neglect of its property, and (2) that such increase was an appropriate step in the improvement of services. *Ibid.*

TRIAL

§ 3. Motions for Continuance

In action against motel owner, principal contractor and subcontractor to recover for materials furnished by plaintiff to the subcontractor for use in the construction of the motel, plaintiff was not prejudiced by continuance of the case as to the subcontractor. *Supply Co. v. Motor Lodge*, 312.

§ 11. Argument and Conduct of Counsel

When the remarks of counsel are not warranted by either the evidence or the law, or are calculated to mislead or prejudice the jury, it is the duty of the judge to interfere. *In re Will of Farr*, 86.

TRIAL—Continued

§ 33. Statement of Evidence and Application of Law Thereto

The trial court has the duty to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence. *Panhorst v. Panhorst,* 664.

UTILITIES COMMISSION

§ 1. Nature and Functions of Commission and Proceedings in General

A public utility which has been allowed to charge sufficient rates must accept the responsibility for inadequate services rendered to its customers. *Utilities Comm. v. Morgan,* 255.

In determining the local rates for a telephone company, it was improper for the Utilities Commission to include in its rate base the value of the company's telephone plant that was under construction at the end of the test period but was not yet in operation. *Ibid.*

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The Utilities Commission lawfully concluded (1) that an increase in local telephone rates was warranted, notwithstanding existing service inadequacy due to the telephone company's neglect of its property, and (2) that such increase was an appropriate step in the improvement of services. *Ibid.*

WATERS AND WATERCOURSES

§ 7. Marsh and Tide Lands

The lands beneath coastal waters belong to the states and not to the federal government—subject, however, to the restrictions of the Commerce Clause and to specific reservations for use of such waters for navigation, flood control, or the production of power by the federal government. *Fishing Pier v. Town of Carolina Beach,* 297.

In North Carolina, private property ends at the high-water mark, and the foreshore is the property of the State. *Ibid.*

A fishing pier operator whose seashore lots had been completely eroded by the Atlantic Ocean was not entitled to recover compensation from a municipality on the theory that the municipality's construction of a 15-foot beach erosion seawall constituted a taking of his lots for a public purpose without just compensation. *Ibid.*

Statute which granted municipality title in reclaimed seashore lands down to the *low-water* mark controls over inconsistent provision in another statute which provided that State land under navigable waters cannot be conveyed in fee. *Ibid.*

WEAPONS AND FIREARMS

Warrant was sufficient to charge a violation of the offense making it unlawful for any person to possess machine or submachine guns; the trial court in this case erred in granting defendant's motion to quash on the ground that the carbine in his possession could only fire 30 shots. *S. v. Lee,* 205.

In a prosecution charging defendant with the unlawful possession of a dangerous weapon in an area in which a declared state of emergency existed, the State's evidence was sufficient to withstand defendant's motion for nonsuit. *S. v. Dobbins,* 484.

WILLS

§ 2. Contract to Devise or Bequeath

Language in a joint will executed by husband and wife held sufficient, in conjunction with the reciprocal devises and bequests, to show the existence of a contract between the husband and wife to execute a joint will. *Mansour v. Rabil,* 364.

Mutual promises of a husband and wife constitute sufficient consideration to support their agreement to execute a joint will. *Ibid.*

Where signatures on a contract to make a joint will were under seal, the seals are conclusive evidence of the existence of consideration for the contract. *Ibid.*

A joint will executed by husband and wife was itself sufficient memorandum of their contract for the disposition of their estates to satisfy the statute of frauds. *Ibid.*

A contract between a husband and wife to make a joint will was void as to the wife because not executed by her in accordance with G.S. 52-6, and its invalidity was not affected by the curative statutes. *Ibid.*

§ 8. Revocation of Will

Where testators' codicil No. 5 revoked Articles Four and Thirteen of the original will, the Articles Four and Thirteen were not reinstated by codicil No. 6 which revoked codicil No. 5; the Articles could be reinstated only by a reexecution of the will or by incorporating the previously revoked Articles by reference in codicil No. 6. *In re Will of Farr,* 86.

In the absence of a valid contract to the contrary, either signer of a joint will may revoke it in any manner permitted by statute during the life of all the persons signing as testators. *Mansour v. Rabil,* 364.

§ 9. Proof of Will and Probate in Common Form

Where a document has been admitted to probate as the last will of a decedent, the subsequent offer to the same or another court of another document for probate as a later will of decedent is a collateral attack upon the probate of the first document. *In re Davis,* 134.

A judgment admitting a will to probate entered by a court having jurisdiction thereof may be attacked only in direct proceedings, but if the record of the probate proceeding shows upon its face that the court had no jurisdiction to enter the order of probate, its order doing so is void and may be attacked collaterally. *Ibid.*

WILLS—Continued

Mere failure of the record of a probate proceeding to show jurisdiction in the clerk is not sufficient to subject his order to collateral attack. *Ibid.*

If testatrix at death was domiciled in one county and also had a place of residence in another county, her will could be lawfully probated in either county. *Ibid.*

Where it does not affirmatively appear upon the face of the record of a probate proceeding in Iredell County that the clerk of that county did not have jurisdiction to probate a document as the will of decedent, the clerk's order admitting the will be probate and his issuance of letters of administration cannot be collaterally attacked by the offer for probate in Buncombe County of a later will, and the Clerk of Superior Court of Iredell County is the only court which can determine whether or not decedent was domiciled in or had a place of residence in Iredell County at the time of her death. *Ibid.*

§ 19. Evidence in Caveat Proceedings in General

In the absence of fraud, testator's misunderstanding of the legal effect of a will or codicil does not ordinarily affect its validity. *In re Will of Farr,* 86.

§ 22. Mental Capacity

Mere ignorance of a technical statute relating to wills does not evidence a lack of testamentary capacity. *In re Will of Farr,* 86.

§ 24. Issues and Verdict

The jury in a caveat proceeding is not entitled to base its findings upon the legal consequences of its verdict. *In re Will of Farr,* 86.

§ 29. Construction of Codicils

Where codicil No. 5 revoked Articles 4 and 13 of testator's will, the Articles were not reinstated by codicil No. 6 which revoked the codicil No. 5. *In re Will of Farr,* 86.

In a caveat proceeding, the statute providing that a subsequent codicil executed by testator, which codicil revoked the codicil challenged by testator, did not have the effect of reinstating the revoked articles of the will, held irrelevant to the issue of testator's mental incapacity. *Ibid.*

§ 40. Devises with Power of Disposition

Provisions of a joint will held to give the surviving wife a life estate in the real and personal property of the husband with power to dispose of it during her lifetime. *Mansour v. Rabil,* 364.

§ 64. Whether Beneficiary is Put to Her Election

The doctrine of equitable election did not apply to estop the wife from disposing of her property in a manner different from that provided in joint will with her husband which was void as to her. *Mansour v. Rabil,* 364.

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