NORTH CAROLINA REPORTS

VOLUME 278

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1970
SPRING TERM 1971

RALEIGH
1971

CITE THIS VOLUME

278 N.C.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

WILLIAM H. BOBBITT

Associate Justices

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

Emergency Justices

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

Clerk

ADRIAN J. NEWTON

Marshal and Librarian

RAYMOND M. TAYLOR

ADMINISTRATIVE OFFICE OF THE COURTS

Director

BERT M. MONTAGUE

Assistant Director and Administrative Assistant to the Chief Justice

FRANK W. BULLOCK, JR.

APPELLATE DIVISION REPORTERS

WILSON B. PARTIN, JR.
RALPH A. WHITE, JR.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	WALTER W. COHOON	Elizabeth City
2	ELBERT S. PEEL, JR.	Williamston
3	ROBERT D. ROUSE, JR.	Farmville
4	HOWARD H. HUBBARD	Clinton
5	BRADFORD TILLERY	Wilmington
	JOSHUA S. JAMES	Wilmington
6	JOSEPH W. PARKER	Windsor
7	GEORGE M. FOUNTAIN	Tarboro
8	ALBERT W. COWPER	Kinston

Second Division

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

Third Division

17	JAMES M. LONG	Yanceyville
18	WALTER E. CRISSMAN	High Point
	JAMES G. EXUM, JR.	Greensboro
	CHARLES T. KIVETT	Greensboro
19	FRANK M. ARMSTRONG	Troy
	THOMAS W. SEAY, JR.	Spencer
20	JOHN D. McCONNELL	Southern Pines
21	WALTER E. JOHNSTON, JR.	Winston-Salem
	HARVEY A. LUPTON	Winston-Salem
22	ROBERT A. COLLIER, JR.	Statesville
23	ROBERT M. GAMBILL	North Wilkesboro

Fourth Division

DISTRICT	JUDGES	ADDRESS
24	W. E. ANGLIN	Burnsville
25	SAM J. ERVIN III	Morganton
26	FRED H. HASTY	Charlotte
	WILLIAM T. GRIST	Charlotte
	FRANK W. SNEPP, JR.	Charlotte
27	B. T. FALLS, JR.	Shelby
	JOHN R. FRIDAY	Lincolnton
28	W. K. MCLEAN	Asheville
	HARRY C. MARTIN	Asheville
29	J. W. JACKSON	Hendersonville
30	T. D. BRYSON[1]	Bryson City

SPECIAL JUDGES

J. WILLIAM COPELAND	Murfreesboro
HUBERT E. MAY[2]	Nashville
FATE J. BEAL[3]	Lenoir
JAMES C. BOWMAN[3]	Southport
ROBERT M. MARTIN	High Point
LACY H. THORNBURG[4]	Webster
A. PILSTON GODWIN	Raleigh
MARVIN K. BLOUNT, JR.	Greenville

EMERGENCY JUDGES

W. H. S. BURGWYN	Woodland
ZEB NETTLES	Asheville
WALTER J. BONE	Nashville
HUBERT E. OLIVE	Lexington
F. DONALD PHILLIPS	Rockingham
HENRY L. STEVENS, JR.[5]	Warsaw
GEORGE B. PATTON	Franklin
CHESTER R. MORRIS	Coinjock
FRANCIS O. CLARKSON	Charlotte
P. C. FRONEBERGER	Gastonia

[1] Retired 30 June 1971. Succeeded by Lacy H. Thornburg 27 July 1971.
[2] Deceased 20 June 1971.
[3] Term expired 30 June 1971.
[4] Appointed Resident Judge, 30th District, 27 July 1971.
[5] Deceased 5 August 1971.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	FENTRESS HORNER (Chief)	Elizabeth City
	WILTON F. WALKER	Currituck
2	HALLETT S. WARD (Chief)	Washington
	CHARLES H. MANNING	Williamston
3	J. W. H. ROBERTS (Chief)	Greenville
	CHARLES H. WHEDBEE	Greenville
	HERBERT O. PHILLIPS III	Morehead City
	ROBERT D. WHEELER	Grifton
4	HARVEY BONEY (Chief)	Jacksonville
	PAUL M. CRUMPLER	Clinton
	RUSSELL J. LANIER	Beulaville
	WALTER P. HENDERSON	Trenton
5	GILBERT H. BURNETT (Chief)	Wilmington
	N. B. BAREFOOT	Wilmington
	JOHN M. WALKER	Wilmington
6	J. T. MADDREY (Chief)	Weldon
	JOSEPH D. BLYTHE	Harrellsville
	BALLARD S. GAY	Jackson
7	J. PHIL CARLTON (Chief)	Pinetops
	ALLEN W. HARRELL	Wilson
	TOM H. MATTHEWS	Rocky Mount
	BEN H. NEVILLE	Whitakers
8	W. MILTON NOWELL (Chief)	Mount Olive
	HERBERT W. HARDY	Maury
	EMMETT R. WOOTEN	Kinston
	LESTER W. PATE	Kinston
9	JULIUS BANZET (Chief)	Warrenton
	CLAUDE W. ALLEN, JR.	Oxford
	LINWOOD T. PEOPLES	Henderson
10	GEORGE F. BASON (Chief)	Raleigh
	EDWIN S. PRESTON, JR.	Raleigh
	S. PRETLOW WINBORNE	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	N. F. RANSDELL	Fuquay-Varina
11	ROBERT B. MORGAN, SR. (Chief)	Lillington
	W. POPE LYON	Smithfield
	WILLIAM I. GODWIN	Selma
	WOODROW HILL	Dunn
12	DERB S. CARTER (Chief)	Fayetteville
	JOSEPH E. DUPREE	Raeford
	DARIUS B. HERRING, JR.	Fayetteville
	SEAVY A. CARROLL	Fayetteville
13	RAY H. WALTON (Chief)	Southport
	GILES R. CLARK	Elizabethtown
14	E. LAWSON MOORE (Chief)	Durham
	THOMAS H. LEE	Durham
	J. MILTON READ, JR.	Durham
15	HARRY HORTON (Chief)	Pittsboro
	STANLEY PEELE	Chapel Hill
	D. MARSH MCLELLAND	Graham
	COLEMAN CATES	Burlington
16	SAMUEL E. BRITT (Chief)	Lumberton
	JOHN S. GARDNER	Lumberton
	CHARLES G. MCLEAN	Lumberton
17	LEONARD H. VAN NOPPEN (Chief)	Danbury

DISTRICT	JUDGES	ADDRESS
	FOY CLARK	Mount Airy
	GEORGE M. HARRIS	Yanceyville
	FRANK FREEMAN	Dobson
18	E. D. KUYKENDALL, JR. (Chief)	Greensboro
	HERMAN G. ENOCHS, JR.	Greensboro
	BYRON HAWORTH	High Point
	ELRETA M. ALEXANDER	Greensboro
	B. GORDON GENTRY	Greensboro
	KENNETH M. CARRINGTON	Greensboro
	EDWARD K. WASHINGTON	Jamestown
19	HAL HAMMER WALKER (Chief)	Asheboro
	L. T. HAMMOND, JR.	Asheboro
	ROBERT L. WARREN	Concord
	FRANK M. MONTGOMERY	Salisbury
	ODELL SAPP	Salisbury
20	F. FETZER MILLS (Chief)	Wadesboro
	EDWARD E. CRUTCHFIELD	Albemarle
	WALTER M. LAMPLEY	Rockingham
	A. A. WEBB	Rockingham
21	ABNER ALEXANDER (Chief)	Winston-Salem
	BUFORD T. HENDERSON	Winston-Salem
	RHODA B. BILLINGS	Winston-Salem
	JOHN CLIFFORD	Winston-Salem
	A. LINCOLN SHERK	Winston-Salem
22	HUBERT E. OLIVE, JR. (Chief)	Lexington
	L. ROY HUGHES	Thomasville
	PRESTON CORNELIUS	Troutman
	C. H. DEARMAN	Statesville
23	RALPH DAVIS (Chief)	North Wilkesboro
	SAMUEL L. OSBORNE	Wilkesboro
24	J. RAY BRASWELL (Chief)	Newland
	J. E. HOLSHOUSER, SR.	Boone
25	JOE H. EVANS (Chief)	Hickory
	GENE SIGMON	Newton
	WHEELER DALE	Morganton
	JOE K. MATHESON	Hickory
26	WILLIAM H. ABERNATHY (Chief)	Charlotte
	WILLARD I. GATLING[1]	Charlotte
	HOWARD B. ARBUCKLE	Charlotte
	J. EDWARD STUKES	Charlotte
	CLAUDIA W. BELK	Charlotte
	P. B. BEACHUM, JR.	Charlotte
	CLIFTON JOHNSON	Charlotte
27	LEWIS BULWINKLE (Chief)	Gastonia
	OSCAR F. MASON, JR.	Gastonia
	JOE F. MULL	Shelby
	JOHN J. MAHONEY	Shelby
	ROBERT W. KIRBY	Gastonia
28	CARY WALTER ALLEN (Chief)	Asheville
	DENNIS J. WINNER	Asheville
	ZEBULON WEAVER, JR.	Asheville
	JAMES O. ISRAEL, JR.	Candler
29	ROBERT T. GASH (Chief)	Brevard
	WADE B. MATHENY	Forest City
	EVERETTE C. CARNES	Marion
30	F. E. ALLEY, JR. (Chief)	Waynesville
	ROBERT J. LEATHERWOOD III	Bryson City

[1] Retired 31 July 1971. Succeeded by Kenneth A. Griffin 2 August 1971.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

ROBERT MORGAN

Deputy Attorneys General

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

Assistant Attorneys General

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

SOLICITORS OF SUPERIOR COURT

DISTRICT	SOLICITORS	ADDRESS
1	JOHN HERBERT SMALL	Elizabeth City
2	WILLIAM C. GRIFFIN, JR.	Williamston
3	ELI BLOOM	Greenville
4	WALTER T. BRITT	Clinton
5	WILLIAM ALLEN COBB	Wilmington
6	W. H. S. BURGWYN, JR.	Woodland
7	ROY R. HOLDFORD, JR.	Wilson
8	F. OGDEN PARKER	Goldsboro
9	CHARLES M. WHITE III	Warrenton
10	WILLIAM G. RANSDELL, JR.	Raleigh
11	JOHN W. TWISDALE	Smithfield
12	JACK A. THOMPSON	Fayetteville
13	LEE J. GREER	Whiteville
14	ANTHONY BRANNON	Durham
15	HERBERT F. PIERCE	Graham
16	JOHN B. REGAN	Saint Pauls
17	ALLEN D. IVIE, JR.	Eden
18	W. DOUGLAS ALBRIGHT	Greensboro
19	JAMES E. ROBERTS	Kannapolis
20	CARROLL R. LOWDER	Monroe
21	FRANK J. YEAGER	Walkertown
22	H. W. ZIMMERMAN, JR.	Lexington
23	J. ALLIE HAYES	North Wilkesboro
24	CLYDE M. ROBERTS	Marshall
25	DONALD E. GREENE	Hickory
26	THOMAS F. MOORE, JR.	Matthews
27	W. HAMPTON CHILDS, JR.	Lincolnton
28	ROBERT D. LEWIS	Asheville
29	M. LEONARD LOWE	Caroleen
30	MARCELLUS BUCHANAN III	Sylva

CASES REPORTED

PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 14	State v. Atkinson, 168.
Art. I, § 15	State v. Simmons, 468.
Art. I, § 17	State v. Cutshall, 334.
Art. I, § 19	Sykes v. Belk, 106.
	Cutts v. Casey, 390.
Art. II, § 1	Keiger v. Board of Adjustment, 17.
Art. IV, § 12	Sykes v. Belk, 106.
Art. V, § 7	Coggins v. City of Asheville, 428.
Art. VII, § 6	Sykes v. Belk, 106.

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

Amendment I	State v. Leigh, 243.
Amendment IV	State v. Simmons, 468.
Amendment V	State v. Cutshall, 334.
	State v. Simmons, 468.
Amendment VIII	State v. Atkinson, 168.
	State v. Barber, 268.
Amendment XIV	State v. Leigh, 243.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1970

THOMAS L. KALE v. FRANCES KALE FORREST AND RICHARD B. KALE, SR., INDIVIDUALLY AND AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RUSSELL H. KALE, SR., RUSSELL H. KALE, JR., TRUDY LEE KALE, THERESA LYNN KALE, TINA LOUISE KALE, TRACEY KALE, TAREN LEIGH KALE, RICHARD B. KALE, JR., MARJORIE SYM KALE AND JOSEPH TURNER FORREST, JR., AND JOHN H. VERNON, GUARDIAN AD LITEM

No. 58

(Filed 29 January 1971)

1. **Wills § 28— construction — intent of testator**

The intent of the testator is his will, and such intent as gathered from its four corners must be given effect unless it is contrary to some rule of law or is in conflict with public policy.

2. **Wills § 28— intent of testator**

The intent of the testator is ascertained, if possible, from testator's language and in light of conditions and circumstances existing at the time the will was made.

3. **Wills § 28— construction — technical words**

Technical words in a will are presumed to have been used in their technical sense unless the other language of the will evidences a contrary intent; however, when testator obviously does not intend to use words in their technical sense, they will be given their ordinary and popular meaning.

4. **Wills § 28— intent of testator — control over particular words, phrases, sentences**

The use of particular words, clauses or sentences must yield to the purpose and intent of the testator as found in the whole will.

5. Wills § 58— failure of Court of Appeals to classify legacy

Failure of the Court of Appeals to classify a legacy as general, specific or demonstrative is of no importance where the facts do not present questions of ademption, abatement or accretion, and the only question presented is the source from which the legacy is to be satisfied.

6. Wills §§ 58, 73— educational bequest for granddaughters — payment from son's share

Language of entire will shows that it was the intent of the testator that a $25,000 educational bequest for five of testator's granddaughters should be taken from the one-fourth share of their father in testator's estate.

7. Wills § 35— trust income to be paid son at age 60 — vested remainder

Provision of a will stating that the share of testator's son "shall be put in trust for him and he shall get interest from this when he reaches 60 years of age," when considered with the language of the entire will and the circumstances existing when the will was executed, *held* to give the son a vested remainder in all accumulated income from his trust so that if he died before reaching age 60 such accumulated income would be paid to his estate.

8. Wills § 43— ordinary meaning of "heir"

The natural and ordinary meaning of the word "heir" is one who inherits or is entitled to succeed to the possession of property after the death of the owner.

9. Wills § 28— meaning imputed to every word

Every word of a will must have a meaning imputed to it if it is capable of a meaning without violation of the general intent or of any other provision of the will with which it may appear inconsistent.

10. Wills § 43— life estate — remainder to testator's "surviving heirs" — determination at death of life beneficiary

Where a will provided that the share of testator's son should be put in trust for him, that he should get the interest thereon when he reaches 60 years of age, and that "At his death the balance shall be given to my surviving heirs," the "surviving heirs" of testator who will take the balance of the trust fund should be determined at the death of the life beneficiary, not at the death of testator.

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

ON *certiorari* to review decision of the Court of Appeals (9 N.C. App. 82, 275 S.E. 2d 752), affirming judgment of *Gambill, J.*, February 1970 Session of ALAMANCE Superior Court.

This is a civil action instituted pursuant to G. S. 1-253 *et seq.*, seeking construction and interpretation of the will of Russell Henderson Kale, Sr.

Russell Henderson Kale, Sr., died testate a resident of Alamance County, on 7 February 1969, seized and possessed of real and personal property. His last will and testament, written in his own handwriting, provides as follows:

Mebane, N. C.
August 10, 1965

This is my Last Will and Testament

Item #1

After my taxes and all other expenses have been paid, my estate shall be divided as follows:

Richard B. Kale's ¼ part shall be given to Richard B. Kale, Jr. and Marjorie Sym Kale. They shall have Kale Knitting Mills stock at book value.

Frances Kale Forrest's interest shall divided equally between she and her son Joseph Turner Forrest, Jr.

Russell Henderson Kale's share shall be put in trust for him and he shall get interest from this when he reaches 60 years of age. At his death the balance shall be given to my surviving heirs.

Richard B. Kale, Sr. and Frances Kale Forrest are to act as Co-Executors without fee.

I hereby revoke all wills and codicils heretofore made by me.

$25,000.00 shall be taken from my estate for the college education of daughters of Thomas Kale, Trudy Lee Kale, Teresa Lyn Kale, Tina Louise Kale, Tracey Kale and Taren Leigh Kale. Any moneys not used for their education shall be held and earnings given to Thomas L. Kale.

Thomas L. Kale's share shall be put in trust for him and income from this trust shall be given him at age 60. If he is solvent at that time he can draw $1,000.00 yearly on principal.

s/ Russell H. Kale, Sr.

Witness: Manley L. Warren
Witness: Shirley J. Carver

The case was tried before Judge Robert M. Gambill, without a jury, at the February 1970 Civil Session of Alamance

County, at which time the court entered findings of fact, conclusions of law and judgement. We will hereafter quote portions of the facts found, conclusions of law and judgment as we consider the questions presented by this appeal.

Upon entry of judgement, petitioner Thomas L. Kale and respondent Frances Kale Forrest each appealed to the North Carolina Court of Appeals. The Court of Appeals affirmed the judgment entered by the trial judge. Petitioner Thomas L. Kale petitioned for writ of *certiorari* to North Carolina Court of Appeals to review its decision pursuant to G. S. 7A-31(c). The petition was allowed by order dated 5 October 1970.

Ross, Wood & Dodge, by Harold T. Dodge, for Plaintiff-Appellant.

Hofler, Mount & White, by Lillard H. Mount and Richard M. Hutson II, for Defendant-Appellee Frances Kale Forrest.

Aycock, LaRoque, Allen, Cheek & Hines by C. B. Aycock for Defendant-Appellee Russell H. Kale, Jr.

BRANCH, Justice

We first consider plaintiff appellant's contention that the trial court erred in determining that the $25,000 used to fund the educational bequest for testator's granddaughters shall be taken from the one-fourth share of Thomas L. Kale in the estate of Russell Henderson Kale, Sr.

This question involves specifically that portion of testator's will which states: ". . . $25,000.00 shall be taken from my estate for the college education of daughters of Thomas Kale, Trudy Lee Kale, Teresa Lyn Kale, Tina Louise Kale, Tracey Kale and Taren Leigh Kale. Any moneys not used for their education shall be held and earnings given to Thomas L. Kale."

We quote the trial judge's Findings of Fact, Conclusions of Law, and the portion of the judgment pertinent to this question:

CONCLUSIONS OF LAW . . . ISSUE V.

"1. The intent of the testator was to establish a $25,000.00 educational bequest for his granddaughters, the children of Thomas L. Kale.

2. The testator had already disposed of ¾th of his estate, prior to the $25,000.00 educational bequest.

3. The testator bequeathed any remainder in the education trust to Thomas L. Kale under the terms of the trust created for his benefit.

4. The testator allowed Thomas L. Kale to draw $1,000.00 annually from his trust after age 60.

5. It was the intent of the testator, Russell H. Kale, Sr., that the $25,000.00 used to fund the educational bequest of the children of Thomas L. Kale be taken from the ¼th share of Thomas L. Kale in the estate of Russell H. Kale, Sr."

" . . . IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

. . . .

ISSUE V

"The $25,000.00 used to fund the education bequest for Trudy Lee Kale, Theresa Lyn Kale, Tina Louise Kale, Tracey Kale, and Taren Leigh Kale, shall be taken from the ¼ share of Thomas L. Kale in the Estate of Russell H. Kale, Sr."

Appellant contends that the words "shall be taken from my estate" clearly created a general legacy chargeable upon the testator's personal estate. He argues that this language is so plain and obvious that the words must be taken to mean exactly what they say and that there is therefore no necessity for judicial construction. *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205. However, an examination of this item of the will reveals that the language does not clearly express testator's intent and purpose as to whether the $25,000.00 educational bequest should be taken from the share of plaintiff Thomas L. Kale or from the general funds of the estate. We must therefore ascertain the intent of the testator when he made the will. *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246.

[1] The intent of the testator is his will, and such intent as gathered from its four corners must be given effect unless it is contrary to some rule of law or is in conflict with public policy. *McCain v. Womble,* 265 N.C. 640, 144 S.E. 2d 857; In re Will of Wilson, 260 N.C. 482, 133 S.E. 2d 189; *Poindexter v. Trust Co.,* 258 N.C. 371, 128 S.E. 2d 867.

[2-4] The intent is ascertained, if possible, from the testator's language and in light of conditions and circumstances existing at the time the will was made. *Thomas v. Thomas,* 258 N.C. 590, 129 S.E. 2d 239. In considering the language used, technical words will be presumed to have been used in their technical sense unless the other language of the will evidences a contrary intent; however, when testator obviously does not intend to use words in their technical sense, they will be given their ordinary and popular meaning. *Elledge v. Parrish,* 224 N.C. 397, 30 S.E. 2d 314. In any event, the use of particular words, clauses or sentences must yield to the purpose and intent of the testator as found in the whole will. *Moore v. Langston,* 251 N.C. 439, 111 S.E. 2d 627; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17.

The bequest under consideration was made after testator had disposed of three "shares" or "parts" of his estate. Thomas L. Kale was the only remaining child, and the first share had been denominated a ¼ part. We think the language of the will shows a paramount intent to divide his estate into four equal parts or shares for the benefit of testator's four children or their representatives. There is nothing in the language of the will that indicates that the testator intended to shift the primary responsibility to educate his children from Thomas L. Kale to the other beneficiaries of the will. The provision that any moneys not used for educational purposes should be held and given to Thomas L. Kale runs counter to appellant's contention that the bequest should be satisfied from the general fund. In addition to putting a burden on all the beneficiaries to educate Thomas L. Kale's children, the testator would be destroying the equal division of the corpus of the shares of his estate by giving Thomas L. Kale the benefit of any unused moneys in the bequest. The provision in the will allowing Thomas L. Kale to invade the principal of the trust created for his benefit infers a recognition by the testator that Thomas L. Kale's share might be depleted by the educational bequest. Further, if we place ourselves in the position of the testator at the time he made his will, it is understandable that the unskilled writer of his "homemade" will would consider money taken from any one of the allotted shares of his estate to be synonymous with money taken "from my estate."

[5] Plaintiff complains of the failure of the Court of Appeals to classify the legacy as general, specific or demonstrative.

See *Shepard v. Bryan,* 195 N.C. 822, 143 S.E. 835, for a full discussion of the classification of legacies and for distinctions between general, demonstrative and specific legacies.

In the Lifetime Edition of *Page on Wills,* Volume 4, Sec. 1392, page 102, it is stated:

> "While it is generally assumed that the terms which are used to designate these different classes of legacies have the same meaning, without regard to the nature of the problem, in the solution of which the classification is employed, it is by no means certain that they are used in the same way in all of these cases. The courts determine the class under which a legacy is to be placed, by ascertaining the incidents which testator intended that such legacy should have, whether in case of abatement, due to a deficiency in assets, or in ademption, due to the destruction or sale of the subject-matter of the gift, or in other questions such as to the right to accretions; and if the court has ascertained the testator's intention in such instances, the court then places the legacy in the class to which such incidents attach it. The court does not begin by determining the class under which the legacy is to be placed; and then attaching to the legacy in question, the incidents which ultimately attach to a legacy of such class. The classification of legacies and devises is, therefore, practically a matter of convenience in expression. The rights of the parties could be determined just as well without the use of the names of these classes of legacies and devises; although it would frequently take more words to express the same idea. It is quite likely, therefore, that a somewhat different meaning is given to these different names of classes, when used in connection with different problems.
>
> "If the result is likely to be the same, whichever class of a legacy or devise it may be, the terms are likely to be used rather loosely. If a question of abatement is involved, and the result would be the same whether the legacy were specific or demonstrative, a legacy which is really specific may be called demonstrative. Conversely if the question is one of the ademption by sale of the property, and the result would be the same whether the legacy were a general legacy or a demonstrative legacy, it may be called a demon-

strative legacy when it is really a general legacy. The term specific legacy is sometimes used to indicate a legacy to which precedence is given in abatement, rather than a legacy which is in its nature specific.

"Whether a given legacy is residuary, general, specific, or demonstrative depends upon the intention of the testator as shown by the entire will."

We do not attach importance to the failure of the Court of Appeals to classify this legacy since the facts of this case do not present questions of ademption, abatement or accretion. The only question presented is the source from which the fund is to be satisfied.

[6] We think that the language of the entire will shows that it was the intent of the testator that the educational bequest for his grandchildren be taken from the share of their father, Thomas L. Kale, and that it was the intent of the testator to burden only the share of Thomas L. Kale with the payment of this bequest.

The Court of Appeals correctly found no error in the trial court's findings of fact, conclusions of law and judgment entered as to testator's educational bequest.

[7] Appellant contends that the trial judge erred in concluding as a matter of law that Russell Henderson Kale, Jr. had a vested remainder in all accumulated income from his trust so that if he died before reaching age 60 such accumulated income would be paid to his estate.

The specific provision of the will pertinent to this question is as follows: "Russell Henderson Kale's share shall be put in trust for him and he shall get interest from this when he reaches 60 years of age. At his death the balance shall be given to my surviving heirs."

The conclusions of law and portions of the judgment relating to this question are:

CONCLUSIONS OF LAW . . . ISSUE II.

"2. The testator, Russell H. Kale, Sr., intended to provide Russell Henderson Kale, Jr., a life estate in the corpus of his portion of the estate with the remainder to the testator's surviving heirs. The income produced from this portion is to be accumulated until Russell Henderson

Kale, Jr., reaches the age of 60, at which time he will be paid the accumulated income; and thereafter, he shall be paid the income on the corpus at quarterly intervals.

"3. In the event that the said Russell Henderson Kale, Jr., shall die prior to reaching the age of 60 years, all accumulated income shall be paid to his estate."

" . . . IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

. . . .

ISSUE II.

"1. The ¼th interest devised to Russell Henderson Kale, Jr., shall be held in trust for him for life. The income produced from this portion is to be accumulated until Russell Henderson Kale, Jr., reaches the age of sixty (60), at which time he will be paid the accumulated income, and thereafter he shall be paid income on the corpus at quarterly intervals.

"2. In the event the said Russell H. Kale, Jr., shall die prior to reaching the age of sixty (60) all accumulated income shall be paid to his estate."

In the case of *Trust Company v. Grubb,* 233 N.C. 22, 62 S.E. 2d 719, the testator devised the residue of his estate in trust, providing that the "entire net income be paid monthly or quarterly, after expiration of three years from the date of my death" to named beneficiaries. This Court, in construing this portion of the will, stated:

" 'Where a trust is created by will and by the terms of the trust the income is payable to a beneficiary for a designated period, the beneficiary is entitled to income from the date of the death of the testator, unless it is otherwise provided in the will. The rule here stated is applicable to trusts created by a specific devise or legacy, by a general pecuniary legacy, and by a residuary devise or bequest; and it is immaterial whether the same person is designated as executor and trustee.' Restatement of the Law of Trusts, Sec. 234, p. 692; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; 54 A. J. 92; Anno. 70 A.L.R. 636, 105 A.L.R. 1194, and 158 C.L.R. 441.

"Under this rule those to whom the income is to be paid are entitled to the income from the date of the death of testator unless it is otherwise provided in the will.

"The appellants concede that the general rule, as above quoted, prevails in this jurisdiction, *Cannon v. Cannon, supra,* and that nothing else appearing, all the income must be disbursed as directed in the will. But they stressfully contend that it is 'otherwise provided in the will'; that the language 'after the expiration of three years from the date of' testator's death fixes the time the income shall begin to accrue to the use of the beneficiaries, as well as the time the payments to them are to begin. . . .

. . . .

"The language 'after the expiration of three years from the date of my death' designates the time payments to the beneficiaries shall begin and merely postpones the enjoyment of the gift."

In the case of *Robinson v. Robinson,* 227 N.C. 155, 41 S.E. 2d 282, the testator's will, in part, provided:

"Fifth. I will and bequeath to my Executors hereinafter named to be held in trust for my grandchildren, all my lands in Camden County, N. C., and all my lands in Baltimore County, Md., together with any money on deposit with the C. H. Robinson Co. as shown on the books of said Company in an account under the heading of 'C. H. Robinson Trust Account.' My Executors are hereby empowered to sell any part of said lands, and to use the proceeds of such sales for the improvement of the balance of the lands unsold, or to place the proceeds of such sales in Trust in some Bank or Trust Company to be held as a Trust fund for the benefit of my Grand Children, at the discretion of said Executors. When the youngest of my Grand Children shall reach the age of Twenty one years, an equal division of this Trust shall be made in value of any lands unsold and of money on deposit held in trust for my Grand Children, and conveyed to my Grand Children by my Executors, share and share alike in value."

One of the grandchildren, Charles Robinson Hanes, died before the youngest grandchild reached majority and left a widow surviving who was the sole beneficiary of his will. After

the youngest grandchild became twenty-one years old, the trustee sought advice of the court as to whether the widow of Charles R. Hanes should share equally with the other grandchildren. The court, holding that Charles R. Hanes became vested with his interest in the trust property prior to his death, and that his widow was entitled to receive his interest, stated:

> ". . . 'It is generally held, nothing else appearing in the will to the contrary, where an estate is devised to a trustee in an active trust for the sole benefit of persons named as beneficiaries with directions to divide up and deliver the estate at a stated time, this will have the effect of vesting the estate immediately upon the death of the testator. The intervention of the estate of the trustee will not have the effect of postponing the gift itself, but only the enjoyment . . . The rule is, we think, applicable to an estate in trust of mixed personalty and realty.
>
> "Moreover, the primary purpose in interpreting all wills is to ascertain what the testator desired to be done with his estate."

We find in *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205, the following statement: "The law favors the construction of a will which gives to the devisee a vested interest at the earliest possible moment that the testator's language will permit," and in *Parker v. Parker,* 252 N.C. 399, 113 S.E. 2d 899, it is stated: "An estate is vested when there is either an immediate right of present enjoyment or a *present fixed right of future enjoyment.*" (Emphasis supplied.) See also *Patrick v. Beatty,* 202 N.C. 454, 163 S.E. 572; *Pridgen v. Tyson,* 234 N.C. 199, 66 S.E. 2d 682; *Johnson v. Baker,* 7 N.C. 318; *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341.

Appellant, in support of his contention, cites and relies upon the case of *Giles v. Frank,* 17 N.C. 521, which held the following provision passed a contingent interest: "I give to Edward S. Giles one horse, saddle and bridle, worth $80, 'when he shall arrive at age of twenty-one years.' "

Giles v. Frank, supra, is distinguishable from instant case in that there, the only part of the will before the court was the above quoted sentence, which expressly and unmistakably made the gift effective when beneficiary reached the age of twenty-one. In instant case the language, standing alone, seems to im-

mediately place the fund in trustee's hands upon death of testator. Further, the whole will is before the court and lends itself to an interpretation of immediate vesting.

Appellant also relies upon that portion of *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713, which states:

> ". . . (I)f there is no gift of the estate, or the income therefrom, or other interest therein, distinct from the provision for its division, which is to be made equally between all the children and, for the first time, upon the termination of the trust, the 'when' of the division is of the essense of the donation and is a condition precedent that marks the time of vesting as well as the time of the full enjoyment of the gift."

Instant case does not come within the rule stated in *Carter v. Kempton, supra,* which is relied upon by appellant. In the case before us there was an immediate gift conveyance to the trustee and there was a provision for distribution prior to the termination of the trust. Thus, the "when" in instant case is not a condition precedent marking the time of vesting.

[7] We think that the words "Russell Henderson Kale's share shall be put in trust for him and he shall get the interest from this when he reaches 60 years of age," when considered with the language of the entire will and the circumstances existing when the will was executed, manifests an intent on the part of the testator that the "share" should immediately vest in the trustee for the benefit of Russell Henderson Kale, Jr., during his lifetime and that benefit of the full enjoyment of the "share" was only postponed until he reached the age of sixty. Upon testator's death Russell Henderson Kale, Jr., had a present fixed right of enjoyment in all properties constituting his trust estate, and it is so vested that in event of his death before age sixty any accumulated income from his trust estate shall be paid to the representative of his estate.

[10] Finally, we must determine whether the trial judge erred in concluding that the surviving heirs of Russell Henderson Kale, Sr., should be determined as if testator "had died immediately following the death of Russell Henderson Kale, Jr." We quote the portion of the will relevant to this question: "Russell Henderson Kale's share shall be put in trust for him and he shall get interest from this when he reaches 60 years of age. *At his death*

the balance shall be given to my surviving heirs." (Emphasis ours.)

The portion of the judgment and the conclusions of law pertinent to this question are:

CONCLUSIONS OF LAW . . . ISSUE II.

"4. The surviving heirs of Russell H. Kale, Sr., are to be determined at the death of the life tenant, Russell Henderson Kale, Jr., as if Russell H. Kale, Sr., had died immediately after the death of Russell Henderson Kale, Jr. All heirs of Russell H. Kale, Sr., so determined will inherit the corpus."

". . . IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

. . . .

ISSUE II.

. . . .

"3. Upon the death of Russell Henderson Kale, Jr., the corpus shall be paid to the surviving heirs of Russell H. Kale, Sr. The heirs of Russell H. Kale, Sr., shall be determined at the death of Russell Henderson Kale, Jr., as if Russell H. Kale, Sr., had died immediately following the death of Russell Henderson Kale, Jr. All the heirs of Russell H. Kale, Sr., so determined, will inherit the corpus."

In *Trust Company v. Bass,* 265 N.C. 218, 143 S.E. 2d 689, it is stated:

"The rule is succinctly stated in *Yarn Co. v. Dewstoe,* 192 N.C. 121, 124, 133 S.E. 407, 409:

'As a general rule where a devise is made to one for life and after his death to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator and not those who answer the description at the death of the first taker. (Citations omitted.) It is otherwise, however, where it appears from the terms of the will that some intervening time is indicated.' Accord, *Pridgen v. Tyson,* 234 N.C. 199, 66 S.E. 2d 682; *Privott v. Graham,* 214 N.C. 199, 198 S.E. 635; *Trust Co. v. Lindsay,* 210 N.C. 652, 188 S.E. 94; *Baugham v. Trust Co.,* 181 N.C. 406; 107 S.E. 431; *Jenkins v. Lambeth,* 172 N.C. 466, 90 S.E. 513; *Rives v. Frizzle,* 43 N.C. 237; *Jones v. Oliver, supra* (38 N.C. 369)."

This general rule is bottomed on the reasoning that the law favors early vesting of estates and that it generally operates so as to give the words of description their ordinary and natural meaning; however, the rule is one of construction used in ascertaining the testator's intent, and must give way when an examination of the entire will discloses a different meaning. *Jenkins v. Lambeth,* 172 N.C. 466, 90 S.E. 513; *Trust Co. v. Bass, supra.*

In instant case other portions of the will shed little light upon our search for testator's intent as to whether the surviving heirs of testator are determined at the death of testator or upon the death of Russell H. Kale, Jr. Our interpretation must therefore focus on the words "At his death the balance shall be given to my surviving heirs."

We again try to place ourselves in the position of the testator, a writer untrained in the law, and determine his intent from the language used in the will.

[8] Webster's New International Dictionary defines the word "heir" as one who inherits or is entitled to succeed to the possession of property after the death of the owner. This is, we think, the natural and ordinary meaning of the word. This Court has held that "An heir is a person on whom the law casts an estate upon the death of the owner of the property, and therefore a living person, strictly speaking, can have no heir." Strong, N. C. Index, 2d Ed., Vol. 7, Wills, Sec. 43, p. 646; *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906. Thus, when we consider the word "heir" either in its ordinary and common meaning or as construed by the court, it must have been apparent to testator that any of his heirs must of necessity survive him.

[9] It is a recognized rule of construction that every word of a will must have a meaning imputed to it, if it is capable of a meaning, without violation of the general intent or of any other provision in the will with which it may appear inconsistent. *Lee v. Baird,* 132 N.C. 755, 44 S.E. 605. Thus, in ascertaining testator's intent we must give some meaning to the word "surviving."

Webster's New International Dictionary defines "surviving": "remaining alive or in existence."

We are unable to find a North Carolina case containing an interpretation of the exact language here used. We do find cases which we deem helpful in interpreting the testator's intent.

In the case of *Freeman v. Freeman,* 141 N.C. 97, 53 S.E. 620, the testator gave to his wife sole use of all his property for her life, and provided: "That the real and personal property, at the death of my wife, Elizabeth Freeman, shall be sold to the highest bidder, (graveyard excepted) and the proceeds equally divided between all my children that appears personally and claims their part, and this will shall disinherit all of said children that applies through an agent." The Court, holding that only children of the testator who were living at the death of his widow were entitled to share in the estate, stated:

> " . . . [T]he court inclines to that construction which will make the title to property left in remainder vested, rather than contingent. . . . This rule is not permitted, however, to interfere with the primary rule of construction which requires the court, in all cases, to ascertain and effectuate the intention of the testator, as gathered from the language used, if possible. The court will ascertain such intention by giving to non-technical words their ordinary and popular meaning, assuming that the testator used them in that sense in which they are generally used and understood."

We find the following in the case of *Mercer v. Downs,* 191 N.C. 203, 131 S.E. 575:

> ". . . Indeed the prevailing rule seems to be that if an estate is given by will to the survivors of a class to take effect on the death of the testator, the word 'survivors' means those living at the death of the testator; but if a particular estate is given and the remainder is given to the then survivors of a class, the word 'survivors' means those surviving at the termination of the particular estate. . . . It necessarily follows, therefore, that the remaindermen could not be ascertained with certainty until the termination of the life estate."

This Court has held that a devise for life and at death of life tenant to children "then living" conveys a contingent remainder to the children, which would determine the class at the death of the life tenant, *Woody v. Cates,* 213 N.C. 792, 197 S.E. 561, and that where a will provides that a remainder shall go to persons alive at the termination of a trust or a life estate, that the remainder is contingent, and the persons who take are de-

termined at the termination of the trust or at the time of the death of the holder of the life estate. *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578; *Trust Co. v. Henderson,* 225 N.C. 567, 35 S.E. 2d 694; *Knox v. Knox,* 208 N.C. 141, 179 S.E. 610.

The case of *Witty v. Witty,* 184 N.C. 375, 114 S.E. 482, in part states:

> ". . . Thus it has been held that contingent and not vested remainders were created where the testator, in making an ulterior disposition of property after a particular life estate, uses such expressions as 'to such of my sons as may be living at their mother's death,' or 'surviving at her death,' or 'to the representatives of such as may have died before her death,' showing clearly that not only the enjoyment of the remainder, but also the right to take it was intended to be postponed until after the expiration of the preceding life estate. *Whitesides v. Cooper,* 115 N.C. 570; *Bowen v. Hackney,* 136 N.C. 187; *Freeman v. Freeman,* 141 N.C. 97; *James v. Hooker,* 172 N.C. 780; *Jenkins v. Lambeth,* 172 N.C. 466; *Thompson v. Humphrey,* 179 N.C. 44; *In re Kenyan,* 17 R.I. 149."

In the case of *Johnston v. Herrin,* 383 Ill. 598, 50 N.E. 2d 720, testator devised his estate to his wife in trust so as to give her full use and power of disposition of all the property in the trust, and at her death provided that the remainder should be "equally divided among my surviving descendants" in the same manner as provided by intestate laws of the State of Illinois. The court held that the class was to be determined at the death of the life tenant, and stated:

> ". . . The word 'surviving' is a part of the description of those who are to take. This marks a distinction between this case and those cited by appellants. 'Surviving' is a word of survivorship which describes the gift and the donees and precludes the vesting of the gift until it can be determined who such donees are."

See Annotations 114 A.L.R. 4; 20 A.L.R. 2d 830.

[10] Here, the language of the will clearly refers to the death of the first taker as the time when the fund will be distributed. This is the time when the persons who finally take will be definitely and finally determined. We think it is clear that when the testator used the words "my surviving heirs" he was speaking

of persons who would be living or surviving at the death of Russell Henderson Kale, Jr. We hold that the heirs of Russell Henderson Kale, Sr., who will take the balance of the trust fund devised to Russell Henderson Kale, Jr., will be the heirs surviving at the death of Russell Henderson Kale, Jr.

The decision of the Court of Appeals is

Affirmed.

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

CHARLES F. KEIGER AND MAMILEE ENTERPRISES, INC. v. THE WINSTON-SALEM BOARD OF ADJUSTMENT; J. A. HANCOCK, ROY SETZER, C. C. SMITHDEAL, JR., JOHN MANNING, WILLIAM F. THOMAS, SAM OGBURN AND MRS. MARTHA CATES, AND THE WINSTON-SALEM-FORSYTH COUNTY PLANNING BOARD; F. GAITHER JENKINS, ZEB B. STEWART, A. L. EVANS, HAMPTON D. HAITH, CLIFTON E. PLEASANTS, H. C. PORTER, J. C. SMITH, M. C. BENTON, JR., DAVID W. DARR

No. 33

(Filed 29 January 1971)

1. **Municipal Corporations § 30— power to zone**

The original zoning power of the State reposes in the General Assembly, which has delegated this power to the "legislative body" of municipal corporations. G.S. 160-172 *et seq.*

2. **Municipal Corporations § 30— limitations on power to zone**

The power to zone, conferred upon the "legislative body" of a municipality, is subject to the limitations of the enabling act.

3. **Municipal Corporations § 30— zoning — denial of special use permit for mobile home park — unlawful exercise of legislative power by Board of Adjustment**

Where a municipal ordinance provides for the issuance by the Board of Adjustment of a special or conditional use permit for the construction of a mobile home park on land located in a B-3 zone upon the applicant's compliance with prescribed requirements, and an applicant's plans for a mobile home park in a B-3 zone met all the requirements of the ordinance, the Board of Adjustment's denial of a permit to the applicant on the ground that the proposed conditional use is not in accord with the "purpose and intent" of the ordinance constituted an unlawful exercise of legislative power in violation of Article II, Section 1, of the Constitution of North Carolina.

APPEAL by petitioners under G.S. 7A-30(1) from the decision of the Court of Appeals reported in 8 N.C. App. 435.

The Court of Appeals affirmed the judgment entered by *Exum, J.*, at January 5, 1970 Civil Session of FORSYTH Superior Court, which, after review on *certiorari*, affirmed the denial by the Winston-Salem Board of Adjustment of an application for a special use permit to construct a mobile home park upon a 14.5-acre site owned by petitioner Mamilee Enterprises, Inc.

A comprehensive zoning ordinance was adopted by the Board of Aldermen of Winston-Salem pursuant to authority conferred by "Article 14, Chapter 160, as amended, of the General Statutes of North Carolina, and Chapter 677 of the 1947 Session Laws of North Carolina, as amended."

When petitioners' application for a special use permit was filed, the 14.5-acre site was part of a larger acreage zoned B-3 (Highway Business).

Section 29-7F of the Ordinance provides:

"F. *Conditional Uses Requiring Special Use Permits.*

1. The Board of Adjustment may authorize the issuance of a special use permit, as provided in Section 29-19.A.2.c.(1), for uses included in the following table, *but only in the districts where such uses are permitted,* and only after receiving from the City-County Planning Board a report finding that the proposed building or site will comply with all applicable requirements of this ordinance and after public notice and public hearing.
2. Any application for a special use permit shall be submitted in compliance with Section 29-19, Administration and Records, and shall be reviewed by the Planning Board prior to consideration by the Board of Adjustment." (Our italics.)

B-3 is one of the districts in which the construction of a mobile home park is a conditional use requiring a special use permit. The Ordinance (Table of Conditional Uses Requiring Special Use Permit) requires that, in order to acquire a special use permit for the construction of a mobile home park in a B-3 district, the applicant-owner must comply with the prescribed "Site Requirements" and with the "Other Requirements" set forth therein.

The judgment entered by Judge Exum contains the following finding of fact: "(T)he Board of Adjustment found, and all parties agreed, that petitioners' plans met the site requirements and other physical requirements set forth in the 'Table of Conditional Uses' applicable to mobile home parks."

The ground on which Judge Exum affirmed the denial by the Board of Adjustment of petitioners' application for the special use permit is epitomized in the following finding: "Disregarding the words 'and the public interest' appearing in the above quoted portion of Section 29-19.A.2.c.(1), the action of the Board of Adjustment denying petitioners' application is clearly based upon purposes set forth in Section 29-2 of the Zoning Ordinance, such as 'to lessen congestion in the streets,' and 'the preservation of property values.' "

R. Kason Keiger for petitioner appellants.

Womble, Carlyle, Sandridge & Rice by William F. Womble and Zeb E. Barnhardt for respondent appellees.

BOBBITT, Chief Justice.

The principal constitutional question presented is whether the denial of petitioners' application for the special use permit constituted an unlawful exercise of legislative power by the Board of Adjustment in violation of Article II, Section 1, of the Constitution of North Carolina.

[1, 2] 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. Within the limits of the power so delegated, the municipality exercises the police power of the State. *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897. 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.

G.S. 160-172 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 use of buildings, structures and land for trade, industry, residence or other purposes. Such regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained. *Such regulations may also provide that the board of adjustment or the local legislative body may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein, and may impose reasonable and appropriate conditions and safeguards upon such permits.*" (Our italics.)

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."

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 overcrocwding 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 relates to the method of procedure by 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," by "(t)he legislative body of such municipality."

G.S. 160-178 authorizes the "legislative body" to provide for the appointment and compensation of "a board of adjustment" and prescribes the procedures and functions of such board.

Here, the Board of Alderman, Winston-Salem's "legislative body," determined that the construction of a mobile home park is *a conditional permissible use* of land in a B-3 zone. In addition, it prescribed with particularity the conditions prerequisite to the issuance of a special or conditional use permit for the construction of a mobile home park. The nature of the prescribed requirements is indicated by the following brief excerpt, *viz.:* "The zoning lot for a mobile home park shall be not less than two and one-half acres. Any mobile home park shall contain not fewer than ten mobile home spaces for initial development. The maximum number of mobile homes per gross acre in a mobile home park shall be ten. Mobile homes shall be parked or harbored in such a manner that neither the end-to-end clearance nor the lateral clearance between mobile homes, including enclosed extensions thereof, shall be less than 20 feet and no mobile home shall be located nearer than 20 feet to any building on the premises."

In accordance with the authority conferred by the italicized portion of G.S. 160-172, the Ordinance provides for the issuance by the Board of Adjustment of a special or conditional use permit for the construction of a mobile home park on land located in a B-3 zone upon the applicant's compliance with prescribed requirements.

Section 29-19.A.2.c.(1), entitled "Special Use Permits," is quoted in full in the opinion of the Court of Appeals. The decisions of the Superior Court and of the Court of Appeals are based on these provisions thereof: "In acting upon an application for a special use permit, the Board of Adjustment shall consider, and base its decision upon, the information submitted, the findings of the City-County Planning Board, *the purpose and intent of this ordinance,* and the public interest. No provision of this ordinance shall be interpreted as conferring upon the Board of Adjustment the authority to approve an application for a special use permit for any use except as authorized in Section 29-7.F and 29-11.B. In approving an application for the issuance of a special use permit, the Board of Adjustment may impose additional reasonable and appropriate conditions and safeguards to protect the public health, safety, morals, and general welfare, the

value of neighboring properties, and the health and safety of neighboring residents." (Our italics.)

The Board of Adjustment did not attempt to "impose additional reasonable and appropriate conditions and safeguards" but unconditionally denied petitioners' application for a special or conditional use permit.

The application for the special or conditional use permit here involved was filed subsequent to our decision in *Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78. Jackson involved the comprehensive zoning ordinance adopted by the board of commissioners of Guilford County pursuant to authority conferred by Article 20B, Chapter 153, of the General Statutes of North Carolina, codified as G.S. 153-266.10 *et seq.* G.S. 160-172 and G.S. 160-173 confer upon the legislative bodies of cities and incorporated towns essentially the same authority as that conferred upon boards of county commissioners by G.S. 153-266.10 and G.S. 153-266.11, respectively, quoted in pertinent part in Jackson. It was held in Jackson: "So much of Section 6-13B of this ordinance as requires the Board of Adjustment to deny a permit for the establishment of a mobile home park in the A-1 Agricultural District unless it finds 'that the granting of the special exception will not adversely affect the public interest' is, therefore, beyond the authority of the Board of County Commissioners to enact and so is invalid."

In the light of Jackson, the Superior Court and the Court of Appeals treated as invalid the portion of Section 29-19.A.2.c.(1) which purported to authorize the Board of Adjustment to base its decision upon what it considered favorable or adverse to "the public interest." They base decision on the portion of this section of the Ordinance which purports to authorize the Board of Adjustment to deny an application for a special or conditional use permit if the Board of Adjustment finds that the special or conditional use for which the application is made is contrary to the "purpose and intent" of the Ordinance.

[3] Section 29-2 of the Ordinance, quoted in the opinion of the Court of Appeals and referred to therein as the "purpose and intent" clause of the Ordinance, sets forth in detail the purposes for which the Ordinance was adopted. The purposes set forth in Section 29-2 are in substance the purposes set forth in G.S. 160-172 *et seq.* These are the purposes for which the General

Assembly delegated its power to zone to the Board of Aldermen, Winston-Salem's "legislative body." In the exercise of this grant of power by the Board of Aldermen, the 14.5-acre site was included in a B-3 zone where, according to the Ordinance, the construction of a mobile home park is a conditional permissible use. Precise conditions were set forth by the Board of Aldermen as requirements for the granting of a special or conditional use permit by the Board of Adjustment. Petitioners complied with these requirements. It would constitute an unlawful delegation of the legislative power vested by the General Assembly in the Board of Aldermen of Winston-Salem to allow the Board of Adjustment to deny such permit on the ground *it* did not consider the use *specified in the Ordinance as a conditional permissible use* to be in accord with the "purpose and intent" of the Ordinance. We perceive no substantial difference between the denial of a permit on the ground the conditional use is adverse to the public interest and the denial thereof on the ground the conditional use is not in accord with the "purpose and intent" of the Ordinance. Hence, the denial of petitioners' application on this ground constituted an unlawful exercise of legislative power by the Board of Adjustment in violation of Article II, Section 1, of the Constitution of North Carolina.

As stated by Justice Lake in Jackson: "Under those statutes, (G.S. 160-172 *et seq.),* this Court has held that the legislative body of the municipal corporation may not delegate to the municipal board of adjustment the power to zone; that is, the power originally vested in the General Assembly to legislate with reference to the use which may be made of land and the structures which may be erected or located thereon. *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189; *James v. Sutton,* 229 N.C. 515, 50 S.E. 2d 300."

As stated by Justice Sharp in *In re Application of Ellis,* 277 N.C. 419, 425, 178 S.E. 2d 77, 80: "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."

This case does not involve the function and authority of a board of adjustment in respect of alleged hardship situations relating to property within a particular zone. Under the circum-

stances of the present case, denial of petitioners' application would constitute an unlawful rezoning of petitioners' property by the Board of Adjustment.

Respondents' motion to dismiss petitioners' appeal for alleged failure to comply with Rule 3 (b) of the Supplemental Rules of the Supreme Court (274 N.C. at 604) has been considered and is denied.

The record discloses the additional matters set forth below.

After the Board of Adjustment denied their petition, petitioners applied for and obtained a writ of *certiorari*. On October 28, 1969, in compliance with the writ, respondents filed the documents and transcript of evidence involved in the proceedings before the Board of Adjustment and also filed a "Response to Petition for Certiorari." On January 14, 1970, prior to the hearing before Judge Exum, respondents filed a "Motion to Dismiss" in which they asserted that petitioners' application had been rendered moot by an "ordinance passed by the Board of Aldermen on November 3, 1969, rezoning a portion of their property from B-3 and R-6 to R-4, which category does not allow special use permits for the construction of a mobile home park." Attached to this motion is a copy of what purports to be an ordinance adopted by the Board of Aldermen amending the "Winston-Salem City Zoning Ordinance and the Official Zoning Map of the City of Winston-Salem" by changing "from B-3 and R-6 to R-4 the zoning classification" of two separately described (by metes and bounds) tracts of land.

The record contains no stipulation, finding or evidence with reference to the adoption by the Board of Aldermen of an ordinance containing the provisions set out in the exhibit attached to respondents' "Motion to Dismiss." Nor does the record contain a stipulation, finding or evidence as to what portion, if any, of the 14.5-acre site is included in the tracts described in the exhibit.

The recitals in Judge Exum's judgment include the following: "(T)his cause also being heard upon respondents' motion to dismiss on the ground that the questions raised by petitioners in this action have been rendered moot by the subsequent ordinance passed by the Board of Aldermen on November 3, 1969, rezoning the property in question from B-3 to R-4, which category does not allow special use permits for the construction of

a mobile home park." The first numbered (adjudicatory) paragraph of the judgment is as follows: "1. Respondents' motion to dismiss is denied, to which ruling the respondents, in open Court, excepted."

The opinion of the Court of Appeals contains the following: "Like the superior court, we have not considered or passed upon respondents' contention that the questions raised by petitioners have been rendered moot by an ordinance enacted by the Winston-Salem Governing Board on 3 November 1969 rezoning the property in question from B-3 and R-6 to R-4. Proper procedures are available to the parties to determine the effect of that ordinance should they desire a determination."

Judge Exum decided in favor of respondents without regard to the effect, if any, of an ordinance changing the zone of all or a part of the 14.5-acre site from R-3 to R-4. Apparently, for this reason, facts with reference to the adoption of a rezoning ordinance such as that referred to in respondents' "Motion to Dismiss" were not developed. Nothing in the record affords a basis for our consideration of the legal significance, if any, of such a rezoning ordinance.

We conclude that the denial by the Board of Adjustment of petitioners' application was unlawful and in violation of petitioners' constitutional rights; that the decisions of the Superior Court and of the Court of Appeals, which affirmed the action of the Board of Adjustment, are erroneous; and that the significance, if any, of a rezoning ordinance, if any, enacted subsequent to the denial by the Board of Adjustment of petitioners' application, is for further consideration in the Superior Court.

Accordingly, the judgment of the Court of Appeals is reversed. The cause is remanded to the Court of Appeals for the entry of its judgment remanding the case to the Superior Court for the entry of judgment not inconsistent with the law as stated in this opinion. Upon further consideration in the Superior Court, all parties should be afforded an opportunity to develop all pertinent facts with reference to the adoption of the alleged rezoning ordinance of November 3, 1969, and its effect, if any, upon petitioners' asserted right to construct a mobile home park on the 14.5-acre site. Unless precluded by such rezoning ordinance, petitioners are entitled to have issued the special permit for which they have applied.

Reversed and remanded.

CITY OF CHARLOTTE, A MUNICIPAL CORPORATION v. THE CHARLOTTE PARK AND RECREATION COMMISSION; MAUDE STEWART HAYWOOD; PIEDMONT REALTY COMPANY, ITS SUCCESSORS AND ASSIGNS; AND ABBOTT REALTY COMPANY, ITS SUCCESSORS AND ASSIGNS, CHARLOTTE KELLY AND LUTHER KELLY

No. 64

(Filed 29 January 1971)

1. **Deeds § 15; Estates § 4.1— conveyance of park to municipality — fee simple determinable estate**

A deed providing that land conveyed to a municipality should be used as a park for white people and that the land was to revert to the grantor or its successors and assigns in the event that the land ceased to be used for such purpose, *held* to create a fee simple determinable estate.

2. **Deeds § 15; Estates § 4.1— fee simple determinable estate — possibility of reverter**

The grantor's conveyance of a fee simple determinable estate leaves in the grantor a possibility of reverter, which is not an estate in the land but is a reversionary interest therein.

3. **Descent and Distribution § 1; Deeds § 15— possibility of reverter — descent to the heirs of the grantor**

Absent a valid *inter vivos* transfer, a possibility of reverter passes by descent to the heirs of the grantor of the fee simple determinable or, if the grantor was a corporation, to the successors thereof upon the dissolution of the corporate grantor.

4. **Deeds § 15; Estates § 4.1—fee simple determinable — termination of the estate — reversion of the fee**

A fee simple determinable estate terminates automatically upon the occurrence of the event which gives rise to the reverter, and no entry upon the land by the holder of the possibility of reverter is necessary to bring about the reversion of the fee simple absolute to him.

5. **Estates § 4.1; Eminent Domain § 14— condemnation of determinable fee — interest acquired in land**

The condemnation of land subject to a possibility of reverter does not cause a reversion of the title to the grantor or to its successor or transferee.

6. **Estates § 4.1; Eminent Domain § 14— condemnation of fee simple determinable and possibility of reverter**

The simultaneous condemnation of a fee simple determinable estate and the possibility of reverter destroys the possibility of reverter.

7. **Eminent Domain § 16; Estates § 4.1— condemnation of land subject to fee determinable — person entitled to award of compensation**

The owner of a fee simple determinable estate is entitled to the full award of compensation for the condemnation of land subject to the fee, where, at the time of the taking of both the fee simple determinable estate and the possibility of reverter, the event which would otherwise have terminated the estate is not a probability for the near future.

8. **Eminent Domain § 16— persons entitled to award of compensation — condemnation of park land subject to possibility of reverter**

A municipal parks commission was entitled to the full award of compensation for the condemnation of park land that was subject to a possibility of reverter, where the alleged claimants of the possibility of reverter either failed to file answer to the proceeding or had filed answer disclaiming any interest in the award.

9. **Eminent Domain § 5; Estates § 4.1— condemnation of park land subject to possibility of reverter — amount of compensation**

In a municipality's proceeding to condemn park land that was subject to a possibility of reverter if the land ceased to be used for park purposes, the park commission, which held fee simple determinable title to the land, was entitled to recover as compensation the difference between the full market value of the land immediately before and immediately after the condemnation without restrictions as to its use as park land, where (1) the municipality simultaneously condemned the fee simple determinable estate and the possibility of reverter and (2) the event which would have otherwise terminated the estate was not a probability for the near future.

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

APPEAL by plaintiff from *Clarkson, E.J.*, at the 6 April 1970 Special Civil Non-Jury Session of MECKLENBURG, heard prior to determination by the Court of Appeals.

The City of Charlotte instituted this proceeding to condemn property owned by The Charlotte Park and Recreation Commission (the Commission), used by it as a park and known as the Rose Garden, the taking being for the purpose of construction of a highway known as the Northwest Expressway. The Commission moved that its title to the property and its sole right to receive the award for its taking be determined. The City moved that a hearing be had upon all issues raised by the pleadings, other than the issue of damages, and that the court determine the nature and extent of the Commission's interest in the land and the measure of damages to be paid by the City. The case was so heard in the Superior Court without a jury. The following is a

summary of the facts found by the Superior Court, to which findings no exception has been taken:

1. All parties known to claim any interest in the property have been named as defendants and properly served with process.

2. The property was conveyed to the City of Charlotte by Piedmont Realty Company by deed dated July 13, 1904, which deed contained the following provision:

> "To Have and To Hold unto the said party of the second part, its successors and assigns, to be improved, maintained and used by it for the purpose of furnishing to white people a park for their pleasure and comfort, and upon condition that whenever the said property shall cease to be used as a park for white purposes (sic), then the same shall revert to the party of the first part, its successors and assigns."

3. Subsequently, title to the property vested in the Commission, subject to the above quoted provision in the deed from Piedmont Realty Company, and such title was held by the Commission at the time of the taking in this proceeding by the City.

4. At the time of the taking, there was no intent on the part of the Commission to abandon the use of the property for a public park or any probability of the discontinuance of the use of the property for park purposes.

Upon these facts the Superior Court concluded as matters of law (summarized):

1. The Commission is the only party having any interest in the property condemned and is entitled to the entire amount of any award to be made.

2. The City has acquired title to the property in fee simple absolute, free and clear of any restriction as to use, rights of reverter or any other encumbrance.

3. "Plaintiff having acquired title in fee simple absolute, the measure of damages to be followed in determining the issue of damages shall be the difference between the fair market value of the entire tract immediately prior to March 11, 1969, on which date the taking occurred, and the fair market value of the remaining property immediately after the taking."

4. No request for appointment of commissioners having

been made, the cause is transferred to the Civil Issue Docket for trial as to the issue of just compensation.

The City appeals, assigning as error the third of the above conclusions of law, the signing of the order by the Superior Court and the refusal of the court to sign an order tendered by the City. The order so tendered by the City and rejected by the court would have directed the judge, at the trial of the issue of damages, to include in his charge the following:

> "In determining the issue of damages, the measure of damages shall be the difference between the fair market value of the entire tract *with its use limited to that of a public park* immediately prior to March 11, 1969, and the fair market value of the remaining property *with its use limited to that of a public park* immediately after the taking." (Emphasis added.)

Prior to the entry of the order in question, the defendants Maude Stewart Haywood, Charlotte Kelly and Luther Kelly, the last two having been made additional parties defendant upon the allegation that they are successors to Abbott Realty Company, filed a joint answer. Therein they alleged that they have assigned and transferred to the Commission any and all rights which they had in the property at the time of the taking by this proceeding and disclaimed any right to participate in any award on account of such taking. These defendants pray that they be dismissed as parties to the action.

The answer of the Commission alleged that Piedmont Realty Company was dissolved as a corporation on June 19, 1911, and that Abbott Realty Company was suspended as a corporation on December 15, 1952. Both of these corporate defendants were served by publication and neither filed an answer. The record does not show what interest, if any, Abbott Realty Company ever had in the property, but in the brief of the Commission it is referred to as "a supposed transferee of Piedmont Realty Company."

W. A. Watts for plaintiff appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Joseph W. Grier, Jr., and James Y. Preston for defendant appellee.

LAKE, Justice.

[1] The deed from Piedmont Realty Company conveyed to the City of Charlotte a fee simple determinable estate, sometimes called a base or qualified fee, in the land here in question. *Recreation Commission v. Barringer,* 242 N.C. 311, 88 S.E. 2d 114, *cert. den.,* 350 U.S. 983; *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205; *Hall v. Turner,* 110 N.C. 292, 305, 14 S.E. 791; Restatement, Property, § 44; 28 AM. JUR. 2d, Estates, §§ 22, 29, 30, 31. The Superior Court found, without objection, that by virtue of certain acts of the Legislature this estate in the land was vested in the Commission at and prior to the time of the retaking of the land by the City in this condemnation proceeding.

[2] The conveyance of the fee simple determinable estate left in the grantor, Piedmont Realty Company, a possibility of reverter, which is not an estate in the land but is a reversionary interest therein. *Elmore v. Austin, supra;* Restatement, Property, § 154(3); 28 AM. JUR. 2d, Estates, §§ 27, 182, 183. Though the record before us does not so show, it is stated in the brief of the Commission that Abbott Realty Company, itself now defunct, was "a supposed transferee of Piedmont Realty Company."

There is a widespread division among the authorities on the subject as to whether a possibility of reverter, resulting from a conveyance of a fee simple determinable, can be the subject of an *inter vivos* transfer. See: *Annot.,* 53 A.L.R. 2d 224-266; 28 AM. JUR. 2d, Estates, §§ 27, 184. Among the authorities saying that such an interest is not transferable *inter vivos* are *Pond v. Douglass,* 106 Maine 85, 75 A 320; *Puffer v. Clark,* 202 Mich. 169, 199, 168 N.W. 471, 480; and Tiedeman, Real Property (3rd Ed.), § 291. See also: *Church v. Young,* 130 N.C. 8, 40 S.E. 691, in which the majority opinion does not make it clear whether the interest attempted to be transferred was a possibility of reverter, created by the conveyance of a fee simple determinable, or was a right of reentry for breach of a condition subsequent, fastened upon a conveyance of fee simple absolute. Authorities supporting the transferability of a possibility of reverter, arising from a conveyance of a fee simple determinable, include *Copenhaver v. Pendleton,* 155 Va. 463, 155 S.E. 802, 77 A.L.R. 324; and Restatement, Property, § 159(1).

It is not necessary for us to determine this question in the matter now before us. The successors of both Piedmont Realty Company, the grantor of the fee simple determinable, and of Abbott Realty Company, the "supposed transferee" of the possibility of reverter, as well as the two corporations themselves, have been made parties defendant in this condemnation proceeding and have been served with process by publication. Neither of the corporate defendants filed answer. Both are said to be defunct long since. Individual defendants, made parties on the ground that they are "heirs and successors to the assets of the Abbott Realty Company," filed a joint answer, disclaiming any interest in the award of compensation for the taking, and asserting that they have assigned to the Commission any and all rights which they had at the time of the taking. Thus, both parties to the "supposed transfer" of the possibility of reverter, and the successors of each of them, were made parties to this action, were served with process, and either disclaimed or failed to assert any interest in the award of compensation for the taking.

[3] Absent a valid *inter vivos* transfer of a possibility of reverter, it passes by descent to the heirs of the grantor of the fee simple determinable or if, as here, the grantor was a corporation, it passes to the successors thereof upon the dissolution of the corporate grantor. See: *Church v. Young, supra; Copenhaver v. Pendleton, supra;* Restatement, Property, § 164; 28 AM. JUR. 2d, Estates, § 184. Thus, if the "supposed transfer" to Abbott Realty Company was valid, the possibility of reverter was held, at the time of the taking, by the successors of that corporation, it being defunct. If the "supposed transfer" was invalid, the possibility of reverter was then held by the successors of Piedmont Realty Company, also now defunct. In either event, those who held the possibility of reverter, at the time of the taking of the property in this condemnation proceeding, are parties hereto and have either failed to assert a claim or have disclaimed any interest in the award of compensation.

[4, 5] A fee simple determinable estate terminates automatically upon the occurrence of the event, which gives rise to the reverter, and no entry upon the land by the holder of the possibility of reverter is necessary to bring about the reversion of the fee simple absolute to him. *Recreation Commission*

v. Barringer, supra; First Universalist Society of North Adams v. Boland, 155 Mass. 171, 29 N.E. 524; 28 AM. JUR. 2d, Estates, § 24. Thus, had the Commission put the land to a use other than that specified in the deed from Piedmont Realty Company, which the record does not indicate, the Commission's right in the land would have terminated immediately. The taking of the land under the power of eminent domain does not, however, cause a reversion of the title to the grantor or its successor or transferee. *Carter v. New York Cent. R. Co.,* 73 N.Y.S. 2d 610; Nichols, Eminent Domain, § 12.321.

[6] In this proceeding the City, in its declaration of taking, asserted that it thereby acquired a fee simple absolute in the land described as taken. Thus, the City in this proceeding has taken by condemnation both the fee simple determinable estate and the possibility of reverter. These were taken simultaneously. There was no interval following the taking of the fee simple determinable estate, for use for a purpose other than that stated in the deed from Piedmont Realty Company, in which the reverter could have occurred. The condemnation destroyed the possibility of reverter. *First Reformed Dutch Church v. Croswell,* 210 App. Div. 294, 206 N.Y.S. 132; *Carter v. New York Cent. R. Co., supra; Town of Winchester v. Cox,* 129 Conn. 106, 26 A 2d 592. The court below has found, without objection, that at the time of the taking by this proceeding there was no intent on the part of the Commission to abandon its use of the land as a park and that there was then no probability that such use by the Commission would be discontinued.

The right to compensation for a taking of property by the power of eminent domain is in those who owned compensable interests in the property immediately prior to the filing of the complaint and declaration of taking. G.S. 136-104; *Highway Commission v. Hettiger,* 271 N.C. 152, 155 S.E. 2d 469. In condemnation proceedings, where there are several separately owned interests in the condemned property, a proper method for determining compensation to be paid the holder of each interest is, first, to determine the value of the property taken, as a whole, and then apportion the award among the several claimants. G.S. 136-117; *Durham v. Realty Co.,* 270 N.C. 631, 155 S.E. 2d 231; *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732; 27 AM. JUR. 2d, Eminent Domain, § 247. The taker of the property, thus having its total liability determined,

is not affected by or interested in the division of the award by the court.

[7, 8] Although there is authority to the contrary (See: *State v. Independent School District No. 31,* 266 Minn. 85, 123 N.W. 2d 121), the weight of authority supports the view that if, at the time of the taking of both the fee simple determinable estate and the possibility of reverter, the event which would otherwise have terminated the fee simple determinable estate is not a probability for the near future, the owner of the fee simple determinable estate is entitled to the full award of compensation for the taking, the possibility of reverter being considered of no value. *United States v. 16 Acres of Land,* 47 F. Supp. 603 (D.C. Mass.); *United States v. 1119.15 Acres of Land,* 44 F. Supp. 449 (D.C. Ill.); *State v. Cooper,* 24 N.J. 261, 131 A 2d 756; *First Reformed Dutch Church v. Croswell, supra; Carter v. New York Cent. R. Co., supra;* Restatement, Property, § 53, Comment b; Nichols, Eminent Domain, § 5.221[1]; 27 AM. JUR. 2d, Eminent Domain, § 251. In the present instance, those whom the City has designated as claimants of the possibility of reverter have either failed to file answer, or have filed answer disclaiming any interest in the award and asserting that they have transferred such interest as they might otherwise have to the Commission. Thus, there was no error in the conclusion of the Superior Court that the Commission is entitled to the full award to be made in this case.

[9] It appears from the record that substantially all, but not all, of the tract of land affected by this taking has been condemned. The Commission asserts that the remainder is of no value as a park. "Where a portion of a tract of land is taken for highway purposes, the just compensation to which the landowner is entitled is the difference between the fair market value of the property *as a whole* immediately before and immediately after the appropriation of the portion thereof." *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219; G.S. 136-112; *Highway Commission v. Gasperson,* 268 N.C. 453, 150 S.E. 2d 860; *Gallimore v. Highway Commission,* 241 N.C. 350, 85 S.E. 2d 392. The market value of the property is to be determined on the basis of conditions existing at the time of the taking. *Highway Commission v. Hettiger, supra.* It is not limited by the use then actually being made of the property, but is determined in the light of all uses to which the property was

then adapted and for which it could have been used. *Williams v. Highway Commission,* 252 N.C. 514, 114 S.E. 2d 340; *Barnes v. Highway Commission, supra; Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10. All factors pertinent to a determination of what a buyer, willing to buy but not under compulsion to do so, would pay and what a seller, willing to sell but not under compulsion to do so, would take for the property must be considered. *Highway Commission v. Gasperson, supra.*

The City contends that the application of this rule requires that the land be valued on the basis of its use as a public park only, since the Commission could not use it for any other purpose without terminating its estate therein. Although there is authority to that effect, in our opinion the better view, which is supported by the weight of authority, is that, in the absence of exceptional circumstances, if both the fee simple determinable estate and the possibility of reverter are condemned and if, at the time of the taking, the event which would otherwise terminate the fee simple determinable is not a probability for the near future, the award is made on the basis of the full market value of the land without restrictions as to its use. *United States v. 16 Acres of Land, supra; Town of Winchester v. Cox, supra; State v. Cooper, supra; First Reformed Dutch Church v. Croswell, supra; Carter v. New York Cent. R. Co., supra; In Re Appropriation of Easement for Highway Purposes,* 169 Ohio St. 291, 159 N.E. 2d 612, 75 A.L.R. 2d 1373; Restatement, Property, § 53; Nichols, Eminent Domain, § 12.321; 27 AM. JUR. 2d, Eminent Domain, § 289; *Annot.,* 75 A.L.R. 2d 1382. There is no injustice to the taker in this ruling for, having condemned both the fee simple determinable and the possibility of reverter, it has acquired a fee simple absolute. It is, therefore, required to pay only the value of the property which has been taken. If any injustice results, it falls upon the holder of the possibility of reverter. In the present case, according to the record before us, the holder or holders of that interest in the land have either filed no answer and made no claim to any portion of the award or have expressly disclaimed any interest therein and have requested that it be paid to the Commission.

A number of the cases cited by the City in support of its position are, in our opinion, distinguishable. In *Boston Chamber of Commerce v. Boston,* 217 U.S. 189, 30 S.Ct. 459, 54 L.Ed. 725, the city condemned land for use as a street. The land was subject

to an easement of way, light and air in favor of an adjoining property owner. The Supreme Court of the United States held that the Fourteenth Amendment required the city to pay only the value of the land after taking this encumbrance into account. There, the encumbrance was not taken, or destroyed, by the condemnation proceeding since the purpose of the condemnation was to provide a public street and would, necessarily, preserve the easement of way, light and air. Not having taken or destroyed the right of the owner of the dominant estate, the city was properly held liable for the value of the servient estate only. In *Rogers v. State Roads Commission,* 227 Md. 560, 177 A 2d 850, and in *State Highway Commission v. Callahan,* 242 Ore. 551, 410 P. 2d 818, the taker was the grantor of the fee simple determinable and, therefore, was already the owner of the possibility of reverter. Not having taken this interest, that is, not having taken the fee simple absolute, it should not be required to pay for it, and the award was properly limited to the value of the fee simple determinable estate. *Staninger v. Jacksonville Expressway Authority,* 182 So. 2d 483 (Fla. Dist. Ct. App.), and *State v. Reece,* 374 S.W. 2d 686 (Tex. Civ. App.), involved zoning restrictions and restrictions imposed by a covenant. These are distinguishable for the reason that the condemnation proceeding was not a taking or a destruction of the restriction. Furthermore, such restrictions are distinguishable from a possibility of reverter in that those restrictions forbid a use to be made of property, whereas the possibility of reverter does not forbid such use but transfers title to the property if it occurs. Where, as in the case before us, both the fee simple determinable and the possibility of reverter have been taken in the same condemnation proceeding, the full fee simple absolute has been taken and its full value should be paid by the taker to the party or parties rightfully entitled.

It follows that the measure of damages set forth in the third conclusion of law by the court below is the correct measure to be applied in this case and there was no error in the court's refusal to limit such damages to the value of the property as used for a public park.

No error.

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

STATE OF NORTH CAROLINA v. MARSHALL SMITH

No. 74

(Filed 29 January 1971)

1. **Criminal Law § 135; Homicide § 31— first-degree murder case — jury may decide both guilt and punishment**

Defendant's motion to quash a first-degree murder indictment on the ground that the jury in a capital case is required to decide both guilt and punishment, *held* properly denied by the trial court. G.S. 14-17.

2. **Criminal Law § 76— homicide case — slaying of housewife — admissibility of confession — conflicting evidence**

Defendant's confession that was made to investigating officers subsequent to his arrest for the pistol slaying of a housewife during a robbery, including his statement that the killing was "an accident," was properly admitted in evidence when the trial court made findings of fact upon conflicting evidence that the confession and the statement were freely and voluntarily made.

3. **Criminal Law §175— findings of fact — conclusiveness on appeal**

The findings of fact of the trial judge are conclusive on appeal if supported by the evidence.

APPEAL by defendant from *McKinnon, J.*, June 22, 1970 Criminal Session, CUMBERLAND Superior Court.

In this criminal prosecution the defendant, Marshall Smith, was indicted for the first degree murder of Caroline A. Flores. The indictment, proper in form, cites December 9, 1969, as the date on which the offense occurred.

On December 30, 1969, the court, finding the defendant to be indigent, appointed Larry A. Thompson attorney to represent him. Attorney Thompson filed a verified petition alleging the defendant, Marshall Smith, age twenty-four years, was under two indictments and was confined in jail on charges of housebreaking and larceny and murder. The petition alleged that because of his service in Viet Nam ". . . (T)here is a distinct possibility that the Defendant is mentally incompetent to answer the charges against him," and requested the court to commit him to the State Hospital for examination, as provided in G.S. 122-91. At the conclusion of the examination period, the defendant was returned to Cumberland County for trial.

At the arraignment the defendant moved for a change of venue. The motion was denied. He then moved to quash the

indictment on three grounds: (1) On the charge of first degree murder, G.S. 14-17 requires the same jury to pass on the issue of guilt or innocence; and if guilt is found, to determine whether the punishment should be death or life imprisonment. (2) The defendant was not given a preliminary hearing. (3) The defendant was not given a speedy trial. At the hearing, defense counsel admitted that the defendant had not requested the case be placed on the trial calendar. The court concluded there had been no prejudicial delay in the defendant's trial.

The defendant's counsel ascertained from the solicitor that, as a part of the State's case, the prosecutor intended to offer in evidence defendant's in-custody confession. Thereupon the defendant made a motion to suppress the confession on the ground it was not free and voluntary. The court conducted a painstaking *voir dire* at which Officer Washburn testified the required warnings were given prior to the beginning of the interrogation, that the defendant, having been given the Miranda Warnings, consented to the interrogation without counsel and that he freely and voluntarily disclosed to the officers the manner in which he shot and killed Mrs. Flores in the attempt to rob her.

The defendant said he was on his way home from the grocery store about 8:30 on the night of December 9, 1969. He saw a light in Apartment 4 at 315 Johnson Street and walked up to the door and knocked. " . . . (A) young Caucasian girl answered the door. He told her that he had been walking for a long time and was thirsty and wanted a drink of water, . . . he opened the screen door and stepped in and she returned with the glass of water and he drank it." She placed the empty glass on the kitchen table. " . . . (T)hat he turned around and pulled his automatic from his belt and told her he wanted all of her money. He said that she told him that, 'Don't hurt me; I will give you the money.' . . . (S)he went into a rear bedroom, where she took a billfold out of the right top dresser drawer. That she took the money out of the billfold and handed it to him, and when she jerked her hand back the gun went off, and he stated that he just went all to pieces and he just emptied the gun, just kept firing, and she fell to the floor." The defendant told the officers he was high on marijuana.

The warnings given and the admissions were reduced to writing, submitted to the defendant who made minor correc-

tions, initialed each page and signed at the end. He voluntarily appeared before a justice of the peace and made oath that the warnings were given and that his admissions were true. Other officers, including the justice of the peace, gave testimony corroborating Officer Washburn.

The defendant testified, denying that warnings were given or that he waived his right to counsel. He testified he was assaulted by the officers and forced to sign the prepared confession. His wife testified the defendant demanded a lawyer at the time of his arrest. At the conclusion of the inquiry the court, finding the confession was freely and voluntarily made, overruled the motion to suppresss.

The following is a summary of the evidence developed at the trial before the jury. On and prior to December 9, 1969, the defendant, Marshall Smith, a sergeant in the Army, lived with his wife in a duplex apartment at 617 Johnson Street near Fort Bragg, Cumberland County. Roy Hamby, also a soldier, lived in an adjoining apartment. Roy Hamby testified that he owned and kept a twenty-two Browning automatic pistol in the nightstand beside his bed. The magazine contained four live rounds. On December 11, 1969, Hamby discovered his pistol and a camera were missing. He reported the loss to the police whose investigation caused them to suspect the defendant, Marshall Smith. The camera was found in a pawn shop where a friend of the defendant had pawned it for him. The friend so testified. The twenty-two Browning automatic pistol was discovered near the defendant's apartment. Sergeant Hamby, the owner, identified the weapon by its serial number.

As the officers were investigating the defendant as a suspect in the breaking and entering charge, the dead body of Caroline A. Flores was discovered in her apartment. The autopsy showed that she died as a result of four gunshot wounds. Two twenty-two caliber bullets were recovered from her body. Four fired cases were found near the body. A ballistics expert testified that his examination disclosed that one of the bullets removed from the body and the empty cases found nearby had been fired from the twenty-two Browning automatic pistol. The other bullet taken from the body was too badly mutilated to permit the witness to express a similar opinion.

During the interrogation of the defendant with reference to the theft of Hamby's pistol, Deputy Sheriff Washburn testified, after having given the necessary warning as to his rights: "I advised him that we had found the twenty-two Browning automatic pistol. I told him that the pistol was sent to the laboratory. . . . My information was that this was the gun that had killed the deceased. At that time he blurted out '(I)t was an accident.' " Deputy Sheriff Washburn again advised the defendant he need not make any admissions and when the defendant indicated his desire to admit his connection with the death of Mrs. Flores, Deputy Washburn called in the other officers, who also testified on the *voir dire.*

When further questioned, the defendant gave the officers a detailed statement concerning the shooting. One of the officers reduced to writing the defendant's story which the defendant checked, made some minor corrections, then signed. He went before a justice of the peace, acknowledged the statement and made oath that the statement was true and correct and that he executed it freely and voluntarily.

Before offering the defendant's confession before the jury, the State offered evidence that on and prior to December 9, 1969, Caroline A. Flores and her husband, Miguel Flores, a soldier, lived in an apartment on Johnson Street near Fort Bragg. During that week he had been absent on field maneuvers. On December 11, 1969, he returned home and found his wife's dead body on the floor of the bedroom. The post mortem disclosed that death was caused by four gun shot wounds.

The court, over objection, permitted Officer Washburn to repeat to the jury the admissions made by the defendant. Evidence was offered that the defendant's fingerprints were discovered on a water glass on the kitchen table in the Flores home.

After the State concluded its evidence, the court denied the defendant's motion for a verdict of not guilty. The defendant did not offer evidence before the jury. After the argument and the court's charge, the jury found the defendant guilty of murder in the first degree and fixed his punishment as imprisonment for life in the State's Prison. After denying the defendant's motion to set the verdict aside, the court imposed

the mandatory sentence of life imprisonment. The defendant appealed.

Downing, Downing & David by Harold D. Downing for the defendant appellant.

Robert Morgan, Attorney General Millard R. Rich, Jr., Assistant Attorney General, Andrew A. Vanore, Jr., Assistant Attorney General for the State.

HIGGINS, Justice.

On this appeal the defendant argues the trial court committed two prejudicial errors: (1) The court should have sustained his motion to quash the indictment and should have dismissed the action because of defects in the North Carolina Capital Felony Statute under which the indictment was drawn; and, conditionally, (2) If his motion to quash be not allowed, then he is entitled to a new trial because of the court's error in permitting the State to introduce his confession in evidence. These two questions alone were discussed and hence all other objections are abandoned.

[1] As ground for his motion to quash the indictment charging murder in the first degree, the defendant argues G.S. 14-17 requires the trial jury to pass on both guilt and punishment, thereby placing upon him the impermissible burden of deciding whether to testify in mitigation of punishment and thereby take the risk of being required to give evidence against himself on the issue of guilt, or to forego all right to testify.

In the event the court should fail to sustain his motion to quash the indictment, then he should be awarded a new trial on the ground his confession was involuntary and was erroneously admitted in evidence.

Motions to quash indictments charging capital felonies based on the grounds here alleged have been before this Court many times. Without exception, the Court has denied them. "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. Dozier,* 277 N.C. 615, 178 S.E. 2d 412. See also *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886, *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885, *State v. Atkinson,* 275 N.C.

288, 167 S.E. 2d 241, *Jackson v. Denno,* 378 U.S. 368, 12 L. Ed. 908, 84 S.Ct. 1774, *Spencer v. Texas,* 385 U.S. 554, 17 L. Ed. 2d 606, 87 S.Ct. 648. We adhere to our former decisions and hold the trial court correctly denied the motion to quash.

[2] The trial court conducted a full hearing before overruling the defendant's motion to suppress his confession. The most that may be said for the defendant is that the evidence on the *voir dire* was conflicting. True the defendant testified that proper warnings were not given him and that his request for a lawyer prior to and during his interrogation was denied. He testified he was assaulted by the officers and threatened if he did not confess. His wife corroborates his story that he had demanded the right to see a lawyer at the time of his arrest.

On the other hand, officers testified the required warnings were given. The defendant, when told the murder weapon had been discovered, "Blurted out, 'it was an accident.'" After Officer Washburn had testified, repeating the substance of the confession, defense counsel sought by cross-examination to impeach him. As corroboration, the State introduced the written documents which the defendant verified before the justice of the peace.

[3] At the conclusion of the hearing it became the duty of the trial judge to weigh the evidence on the *voir dire,* find the facts, and based on the findings, to determine whether the admissions were free, voluntary and understandingly made. Where the evidence is conflicting (as here), the judge must resolve the conflict. He sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The appellate court is much less favored because it sees only a cold, written record. Hence the findings of the trial judge are, and properly should be, conclusive on appeal if they are supported by the evidence. *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344, *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53, *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681. In this case the physical evidence gives sturdy support to the verity of the defendant's confession. When the murder weapon was stolen it contained four live rounds of ammunition. Mrs. Flores was shot four times. The defendant told the officer when he shot Mrs. Flores the first time she fell and screamed and he kept shooting. He made the statement that he went into the house and asked for a

drink of water. Mrs. Flores went to the kitchen, got a glass of water and gave it to him. He drank the water and returned the glass to her and she placed it on the kitchen table. The officers found the water glass on the kitchen table in the Flores home. Examination by the fingerprint expert disclosed the defendant's fingerprints on that glass.

The evidence made out a strong case of murder in the first degree (a killing in the perpetration of a robbery). Careful review fails to disclose any error of law in the trial.

No error.

STATE OF NORTH CAROLINA v. JAMES INGLAND

No. 83

(Filed 29 January 1971)

1. **Criminal Law § 112— instruction on reasonable doubt**

In the absence of a request, the trial judge is not required to define reasonable doubt.

2. **Criminal Law § 126— instruction on unanimity of verdict**

In the absence of a request, the trial judge is not required to charge the jury that its verdict must be unanimous.

3. **Criminal Law § 168— omission in the charge — harmless error**

To merit the retrial of a case, an omission in the charge must not only be erroneous but must also be material and prejudicial.

4. **Kidnapping § 1— kidnapping by fraud**

The unlawful taking and carrying away of a person by fraud is kidnapping. G.S. 14-39.

5. **Kidnapping § 1— kidnapping by fraud — instructions**

Failure of the trial judge in a kidnapping prosecution to charge on the law applicable to kidnapping effected by fraud was not prejudicial to defendant.

6. **Criminal Law § 167—omissions beneficial to defendant**

Omissions beneficial to a defendant afford no grounds for reversal.

7. **Kidnapping § 1; Criminal Law § 168— kidnapping defined — instructions correct at one point, incorrect at another**

Trial judge's "clarifying" instructions which correctly defined kidnapping as the taking and carrying away of a person by force or fraud, but which then incorrectly defined kidnapping as the seizure

and detention of a person for the purpose of carrying him away against his will, was reversible error, since the jury might have acted upon the incorrect part in reaching its verdict.

8. **Kidnapping § 1—definition of kidnapping — repudiation of earlier dicta**

The statement in previous decisions that kidnapping constitutes the seizure and detention of a human being for the purpose of carrying him away against his will is no longer authoritative.

9. **Kidnapping § 1; False Imprisonment § 1— common law crimes**

The common law with respect to kidnapping and false imprisonment is the law of this State. G.S. 4-1; G.S. 14-39.

10. **Kidnapping § 1; False Imprisonment § 1— the crimes distinguished**

The unlawful detention of a human being against his will is false imprisonment, not kidnapping; kidnapping contemplates, in addition to unlawful restraint, a carrying away of the person detained.

APPEAL from *Cowper, J.*, 10 August 1970 Special Criminal Session, CUMBERLAND Superior Court.

Defendant James Ingland, Curtis Proulx, alias Harold Jones, and Guy Webb were charged in a bill of indictment, proper in form, with the kidnapping of one Richard Fortner on 30 April 1970. This appeal involves only the trial and conviction of James Ingland. He was represented at the trial by the Public Defender.

Richard Fortner testified that he had known defendant six or seven months. On 30 April 1970 defendant invited him to a party at a house on Maiden Lane known as The Family House. He arrived there about midnight and was talking with defendant's brother, Terry Ingland, on the front porch when defendant drove up with a man named Stoner, a man named Guy Webb, and a man named Candy. They all went inside. Fortner had a knife which he was sharpening, and Stoner, on the pretense of showing him how to sharpen it, took the knife and then pointed it at Fortner. At this time the defendant laid a shotgun across his lap and said to Fortner, "You are dead." Fortner asked, "What do you want to kill me for?" Defendant replied that Fortner had been informing on him.

Defendant then said, "Let's get in the car and go for a ride"; whereupon Fortner was ushered out of the house and into a car accompanied by Stoner with the knife, defendant with his shotgun, Webb and Candy. They proceeded to a wooded

area near Seventy-First High School, got out of the car, and further discussed the matter of who was an informer. Fortner denied the accusation and defendant agreed to go find another man named Wayne Eschelman, otherwise known as Spanky. Fortner's hands were tied behind his back. Then he was "walked about fifteen or twenty yards into the woods and there laid face down on the ground and stakes were placed so that he could not move without them sticking in his throat." Stoner was left to guard Fortner, and the rest of the group left with defendant. Fortner remained in that position for four and one-half hours with Stoner guarding him. Defendant never came back, but his brother Terry Ingland, Guy Webb and Candy returned with Wayne Eschelman. Fortner was untied and questioned at length by Terry Ingland who finally told him to "start walking." He left on foot, crossed a field to a house, and telephoned the sheriff's department.

Deputy Sheriff Hodges testified that Fortner told him substantially the same story in early May and took him to the wooded area where the pointed sticks described by Fortner were discovered.

On cross-examination Fortner admitted that he had been a user of heroin for about a year and a half and had injected himself with an eight-dollar bag of heroin early on the evening in question. He admitted he was serving a sentence at the time of the trial for possession and transportation of heroin.

Defendant's evidence consisted primarily of his own testimony. He testified that The Family House where he lived had been searched by the police on several occasions, but nothing was ever seized. Recently he had been questioned about a matter known only to himself, Fortner and Eschelman, and he was anxious to find out which one had been telling lies to the authorities and causing the house to be raided. This was the reason Fortner was invited to The Family House on the night of April 30. Defendant further stated that Fortner was "barely coherent" when he arrived at The Family House but agreed to go with them to find Eschelman; that he got the shotgun when the group was getting ready to leave; that he walked out of the house first, unloaded the shotgun on the porch, and put it in the car; that they went to the home of Teresa Zahran seeking Eschelman, but he was not there; that he then drove out

Highway 401, turned left on a dirt road intending to double back the way he had come; that Fortner was speaking rapidly but incoherently and he stopped the car and asked Fortner to get out; that he talked with Fortner for about fifteen minutes and the two of them agreed that Fortner would remain there and defendant would continue to search for Wayne Eschelman; that he requested Stoner to stay with Fortner; that he then drove into town, contacted his brother Terry, and the two of them searched unsuccessfully for Wayne Eschelman; that he never returned to the area where Fortner left the car.

On cross-examination defendant denied that during the meeting with Fortner at The Family House he pulled out his shotgun, laid it across his lap, and pointed it at Fortner.

Lynda Jette, a defense witness, testified that she and her husband picked up Richard Fortner when he was hitchhiking early in May; that Fortner was somewhat incoherent in his speech, his eyelids drooped, and his movements were slow and sluggish; that Fortner stated he had taken a shot of heroin a few minutes earlier and further stated he did not want to turn in defendant and his brother Terry but had no choice.

Rex Simms testified that he shared a cell with Fortner in the Cumberland County Jail in early June while awaiting trial on a drug abuse charge; that Fortner told him that he voluntarily went on the ride with defendant and others on April 30; that they took him to a field, held him there, and that he "nodded out" from the effects of heroin; that Fortner said he "couldn't stand" defendant and his brother and that he had to testify; that Fortner said, "They gave me five years prayer for judgment, I've got to testify."

Danny Dennis, awaiting trial on a murder charge and confined to the Cumberland County Jail, testified that he overheard a conversation there in which Fortner told defendant James Ingland that he wanted to talk out a misunderstanding; that he was not coerced into leaving The Family House but went willingly and was not in fear of his life except during the time he was alone with the man named Stoner; that he just told the officers what they wanted to hear in return for a reduction of his sentence to only one year.

In rebuttal, Richard Fortner testified that he told Rex Simms he had been kidnapped and that the members of the group wanted to kill him. He denied making statements to any of the defense witnesses to the effect that he had gotten in the car at Maiden Lane voluntarily and was not in fear of his life.

The jury returned a verdict of guilty of kidnapping as charged and defendant was sentenced to a term of twelve years in the State Prison. He appealed to the Court of Appeals and the case was transferred to the Supreme Court under its general order dated July 31, 1970.

William S. Geimer, Assistant Public Defender, Twelfth Judicial District for defendant appellant.

Robert Morgan, Attorney General; Claude W. Harris and Robert G. Webb, Assistant Attorneys General for the State.

HUSKINS, Justice.

[1] Defendant assigns as error the failure of the trial judge to define reasonable doubt. In the absence of a request, such a charge is not required. *State v. Potts,* 266 N.C. 117, 145 S.E. 2d 307 (1965); *State v. Browder,* 252 N.C. 35, 112 S.E. 2d 728 (1960); *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295 (1958); *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954). It is the better practice, however, to do so and "seems to be well nigh the universal practice of our trial judges. . . . " *State v. Hammonds, supra.*

[2] Defendant next assigns as error the failure of the judge to charge the jury that its verdict must be unanimous. Some jurisdictions hold that a defendant is entitled to such an instruction. 53 Am. Jur., Trial § 804; *Markham v. State,* 209 Miss. 135, 46 So. 2d 88 (1950); *State v. McKinney,* 88 W. Va. 400, 106 S.E. 894 (1921).

[3] In North Carolina a defendant cannot constitutionally be convicted of any crime "but by the unanimous verdict of a jury of good and lawful persons in open court." Constitution of North Carolina, Art. I, § 13. This Court has never held, however, that failure of the trial judge to instruct the jury that its verdict must be unanimous is prejudicial error. Such a holding is unnecessary because in North Carolina a defendant has an absolute right to have the jury polled. *State v. Webb,* 265 N.C. 546, 144

S.E. 2d 619 (1965); *State v. Dow,* 246 N.C. 644, 99 S.E. 2d 860 (1957); *State v. Cephus,* 241 N.C. 562, 86 S.E. 2d 70 (1955); *Smith v. Paul,* 133 N.C. 66, 45 S.E. 348 (1903); *State v. Toole,* 106 N.C. 736, 11 S.E. 168 (1890); *State v. Young,* 77 N.C. 498 (1877). He can thus ascertain if there has been any misunderstanding of the requirement of unanimity by any juror. "This right is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise only a mode, more satisfactory to the prisoner, of ascertaining the *fact* that it is the verdict of the whole jury." *State v. Young, supra.* Here, the record shows that the jury was polled and all jurors assented to the verdict in open court. Defendant was assured that all jurors agreed with the verdict rendered. The omission of the charge on unanimity was entirely harmless. An omission complained of must not only be erroneous but also material and prejudicial to merit retrial of the case. Only if it is *likely that a different result would have been reached* but for the omitted instruction is a new trial required. *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522 (1968); *State v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39 (1953).

[2] We hold that, in the absence of a request, a trial judge is not required to charge the jury that its verdict must be unanimous. Since the defendant has the right to have the jury polled, there is no apparent reason why the trial judge should be required in every case to so instruct. This assignment of error is overruled.

Defendant assigns as error the failure of the trial judge to charge on the legal principles applicable to kidnapping effected *by fraud* as well as kidnapping effected by force.

[4] The unlawful taking and carrying away of a person fraudulently is kidnapping, "and this is true even though G.S. 14-39 omits the words 'forcibly or fraudulently.' . . . To construe the word 'kidnap' as used in G.S. 14-39 as applying only to a forcible taking . . . is too narrow a construction, and in many instances would make G.S. 14-39 practically useless." *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118 (1962).

[5, 6] If it be conceded *arguendo* that the evidence in this case was sufficient to require a charge on kidnapping by fraud as well as kidnapping by force, it is not perceived how a failure to

charge on the fraudulent aspect of the matter was prejudicial to defendant. After all, kidnapping effected by fraud is still kidnapping, and failure to so charge would have been advantageous to defendant. Omissions beneficial to a defendant afford no grounds for reversal. *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1964). This assignment has no merit.

[7] Defendant's final assignment of error is addressed to the following portions of the charge:

> "Now, the defendant is charged with a violation of the statute making it a felony for anyone to kidnap. It shall be unlawful for any person to kidnap or cause to be kidnapped another human being. This is the statute law. . . . By kidnapping is meant the taking and carrying away of a person forcibly or fraudulently. There is no question of fraud here. . . . Force is a necessary element of the offense, to carry anyone away by unlawful force, and against his will, *to seize and detain him for the purpose of carrying away.* This is the way Webster defines kidnapping. Now, if the State has satisfied you, in this matter, from the evidence and beyond a reasonable doubt, that on the 30th day of April 1970, the defendant James Ingland in company with others, did forcibly and by using a shotgun, take and kidnap the person of Richard Michael Fortner, and transport him to a place outside of Fayetteville, in the country, unlawfully, or done without lawful authority, it would be your duty to return a verdict of guilty as charged. If the State has failed to so satisfy you, it would be your duty to return a verdict of not guilty." (Emphasis added.)

The jury retired and, after deliberating for some time, returned to the courtroom and the following colloquy occurred:

> "COURT: I understand you have a question?
>
> "FOREMAN: Yes sir, the question is: Would forcible detention be classified the same as an act of kidnapping?
>
> "COURT: Forcible detention? Yes."

The jury again retired and, after a conference between the trial judge and defense counsel, the jury was recalled by the court and the following instruction was given:

> "COURT: I want to clarify what I said to you and read this to you: By kidnapping is meant the taking and carry-

ing away of a person forcibly or fraudulently, to carry away anyone by unlawful force or fraud or against his will; *to seize and detain him for the purpose of so carrying him away.* The offense is not committed if the person, the person taken away *or detained,* is capable in law of consenting and goes voluntarily, without objection, in the absence of fraud or deception." (Emphasis added.)

Defendant assigns as error the italicized portions of the foregoing instructions. He contends the definition of kidnapping is erroneous in that the jury was told defendant would be guilty of kidnapping if he seized and detained Fortner for the purpose of carrying him away, regardless of whether there was an asportation.

G.S. 14-39 provides in pertinent part: "It shall be unlawful for any person . . . to kidnap . . . any human being. . . ." We held in *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870 (1965), that the failure of the statute to define kidnapping did not render the statute vague or uncertain and that the common-law definition of the offense is incorporated into 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). That decision then holds that the common-law definition of kidnapping is "the unlawful taking and carrying away of a person by force and against his will."

As stated earlier, the use of fraud instead of force to effect a kidnapping is likewise a violation of our kidnapping statute. "[W]here false and fraudulent representations or fraud amounting substantially to a coercion of the will of the kidnapped person are used as a substitute for force in effecting kidnapping, there is, in truth and in law, no consent at all on the part of the victim. In brief, under those circumstances the law has long considered fraud and violence as the same in the kidnapping of a person." *State v. Gough, supra* (257 N.C. 348, 126 S.E. 2d 118). Furthermore, threats and intimidation are equivalent to the use of actual force or violence. *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966).

[8] The question presented here, however, has never been directly answered by this Court. Does unlawful detention with

the intent to carry away, without the asportation in fact being accomplished, constitute kidnapping? This Court has held, or quoted with approval in at least three decisions, that the word *kidnap,* as used in G.S. 14-39, means the unlawful taking and carrying away of a human being against his will by force or fraud or threats or intimidation; *or to seize and detain him for the purpose of so carrying him away. State v. Witherington,* 226 N.C. 211, 37 S.E. 2d 497 (1946); *State v. Dorsett,* 245 N.C. 47, 95 S.E. 2d 90 (1956); *State v. Gough, supra* (257 N.C. 348, 126 S.E. 2d 118). Later cases omitted the italicized portion of the definition. *State v. Lowry, supra* (263 N.C. 536, 139 S.E. 2d 870); *State v. Bruce, supra* (268 N.C. 174, 150 S.E. 2d 216); *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969); *State v. Woody,* 277 N.C. 646, 178 S.E. 2d 407 (1971). In every instance, however, use of the expression "or to seize and detain him for the purpose of so carrying him away" was unnecessary to a decision of the case. The court was simply quoting Webster's definition of the word without regard to the fact that it is at variance with the common-law definition. Such dicta should no longer be regarded as authoritative.

At common law forcible detention was false imprisonment, not kidnapping. 2 Burdick, The Law of Crime (1946), § 373; Perkins on Criminal Law (1957) pp. 129, *et seq.* Modern statutes of many states, however, have varied the common-law definition of kidnapping, and some of these statutes have simply incorporated what was false imprisonment at common law into the statutory offense of kidnapping. See, for example, Alabama Code Annotated (1940), Title 14, Chapter 1, Section 6. For definitions of kidnapping which encompass a wider range of activities, see Idaho Code Annotated (1948) 18-4501; Georgia Code Annotated (1970) 26-1311; Minnesota Statutes Annotated (1964) 609-25. See generally, 1 Wharton's Criminal Law and Procedure (1957) § 371; 51 C.J.S., Kidnapping, § 1; 1 Am. Jur. 2d, Abduction and Kidnapping, § 1, *et seq.*

[9] North Carolina has done none of these things. Since G.S. 14-39 does not define kidnapping, the General Assembly changed nothing from the common-law definition of that crime. Moreover, North Carolina does not have a criminal statute making false imprisonment a crime. G.S. 4-1 adopts the common law as the law of this State (with exceptions not pertinent here). Thus the common law with respect to kidnapping and false imprisonment is the law of this State.

[10] "False imprisonment was indictable as a specific crime at common law, and this doctrine still applies in states where the common law has been adopted." 35 C.J.S., False Imprisonment, § 71; *Commonwealth v. Brewer,* 109 Pa. Super. 429, 167 A. 386 (1933). Our decisions hold that the unlawful detention of a human being against his will is false imprisonment, not kidnapping. *State v. James,* 78 N.C. 455 (1878); *State v. Lunsford,* 81 N.C. 528 (1879); *Hales v. McCrory-McClellan Corp.,* 260 N.C. 568, 133 S.E. 2d 225 (1963); *Black v. Clark's Greensboro, Inc.,* 263 N.C. 226, 139 S.E. 2d 199 (1964). In *Lunsford* the Court said: "False imprisonment is the illegal restraint of the person of any one against his will. . . . But there must be a detention, and the detention must be unlawful. 3 Bl. Com., 127." Other authorities sustain this view. "Any unlawful restraint of one's liberty, whether in a common prison, in a private house, on the public streets, in a ship, or elsewhere, is in law, a false imprisonment. . . . The offense is a misdemeanor at common law." 2 Burdick, The Law of Crime (1946), § 373; 3 Bl. Comm., 127, 218. "False imprisonment is, at common law, the unlawful restraint or detention of another." Burdick, *supra,* § 377. See Clark and Marshall, A Treatise on the Law of Crimes (7th Ed., 1967), § 10.24; 1 Wharton's Criminal Law and Procedure (1957), § 385.

On the other hand, common-law kidnapping contemplates, in addition to unlawful restraint, a carrying away of the person detained. *State v. Harrison,* 145 N.C. 408, 59 S.E. 867 (1907), quotes Bishop's definition of kidnapping as "false imprisonment aggravated by conveying the imprisoned person to some other place." *See also State v. Lowry, supra.* Blackstone and the early English authorities held that a carrying away to *another country* was necessary to constitute kidnapping. The asportation requirement has now been relaxed, however, so that *any* carrying away is sufficient. The distance the victim is carried is immaterial. *State v. Lowry, supra.*

[7] In light of these distinctions, we hold that in order to constitute kidnapping there must be not only an unlawful detention by force or fraud but also a carrying away of the victim. While the italicized portion of the judge's initial charge was therefore erroneous, the error at that point was harmless because the mandate to the jury which immediately followed correctly stated the law and correctly applied it to the factual findings necessary to support a verdict of guilty. This clarity was destroyed, however,

by the colloquy which followed when the jury returned with its question and by the additional instructions given when the judge sent for the jury to clarify his answer. This final "clarifying" instruction was correct in part and erroneous in part. We cannot know upon which part the jury based its verdict. Did it find that Fortner was unlawfully taken and carried away by force and against his will? Or did it find that he consented to go and went voluntarily to the wooded area where he was seized and detained? The one is kidnapping; the other is not.

This uncertainty requires a new trial. "It has been uniformly held that where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. This is particularly true when the incorrect portion of the charge is the application of the law to the facts. (Citations omitted.) A new trial must also result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation." *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230 (1969).

It should be said in fairness to the able trial judge that his error in the charge was induced by the language of this Court in the cases cited and discussed in this opinion.

New trial.

STATE OF NORTH CAROLINA v. CHARLES LEWIS HASKINS, JR.

No. 84

(Filed 29 January 1971)

1. **Criminal Law § 66— identification testimony — necessity for voir dire — failure of defendant to object**

Defendant, without at least a general objection, was not entitled to a *voir dire* hearing on the admissibility of identification testimony by the prosecuting witness.

2. **Constitutional Law § 30; Criminal Law § 66— identification testimony — pretrial confrontation in courtroom — unnecessary suggestiveness — independent origin**

In this armed robbery prosecution, confrontation in the courtroom before the trial commenced was not so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process, and the State's evidence clearly showed that the in-court

identification of defendant by the prosecuting witness was of independent origin.

3. Criminal Law § 76— in-custody statements — necessity for voir dire

When defendant's counsel requested a *voir dire* hearing as to the admissibility of in-custody statements allegedly made by defendant, the trial judge properly held a *voir dire* hearing in the jury's absence to determine whether the statements were in fact voluntarily and understandingly made.

4. Criminal Law § 76— admissibility of in-custody statements — sufficiency of evidence and findings

The findings of fact by the trial judge upon the *voir dire* as to the voluntariness of defendant's in-custody statements are supported by competent evidence and are, therefore, binding upon the appellate court, and the findings in turn support the court's conclusion of law that defendant's statements were "freely, understandingly and voluntarily made."

5. Criminal Law § 75— form of Miranda warnings

Words which convey the substance of the *Miranda* warnings along with the required information are sufficient to meet the requirements of that decision, there being no set form that must be followed in every case.

6. Criminal Law § 75— sufficiency of pre-interrogation warnings

Warnings given to defendant prior to his in-custody interrogation, which included statement that "it is our duty as police officers to get you a lawyer," sufficiently conveyed to defendant the information that he had a right to consult a lawyer and have the lawyer with him during questioning, and if defendant was indigent that a lawyer would be appointed to represent him.

7. Criminal Law § 75— whether confession was made — jury question

Whether defendant did or did not make the inculpatory in-custody statements attributed to him is a question of fact to be determined by the jury.

8. Criminal Law § 76— confession — influence of drugs — failure to make specific findings

Where defendant contended that he did not remember making any in-custody statement because he was under the influence of drugs, finding by the trial court that defendant knowingly, intelligently and understandingly waived his constitutional rights and intelligently waived the right to counsel implicitly carries the finding that his understanding and intelligence were not so adversely affected as to make him unconscious of the meaning of his words; consequently, failure of the trial court to make specific findings as to whether defendant was under the influence of drugs was not error, although the better procedure would have been for the trial court to have made such findings.

9. Criminal Law §§ 76, 169— confession — influence of drugs — failure to make specific findings — harmless error

The record reveals that the State has shown beyond a reasonable doubt that failure of the trial court to make specific findings as to whether defendant was under the influence of drugs when he made in-custody statements, if error, did not contribute to the verdict and was not prejudicial to defendant.

APPEAL by defendant from *Brewer, J.*, 13 July 1970 Special Criminal Session of CUMBERLAND Superior Court.

Defendant was charged in a bill of indictment with the armed robbery of James Evans, Jr. Defendant, through counsel Sol G. Cherry, Public Defender, entered a plea of not guilty. The jury returned a verdict of guilty as charged. Defendant appealed from judgment sentencing him to a term of not less than ten years nor more than fifteen years in North Carolina Department of Correction. The case is before this Court pursuant to its general referral order effective 1 August 1970.

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

Sol G. Cherry, Public Defender for defendant.

BRANCH, Justice.

Defendant assigns as error the failure of the trial judge to suppress the evidence of identification by the witness James Evans, Jr.

The State offered evidence of James Evans, Jr., which tended to show that on the night of 21 March 1970 he was employed as a service station attendant at a station located on Murchison Road in Fayetteville, North Carolina. He was working alone, and at about 9:30 p.m. he noticed defendant standing on the edge of the road about 30 feet from him. The telephone located at the refreshment stand on the premises rang while he was waiting on a customer. Evans testified that defendant, Charles Haskins (calling him by name) came off the street and said he would answer the telephone. Evans testified:

> "I see Charles Haskins in the courtroom today (at which point he pointed to defendant). Charles Haskins pecked at the window and I opened the door. He asked if the cigarette machine was working and I turned around to give him change. He then told me to give him all the money I

had in my pocket. I had my back turned to him when he told me that. I told him that he must be joking but at that time he poked me in the ribs and I turned around and saw this pistol he had in his hand. After I saw the pistol, I gave him the money I had in my pocket. I did not know how much I had in my pocket until the man had checked the pumps and counted the money and found out how much. The amount was Sixty-one Dollars."

Evans further testified that he had met defendant in October 1968, when he was introduced to him by his nickname "Chuck" rather than Charles Haskins. He talked to police officers after the incident. Defendant's counsel did not object to any of the direct testimony of Evans.

On Cross-examination Evans testified that when he met defendant in 1968 he was in defendant's presence for about five minutes and that he had not seen him again until 21 March 1970. He did not identify defendant at any pretrial "line-up." The first time he saw defendant after 21 March 1970 was in the District Court, when defendant was at the counsel table with his attorney. Defendant was the only Negro male at the table, and when the case was called for trial, Evans identified defendant as the man who committed the robbery.

When defendant's counsel completed his cross-examination, he, for the first time, moved to suppress the evidence of identification. The motion was denied and defendant excepted. Defendant made no motion to hold a *voir dire* or to qualify the witness. Evans, on redirect examination, testified that the lights were on and he could see the face of the man who robbed him.

There was other evidence indicating that Evans gave the police officers a detailed description of defendant and that as a result of the conversation with Evans defendant was arrested two days later.

[1] Defendant, without at least a general objection, was not entitled to a *voir dire* hearing on the question of his identification. *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534; *State v. Accor,* 277 N.C. 65, 175 S.E. 2d 583. Defendant's counsel did not request a *voir dire* or further opportunity to "qualify" the witness when he made his motion to suppress the evidence on identification. It is apparent that all of the evidence on this question was before the jury, and it would have been a vain act for the

judge to have dismissed the jury for the purpose of then conducting a *voir dire* hearing.

Defendant was represented by counsel at the preliminary hearing, and in Superior Court, and we therefore are not concerned with defendant's Sixth Amendment guarantee of counsel at a pretrial "line-up" or confrontation.

[2] The question here presented is whether the confrontation in the courtroom before the trial commenced was so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to deprive defendant of due process under the Fourteenth Amendment. In deciding this question we will look to the "totality of the circumstances." *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S.Ct. 1967; *Simmons v. United States,* 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S.Ct. 967.

In the case of *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593, the victim of a robbery went to the county jail to report the crime to the sheriff. He described defendants and the automobile they were using. Defendants were arrested and brought to the county jail within about four hours, and the victim, who had remained at the jail of his own volition, promptly identified defendants when they entered the county jail in the custody of police officers. Defendants and the automobile used by them fitted the description previously given by the victim to police officers, and his wallet was found in the automobile occupied by defendants. This Court held that the trial court properly allowed the victim of the robbery to make an in-court identification notwithstanding the fact that defendants were without counsel at the out-of-court confrontation. The Court stated that defendants were not shown "singly" for identification purposes and that the principles set forth in *Stovall v. Denno, supra,* were not available to defendants.

United States v. Davis, 407 F. 2d 846 (1969), is a case in which defendant was charged with kidnapping. The victim had only a fleeting glance of his assailant and had failed to recognize him in photographs. The victim made his first identification at a preliminary hearing. The Fourth Circuit Court of Appeals rejected defendant's contention that he had been denied due process, and stated:

> ". . . There is no indication that this occasion was used by the government to provide the setting for an unfair con-

frontation or that it had this effect. The hearing was conducted before a United States Commissioner. Davis was not handcuffed, and no attempt was made to single him out before the victim recognized him. Davis was represented by counsel who made no objection about the conduct of the hearing or the manner of identification.

". . . There is no suggestion that the opportunity for the victim to observe Davis was prearranged. On the contrary, it was simply inadvertent. Cf. *United States v. Marson,* 408 F. 2d 644 (4th Cir. 1968).

"Due process does not require that every pretrial identification of a witness must be conducted under laboratory conditions of an approved lineup. *United States v. Quarles,* 387 F. 2d 551, 556 (4th Cir. 1967). Here the victim's opportunities to see Davis were simply those that are likely to occur at various stages of all criminal proceedings. Nor were the confrontations 'so unnecessarily suggestive and conducive to irreparable mistaken identification' that Davis was denied due process of law. *Stovall v. Denno,* 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L. Ed. 2d 1199 (1967). We conclude, therefore, that the district judge did not err in admitting the victim's in-court identification."

See also *United States v. Schartner,* 426 F. 2d 470.

In instant case the witness Evans had known defendant before the night of the robbery, and on the night of the robbery had ample opportunity to observe defendant in a lighted area. He furnished police with a detailed description of the person who robbed him, and defendant was thereafter arrested on 23 March 1970. Defendant's presence in court with his counsel does not support an inference that there was any planned "suggestiveness" on the part of the police officers. Defendant had counsel at the preliminary hearing and at the trial in Superior Court. The record shows no objection to the proceedings or the manner of identification at the preliminary hearing. He had every opportunity to explore and expose any circumstance that might have tainted the in-court identification.

We think the State's evidence clearly shows that the in-court identification was of independent origin, and under the totality of the circumstances of this case we do not think that

defendant was deprived of "due process." This assignment of error is overruled.

[4] Defendant's only other assignment of error is that the trial court committed error by admitting inculpatory statements allegedly made by him.

When Police Officer Charles House was testifying for the State he said that he had talked with defendant. Upon motion of defendant's counsel, the trial judge conducted a *voir dire* hearing to determine the voluntariness of the alleged statements. On *voir dire* Officer House testified:

> "I advised him of his constitutional rights after which he did make a statement to me. . . . I explained to him that that meant that he had a right to have legal counsel and a legal counsel was an attorney or a lawyer at the time that he was being questioned if he so desired. I told him that if he did not have the proper funds to hire an attorney or a lawyer it was 'our duty as police officers to get an attorney for him.'
>
> "I advised him that any statement he made could be held against him in a court of law, that he had a right, if he so desired, while he was answering questions, if he did not want to answer any questions he could answer some questions and if some questions were asked that he did not want to answer, he did not have to answer those questions, that he had a right to quit answering at any time he so desired. He said he didn't need a lawyer; that he fully understood his rights and that he would talk about the robbery of the Service Distributing Company. . . .
>
> ". . . He was seated just across the desk. At the time I advised him of his constitutional rights he paid attention. I could not detect any influence of alcohol, drugs or other medicine. He had been in my custody at 9:23. When he had been advised he probably had been in my custody one hour."

Defendant then testified on *voir dire* that he saw Officer House and another police officer at about 9:30 on 22 March 1970 at 2420 Murchison Road in Fayetteville. He said that on that occasion he heard a knock on the door, and one of the officers told him to open the door. He told the officers that since the door was jammed, it would be necessary for them to go to the back.

They went to the back and asked him his name. He told them his name was "Chuck" and the officers immediately arrested him for armed robbery. Defendant stated: "I asked him what particular armed robbery he was talking about and he told me that I had robbed the Service Distributing Company. I told him that he was out of his mind. He took me to the police station and asked if I wanted to talk about it. I said 'Talk about what?' He said 'Talk about the robbery.' I told him 'I didn't rob nobody, why should I want to rob a place where I used to work, that would be a fool thing, people sure know you?" Defendant further testified that when they went to the police station Mr. House read off a form, and he remembered Mr. House saying that he had a right to legal counsel before he answered questions, but that he did not recall making any statement. He said he was under the influence of "two bags of heroin which I had taken an hour and a half before the officers came to the house," and that the heroin made him drowsy and 'paranoid.' Defendant also testified that he had completed two and one-half years study at Princeton University.

At the close of the *voir dire* hearing the trial judge, in part, found:

> "The court finds from the testimony that Officer Charles B. House warned the defendant that he had a right to remain silent, that anything he said could be used against him in a court of law, that he had a right to have an attorney if he did not have the funds to get an attorney for him, he advised the defendant it was his duty to get that attorney for him prior to any questioning . . . that the defendant stated . . . that he didn't need a lawyer and understood his rights and would talk about the robbery at the Service Distributing Company; . . . That opportunity to exercise the constitutional rights of the defendant were accorded to the defendant throughout the interrogation; that the defendant requested no attorney and did not refuse to make a statement to Officer C. B. House; and by doing so, knowingly, intelligently and understandingly waived any constitutional rights accorded to the defendant and intelligently waived the right to have counsel present with him at the time of making a statement to Officer C. B. House."

The Court thereupon concluded:

". . . [T]hat the defendant freely, understandingly and voluntarily made a statement to Officer C. B. House without undue influence, coercion or duress and without promise of any kind and waived his right to have counsel present with him at the time of interrogation and making of statement to C. B. House. Therefore, it is adjudged that the defendant's answers and statement to Officer C. B. House are competent evidence and that the officer will be permitted to testify accordingly. . . ."

When the jury returned, Officer House testified that defendant told him he borrowed a 22 caliber pistol from Frank Pierce Allen and robbed the station, carried the pistol back to Allen after the robbery, and left $29 with Allen. He spent the rest of the money. The officer further testified that he went to see Frank Pierce Allen at 2420 Murchison Road and picked up the 22 caliber pistol and $29 in cash.

[3, 4] When defendant's counsel requested a *voir dire* hearing as to the admissibility of statements allegedly made by defendant, the trial judge properly held a *voir dire* hearing in the jury's absence to determine whether the statement was in fact voluntarily and understandingly made. *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. Both the State and defendant offered evidence on *voir dire,* and at the conclusion of the hearing the trial judge made findings of fact and concluded that defendant's statements were "freely, understandingly and voluntarily made." There was ample competent evidence to support the findings of fact, and these findings are therefore binding on this Court. *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681; *State v. Gray, supra.* The findings of fact in turn support the conclusions of law.

Defendant relies on the familiar case of *Miranda v. Arizona,* 384 U.S. 436, and the case of *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620. We concede that the principles cited in these cases are authoritative; however, both cases are factually distinguishable from instant case.

In *Miranda* the defendant was an uneducated, seriously disturbed Mexican boy with pronounced sexual fantasies, who made a confession after being interrogated by two police officers for two hours. It was admitted that Miranda was not advised that he had a right to have an attorney present.

[6] Defendant contends that the language used by the police officer in advising him of his constitutional rights did not convey to defendant the information that he had a right to have counsel present during his interrogation. He points specifically to the language "It is our duty as police officers to get you a lawyer."

[5] The decision in *Miranda* does not set out a form which must be followed in every case. *State v. Gray, supra.* Words which convey the substance of the warning along with the required information are sufficient. *United States v. Lamia,* 427 F. 2d 373; *Oritz v. State,* 212 So. 2d 57 (Fla.).

[6] The warnings given by the police officers in instant case conveyed the meaning that defendant had a right to consult a lawyer and have the lawyer with him during questioning and, if defendant was indigent, that a lawyer would be appointed to represent him.

In the case of *State v. Chamberlain, supra,* the court rejected the confession evidence obtained after five days of lengthy daily questioning. The defendant was a soldier, far from home, who was without counsel. He was not advised of any of his constitutional rights. There was also evidence that defendant was told by a deputy sheriff that he might be further charged with kidnapping, and if he would cooperate and sign a confession that he participated in two armed robberies, that they would drop the kidnapping charge.

Here, there is ample evidence that the officers fully complied with the procedural safeguards required by *Miranda.* There is no evidence of threat, promise or coercion of any kind which might have tended to "overbear" defendant's will.

[7, 8] Defendant contends he did not make an inculpatory statement to the officers. Whether defendant did or did not make the statement attributed to him is a question of fact to be determined by the jury. *State v. Gray, supra.* He also contends that he did not remember making a statement because he was under the influence of drugs. In this connection, it is noted that the trial judge made no specific findings as to drugs or their effect on defendant at the time he allegedly made the inculpatory statement. It would have been the better procedure for the trial judge specifically to have found facts concerning the effect, if any, of drugs on defendant's mental or physical condition at the time he

allegedly made statements to the officers. However, under the particular facts of this case, the Judge's finding that "opportunity to exercise the constitutional rights of the defendant were accorded to the defendant throughout the interrogation; that the defendant requested no attorney and did not refuse to make a statement to Officer C. B. House; and by doing so, knowingly, intelligently and understandingly waived any constitutional rights accorded to defendant and intelligently waived the right to have counsel present with him at the time of making a statement to Officer House," implicitly carries the finding that his understanding and intelligence were not so adversely affected as to make him unconscious of the meaning of his words.

Even had we considered this omission erroneous, we think the record clearly shows that no prejudicial error would have resulted. Officer House, who had been in defendant's presence for about an hour before the alleged statement was made, unequivocally testified that in his opinion defendant was not under the influence of drugs. Even more convincing is defendant's own testimony which shows verbal exchanges with the officers and actions indicating full possession of his faculties and a keen understanding of his predicament.

[9] This record reveals that the State has shown beyond a reasonable doubt that such omission did not contribute to the verdict obtained. *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824.

For the reasons stated, this assignment of error is overruled.

In the trial of the case below we find

No error.

State v. Vincent

STATE OF NORTH CAROLINA v. FRANK WALLACE VINCENT

No. 96

(Filed 29 January 1971)

1. **Incest— requisites of the offense**

A father is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter. G.S. 14-178.

2. **Incest— sufficiency of the evidence — uncorroborated testimony of daughter**

A conviction for incest may be had against a father upon the uncorroborated testimony of the daughter if such testimony suffices to establish all the elements of the offense beyond a reasonable doubt.

3. **Criminal Law § 104— motion for nonsuit — consideration of evidence**

On motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

4. **Incest— prosecution of father — sufficiency of evidence**

In a prosecution for incest, positive testimony by the 16-year-old prosecuting witness that the defendant, her father, while living with her in the relationship of father and daughter, had sexual intercourse with her, which testimony was corroborated by the other witnesses to whom she had reported the occurrence, *held* sufficient to be submitted to the jury on the issue of defendant's guilt.

5. **Criminal Law § 161— exception to the judgment — question presented**

Defendant's exception to the signing and entry of the judgment raises only the question of whether there is error or a fatal defect apparent on the face of the record proper.

Justice LAKE did not participate in the consideration or decision of this case.

APPEAL by defendant from judgment of *Collier, J.*, November 17, 1969 Criminal Session of GUILFORD County Superior Court.

Criminal prosecution on a bill of indictment, proper in form, charging defendant with incest with his daughter.

The State made out this case by the testimony of the prosecutrix: The prosecutrix is the daughter of defendant. The defendant and the prosecutrix's mother are separated. On 13 September 1969 the defendant compelled the prosecutrix, who was then a 16-year-old inmate of his home, to engage in sexual inter-

course with him, as he had done on various other occasions since the prosecutrix was 9 or 10 years old. On 16 September 1969, the prosecutrix related the details of the affair to her teacher, a deputy sheriff, and a friend.

Dr. William Reed Wood, a doctor specializing in obstetrics and gynecology, examined the prosecutrix on 16 September 1969. He testified that in his opinion she had previously had sexual intercourse.

Defendant denied ever having had sexual relations with his daughter. His testimony tends to show that he was at home on the date in question, either with his 15-year-old son Kenneth or his 12-year-old son Lee, at all times, and that he could not have had intercourse with his daughter without one or both of his sons seeing him. Kenneth and Lee both testified that they did not see their father touch their sister.

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 and Assistant Attorney General I. Beverly Lake, Jr., for the State.

Wallace C. Harrelson, Public Defender, for defendant appellant.

MOORE, Justice.

Defendant makes these assertions by his assignments of error: (1) That the court erred in refusing to dismiss the prosecution upon a compulsory nonsuit. G.S. 15-173. (2) That the court erred in entering and signing the judgment as appears of record.

[1-3] A father violates G.S. 14-178 and by reason thereof is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter. A conviction for incest may be had against a father upon the uncorroborated testimony of the daughter if such testimony suffices to establish all the elements of the offense beyond a reasonable doubt. *State v. Rogers,* 260 N.C. 406, 133 S.E. 2d 1; *State v. Wood,* 235 N.C. 636, 70 S.E. 2d 665; *State v. Sauls,* 190 N.C. 810, 130 S.E. 848; *Strider v. Lewey,* 176 N.C. 448, 97 S.E. 398. On motion for judg-

ment as of nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Lipscomb,* 274 N.C. 436, 163 S.E. 2d 788; *State v. Davis,* 272 N.C. 469, 158 S.E. 2d 630; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; 2 Strong's N. C. Index 2d, Criminal Law § 104, p. 648. Only the evidence favorable to the State will be considered, and the evidence relating to matters of defense or the defendant's evidence in conflict with that of the State will not be considered. *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335; *State v. Young,* 271 N.C. 589, 157 S.E. 2d 10; *State v. Glover,* 270 N.C. 319, 154 S.E. 2d 305; *State v. Goins,* 261 N.C. 707, 136 S.E. 2d 97; *State v. Moseley,* 251 N.C. 285, 111 S.E. 2d 308; *State v. Gay,* 251 N.C. 78, 110 S.E. 2d 458; 2 Strong's N. C. Index 2d, Criminal Law § 104, p. 650.

[4] In the instant case there was positive testimony by the prosecuting witness that the defendant, her father, while living with her in the relationship of father and daughter, had sexual intercourse with her. This testimony was corroborated by the other witnesses to whom she had reported the occurrence. Judge Collier correctly adjudged that this evidence for the State made the defendant's guilt a question for the jury.

[5] The defendant's exception to the signing and entry of the judgment raises only the question of whether there is error or a fatal defect apparent on the face of the record proper. *State v. Hilton,* 271 N.C. 456, 156 S.E. 2d 833; *Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592; 3 Strong's N. C. Index 2d, Criminal Law § 161. In the instant case, no such error or defect appears. The bill of indictment properly charges the offense. The judgment is within the statutory limits and is supported by the verdict. Therefore, the defendant's exception to the signing and entry of the judgment is without merit. *State v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738; *State v. Williams,* 235 N.C. 429, 70 S.E. 2d 1; *State v. Oliver,* 213 N.C. 386, 196 S.E. 325; 3 Strong's N. C. Index 2d, Criminal Law § 161.

We have carefully reviewed the record and find no error.

No error.

Justice LAKE did not participate in the consideration or decision of this case.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1971

STATE OF NORTH CAROLINA v. GRADY DELANEY WINFORD

No. 59

(Filed 3 February 1971)

Criminal Law §§ 154, 177— case on appeal — inability to obtain trial transcript from reporter — remand to superior court

On defendant's appeal from the refusal of a superior court judge to grant defendant a new trial because of the court reporter's failure to provide a trial transcript for preparation of the case on appeal, the Supreme Court remanded the appeal to the superior court so that defendant might proceed to perfect his appeal, since the trial transcript had been delivered to defendant subsequent to the present appeal.

THIS APPEAL was transferred for initial appellate review by the Supreme Court by an order entered pursuant to G.S. 7A-31(b) (4). It was docketed and argued as Case No. 97 at the Fall Term 1970.

Robert Morgan, Attorney General; William F. Briley, Assistant Attorney General; and Claude W. Harris, Assistant Attorney General for the State.

Collier, Harris & Homesley by Richard M. Pearman, Jr., and Walter H. Jones, Jr., for defendant appellant.

PER CURIAM.

At the 25 May 1970 Session of IREDELL, *Seay, J.*, presiding, defendant was convicted of murder in the second degree. From a prison sentence of not less than 25 nor more than 30 years he gave notice of appeal. He was allowed 60 days in which to prepare and serve his case on appeal, and the State was allowed 20 days thereafter to prepare and serve countercase. In apt time defendant's counsel requested Ms. Sandra H. Shoup, the court reporter for that session, to furnish him a transcript of the trial proceedings. She agreed to do so but thereafter moved to the State of Maryland without having delivered it. Because of her failure to deliver the transcript Judge Seay twice extended defendant's time for serving case on appeal, the last time until 14 November 1970.

On 22 October 1970 defendant filed a motion for a new trial on the ground that he had been unable to secure the stenographic record of his trial; that the time for docketing his appeal in the Court of Appeals expired on 25 October 1970; and that, without the transcript, his counsel could not properly prepare his case on appeal. The motion was supported by an affidavit of his counsel, T. C. Homesley, Jr., who detailed the failure of his "continuous and repeated efforts," made by both mail and telephone, to get the transcript from Ms. Shoup. He asserted his belief that she either could not or would not produce it.

Judge Robert M. Martin heard defendant's motion and denied it on 22 October 1970. In the record is a stipulation, signed by Solicitor Zeb A. Morris and Mr. Homesley, that due to the failure of the court reporter to provide a transcript neither defendant's attorneys nor the solicitor could competently set forth the trial proceedings.

On 26 October 1970 defendant docketed in the Court of Appeals the record proper, the motions and orders extending the time for serving case on appeal, the motion for a new trial with the supporting affidavit and stipulation, and the court's order denying the motion. He made three assignments of error, all of which were directed to the court's refusal to grant defendant a new trial because of the court reporter's failure to provide a transcript.

The case was argued in this Court on 9 December 1970 on the sole question whether defendant was entitled to a new trial

because of the court reporter's failure to deliver the transcript. Thereafter further efforts to secure the transcript were made at the instance of this Court. The transcript has now been delivered.

IT IS THEREFORE ORDERED that this case be and the same is hereby remanded to the Superior Court of Iredell County to the end that defendant may, if so advised, proceed to perfect his appeal. Defendant is allowed through March 6th to make up and serve his case on appeal. The State is allowed 20 days after service of the case upon the solicitor in which to file exceptions or countercase. Defendant will file his case on appeal and his assignments of error in this Court on or before 13 April 1971, and the case will be set for argument in regular course at the May Session, 1971.

Remanded.

RESORT DEVELOPMENT CO., INC. v. ILA FREEMAN PHILLIPS (WIDOW); LULA FREEMAN HILL AND HUSBAND, FRANK C. HILL; CELESTE BURNETT EATON AND HUSBAND, HUBERT A. EATON; FOSTER F. BURNETT, JR., AND WIFE, GLORIA M. BURNETT; MARIE GAUSE (WIDOW); VICTOR FREEMAN (SINGLE); VIOLA F. RODICK AND HUSBAND, LEWIS RODICK; GENEVA CROMARTIE (WIDOW); OLIVER DINKINS, JR., AND WIFE, MERCEDES DINKINS; MARTHA HOLIDAY HAWKINS AND HUSBAND, JESSE C. HAWKINS; JAMES H. DINKINS; MARY ELEANOR SPICER AND HUSBAND, HARLEE SPICER; ALICE LEOLA HANKINS AND HUSBAND, WADE HANKINS; VICTOR DINKINS (SINGLE); LORETTA DINKINS (SINGLE); ELECTA FREEMAN (WIDOW); RONALD FREEMAN AND WIFE, ...; KATHERINE ONEDA FREEMAN AND HUSBAND, ...; MARY ALWIDA FREEMAN FORD AND HUSBAND, WALTER LEE FORD; ARCHIE FREEMAN (SINGLE); AVIE FREEMAN WILSON AND HUSBAND, DOGAN H. WILSON; MILDRED FREEMAN (SINGLE); BERTHA MAE COLE AND HUSBAND, ROBERT L. COLE; LONICE FREEMAN (WIDOW OF WILLIAM GASTON FREEMAN); F. E. LIVINGSTON, TRUSTEE AND JOHN BRIGHT HILL, AND ALL OTHER PERSONS, FIRMS, CORPORATIONS WHO HAVE OR CLAIM ANY INTEREST IN LAND DESCRIBED HEREIN

No. 45

(Filed 10 February 1971)

1. Constitutional Law § 4— waiver of constitutional question — right to jury trial — quieting title action

Defendants in a quieting title action waived their right to challenge the decision of the Court of Appeals that an order submitting the dispute to a compulsory reference did not violate their constitutional

right to a jury trial, where the defendants failed to apply for *certiorari* following the decision of the Court of Appeals.

2. **Reference § 11— compulsory reference — right to jury trial**

A compulsory reference under G.S. 1-189 does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings.

3. **Quieting Title § 2— plaintiff's standing to assert cloud on title — claims by defendant**

Defendants' assertion in a quieting title action that they, as well as the plaintiff, have an interest in the lands described in plaintiff's complaint is sufficient to give the plaintiff standing in court to challenge defendants' claim as a cloud upon its title.

4. **Quieting Title § 1— standing to maintain action — plaintiff's interest in the land**

In a quieting title action it is only required that the plaintiff have such an interest in the lands as to make the claim of the defendants adverse to him.

5. **Quieting Title § 2— defendants' allegation of title — burden of proof**

Defendants in a quieting title action who alleged that their title had its origin in a certain grant assumed the burden of locating the calls of the grant on the ground and of showing that the grant covered at least a part of the lands described in the complaint.

6. **Boundaries § 6— location of calls — junior and senior deeds**

Defendants in a quieting title action were not entitled to use a description contained in a junior conveyance to locate the lines called for in a senior conveyance.

7. **Quieting Title § 2— defendant's assertion of title — burden of proof**

The defendant in a quieting title action has the burden to establish the title which he has set up to defeat the complainant's claim of ownership.

8. **Quieting Title § 2— setting aside judgment awarding ownership to plaintiff — insufficiency of evidence**

The trial court's finding and conclusion in a quieting title action that the corporate plaintiff was the owner of the two tracts of land described in its complaint must be set aside on appeal when (1) plaintiff's own evidence, which consisted of a map and oral testimony, failed to show its ownership of the two tracts and (2) the boundaries of the tracts as set out in the complaint show on their face that they are not coterminous with the boundaries of plaintiff's land as described by the surveyor and found by the referee.

9. **Quieting Title § 2— failure of plaintiff to establish fee simple title**

Corporate plaintiff's failure to show fee simple title to all the lands claimed by it was not fatal to its action to quiet title to the

lands, since a cause of action to remove cloud from title is made out when the plaintiff introduces evidence of its interest in a described tract of land and the defendant asserts an unjust claim thereto.

Justice SHARP concurring.

Chief Justice BOBBITT joins in concurring opinion.

ON appeal from the decision of the North Carolina Court of Appeals (9 N.C. App. 158) dismissing the defendants' appeal from the judgment of *Cowper, J.*, February, 1970 Session, NEW HANOVER Superior Court, docketed and argued as No. 50 at Fall Term 1970.

The plaintiff, Resort Development Company, Inc., a North Carolina corporation, on May 1, 1962, instituted this civil action and filed a verified complaint alleging: (1) The plaintiff is the owner and in possession of two specifically described tracts of land in New Hanover County; (2) The defendants, Ila Freeman Phillips and others, claim an interest adverse to the plaintiff in the described land; (3) The claim is valid neither in law nor in fact; (4) The defendants' claim, though invalid, constitutes a cloud upon the plaintiff's title, which it is entitled to have removed.

The defendants, on June 7, 1962, filed answer, which contains the following admission:

> "That it is admitted, as alleged in paragraph three of the Complaint, that these defendants claim and have an interest in the lands described in paragraph two of the Complaint, by virtue of mesne conveyances of Grant 97 of the State of North Carolina, made to one John Guerard, dated April 13, 1870, and recorded in Book LL, at page 644, New Hanover County Registry."

By further answer and defense and cross-action, the defendants allege:

> "(1) That plaintiff, these defendants and numerous other persons, some of whom are grantees of plaintiff, are tenants in common in the following described lands, to wit;
>
> BEING Grant No. 97 by the State of North Carolina to John Guerard, dated April 13, 1870, recorded in Book L-2 page 644, New Hanover County Registry, and more particularly described by metes and bounds as follows:

BEGINNING at a stake in the southwest corner of your new survey in your old line; running thence south 72 degrees east 150 poles to your corner on the Sea Banks; thence along the sea shore South 18 degrees West 384 poles to a stake at the end of the bank near a small inlet; thence across the sound South 72 degrees west 115 poles to your old line; thence along said line to the place and point of BEGINNING; containing three hundred acres, more or less.

(2) That the lands described in paragraph two of the Complaint are a part of and are embraced in the lands described in paragraph (1) of the Further Answer and Defense and Cross-Action, that is, the lands in which these defendants, the plaintiff and others are tenants in common."

The plaintiff filed a reply on June 15, 1962, specifically denying that Grant No. 97 to John Guerard covered any part of the two tracts of land described in the complaint. The parties had surveys made and plats filed showing their respective contentions. The court appointed an engineering firm and ordered and had prepared a survey and map for the use of the court at the trial. When the cause came on for hearing, Judge Bundy, finding the controversy involved a complicated boundary dispute, ordered a compulsory reference. The defendants excepted to the reference on the ground that title to real property was involved and the order violated their constitutional right to a jury trial.

By *certiorari,* the defendants obtained a review by the North Carolina Court of Appeals. The decision, reported in 3 N.C. App. 295, sustained the order of reference, holding the defendants had the right to file exceptions to the referee's report, tender issues, and have the Superior Court submit them to the jury on the evidence taken before the referee.

In due course the referee conducted a hearing at which the plaintiff introduced in evidence a grant from the State to James Adkins dated January 22, 1858, and recorded in New Hanover County. According to the court surveyor, the grant covered a part of the two tracts of land claimed by the plaintiff and described in the complaint. The parties stipulated that plaintiff's chain of title consisted of twenty-four deeds executed by individuals, corporations, trustees, receivers and by the State Board of Education. The surveyors, privately selected by the parties, and the court surveyor filed separate maps and each testified

as a witness before the referee. All admitted to the difficulty in locating the lines and corners of the several conveyances, especially the older ones. The difficulty arose because these lands were located on or near the Atlantic Ocean and many of the calls were for objects at the water's edge which, as a result of accretion, reliction and erosion, had been in imperceptible change through the years.

After considering all the evidence, the referee made this finding and conclusion: (1) The plaintiff has shown title to and possession of the tract of land enclosed within these boundaries: Beginning at Point "A" on the court map, thence to "B," to "C," to "Q," to "J" and back to "A," the point of beginning. (2) That the defendants have failed to show title, either by record or possession, to any lands the plaintiff described in the answer filed. The referee concluded: (1) The plaintiff is the owner and is entitled to the possession of that tract of land within the above calls. (2) That the defendants have failed to show title to any of the lands described in the answer.

The defendants filed objections to the referees' findings and conclusions, tendered issues and demanded a jury trial.

The defendants claim they own an unidentified interest in the described land through mesne conveyances traceable back to Grant No. 97 from the State to John Guerard dated April 18, 1780. The mesne conveyances consisted of seven deeds and five wills, all appearing of record in New Hanover County.

Both plaintiff and defendants offered testimony of their privately employed surveyors, each of whom prepared and introduced maps showing the results of their surveys. The court surveyor also testified and filed maps showing the contentions of the parties. In addition to his maps, Mr. Miller, defendants' Surveyor, was permitted to introduce an aerial photograph of the area.

From the evidence, the referee concluded:

"1. The Plaintiff be and they are hereby adjudged to be the owners of and entitled to possession of the lands and premises as shown, Beginning at Point "A" and running thence to Point "B"; thence to Point "C"; thence to Point "Q"; thence to Point "J"; thence back to Point "A," the Beginning.

2. That the Defendants have failed to show title to the lands described in the Answer."

The referee adjudged: (1) The plaintiff is the owner and entitled to possession of the lands beginning at Point "A" on the court surveyor's map, running to Point "B," Point "C," Point "Q" and Point "J," thence to Point "A," the Beginning. (2) The defendants have failed to show title to the lands described in the answer.

The defendants filed objections to the referee's findings and conclusions, tendered issues and demanded a jury trial.

In the Superior Court a jury was empaneled and the hearing proceeded on the evidence taken and the exhibits filed before the referee. At the conclusion of the evidence, Judge Cowper entered this judgment:

"This cause coming on to be heard and being heard before the undersigned Judge holding Superior Courts of New Hanover County for February 9, 1970, and plaintiff and defendants having presented their testimony in the form of a record taken and transcribed at a hearing before the Honorable Leon Corbett, a referee heretofore appointed in this cause, and upon the conclusion of the testimony of both the plaintiff and defendants, counsel for the plaintiff submitted issues to the Court and moved for a directed verdict on the issues so submitted in favor of the plaintiff and against the defendants.

And it appearing to the Court that from the evidence offered by the plaintiff (sic) no inference adverse to the title of the plaintiff arose and the evidence offered by the plaintiff was clear and conclusive and uncontradicted by evidence of the defendants.

THEREFORE, the motion of the plaintiff as to the first issue was allowed and the Court directed, as provided by General Statutes 1A, Section 1, Rule 50, a verdict answering the first issue:

'Is the plaintiff the owner and entitled to the possesion of the lands described in the complaint as (a) TRACT I and (b) TRACT II?'

ANSWER: 'Yes as to both TRACTS I AND II of the complaint.'

AND, IT FURTHER APPEARING TO THE COURT that the de-

fendants have failed to offer any competent evidence establishing the location of the Grant to John Guerard as alleged in the cross action of the defendants and, FURTHER, have failed to connect by competent evidence themselves in title with all or any part of the lands described in Tracts I and II of the complaint.

THEREFORE, the Court, upon motion of the plaintiff, directed in accordance with provisions of General Statutes 1A, Section 1, Rule 50, that the second issue:

'Are the lands described in TRACT I and II of the complaint or any part thereof covered by or included within the bounds of the Grant to John Guerard as alleged in the cross action of the defendants.'

be answered:

ANSWER: No

And, FURTHER, upon the answer so directed in the first and second issues, the Court then directed that the third issue:

'Do the defendants have any right, title or interest in the lands described in the complaint as TRACTS I and II?'

be answered:

ANSWER: No

WHEREUPON, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff be and it is hereby adjudged to be the owner and entitled to the possession of the lands and premises described in the complaint as TRACTS I and II, free of any claim of the defendants thereto.

/s/ Albert W. Cowper
Judge Presiding"

The defendants duly excepted and appealed. The Court of Appeals dismissed the appeal. The defendants, alleging a constitutional question is involved, brought the cause here for further review.

Carr and Swails by James B. Swails for the plaintiff.

Evelyn A. Williams and Pearson, Malone, Johnson & DeJarmon by LeMarquis DeJarmon for the defendants.

HIGGINS, Justice.

[1] The defendants argue here that the Superior Court in the trial and the Court of Appeals on review committed error by holding the order of reference did not violate their constitutional right to a jury trial under Article 1, Section 19, North Carolina Constitution. The adverse decision (3 N.C. App. 295) was filed on December 18, 1968. The defendants failed to apply by *certiorari* for further review and thereby waived their right to challenge the decision of the Court of Appeals, even though a constitutional question was involved. " 'No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right.' " *Cotton Mills v. Local 578,* 251 N.C. 218, 111 S.E. 2d 457, citing *Yakus v. U. S.,* 321 U.S. 414, 88 L. Ed. 834; *Michel v. Louisiana,* 350 U.S. 91, 100 L. Ed. 83; *Jennings v. Illinois,* 342 U.S. 104, 96 L. Ed. 119.

[2] We conclude the constitutional right to a jury trial, having been raised in the trial court and in the Court of Appeals and decided adversely to the defendants, they thereby permitted the decision to become final, and hence the law of the case. The decision, however, seems to be supported by this Court's decisions. "A compulsory reference, under provisions of G.S. 1-189, does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial is only upon the written evidence taken before the referee. . ." *Moore v. Whitley* and *Butt v. Moore,* 234 N.C. 150, 66 S.E. 2d 785.

[3, 4] The defendants, by answer, admitted that the plaintiff owned an interest in the described lands, but they assert they also have an interest therein. Moreover, this admission gave the plaintiff standing in court to challenge the defendants' claim as a cloud upon its title. "In order to remove a cloud from a title, it is not necessary to allege and prove that . . . the plaintiff . . . had an estate in or title to the lands in controversy. It is only required . . . that the plaintiff or plaintiffs have such an interest in the lands as to make the claim of the . . . defendants adverse to him or them." *Etheridge v. Wescott,* 244 N.C. 637, 94 S.E. 2d 846; *Williams v. Board of Education,* 266 N.C. 761, 147 S.E. 2d 381. "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse

claim." *Plotkin v. Bank,* 188 N.C. 711, 125 S.E. 541. By suit to remove a cloud from title, a plaintiff does not necessarily put his title in issue. "He is not demanding possession of land nor are his rights put in issue. He demands judgment that the defendant has no right, title or interest . . . adverse . . . to him." *Plotkin v. Bank, supra.* "The beneficial purpose of the Statute (G. S. 41-10) is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion. . . . " *Christman v. Hilliard,* 167 N.C. 4, 82 S.E. 949.

[5] The defendants alleged their title had its origin in Grant No. 97 to John Guerard, from whom they and their predecessors derived title. The defendants thereby assumed the burden of locating the calls of Grant No. 97 on the ground, and of showing that the grant covered at least a part of the lands described in the complaint.

[6] The land embraced in Grant No. 97, according to the description, begins at a stake "in the southwest corner of your new survey in your old line; . . . thence to a stake in your old line and with that line to the BEGINNING." Locating the land on the ground cannot be done by surveying the calls of Grant No. 97. " 'A description contained in a junior conveyance cannot be used to locate the lines called for in a prior conveyance.' " *Day v. Godwin,* 258 N.C. 465, 128 S.E. 2d 814, citing *Carney v. Edwards,* 256 N.C. 20 122 S.E. 2d 786; *Bostic v. Blanton,* 232 N. C. 441, 61 S.E. 2d 443.

The defendants' position in the instant case is strikingly similar to the plaintiff's position in *Day v. Godwin, supra,* where the survey of the junior grant was relied upon and an aerial photograph was offered to assist in locating the boundary lines on the ground. ". . . Having failed to locate the crucial corners and lines upon the ground, he does not explain and the record does not disclose how he may be able to do better on a picture (aerial photograph) or a drawing (plat) . . . . 'It is error to allow a jury on no evidence, or only on hypothetical evidence, to locate the lands described in a deed.' " The court properly excluded the defendants' evidence by which they attempted to locate the boundary lines of Grant No. 97 by surveying the calls of that grant. Grant No. 97 was a junior conveyance and its calls for a senior document could be located only by locating

the calls of the senior document. *Coffey v. Greer,* 249 N.C. 256, 106 S.E. 2d 209.

[7] The defendants claim by record title, and not by adverse possession. They allege their record title had its genesis in Grant No. 97. Therefore, the state of the pleadings casts upon them the burden of tracing their title to Grant No. 97. "The burden rests upon the defendant to establish a title which he has set up to defeat the complainant's claim of ownership." 44 Am. Jur., § 83, Quieting Title, p. 67. "Where the defendant substantially asserts and relies on a fact as an affirmative issue, the burden is on him to establish it." 74 C.J.S., Quieting Title, § 76, Presumptions and Burden of Proof, p. 118; *McCullen v. Durham,* 229 N.C. 418, 50 S.E. 2d 511; *Hayes v. Cotton,* 201 N.C. 369, 160 S.E. 453; *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142.

[8, 9] The trial court, as a matter of law, adjudged the plaintiff is the owner and entitled to possession of the two tracts of land described in the complaint. The boundaries of the two tracts, as set out in the complaint, show on their face they are not coterminous with the boundaries of the plaintiff's land as described by the surveyor and as found by the referee. The plaintiff's map and its oral testimony failed to show the plaintiff's ownership of the lands described as Tracts I and II. The court's finding of plaintiff's ownership is without support in the evidence and must be set aside. However, the court's finding the defendants had no interest in the lands claimed by the plaintiff was required because of their failure to offer proof of the claim. The plaintiff's failure to show fee simple title to all the lands claimed is not fatal to its case. A cause of action to remove a cloud from title is made out when the plaintiff introduces evidence that he has an interest in a described tract of land and the defendant is asserting, or attempting to assert, an unjust claim thereto. Consequently, the finding and conclusion to that effect are affirmed.

The affirmative finding that the plaintiff has established title to the two tracts of land described in the complaint is not supported by the evidence and that finding is set aside. What is said herein with respect to plaintiff's title is not to be construed as a finding, conclusion, or even a suggestion that the plaintiff's title is defective. There is insufficient evidence to support the court's affirmative finding, as a matter of law. Hence the finding and conclusion that the plaintiff is the owner of the two

described tracts of land must be set aside. The Court of Appeals will remand this cause to the Superior Court of New Hanover County for the modification of the judgment as required herein. The decision of the Court of Appeals is

Affirmed in part and reversed in part.

Justice SHARP, concurring:

I concur in the conclusion of the majority (1) that the trial judge was correct in directing a verdict against defendants, who had the burden of proof on the second and third issues, and in adjudicating that defendants have no interest in the lands described in the complaint; (2) that the judge's affirmative finding that plaintiff had established title to the two tracts described in the complaint is not supported by the evidence; and (3) that his adjudication that plaintiff is the owner and entitled to the possession of the two tracts of land described must be vacated. Notwithstanding, I direct attention to the following:

The court's erroneous adjudication that plaintiff was the owner and entitled to the possession of the lands described in the complaint was made upon the false premise that "from the evidence offered by the plaintiff (sic) no inference adverse to the title of the plaintiff arose and the evidence offered by the plaintiff was clear and conclusive and uncontradicted by evidence of the defendants." Although the result of this Court's decision is correct, I dissent from the intimation in the majority opinion that it would have been proper to have directed a verdict in favor of plaintiff, upon which rested the burden of proof, if its evidence had, in fact, been "clear, conclusive and uncontradicted by evidence of the defendant." Now, as before the enactment of the Rules of Civil Procedure, G. S. 1A-1 *et seq.*, the credibility of the witness and the weight of the evidence is for determination by the jury notwithstanding there is no conflict in the evidence.

Based on the admissions in the pleadings, I would hold that plaintiff is entitled to an adjudication that it owned an undefined interest in the lands described in paragraph 2 of the complaint; that, because of defendants' failure of proof, plaintiff is entitled to a directed verdict that defendants have no right, title, or interest in the lands described in the complaint; and that the judgment of Cowper, J., should be stricken and

the case remanded to the Superior Court for judgment in accordance with this opinion.

Chief Justice BOBBITT joins in this concurring opinion.

STATE OF NORTH CAROLINA v. WILLIAM BAILEY, JR.

No. 58

(Filed 10 February 1971)

1. **Criminal Law § 88— impeachment of testimony given on cross-examination — bias or interest of the witness**

It was proper to allow a documents examiner to testify that a defense witness had written a letter attempting to bribe a State's witness, notwithstanding the examiner's testimony was offered to impeach the testimony of the witness on cross-examination that he had not written such a letter, since the examiner's testimony was competent to show the bias or interest of the witness.

2. **Criminal Law § 88; Witnesses § 8— impeachment of testimony given on cross-examination — bias of the witness**

The rule that a party is bound by a witness' answers on cross-examination as to a collateral matter does not apply when the answers tend to show bias, interest, or prejudice of the witness.

3. **Robbery § 5— armed robbery — instructions on force or intimidation — use of weapons or firearms**

In instructing the jury on the element of force or intimidation in armed robbery, the trial court's failure to charge at one point that the force or intimidation exercised must be caused by the use or threatened use of a dangerous weapon or firearm, *held* not prejudicial when the trial court charged on the use of weapons or firearms in his final instruction on armed robbery.

4. **Robbery § 5— armed robbery instructions — use of words "some weapon" — harmless effect**

In instructing the jury in an armed robbery prosecution, the trial court's use of the words "some weapon" rather than the statutory language "firearms or dangerous weapon" could not have misled the jury under the facts of the case, especially where the trial judge's further instructions mentioned that the defendant had used a pistol in the robbery.

5. **Robbery § 5— armed robbery — instructions on lesser offense of common law robbery — use of real pistol or toy**

The trial court in an armed robbery prosecution was required to charge the jury on the lesser included offense of common law robbery,

even in the absence of a request, where the prosecuting witness could not state on cross-examination whether the gun in defendant's hand was a real gun or a toy; the failure of the court so to charge was reversible error.

6. **Robbery § 1— critical difference between armed and common law robbery**

The critical and essential difference between armed robbery and common law robbery is that in order for the jury to convict for armed robbery the victim must be endangered or threatened by the use or threatened use of a firearm or other dangerous weapon.

APPEAL by defendant from *Bailey, J.*, 29 May 1970 Regular Criminal Session of WAKE County Superior Court. This case was docketed and argued as No. 95 at the Fall Term 1970.

Criminal prosecution on a bill of indictment charging defendant with armed robbery.

The evidence for the State tended to show that Loretta Williams, who knew the defendant from having worked with him at the Sir Walter Hotel, was working at the One Hour Valet Cleaners on 23 March 1970, the day of the robbery. Defendant, accompanied by "Piccolo" Davis, came to the cleaners about 2:40 p.m. and, while threatening her with a pistol, demanded the money in the register. Loretta gave him $84, and the two men fled. On cross examination Loretta testified: ". . . I don't know whether it was a real or toy pistol or whether it was metal or rubber."

Defendant was apprehended when he showed up for work at the Downtowner Motor Inn about 7:15 p.m. the same day. He told investigating officers Carroll and Day of the Raleigh Police Department that he had been taking heroin and wanted to go to the hospital. He was taken there about 7:55 p.m., and while waiting to see a doctor and after having been duly advised of his rights, he confessed to the robbery.

He told the officers that he divided the money with other persons involved and returned the .22 caliber pistol he used to its owner.

Defendant's evidence tended to show that he had spent the day in question drinking wine, "shooting" heroin, and shooting pool. He remembered nothing from the time he passed out about noon until he was awakened by friends and told it was time to go to work. He did not remember the robbery, but

remembered confessing because the officers kept asking him about the robbery. He did not remember being warned of his rights.

On *voir dire,* the trial judge found that the confession was freely, understandingly and voluntarily made, and that the defendant understood what he was doing at the time.

From a verdict of guilty as charged and sentence imposed, defendant appealed to the Court of Appeals. This case is before this Court pursuant to our general referral order effective 1 August 1970.

Attorney General Morgan, Assistant Attorney General Eagles, and Staff Attorney Walker for the State.

James R. Rogers III, for defendant.

BRANCH, Justice.

[1] Defendant first contends that the court erred in permitting the witness White to testify as to the authorship of a letter allegedly written by defendant's witness James McDougal. McDougal testified that he saw the defendant on the morning of the robbery, that the defendant was not himself, and that he appeared to be sick and in pain. On cross-examination McDougal testified that he wanted to help defendant but that he would not do anything dishonest to do so. He denied writing a letter purporting to be from him to the prosecutrix, Loretta Williams, offering her $200 not to identify defendant as the robber. Following this denial, the State, for the purpose of impeachment, called Philip White, a documents examiner for the North Carolina Bureau of Investigation, as a witness. Mr. White testified, over objection, that in his opinion the letter received by Loretta offering her $200 not to identify the defendant as the robber was written by McDougal. The defendant contends that the questions concerning the letter were on a collateral matter and that the State was bound by McDougal's answers.

[2] Ordinarily, a party is bound by the answer of the witness to a question asked on cross-examination as to a collateral matter. *In re Gamble,* 244 N.C. 149, 93 S.E. 2d 66; *State v. King,* 224 N.C. 329, 30 S.E. 2d 230; Stansbury, N. C. Evidence § 48 (2d ed., 1963); 7 Strong's N. C. Index 2d, Witnesses § 8, p. 704. However, to this general rule there are exceptions. The rule

does not apply when the questions tend to show bias, interest, or prejudice of the witness. *In re Gamble, supra; State v. Hart,* 239 N.C. 709, 80 S.E. 2d 901; *State v. English,* 201 N.C. 295, 159 S.E. 318; Stansbury, N. C. Evidence § 48 (2d ed., 1963); 7 Strong's N. C. Index 2d, Witnesses § 8, p. 705.

In *State v. English, supra,* defendant was charged with the murder of his wife. The wife's father testified for the defendant. The court held that evidence of the wife's father's attempt to bribe another witness was admissible to show the bias of the bribing witness for the defendant. The Court stated: "Exceptions were also taken to evidence tending to show that the father of the deceased woman, who was a witness for defendant, had attempted to bribe a colored man to implicate two other parties. These exceptions are not sustained. *S. v. Patterson,* 24 N.C. 346; *S. v. Beal,* 199 N.C. 278 [154 S.E. 604]."

Justice Ervin, in *State v. Hart, supra,* states the reason for the exception to the collateral matter rule as follows:

> "Truth does not come to all witnesses in naked simplicity. It is likely to come to the biased or interested witness as the image of a rod comes to the beholder through the water, bent and distorted by his bias or interest. The law is mindful of this plain psychological principle when its fashions rules of evidence to aid jurors in their search after truth. As a consequence, the law decrees that 'any evidence is competent which tends to show the feeling or bias of a witness in respect to the party or the cause,' and that jurors are to consider and weigh evidence of this character in determining the credibility of the witness to whom it relates.
>
> . . . . .
>
> "Where a party cross-examines an adverse witness as to matters which tend to show the partiality of the witness for his adversary or the hostility of the witness toward him, the party is not bound by the answers of the witness denying partiality or hostility, but is at liberty to contradict the witness by the testimony of other persons disclosing such partiality or such hostility. (Citing cases.)"

[1] We hold that the testimony of the witness White was competent to show the bias or interest of defendant's witness McDougal.

Defendant assigns as error various portions of the trial judge's charge to the jury. The trial judge initially charged the jury on armed robbery as follows:

> "Now ladies and gentlemen of the jury, the defendant in this case is charged with the crime of armed robbery. Armed robbery is the taking of personal property from another by the use of force or intimidation, and by means of a threat to the life of another, accompanied by the use of some weapon. This weapon must be in the possession of the accused at the time of the alleged offense. The State has the burden of convincing the jury beyond a reasonable doubt, one, that the accused took personal property from another or from the presence of another, in this case from the presence of another, in this case from the presence of Loretta Williams; two, that the accused used force or intimidation sufficient to create an apprehensive (sic) of danger; three, that the accused was in possession of and used or threatened to use some weapon and in fact threatened the life of the person from whom the property was taken, or from whose presence it was taken; and, finally, that the accused at the time of the taking, must have had the felonious intent to permanently deprive the owner of that property, and to convert it to his own use, or at least to some use besides that of the owner."

Later in the charge the trial judge further instructed the jury as follows:

> "Ladies and gentlemen of the jury I charge you that if you find from the evidence and beyond a reasonable doubt, the burden being upon the State of North Carolina to so satisfy you, that on the 23rd day of March 1970, the accused, William Bailey, Jr., took personal property, in this case United States money, from Loretta Williams or from her presence, and if you further find that the accused William Bailey, Jr., at that time, used force or intimidation sufficient to create an apprehension of danger; and if you further find that at that time the accused was in possession of, and used or threatened to use some weapon, and in fact threatened the life of the victim; and you further find from the evidence and beyond a reasonable doubt that the accused at the time of the taking of the property, had in his mind the felonious intent permanently to deprive the

owner of that property and to convert it to his own use, or at least to the use of another; . . ."

[3] Defendant contends that the court erred in its charge by stating that one of the elements of armed robbery was that "the accused used force or intimidation sufficient to create an apprehension of danger," without charging that the force or intimidation must be caused by the use or threatened use of a dangerous weapon or firearm, implement or means.

Robbery is the taking, with intent to steal, of personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation. *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194. G.S. 14-87 does not add to or substract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used more severe punishment may be imposed. *State v. Smith, supra; State v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355.

Defendant cites as authority *State v. Covington,* 273 N.C. 690, 161 S.E. 2d 140, and *State v. Rogers,* 246 N.C. 611, 99 S.E. 2d 803. In *Covington* the trial court charged defendants could be convicted if they " . . . used force or intimidation sufficient to create an apprehension of danger in the person from whom the property was taken . . . " , but failed to add the additional element required by the statute, "by the use or threatened use of firearms or other dangerous weapon, implement or means."

In *Rogers* the Court charged as to common law robbery and completely omitted any reference to the use of a weapon. Thus instant case is distinguishable from *Covington* and *Rogers* because here the trial judge in his final instruction on armed robbery added to the definition of common law robbery the following: " . . . and if you further find that at the time the accused was in possession of and used or threatened to use some weapon, and in fact threatened the life of the victim . . . . "

[4] Defendant further contends that the trial court's use of the words "some weapon" rather than "firearms or other dangerous weapon" constituted prejudicial error. The court, at the beginning of the charge, read the bill of indictment, which charged that William Bailey, Jr., " . . . having in his possession, and with the use and threatened use of firearms and other dan-

gerous weapon, implement and means, to wit, a pistol . . . " did feloniously steal, take and carry away United States money of the value of $85. Later, the trial judge stated that the prosecuting witness testified that defendant used a pistol in the robbery and that defendant in his statement to the officers admitted that at the time of the robbery he used a blue steel, white handle .22 caliber revolver or pistol. We do not approve the substitution of the words "some weapon" for the words of the statute, but under the facts of this case we do not think that, standing alone, the use of these words would be such as to misinform or mislead the jury.

[5] However, defendant's assignment of error to the failure of the trial court to instruct on and submit to the jury the lesser offense of common law robbery presents a more serious question.

The trial judge charged the jury that they could return a verdict of guilty as charged in the bill of indictment or a verdict of not guilty.

Common law robbery is a lesser included offense of armed robbery, and an indictment for armed robbery will support a conviction for common law robbery. When there is evidence of defendant's guilt of common law robbery, it is error for the court to fail to submit the lesser offense to the jury. *State v. Wenrich,* 251 N.C. 460, 111 S.E. 2d 582; *State v. Davis,* 242 N.C. 476, 87 S.E. 2d 906; *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545; *State v. Keller,* 214 N.C. 447, 199 S.E. 620.

In *State v. Hicks, supra,* it is stated:

> " . . . 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. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice."

Here, the State's witness Loretta Williams testified that defendant robbed her by use of a pistol. On cross-examination she said that she did not know whether it was a "real or toy pistol." The State offered defendant's confession, which contained a statement by defendant that he used a .22 caliber pistol to rob Loretta Williams. However, defendant testified before the jury that because of the effect of wine and heroin in his system he passed out about noon on the day the crime was committed and remembered nothing until he was awakened that night by friends. He specifically denied any recollection of the alleged robbery or the possession by him of a pistol.

This conflicting testimony raised an issue for the jury as to whether defendant had in his possession and used or threatened to use a firearm or other dangerous weapon to perpetrate the robbery.

[6] The critical and essential difference between armed robbery and common law robbery is that in order for the jury to convict for armed robbery the victim must be endangered or threatened by the use or threatened use of a "firearm or other dangerous weapon, implement or means." *State v. Covington, supra.*

Thus, the trial judge, even without request for special instructions, should have submitted the lesser offense of common law robbery to the jury under proper instructions. *State v. Covington, supra; State v. Keller, supra; State v. Rogers, supra;* 61 A.L.R. 2d 996.

We do not deem it necessary to discuss the other assignments of error since there must be a new trial for error in the charge.

New trial.

STATE OF NORTH CAROLINA v. HAROLD W. JONES, ALIAS CURTIS PROULX

No. 54

(Filed 10 February 1971)

1. **Criminal Law § 75— admissibility of confession — test of voluntariness**

The test of admissibility of a confession is whether the statements made by the defendant were in fact voluntarily and understandingly made.

2. **Criminal Law § 75— subsequent interrogation of defendant who had indicated desire to remain silent**

The rule in *Miranda v. Arizona* that the in-custody interrogation of a defendant must cease when the defendant indicates that he wishes to remain silent does not bar the subsequent interrogation of a defendant who, after having been fully advised of his constitutional rights, invites the police officer to resume talks with him.

3. **Criminal Law § 34— testimony that defendant was AWOL — harmless effect**

The admission of defendant's statement, made at the time of his arrest for kidnapping and conspiracy to murder, that he was absent without leave from his military unit was not prejudicial to defendant on the trial for the two felonies, where, among other things, defendant admitted on cross-examination that he was AWOL at the time of the arrest.

APPEAL by defendant from *McKinnon, J.*, 6 July 1970 Regular Session of CUMBERLAND Superior Court. This case was docketed and argued at the Fall Term 1970 as No. 90.

James Ingland, Guy P. Webb, Terry Ingland, Barry T. Sheely, and defendant were charged in a bill of indictment with conspiracy to commit murder. In a separate bill of indictment James Ingland, Guy P. Webb and defendant were charged with kidnapping. The charges were consolidated for trial. This appeal relates only to the trial of Harold W. Jones, alias Curtis Proulx. Defendant through his counsel, William S. Geimer, Assistant Public Defender, Twelfth Judicial District, entered pleas of not guilty to both charges.

The evidence pertinent to decision in this case, in substance, is as follows:

Richard Fortner testified that he was invited to a house on Maiden Lane in Fayetteville by James and Terry Ingland.

After he arrived, he was sharpening his hunting knife, and the defendant obtained the knife on the pretext of showing him how to sharpen it. Defendant pointed the knife at him, another person in the room produced a knife, and still another individual laid a shotgun across his lap and pointed it at Fortner, saying, "You are a dead man." He was thereupon questioned about being a police informer. He was escorted from the house, walking between James Ingland, who carried a gun, and defendant, who carried a knife. Fortner was then placed in an automobile and carried to a wooded area on the outskirts of Fayetteville, where his hands were tied behind his back, and he was forced to lie face down on the ground. Sharp sticks were placed on either side of his neck so he was unable to move. Defendant remained on guard over Fortner until Terry Ingland and a man named "Spanky" returned about four and one-half hours later. When "Spanky" stated that Fortner was not the informer, he was released. Fortner called the Sheriff's Department shortly thereafter, and about three days later he was called to the Sheriff's Department where he identified defendant.

Detective Richard E. Washburn testified that he arrested defendant and brought him to the Sheriff's Department where he was identified by Fortner. Washburn was then questioned about statements made to him by defendant while defendant was in custody. Upon objection by defendant's counsel, the trial judge excused the jury and conducted a *voir dire* hearing. The officer testified that defendant had been advised of his rights upon his arrest on 5 May, at which time he stated, " . . . he would rather not talk about it right now." In response to a note by defendant, Washburn talked with defendant in the jail on 6 May, at which time the officer again advised him of his right to remain silent and his right to counsel as required by the Miranda decision. Defendant at that time told Washburn that his name was not Curtis Proulx, but that he was an AWOL soldier named Harold W. Jones. Defendant told him he was present at the incident on 30 April, but no details were then given because Washburn was called out on business. In response to notes from the jail, the officer again interviewed defendant on 7 May. Washburn stated that he took notes at all meetings with defendant and caused a statement to be typed which defendant signed before a magistrate on 7 May. Before defendant signed this statement on 7 May, both the officer and the magistrate advised defendant of his rights. He testified

that the waiver form which he signed on 6 May 1970 did not contain a section for an individual to indicate that he does not wish to make a statement. Washburn also stated that he made no promise or threats to defendant, but admitted that he told defendant that James Ingland had accused defendant of being a sadist. He told defendant about James Ingland's accusation two or three days after defendant had signed the statement. The witness stated that defendant did not request an attorney.

Defendant testified on *voir dire* and said that when he was taken into custody and carried to the Sheriff's Department he made a request for a lawyer, and that Detective Washburn in effect said that he had been through this stuff before and defendant had better start talking. Shortly thereafter, defendant was identified by Richard Fortner and taken to the jail. On the following day he made a request to see Detective Washburn in order to clear the matter of his proper name, and before he went into further details, the officer was called away. On the following day he made a statement to Detective Washburn and later, when a written statement was presented to him, he read the top part of it and it looked all right. He testified he did not think that he had read the whole statement, but at the request of Detective Washburn he signed at the bottom. Defendant further testified that at the meeting on 6 May at which he had requested to clear the matter of his name, Detective Washburn held up a piece of paper and indicated that it was a statement from others charged in the incident which put the blame on defendant and called him a sadist; that the reason he made a statement was to tell his side. He admitted that he had signed a waiver of rights form and a written statement.

At the conclusion of the *voir dire* the trial judge found facts, entered conclusions of law, and ruled as follows:

> "That after the defendant was arrested upon the charge, he was warned of his right to remain silent; that any statement that he made could be used against him; that he had a right to counsel; that he had a right to have counsel appointed by the Court if indigent, and that he did not have to make a statement until counsel was appointed, and that if he began making a statement, he could stop answering questions at any time; that the defendant shortly after his arrest, stated that he had no statement to

make. Thereafter the defendant sent a message to Mr. Washburn that he did desire to make some statement to him and at that time made a statement, giving his correct name, explaining his use of another name and thereafter made a statement to Mr. Washburn, relating to the incident in question. That sometime later Mr. Washburn reduced to writing by typewriting, statement made by the defendant and the defendant at that time signed the waiver of rights and signed the statement in question before a magistrate. That no threats or violence or promise or coercion was offered by Mr. Washburn towards the defendant; that no promise of reward or leniency was made; and that such statements as were made by the defendant to Mr. Washburn were made voluntarily and freely, after warning as to his constitutional rights as to silence and as to an attorney. The Court finds the statement made by the defendant to be admissible in evidence and overruled the objection."

Thereafter Detective Washburn, over objection, testified before the jury to the statement given by defendant, which statement in effect corroborated the testimony of Richard Fortner. Included in this statement was testimony by Detective Washburn that defendant had stated to him that he was an AWOL soldier and had borrowed the identification and hospital release form from a man named Curtis Proulx before coming to Fayetteville.

Defendant testified before the jury to the effect that he was present on 30 April on Maiden Lane and also in a wooded area near Fayetteville; that Richard Fortner had voluntarily entered the automobile in search of one Wayne Eschelman, and that Richard Fortner agreed to stay with defendant in the woods while the others continued the search. He testified further that Richard Fortner became hysterical and he tied him up so he wouldn't run away. He stated that he never agreed to kill anyone or to abduct Richard Fortner from Maiden Lane.

The jury returned verdicts of guilty as charged on both charges. Defendant was sentenced for the term of not less than ten years nor more than fifteen years in the State's Prison on the charge of kidnapping, and upon the charge of conspiracy to commit murder defendant was sentenced to ten years in the State's Prison, to run concurrently with the term imposed in

the kidnapping charge. Defendant appealed from judgments entered. This case is before this Court pursuant to our general referral order effective 1 August 1970.

Attorney General Morgan, Assistant Attorney General Webb, and Assistant Attorney General Harris for the State.

William S. Geimer, Assistant Public Defender, 12th Judicial District for defendant.

BRANCH, Justice.

Defendant contends that the trial judge erred in admitting into evidence statements allegedly made by defendant to Detective Richard E. Washburn.

[1] The test of admissibility of a confession is whether the statements made by the defendant were in fact voluntary and understandingly made. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. In the case of *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561, Sharp, Justice, succinctly stated the procedure and rules concerning custodial confessions, as follows:

> " . . . 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."

Here, the trial judge properly excused the jury and in the jury's absence heard evidence from the State and defendant upon the question of the voluntariness of defendant's confession. The court made full findings of fact, which were incorporated into the record. The record contains substantial competent evidence supporting the trial court's findings, and the findings

support the conclusion, "That such statements as were made by the defendant to Mr. Washburn were made voluntarily and freely. . . . "

[2] We are aware of the holding in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602, that if an individual in custody indicates in any manner, during the interrogation, that he wishes to remain silent, the interrogation must cease. This rule is not applicable to the facts of this case. True, upon being arrested defendant stated that "he would rather not talk about it right now." The record does not show that the officers attempted further questioning at that time. The statement made by defendant when he was arrested did not bar further questions, because defendant, after having been fully advised of his constitutional rights, not only freely consented to but invited the police officer to resume talks with him. See *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511.

The court correctly overruled defendant's objection and admitted statements made by defendant to Detective Washburn into evidence.

[3] Defendant contends that the trial judge committed prejudicial error by refusing to suppress that portion of defendant's statements containing evidence of uncharged misconduct. The uncharged misconduct referred to is indicated by the statement made by defendant to Detective Washburn that at the time of defendant's arrest he was absent without leave from his military unit without proper authority. Such action is a violation of the Uniform Code of Military Justice, 10 U.S.C.A. § 886.

It is the general rule that on a prosecution for a particular crime, evidence in chief which shows that defendant has committed other distinct, independent offenses is not admissible. *State v. Myers,* 240 N.C. 462, 82 S.E. 2d 213; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. This rule is subject to many exceptions. *State v. McClain, supra,* and *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232.

In Stansbury, North Carolina Evidence, 2d Ed. § 91, p. 209, we find the following:

> ". . . It is submitted, however, that the rule is in fact a simple one which, when accurately stated, is subject to no exceptions: Evidence of other offenses is inadmissible

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

In instant case defendant was charged in the bill of indictment as "Curtis Proulx, alias Harold Jones." The evidence under attack is relevant to show to the jury the reasons for the use of the alias and to correctly identify defendant by name. It is clear that the evidence was not offered to show the character of defendant or his disposition to commit an offense of the nature of the one charged. Defendant made no request for limiting instructions on this point. Further, we are unable to perceive prejudicial error in the admission of testimony showing commission of an act which might result in the limited punishment which can be imposed by a summary court martial, or by "company punishment," when other conduct admitted in the same statement tends to show defendant's participation in two distinct felonies. Prejudicial error is further negated by defendant's own statement on cross-examination that he was AWOL at the time of his arrest. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481.

The trial judge did not commit error in admitting this portion of defendant's statement.

No error.

Stegall v. Housing Authority

WERLEY P. STEGALL AND WIFE, CAROLYN H. STEGALL; ALDEN R. HOGAN AND WIFE, MARY E. HOGAN, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS v. HOUSING AUTHORITY OF THE CITY OF CHARLOTTE, N. C., A PUBLIC BODY CORPORATE; THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION; SUMMERS DEVELOPMENT COMPANY, A NORTH CAROLINA CORPORATION, DEFENDANTS AND VIRGIL R. WILLIAMS, INTERVENING DEFENDANT

No. 48

(Filed 10 February 1971)

1. **Deeds § 19— restrictive covenants — benefit to subsequent purchasers**

A grantee of land cannot benefit from covenants contained in the deed to his vendor except such as attach to, and run with, the land.

2. **Deeds § 19— enforcement of personal covenant**

A restriction which is merely a personal covenant with the grantor does not run with the land and can be enforced by him only.

3. **Deeds § 19— restrictive covenants — personal obligation or covenant running with land**

Whether restrictions imposed upon land by a grantor create a personal obligation or impose a servitude upon the land enforceable by subsequent purchasers from his grantee is determined by the intention of the parties at the time the deed containing the restriction was delivered; this intention must be ascertained from the deed itself and may not be established by parol, but when the language used is ambiguous it is proper to consider the situation of the parties and the circumstances surrounding their transaction.

4. **Deeds § 19— restrictive covenants — construction**

A deed containing a restrictive covenant must be construed most favorably to the grantee, and all doubts and ambiguities are resolved in favor of the unrestricted use of the property.

5. **Deeds § 19— restrictive covenants — burden of showing that covenants run with land**

Restrictions in a deed will be regarded as for the personal benefit of the grantor unless a contrary intention appears, and the burden of showing that they constitute covenants running with the land is upon the party claiming the benefit of the restrictions.

6. **Deeds § 19— restrictive covenants — whether personal to grantor**

In the absence of a general plan of subdivision, development and sales subject to uniform restrictions, restrictions limiting the use of a portion of the property sold are deemed to be personal to the grantor and for the benefit of land retained.

7. **Deeds § 19— restrictive covenants — conveyance of all land affected thereby**

Where a deed containing a covenant restricting the use of land embraces and conveys all the land affected thereby, such covenant stands only as a personal covenant between the parties.

8. **Deeds § 19— conveyance of all interest in land — imposition of covenant running with land**

Where grantors conveyed all their interest in a tract of land, they had no right to limit its free use by imposing upon it a covenant running with the land except for the benefit of other lands then owned by them.

9. **Deeds § 19— enforcement of restrictive covenant — beneficial interest**

One who seeks to enforce a restrictive covenant must show that he is the owner of or has an interest in the premises in favor of which the benefit or privilege has been created.

10. **Deeds § 19— restrictive covenant — enforcement by grantor — failure to show ownership of property benefited by restriction — enforcement by purchaser from grantee**

The grantor of a tract of land could not enforce a covenant in the grantee's deed restricting the use of "any one lot" to "one single-family residence" where the record fails to show ownership by the grantor of any ascertainable property capable of being benefited by the restriction, testimony by the grantor that he owned property "in the area" when the restriction was inserted in the deed being insufficient to show the requisite ownership; *a fortiorari*, purchasers from the grantee could not enforce the covenant against the grantee.

11. **Deeds § 20— subdivision restrictive covenants — enforcement by lot owner**

Where all lots comprising a subdivision are subject to identical restrictions which the developer, pursuant to a general plan of development, specifically imposed upon them individually by numbers, the owner of any lot in the subdivision may enforce such restrictions, for they are covenants running with the land.

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

APPEAL by plaintiffs from *Fountain, J.*, 8 June 1970 Civil Session of MECKLENBURG, certified pursuant to G.S. 7A-31(a) for review by the Supreme Court before determination in the Court of Appeals. This appeal was docketed and argued in the Supreme Court as Case No. 67 at the Fall Term 1970.

Action for a declaratory judgment and injunction. Plaintiffs, who own lots fronting on Wyanoke Avenue in the City of Charlotte, brought this action under G.S. 1A-1, Rule 23(a) in behalf of themselves and 20 other such lot owners. They seek to have the adjacent property of defendant Williams, an 8.38-acre tract, which he purchased from Garrison, declared subject to the restriction "that only one single-family residence may be erected on any one lot."

In brief summary the complaint alleges: (1) The deed from Garrison to Williams imposed the foregoing restriction. (2) Williams has granted to defendant Summers Development Company an option to purchase the 8.38 acres for the construction thereon of 50 or more multi-family units. (3) Defendants City of Charlotte and Housing Authority of the City of Charlotte have jointly announced the proposed construction of a 54 unit multi-family duplex development on the tract. Plaintiffs pray that each defendant be enjoined from using "the restricted property" for any purpose other than single-family residences.

Plaintiffs did not make Williams a party to the action. However, upon his motion the court allowed him to intervene as a party-defendant. Answering, each defendant alleged that the covenants in the deed from Garrison to Williams were personal to Garrison; that they were not inserted pursuant to any general plan of development; and that plaintiffs were not entitled to enforce the covenants. Defendants City of Charlotte and Housing Authority denied that either had any present or contingent interest in "the subject land."

The case was tried by Judge Fountain without a jury. The record evidence and testimony disclosed the following:

By deed recorded 8 January 1945, F. B. Garrison and wife acquired a tract of land in Charlotte Township, Mecklenburg County, containing 59.77 acres, more or less. This deed subjected the land conveyed to no restrictive covenants. Thereafter, the Garrisons made three conveyances from this tract: (1) In February 1946, by a deed which imposed no restrictions, they conveyed four acres, more or less, to Queen City Lumber and Supply Company, which has since used the property as a lumber yard and commercial sales area. (2) In June 1949 they conveyed to J. E. Jones, Russell Cannaday, and defendant Williams, a partnership, 37 acres, more or less. This deed likewise contained no restrictive covenants. (3) In July 1958, 18 acres, more or less, were conveyed to defendant Williams. It is 8.38 acres of this tract which is the subject of this action.

In the deed from Garrison to Williams, between the description of the 18 acres conveyed and the habendum clause, appears the following:

"The above land is conveyed subject to the following restrictions:

"1. That it shall be used for residential purposes only.

"2. That only one single-family residence may be erected on any one lot."

By the three conveyances referred to above, F. B. Garrison and wife disposed of the entire 59.77-acre tract except for a lot with a frontage of about 210 feet on the north side of Bascon Street, a depth of approximately 532 feet, and a rear boundary of about 100 feet. This lot is subject to no restrictive covenants. It is, however traversed by 100 feet of the 200-foot right-of-way of the Seaboard Airline Railroad, and is unsuitable for building. Wyanoke Avenue dead-ends in Bascon Street opposite this lot. Garrison owns no rental property within the 59.77-acre tract which he formerly owned. He does, however, own rental property "somewhere in the area."

By a map recorded 19 October 1959, defendant Williams subdivided the northern portion of the 18-acre tract into lots fronting on each side of Wyanoke Avenue. Those lots on the east side of Wyanoke were plotted as lots 37-40 in Block 6 of Walnut Hills; those on the west side, as lots 1-6 in Block 8. On the same day, Williams and his partner, Russell Cannaday, recorded an agreement whereby these lots were subjected to restrictive covenants "running with the land" and "binding on all parties and all persons claiming under them for a period of twenty-five (25) years. . . . " After that time the covenants would be automatically extended for successive periods of ten (10) years unless a majority of those then owning lots agreed by recorded instrument to change the covenants in whole or in part. These covenants, *inter alia,* restricted each lot to residential purposes, and forbade the construction of any dwelling containing less than 864 square feet of living area and costing less than $8,000.00 based on cost levels prevailing as of 19 October 1959.

By map registered 11 August 1960, Williams and Cannaday subdivided and added to Walnut Hills lots 7-11 of Block 8 and lots 32-36 of Block 6. Restrictions substantially the same as those imposed upon the first subdivision were imposed upon the second.

That portion of the 18-acre tract not covered by the subdivision maps of 19 October 1959 and 11 August 1960—the 8.38 acres in suit—is still owned by defendant Williams. It has never been subdivided, and Williams has imposed no restrictions on it. On 2 April 1970 Williams granted to defendant Summers Development Company an option to purchase this remaining land for the sum of $70,000.00. The option was expressly made subject to "existing zoning of R-6MF" (multi-family zoning), "water and sewerage available at the site," and to "Charlotte Housing Authority approval of the site for the construction of fifty (50) or more multi-family units."

The transcript contains no evidence that either the City of Charlotte or the Housing Authority of the City of Charlotte has any legal or equitable interest in the 8-acre tract, which is the subject of this action.

Without objection, Mr. Garrison testified that at the time he conveyed the 18.38-acre tract to Williams "what he had in mind was protecting his rental property that he had somewhere in the area." Also without objection, plaintiff Stegall testified that at the time he purchased his lot No. 7 he asked Mr. Williams what he was going to do with the 8.38-acre tract of land at the foot of Wyanoke Avenue, and Williams told him that he was going to build single-family dwellings.

Judge Fountain found facts in accordance with the foregoing evidence and concluded as a matter of law that restriction No. 2 in the deed from Garrison to Williams "is vague and creates at most a personal covenant enforceable only by defendant Williams' immediate grantors, F. B. Garrison and his wife, upon a suit by them and upon a proper showing of benefit to them to be derived from the enforcement of the said clause." Accordingly, Judge Fountain decreed that clause No. 2 is invalid and unenforceable by plaintiffs and that they are not entitled to injunctive relief. Plaintiffs excepted and appealed.

Whitfield, McNeely and Echols for plaintiff appellants.

James & Williams by Samuel S. Williams and William K. Diehl, Jr., for Virgil R. Williams, intervening defendant appellee.

Fleming, Robinson & Bradshaw, PA by Robert C. Sink for Housing Authority of the City of Charlotte, defendant appellee.

W. A. Watts for the City of Charlotte, defendant appellee.

Sanders, Walker & London for Summers Development Company, defendant appellee.

SHARP, Justice.

The question presented is whether plaintiffs, who own lots in the northern half of the 18-acre tract conveyed by Garrison to Williams, may enjoin the erection of multi-family units on the southern half of the tract by virtue of the restriction in Williams' deed "that only one single-family residence may be erected on any one lot." Plaintiffs, as grantees of Williams, contend that the restriction is a covenant running with the land which is enforceable by any subsequent grantee of Williams. Defendants contend (1) that it is a personal covenant between Williams and Garrison, not intended for plaintiffs' benefit, and (2) that the restriction is void for vagueness.

[1-4] A grantee of land cannot benefit from covenants contained in the deed to his vendor "except such as attach to, and run with, the land." 20 Am. Jur. 2d *Covenants, Conditions, Etc.* §§ 20, 292 (1965). A restriction which is merely a personal covenant with the grantor does not run with the land and can be enforced by him only. *McCotter v. Barnes,* 247 N.C. 480, 101 S.E. 2d 330; *Julian v. Lawton,* 240 N.C. 436, 82 S.E. 2d 210; 7 Thompson, Real Property § 3168 (1962 Replacement). Whether restrictions imposed upon land by a grantor create a personal obligation or impose a servitude upon the land enforceable by subsequent purchasers from his grantee is determined by the intention of the parties at the time the deed containing the restriction was delivered. Ordinarily this intention must be ascertained from the deed itself, but when the language used is ambiguous it is proper to consider the situation of the parties and the circumstances surrounding their transaction. However, this intention may not be established by parol. Neither the testimony nor the declarations of a party is competent to prove intent. The instrument must be construed most favorably to the grantee, and all doubts and ambiguities are resolved in favor of the unrestricted use of the property. The foregoing rules of construction have been often stated. *See Reed v. Elmore,* 246 N.C. 221, 98 S.E. 2d 360, and cases cited therein; *Cummings v. Dorsam, Inc.,* 273 N.C. 28, 159 S.E. 2d 513; *Long v. Branham,* 271 N.C. 264, 156 S.E. 2d 235; *Lamica v. Gerdes,* 270 N.C. 85,

153 S.E. 2d 814; *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892; *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697.

In July 1958, at the time Garrison conveyed the 18 acres by metes and bounds to Williams, no part of the 18 acres had been subdivided into building lots, and there was in existence no map or general plan of development for that tract. The first map of Walnut Hills, Williams' subdivision of the northern portion of the tract, was dated, approved by the Charlotte-Mecklenburg Planning Commission, and recorded on 19 October 1959. From 8 January 1945, the date the Garrisons acquired the 59.77-acre tract from which they sold the 18 acres to Williams, they never subdivided the property into lots or made any plans for developing it themselves. It was divided into three separate tracts by the three sales above noted.

[5-7] Restrictions in a deed will be regarded as for the personal benefit of the grantor unless a contrary intention appears, and the burden of showing that they constitute covenants running with the land is upon the party claiming the benefit of the restriction. 26 C.J.S. *Deeds* § 167(3) (1956); 7 Thompson, Real Property § 3152 (1962 Replacement). "These principles apply with especial force to persons who (as here) are not parties to the instrument containing the restriction." *Stevenson v. Spivey,* 132 Va. 115, 120, 110 S.E. 367, 368, 21 A.L.R. 1276, 1278. In the absence of a general plan of subdivision, development and sales subject to uniform restrictions, restrictions limiting the use of a portion of the property sold are deemed to be personal to the grantor and for the benefit of land retained. *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344. Furthermore, "where . . . a deed containing a covenant restricting the use of land embraces and conveys all the land affected thereby, such covenant stands only as a personal covenant between the parties." *Craven County v. Trust Co.,* 237 N.C. 502, 516-517, 75 S.E. 2d 620, 631.

[8] For all practical purposes, after the Garrisons conveyed the 18 acres to Williams, they had disposed of the entire 59.77-acre tract. The lot retained, which is less than an acre, is useless because encumbered by the railroad right-of-way. Indeed, Garrison testified that he would be glad to give it to the City. Thus, the restriction which the Garrisons inserted in their deed to Williams could not have been for the benefit of any part of the 59.77-acre tract. Having parted with all their interest in

the 18 acres the Garrisons had no right to limit its free use by imposing upon it a covenant running with the land except for the benefit of other lands then owned by them. *Craven County v. Trust Co., supra.* "[T]he existence of the dominant estate is ordinarily essential to the validity of the servitude granted, and the destruction of the dominant estate releases the servitude." *Welitoff v. Kohl,* 105 N.J. E. 181, 188, 147 Atl. 390, 393, 66 A.L.R. 1317, 1323. "A restrictive covenant can be enforced only by the owner of some part of the dominant land for the benefit of which the covenant was made. It cannot be enforced by the grantor who created the covenant, nor by his heirs, after he or they have parted with all interest in any land benefited by the covenant." 7 Thompson, Real Property § 3172 (1962 Replacement). *Accord,* 26 C.J.S. *Deeds* § 162(3) at 1094 (1956); *Kent v. Koch,* 333 P. 2d 411 (Dist. Ct. App. Cal.). *See* 20 Am. Jur. 2d *Covenants, Conditions, Etc.* § 290 (1968); *Welitoff v. Kohl, supra.*

[9, 10] One who seeks to enforce a restrictive covenant "must show that he is the owner of or has an interest in the premises in favor of which the benefit or privilege has been created; otherwise, he has no interest in the covenant and is a mere intruder." *Los Angeles University v. Swarth,* 107 F. 798, 804 (C.C.S.D. Cal.). Garrison testified that at the time the restriction in question was inserted in Williams' deed he owned property "in the area." The record, however, does not disclose its location or distance from the 18-acre tract. Unless it was close enough to the 18-acre tract to be adversely affected by Williams' disregard of the covenant restricting the use of "any one lot" to "one single-family residence," the Garrisons themselves could not enforce the covenant.

The meager and imprecise language by which the Garrisons attempted to impose restrictions upon Williams' 18 acres makes it imposible to ascertain their real purpose. If the "one-family lot" restriction was inserted for the benefit of other lands retained by the Garrisons it would have been very easy for them to have specified the land. Furthermore, "[T]he word *lot* has no definite significance with reference to dimensions, and, as an indication of quantity, the term is of the vaguest import and contains no legal or other meaning in this respect. How much and what it includes must be determined by the facts and circumstances of each particular case. A lot may be large

or it may be small but the term is most frequently used to describe a small parcel than a large parcel." 54 C.J.S. at 840 (1948). Had Williams extended Wyanoke Avenue through the 8.38-acre tract and divided it into 30- x 50-foot lots on which he had erected a series of one-family townhouses with party walls, could Garrison have successfully contended that he had violated the restriction against multiple-unit dwellings?

[10] Be that as it may, on this record the Garrisons own "no ascertainable property capable of being benefited" by the restrictions in suit. *See* Re Union of London & Smith's Bank Limited's Conveyance, 1 Ch. 611, 89 A.L.R. 797. If the Garrisons, as Williams' grantors, could not enforce the restriction against Williams, *a fortiorari,* plaintiffs, as the grantee of Williams, could not enforce it against Williams.

[11] Plaintiffs Stegall and Hogan own two of the 21 lots comprising the Walnut Hills subdivision. All of these lots are subject to identical restrictions which Williams, pursuant to a general plan of development, specifically imposed upon them individually by number. The owner of any one of these 21 lots may enforce these restrictions against any other owner, for they are covenants running with the land. *Tull v. Doctors Building, Inc.*, 255 N.C. 23, 120 S.E. 2d 817; *Bailey v. Jackson,* 191 N.C. 61, 131 S.E. 567. The adjoining 8.38-acre tract in suit, however, was not made a part of Walnut Hills, and Williams has not subjected it to these restrictions. The ruling of the court below that "the purported restriction contained in clause numbered 2" in the deed from Garrison to Williams was not a covenant running with the 18-acre tract therein conveyed and that plaintiffs have no right to enforce it is correct. The judgment of Fountain, J., is

Affirmed.

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

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BRYANT v. KELLY

No. 3 PC.

Case below: 10 N.C. App. 208.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 3 March 1971.

CREASMAN v. SAVINGS & LOAN ASSOC.

No. 63 PC.

Case below: 10 N.C. App. 182.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 3 March 1971.

GORE v. GEORGE J. BALL, INC.

No. 8 PC.

Case below: 10 N.C. App. 310.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 3 March 1971.

LATHAM v. TAYLOR

No. 4 PC.

Case below: 10 N.C. App. 268.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 March 1971.

SLADE v. BOARD OF EDUCATION

No. 11 PC.

Case below: 10 N.C. App. 287.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 March 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. CHEEK

No. 5 PC.

Case below: 10 N.C. App. 273.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 March 1971.

STATE v. MURPHY

No. 10 PC.

Case below: 10 N.C. App. 11.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 March 1971.

STATE v. SHORE

No. 13 PC.

Case below: 10 N.C. App. 75.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 March 1971.

STRICKLAND v. POWELL

No. 1 PC.

Case below: 10 N.C. App. 225.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 3 March 1971.

THOMAS H. SYKES, ALBERT T. PEARSON AND JIMMY W. PATTON, AS REPRESENTATIVES OF CITIZENS OF CHARLOTTE, NORTH CAROLINA WHO OPPOSE APPROPRIATION OF THE PROCEEDS OF DECEMBER 12, 1969 BOND REFERENDUM IN OTHER THAN MANNER AUTHORIZED BY THE VOTERS v. JOHN M. BELK, MAYOR OF CHARLOTTE, NORTH CAROLINA AND FRED ALEXANDER, JOE D. WITHROW, JERRY TUTTLE, MILTON SHORT, JIM WHITTINGTON, S. R. JORDAN AND JOHN THROWER, MEMBERS OF CHARLOTTE CITY COUNCIL

No. 52

(Filed 10 March 1971)

1. **Taxation § 6— bond issue for municipal auditorium — necessity for vote**

The construction, acquisition and operation of an auditorium by a municipality is not a necessary expense, and the voters of the municipality must therefore approve a bond issue for such purpose. N. C. Constitution, Art. VII, § 6.

2. **Estoppel § 5; Municipal Corporations § 5— estoppel against municipality — governmental functions**

The doctrine of estoppel generally will not be applied against a municipality in its governmental, public or sovereign capacity.

3. **Municipal Corporations § 5— operation of civic center —choice of site — proprietary and governmental functions**

While the operation of a civic center is a proprietary function, the choice of the site for the center by the city council is a public or governmental function.

4. **Estoppel § 4— prejudicial misleading**

An estoppel involves a prejudicial misleading.

5. **Elections § 8; Municipal Corporations § 39— municipal bond election — presumption of validity**

Every reasonable presumption will be indulged in favor of the validity of municipal bond elections, and the courts will uphold their validity unless clear grounds are shown for invalidating them.

6. **Municipal Corporations § 4; Public Officers § 8— exercise of discretionary powers — judicial review**

The courts will not interfere with the exercise of discretionary powers of a municipal corporation unless its actions are so unreasonable and arbitrary as to amount to an abuse of discretion.

7. **Elections § 10; Municipal Corporations § 39— civic center bond election — campaign misrepresentations as to site of center**

Misrepresentations as to the site of a proposed municipal civic center made in public speeches and through the news media by the mayor, other city officials and members of a Citizens Bond Information Committee appointed by the mayor did not vitiate a special election in which voters approved the issuance of bonds for the civic center,

where (1) the purpose for the bond issue was to revitalize the downtown area, with the civic center becoming a catalyst for other projects, and the site finally chosen by the city council was only four blocks from that advertised in the bond election campaign, there being no substantial deviation from the purpose for which the bonds were proposed, and (2) the record does not show and the facts do not require the appellate court to infer that enough voters relied on the misrepresentations to change the election result.

8. **Jury § 1— civil action — right to jury trial**

Every person has the right to demand a jury trial of issues of fact arising in all controversies at law respecting property. N. C. Constitution, Art. I, § 19.

9. **Jury § 1; Rules of Civil Procedure § 38; Trial § 56— civil action — waiver of jury trial**

A party may waive his right to a jury trial (1) by failing to appear at the trial, (2) by written consent filed with the clerk, (3) by oral consent entered in the minutes of the court, or (4) by failing to demand a jury trial pursuant to G.S. 1A-1, Rule 38(b). N. C. Constitution, Art. IV, § 12.

10. **Jury § 1; Trial § 56— denial of motion for jury trial — waiver of jury trial — stipulations and judicial admissions**

The trial court did not err in the denial of plaintiffs' motion for a jury trial where stipulations filed in the cause with the clerk show that the parties waived a jury trial, and the parties had stipulated and judicially admitted facts sufficient to support a judgment determining their rights under the applicable law at the time the trial court denied the motion for a jury trial and entered final judgment.

11. **Pleadings § 32; Rules of Civil Procedure § 15— denial of motion to amend complaint — lack of prejudice**

Plaintiffs were not prejudiced by the court's refusal to allow an amendment to the complaint relating to their right to bring the action, where the judgment was not based on plaintiffs' standing to sue and defendants abandoned any contention that plaintiffs lacked standing to sue.

12. **Appeal and Error § 28; Trial § 58— failure to find immaterial facts**

The trial court did not err in refusing to make further findings of fact which are immaterial and which would not call for a different conclusion.

APPEAL by plaintiffs from *Bryson, J.*, at 27 August 1970 Session of MECKLENBURG Superior Court. This case was docketed and argued as Case No. 82 at the Fall Term 1970.

This is a civil action seeking injunctive relief. The record reveals these pertinent facts:

On 17 December 1966 a special bond election was held in the City of Charlotte, North Carolina. The ballot presented six questions concerning issuance of bonds for various municipal projects. Question No. 2 on the ballot was whether the City could issue bonds not exceeding $2,500,000 for the acquisition of land by the City for the construction of public facilities, including the acquisition of land from the Redevelopment Commission of Charlotte. Pre-election campaigns gave the voters detailed information with regard to plans for a civic center, including press releases and public statements that the center would be located at the corner of College and Trade Streets, known as the "Trade Street" site. Neither the ballot, ordinance, nor any official action mentioned the location of the civic center. The voters rejected this proposition.

On 14 October 1969 the Charlotte City Council, after passing resolutions for the submission of nine bond issues to the voters of Charlotte, passed a resolution which provided that the questions would be submitted at a special bond election to be held on Friday, 12 December 1969. Item No. I on the ballot read as follows:

1. Shall an ordinance passed on October 13, 1969, authorizing the City of Charlotte, North Carolina, to contract a debt, in addition to any and all other debt which said City may now or hereafter have power or authority to contract, and in evidence thereof to issue

YES ( ) PUBLIC BUILDING BONDS

in an aggregate principal amount not exceeding $10,700,000 for the purpose of providing funds with any other available funds, for constructing a

NO ( ) building or buildings to be used as a civic center, including, but without limitation, convention, exhibition, auditorium, meeting room, parking and other appurtenant facilities, and the acquisition of necessary land and rights of way, and authorizing the levy and collection of a sufficient tax for the payment of the principal of and the interest on said bonds, be approved?

We quote the ordinance which authorized the debt for a civic center, subject to the approval of the voters:

BE IT ORDAINED by the City Council of the City of Charlotte:

Section 1. That, pursuant to The Municipal Finance Act, 1921, as amended, the City of Charlotte, North Carolina, is hereby authorized to contract a debt, in addition to any and all other debt which said City may now or hereafter have power or authority to contract, and in evidence thereof to issue Public Building Bonds in an aggregate principal amount not exceeding $10,700,000 for the purpose of providing funds, with any other available funds, for constructing a building or buildings to be used as a civic center, including, but without limitation, convention, exhibition, auditorium, meeting room, parking and other appurtenance facilities, and the acquisition of necessary land and rights of way.

Sec. 2. That a tax sufficient to pay the principal of and the interest on said bonds shall be annually levied and collected.

Sec. 3. That a statement of the debt of the City has been filed with the clerk and is open to public inspection.

Sec. 4. That this ordinance shall take effect when approved by the voters of the City at an election as provided in said Act.

Included in the nine questions submitted to the voters was the question whether bonds should be issued in an amount not to exceed $5,025,000 to provide for widening and extending, constructing or reconstructing street surfaces. Another of the questions presented was whether the voters would approve the issuance of $1,250,000 in bonds for acquisition of land for streets and highways.

Shortly after the bond election was called, Mayor John M. Belk made a public speech, which was carried in the news media, in which he announced the appointment of George H. Broadrick as Chairman of the Citizens Bond Information Committee. In this speech the Mayor pledged that the Committee would be given complete and factual information. The press releases of this Committee and the information furnished to the Committee are voluminous. The information relative to the civic center, in brief summary, shows that the civic center was pro-

jected to be the focal point for a far-reaching redevelopment of the Charlotte downtown area. Among other things, the civic center was pictured as making Charlotte a major convention city. Information was given to the voters that private investors were ready to invest between 54 and 66 million dollars in the downtown area, contingent on the erection of the civic center. It was contended that the private investment would revitalize the downtown area and would increase the property tax base by an estimated $529,000 annually. The information released through the news media and in public speeches placed the site of the civic center on the northwest corner of the intersection of Brevard and Second Streets, called the "Brevard Street" site. The plans for the center showed a ground floor capacity of at least 170,000 square feet and a parking lot providing space for 1200 cars, which purportedly would generate $40,000 annual income. In connection with the erection of the civic center, information was given that street improvements were to be made in the immediate area of the Brevard Street site to accommodate traffic generated by the civic center.

The record shows that no one was ever given specific information that the Charlotte City Council had formally and officially selected the site upon which the civic center would be built. Neither the ballot, the ordinance, nor any other officially adopted document, mentioned the site of the civic center. There was no official action on the part of the City Council concerning the site of the civic center prior to the election.

On 12 December 1969, the voters approved all nine of the proposals submitted. In January 1970 a committee was selected by the Charlotte City Council to implement the building of the civic center, and on 1 April 1970 the City sold bonds in the amount of two million dollars for the building of the civic center. On 10 April 1970 the committee selected to implement the building of the civic center reported that the "Brevard Street" site was not suitable because to build on that site would necessitate the blocking off of a major traffic artery, or the erection of a civic center 30 feet above ground level on stilts, so as to allow traffic to pass underneath. The committee's findings were that this added expense would make the building cost exceed the amount authorized in the bond referendum. The committee thereupon recommended that the civic center be placed at the "Trade Street" site, the same site which had

been unofficially suggested when the bond referendum was rejected in 1966. The two sites are approximately four blocks apart. On 13 April 1970 the City Council, after hearing strenuous objections to the change in location of the civic center, approved the recommendation that the center be located at the "Trade Street" site.

On 26 May 1970 plaintiffs filed suit seeking to enjoin the expenditure of funds on a civic center which would be located at the "Trade Street" site. Plaintiffs contend primarily that "the taxpayers of Charlotte, North Carolina, did not give a blanket approval to the city administration to spend 10.7 million dollars for a civic center, but that the voters and taxpayers of Charlotte, North Carolina, gave authority to the city administration to sell bonds within the limits specified in the bond referendum with the funds so raised to be used in the express manner and for the express purposes [for which] the city administration represented these funds would be used . . . . " The allegations in the complaint candidly state that "[T]here is no allegation and no implication in this Complaint that any of the defendants herein named acted maliciously or that any defendant herein named had a deliberate intention to mislead the voters of Charlotte, North Carolina in a predetermined intention to change the plans for the expenditure of funds thereby raised subsequent to the approval of said expenditure."

On 27 May 1970 Judge Bryson entered an order directing defendants to appear before the Judge Presiding over the nonjury term of Mecklenburg County Superior Court on 10 June 1970 to show cause why they should not be enjoined from continuing with the construction of the civic center on Trade Street. On 10 June 1970 the parties appeared before Judge Bryson and submitted documentary evidence, and the determination of this question was continued until entry of final judgment. On 15 June the parties stipulated that the trial court could consider the questions before it out of term and out of district, and that the court might receive and consider other documentary evidence which counsel might submit; provided, that the admissibility into evidence of such documents was not stipulated by either party.

On 23 June 1970 defendants filed their answer.

On 30 June 1970 plaintiffs filed a written demand for a jury trial.

On 27 August 1970 Judge Bryson entered an order denying plaintiffs' demand for a jury trial on the ground that there was no question of fact presented for determination. On the same date, final judgment was filed by Judge Bryson. Since the findings of fact restate many of the facts stated above, we now set forth only those Findings of Fact and Conclusions of Law which we consider crucial to decision, to wit:

FINDINGS OF FACT

2. . . . No site location was specified in the official advertisements informing the public that this election would be held on December 12, 1969.

3. Prior to December 12, 1969, newspaper articles appeared stating that the Civic Center would be built on the "Brevard Street Site," an area bounded by College, Brevard, Second and Third Streets. This same information as to the site location was given by individuals in speeches favoring the bond issue, and statements were issued by City officials speaking in favor of the bond issue.

4. . . . There was no site location specified in the question presented to the voters on the ballot.

5. On April 13, 1970, the Charlotte City Council, meeting in regular session, approved by motion, the construction of the Civic Center on what is now known as the "Trade Street Site." . . .

6. At no time did the Charlotte City Council act officially in selecting any site other than the Trade Street site, and at no time have the Charlotte voters voted on a specified site for the construction of a Civic Center.

CONCLUSIONS OF LAW

2. A city's governing body has the power to exercise discretion and judgment, and to choose between alternative courses of action so long as these officials act in good faith and in accordance with the law and without arbitrariness. Its decision should not be overturned by the Court.

3. The Charlotte City Council exercised discretion in the selection of a site for the Civic Center, and its decision is based upon facts. The Court will not substitute its judgment for that of the city's duly elected governing body for the reasons given above.

Judge Bryson thereupon dismissed the action and denied plaintiffs' motion for a restraining order. On 28 August 1970 plaintiffs moved to be allowed to amend their complaint, which motion was denied on the same day, and plaintiffs excepted.

Plaintiffs appealed to the North Carolina Court of Appeals. This case is before this Court pursuant to our general referral order effective 1 August 1970.

Gene H. Kendall for plaintiffs.

Henry W. Underhill, Jr., and W. A. Watts for defendants.

BRANCH, Justice.

Plaintiffs' principal contention is that on 12 December 1970 the voters of the City of Charlotte did not approve the issuance of bonds for a civic center at any place other than the "Brevard Street" site, because the bond issue was approved on the basis of misleading representations made in public speeches and through the news media by certain defendants and others (including the "Citizens Bond Information Committee" appointed by the Mayor) that the civic center would be located on the "Brevard Street" site.

Plaintiffs do not attack the election for failure to meet procedural requirements; neither do they contend that the ordinance, the notice of election, the ballot, or any formal action of the City Council invalidated the election.

This case presents a question of first impression as to whether misrepresentations made during a campaign for a special election vitiate the election.

Art. VII, § 6, of the North Carolina Constitution provides:

"No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless

approved by a majority of those who shall vote thereon in any election held for such purpose."

[1] The construction, acquisition and operation of an auditorium is not a necessary expense, and the voters of the municipality must therefore approve a bond issue for such purpose. *Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292.

Some jurisdictions, usually because of statutory and constitutional provisions, require that the ballot specifically state the purpose for which the bond proceeds will be used. *Johnson v. City of Muskogee,* 194 Okla. 513, 153 P. 2d 118; *Schnoerr v. Miller,* 2 Ohio St. 2d 121, 206 N.E. 2d 902; *Borin v. City of Erick,* 190 Okla. 519, 125 P. 2d 768; *Henson v. School District,* 150 Kan. 610, 95 P. 2d 346. In those jurisdictions the courts prohibit the expenditure of any funds except for the purposes specifically stated in the ballot.

North Carolina is one of the jurisdictions which permit the use of a broad and general ballot in bond elections. The statutory provisions as to the ballot require only that,

> "A ballot shall be furnished to each qualified voter at said election, which ballot may contain the words 'for the ordinance authorizing $..... bonds (briefly stating the purpose), and a tax therefor,' and 'against the ordinance authorizing $..... bonds (briefly stating the purpose), and a tax therefor,' with squares in front of each proposition, in one of which squares the voter may make an (X) mark, but this form of ballot is not prescribed." G.S. 160-387(e).

Similarly, the ordinance authorizing a bond sale and calling a special election must state the purpose in only "brief and general terms." G.S. 160-379(b).

In most jurisdictions which permit the use of such broad and general referendum ballots, in determining whether there have been misrepresentations sufficient to void the bond election, the courts have consistently looked to the notice of election, the ballot, and the ordinance authorizing the issuance of bonds, i.e., matters which constitute official proceedings in connection with the bond issue.

The official ballot in *Sooner State Water, Inc. v. Town of Allen,* 396 P. 2d 654 (Okla. 1964) submitted to the voters con-

cerned only the issuance of $30,000 in bonds for acquiring and maintaining a water works system. A public letter from members of the City Council made some misrepresentations, but the misrepresentations were not made as a result of official board action. Holding that the misrepresentations did not void the election, the Oklahoma Supreme Court stated:

> "We are of the opinion that this case is comparable to the case of *Reid v. City of Muskogee,* 137 Okl. 44, 278 P. 339. The first paragraph of the syllabus reads:
>
> > 'Inducements held out or promises made by a so-called "citizens' committee" for the purpose of influencing voters in a municipal bond election are without any legal effect, and amount to no more than campaign argument which the voter could accept or not, and such inducements so offered, even if relied upon by the voters, do not constitute bribery, nor in any wise affect the validity of bonds otherwise legally voted.'
>
> . . . .
>
> ". . . [W]e hold that campaign arguments presented in speeches, pamphlets or newspaper advertisements made by committees, organizations or individuals, which arguments have no official status, cannot be used as a basis for voiding an election. Misrepresentations sufficient to void an election must have an official origin, i.e., appear in some phase of the bond proceedings. Neither is it sufficient that such misrepresentations be made by some city official speaking or acting in his individual capacity, and when such misrepresentations constitute no part of the official proceedings. It is beyond the realm of reason that the validity of bond issues, regularly adopted by a vote of the people, should depend upon the character of campaign speech or advertisement initiated by some individual or group acting in an unofficial capacity."

In the case of *Detroit United Railway v. City of Detroit,* 255 U.S. 171, 65 L. Ed. 570, 41 S. Ct. 285, the City of Detroit, pursuant to its charter, passed an ordinance for the acquisition, ownership, maintenance and operation by the City of a street railway system, and submitted the proposition to the voters, who adopted this action by the required majority. The plaintiff attacked the actions of the City on the grounds that the voters

were misled by the fraudulent conduct of officials of the City in their effort to obtain its property by misrepresentations in a circular, and otherwise, as to the purpose and effect of the vote to be taken upon the question of acquiring the transportation system. The court, upholding the dismissal of plaintiff's bill in the District Court, stated:

> "We think that the court below correctly held that the motives of the officials, and of the electors acting upon the proposal, are not proper subjects of judicial inquiry in an action like this so long as the means adopted for submission of the question to the people conformed to the requirements of the law. . . .
>
> ". . . We are of the opinion that this so-called official information, no complaint being made of it before the election, cannot vitiate the election when the same was had upon a submission within the authority of the city under its charter and the ordinance passed in the form shown."

In *Public Service Co. v. City of Lebanon,* 221 Ind. 78, 46 N.E. 2d 480, it is stated:

> "Another proposition relied on by the appellant as ground for an injunction in its favor in case No. 27837, and for denying the appellee's application for an injunction in cause No. 27793, is that the purchase of the appellant's electric system was never authorized by the voters of the City of Lebanon, as required by § 48-7201, Burns' 1933. To sustain this contention it was established that in the campaign that immediately preceded the special election at which the proposal of purchase was submitted to the voters of said city, the mayor, common council and board of public works represented to the public in newspaper advertisements and handbills that not to exceed $150,000 would be expended to purchase said utility. No official commitment was made in the proceedings of the city council as to the amount of money that might be expended on said undertaking and the question submitted to the voters by the ballot used at said election contained no such limitation. It has not been charged that the election was void or that the voters were coerced. Under these circumstances it cannot be judicially declared that the election was not effectual to accomplish the purpose contemplated by the statute under which it was held. The courts may not go behind the result of an election to ascer-

tain the persuasions that motivated the voters. (Citations omitted.)"

In *Harrison v. Board of County Com'rs,* 68 Idaho 463, 198 P. 2d 1013, it is stated:

"On the question of whether the circulation of misinformation will invalidate an election, the rule is stated in Dillon on Municipal Corporations, 5th Ed., Sec. 213, p. 430, as follows:

" 'Inducements in the way of statements and representations made to influence a voter, although false and fraudulent, will not invalidate the election if it does not appear that by force and fraud the voter was compelled to vote in a way he did not wish to vote.'

"Misrepresentations by public officials and others will not vitiate an election. . . ."

In *Mills v. San Francisco Bay Area Transit District,* 261 Cal. App. 2d 666, 68 Cal. Rptr. 317, the voters approved a bond issue for the funding of a rapid transmit system. The ballot was in general form and described only in the most general terms the purpose of "acquiring, constructing, and operating a rapid transit system." Neither the resolution calling the bond election, the ballot, nor the notice of election specified the location of any station. However, a report was prepared by certain experts employed by the board which did mention a specific location of the station. Preceding the election the public was referred to this report. After the voters approved the bond issue, the Transit District decided to change the location of the station to a location one and one-half miles distant from the place mentioned in the report. Citizens brought suit to enjoin the building of the station at the new location on the ground that the voters had approved the location as set forth in the report. The court held for the Transit District, and stated:

"Obviously, the statutes, the notice of election and the ballot proposition itself contemplate a broad authority for construction of a three-county rapid transit system. In the wide scope of this substantial transit project, the deviation of 1½ miles in location of a single station is but a minor change in the tentative plan which was relied upon only to forecast feasibility of the project as a whole.

"Appellants refer to some statements 'disseminated to the general public' before the election. But these cannot be deemed to modify the intentionally broad language of the proposition in fact submitted to the voters, the call of election published to them, and the statutes authorizing the procedure adopted. (See *City of Los Angeles v. Dannenbrink,* 234 Cal. App. 2d 642, 655 [44 Cal. Rptr. 624].)"

Again, in the case of *Anselmi v. Rock Springs,* 53 Wyo. 223, 80 P. 2d 419, it is stated:

"In several cases, courts have considered the statements of officials in connection with an election, and it has been held that 'misrepresentations made during a campaign by public officials or others will not vitiate an election.' *West Missouri Power Co. v. Washington,* 10 Cir., 80 F. 2d 420; *City of Oswego v. Davis,* 97 Kan. 371, 154 P. 1124; *Detroit United Railway v. Detroit,* 255 U.S. 171, 41 S. Ct. 285, 65 L. Ed. 570; *State v. Waltner,* 340 Mo. 137, 100 S.W. 2d 342; *Kansas Electric Power Co. v. City of Eureka,* 142 Kan. 117, 45 P. 2d 877, 879; *Epping v. Columbus,* 117 Ga. 263, 43 S.E. 803, 812; *Balducci v. Strough,* 135 Misc. 346, 239 NYS 611."

In 43 Am. Jur., Public Securities and Obligations, § 80, p. 336, it is stated:

"Effect of Motives of Voters, Speeches, or Official Misinformation Preceding Vote.—The motives which induce voters to authorize the issuance of municipal bonds cannot be inquired into by the courts, when the propriety of becoming indebted for the purpose for which such bonds are issued has been committed to such voters by the legislature of the state.

Bonds issued under the authority of a popular election cannot be set aside simply because all that may have been said in public speeches during the canvass which preceded the election does not prove true; and official misinformation given to electors in advance of a vote upon a proposition for the municipal acquisition or ownership of a utility system, and the issuance of bonds for that purpose, cannot vitiate an election held in substantial compliance with the law, at least where no complaint regarding such misinformation is made before the election."

Accord: 116 A.L.R. 1250; *West Missouri Power Co. v. City of Washington, Washington County, supra; Harrison v. Board of County Commissioners, supra; Palmer v. City of Liberal,* 334 Mo. 266, 64 S.W. 2d 265; *Bowling v. City of Bluefield,* 104 W. Va. 589, 140 S.E. 685; *State ex rel Kellett v. Johnson,* 330 Mo. 452, 50 S.W. 2d 121; *Epping v. Columbus,* 117 Ga. 263, 43 S.E. 803; *McNichols v. City and County of Denver,* 101 Col. 316, 74 P. 2d 99; *Inslee v. City of Bridgeport,* 153 Neb. 559, 45 N.W. 2d 590.

Plaintiffs rely heavily upon the cases of *Borin v. City of Erick, supra,* and *Henson v. School District, supra.*

In *Borin,* the City Council adopted ordinances and submitted to the people a ballot which submitted the proposition of whether bonds in the sum of $60,000 should be voted for the construction of a power plant, and the official records show that the actual cost of the power plant was to be $110,000. The City Council hoped to obtain the balance by federal grant, but did not disclose this in the ballot or in any of its official records. The court enjoined the sale of the bonds.

Borin is distinguishable from instant case in that the Oklahoma Constitution, Art. 10, § 16, provides: "All laws authorizing the borrowing of money by and on behalf of the state, county or other political subdivision of the state, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for no other purpose." The court in reaching its decision in *Borin* reasoned that the ballot, ordinance and the official records did not inform the voters of the "exact and particular thing upon which they are called to vote and decide. The North Carolina Constitution contains no language similar to that contained in the Oklahoma Constitution. The case is further distinguishable because in the instant case there is no misleading statement or misrepresentation in the official ballot or official minutes.

In *Henson v. School District, supra,* a school board contemplated the construction of a building to cost $15,000, to be paid partially by a $6,500 bond issue and the balance by a federal grant. The ballot submitted to the voters stated the proposition as follows: "Shall the following be adopted: Proposition to issue bonds in the sum of $6500 for the purpose of building and equipping a school house?" The court in *Henson*

held that the notice and ballot did not sufficiently state the object for which the election was called. There, the court did not base its decision on campaign promises and arguments alone, but based its decision upon the official resolutions and minutes of the Council leading up to and inhering in the election.

Although not cited by plaintiffs in their brief, we find that the Nebraska Court, in the case of *May v. City of Kearney*, 145 Neb. 475, 17 N.W. 2d 448, applied the principle of equitable estoppel to facts somewhat similar to those in instant case. There a question was presented to the voters to determine whether the City should acquire a public utility property by eminent domain proceedings. The mayor and City Council took a great interest and active part in the pre-election campaign. The news media were used to express the views of the mayor and Council, including the representation that general obligation bonds would not be used to pay for the property condemned. The voters approved the proposal by a majority of 27 votes. After the election, the City Council passed an ordinance providing for the issuance of general obligation bonds to pay for the property. Plaintiffs brought action seeking permanently to enjoin the City from issuing the general obligation bonds. The Court, holding for plaintiffs, stated:

> " 'As a usual thing, the doctrine of equitable estoppel cannot be invoked against a municipal * * * corporation as to the exercise of governmental functions, but yet exceptions are to be made, and where right and justice demand it, the doctrine will be held to apply, particularly where, as is true here, the controversy is between one class of the public as against another class.' . . . 'The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers have done, * * * .'
>
> " . . . [T]he doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to representations or promises concerning the future, there are well recognized exceptions where to enforce the rule would perpetuate a fraud

or cause injustice; and this doctrine of promissory estoppel has particular application when the representations relate to an intended abandonment of an existing right, and is made to influence others who have in fact been influenced by it and substantial injustice will result unless the promise is enforced. . . . "

The well recognized rules as to equitable estoppel in North Carolina are set forth in the case of *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824, as follows:

"1. Words or conduct by the party against whom the estoppel is alleged, amounting to a misrepresentation or concealment of material facts.

"2. The party against whom the estoppel is alleged must have knowledge, either actual or implied, at the time the representations were made, that they were untrue.

"3. The truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time they were made and at the time they were acted on by him.

"4. The party estopped must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel, or by the public generally.

"5. The representations or conduct must have been relied and acted on by the party claiming the benefit of the estoppel.

"6. The party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party be permitted to deny the truth thereof."

[2, 3] It is generally recognized in North Carolina that the doctrine of estoppel will not be applied against a municipality in its governmental, public or sovereign capacity. *State v. Bevers,* 86 N.C. 588; *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; *Candler v. Asheville,* 247 N.C. 398, 101 S.E. 2d 470. We think that the operation of a civic center would be a proprietory function, *Aaser v. Charlotte,* 265 N.C. 494, 144 S.E. 2d 610, but that the choice of the site by the City Council was a public or governmental function. However, it is not necessary to decide

in what capacity the City Council was acting, since the circumstances of this case do not present facts which require application of the doctrine of equitable estoppel.

[4] An estoppel involves a prejudicial misleading. *Hospital v. Stancil,* 263 N.C. 630, 139 S.E. 2d 901.

In *May v. Kearney, supra,* the mayor and City Council made unqualified representations that no general obligation bonds would be issued. After the election, the City Council passed an ordinance providing for the issuance of such bonds, which would of necessity have had a prejudicial effect upon the plaintiff taxpayers.

[7] In instant case the manifest purpose for which the civic center bond issue was proposed was to revitalize downtown Charlotte, with the civic center becoming the catalyst for other projects. The site finally chosen by the City Council remained in downtown Charlotte, a distance of approximately four blocks from the "Brevard Street" site. We do not think that this amounts to a substantial deviation from the purpose for which the bonds were proposed. There is no showing that plaintiffs were *prejudicially* misled.

[5] It is the general rule that every reasonable presumption will be indulged in favor of the validity of elections, and the courts will uphold the validity of municipal bond elections unless clear grounds are shown for invalidating them. *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904; *Gardner v. City of Reidsville,* 269 N.C. 581, 153 S.E. 2d 139; 43 Am. Jur., Public Securities and Obligations, Sec. 78, p. 335; McQuillin on Municipal Corporations (3d ed.) Vol. 15, Sec. 40.16.

[7] The record fails to show that enough voters relied on the representations as to the site of the civic center to change the result of the election. The facts are not such as to require this Court to infer that a sufficient number of voters were misled. *Nickel v. School Board of Axtell,* 157 Neb. 813, 61 N.W. 2d 556; *Talbott v. City of Lyons,* 171 Neb. 186, 105 N.W. 2d 918. See also 1 A.L.R. 2d 350; *Gordon v. Commissioners' Court of Jefferson County,* 310 S.W. 2d 761 (Texas 1958); *Scott v. City of Orlando,* 173 So. 2d 501 (Fla. Dist. Ct. App. 1965).

[6] The courts will not interfere with the exercise of discretionary powers of a municipal corporation unless its actions

are so unreasonable and arbitrary as to amount to an abuse of discretion. *Burton v. Reidsville,* 240 N.C. 577, 83 S.E. 2d 651; *Housing Authority v. Wooten,* 257 N.C. 358, 126 S.E. 2d 101.

[7] Applying the authorities above set forth, we conclude that the misrepresentations made as to the site of the civic center did not vitiate Question No. 1 as submitted to the voters of Charlotte in the bond issue election held on 12 December 1969.

Plaintiffs contend that the trial court erred in denying their timely made motion for jury trial.

[8] North Carolina Constitution, Art. I, § 19, guarantees to every person the "sacred and inviolable" right to demand a jury trial of issues of fact arising in all controversies at law respecting property.

[9] A party may waive his right to jury trial by (1) failing to appear at the trial, (2) by written consent filed with the clerk, (3) by oral consent entered in the minutes of the court, (4) by failing to demand a jury trial pursuant to G.S. 1A-1, Rule 38(b). Art. IV, § 12, North Carolina Constitution; *Driller Co. v. Worth,* 117 N.C. 515, 23 S.E. 427.

[10] In instant case the parties on 15 June 1970 stipulated:

> "(1) This case was called for a Show Cause hearing before the Honorable T. D. Bryson, Jr., Judge Presiding over a Special Criminal Term of the Superior Court of Mecklenburg County on June 10, 1970, at which hearing it was stipulated that the Court would accept documentary evidence, including exhibits, affidavits, briefs, and all other documents which counsel for both parties desired to submit to the court.
>
> "(2) The Court would consider the said documentary evidence submitted, along with the complete Court file, and make findings of facts and render a Judgment thereon out of term and out of district; and that a Judgment may be rendered even though the Judge its assigned to a criminal term of Court at this time and during the period of time which he may be considering the documents submitted to him."

On 30 June 1970 plaintiffs demanded a jury trial.

On 24 August 1970 the parties further stipulated:

"1. That the hearing held on June 10, 1970 was duly and regularly held and that the Honorable T. D. Bryson, Jr. was duly assigned and commissioned to hold the said Court; that the Court was duly constituted and the holding thereof was in all respects regular.

"2. That the following documents were placed before the Court at the said hearing, with the exception of Defendants' Exhibit 'O,' said Exhibit consisting of an affidavit requested by the Court after the date of the hearing, and with the exception of the speech dated October 15, 1969 listed in Exhibit 'B' and the map listed as Exhibit 'E' of Plaintiffs' exhibits; and that all of these documents may be entered into evidence and are duly before the Court, and may be considered as evidence when the Court makes a ruling and final order on the merits of this case."

These written stipulations were filed with the clerk and appear in the record in this cause. *Hahn v. Brinson,* 133 N.C. 7, 45 S.E. 359.

Any doubt that the parties intended to waive a jury trial by writings filed in the cause is resolved by that portion of the agreed "Statement of Case on Appeal" which states:

"This case was decided by the Honorable T. D. Bryson, Jr. upon documentary evidence, without argument of counsel, and his ruling was accepted as a final Order according to stipulations of the respective counsel which are filed in this cause and which are binding upon both parties. This Appeal will, then, be based upon the documentary evidence which is of record in this case and which was accepted as evidence before Judge Bryson at or prior to the time that he entered his final Order on August 27, 1970."

Further, an examination of the record reveals that at the time the trial judge entered final judgment and denied plaintiffs' motion for a jury trial, the parties had by stipulation and judicial admission admitted facts sufficient to support a judgment determining the rights of the parties under the applicable law. Thus, without submitting the case to the jury, the court

properly found facts, made conclusions of law, and entered final judgment. *Bank v. Jones,* 205 N.C. 648, 172 S.E. 185.

The court correctly denied plaintiffs' motion for a jury trial.

[11] Plaintiffs' motion to amend their complaint related to their right and standing to bring this action. The judgment entered was not based on plaintiffs' standing to sue, and defendants in their brief expressly abandoned any contention that plaintiffs lack standing to sue. Thus there can be no prejudice to plaintiffs in denial of this motion.

[12] Neither do we find merit in the contention that the trial judge erred when he refused to adopt the findings of fact tendered by plaintiffs. The facts found by the trial court are supported by the evidence and are sufficient to support the judgment. There was no error in the court's refusal to make further findings of fact which are immaterial and which would not call for a different conclusion. *Insurance Co. v. Insurance Co.,* 266 N.C. 430, 146 S.E. 2d 410.

We have carefully considered plaintiffs' remaining assignments of error. We find no prejudicial or reversible error.

The judgment of the trial court is

Affirmed.

State v. Johnson

STATE OF NORTH CAROLINA v. JAMES E. JOHNSON, JR.; ALBERT S. KILLINGSWORTH AND WIFE, ELIZABETH E. KILLINGSWORTH; AGNES M. COCKE MAYER, TRUSTEE; HUGH M. MORTON AND WIFE, JULIA T. MORTON; WILLIAM L. HILL II, TRUSTEE; THE SOUTHERN NATIONAL BANK OF NORTH CAROLINA; MICHAEL DELOACH; DEL-COOK LUMBER COMPANY, INC.; AND WESTWIND CORPORATION, ORIGINAL DEFENDANTS, FRANK O. SHERRILL AND WIFE, RUTH J. SHERRILL, ADDITIONAL DEFENDANTS

No. 55

(Filed 10 March 1971)

1. **Eminent Domain § 7— amendment of complaint — filing of supplemental memorandum by condemnor**

The statutory requirement that, upon the amendment of any complaint and declaration of taking "affecting the property taken," the condemnor must file with the register of deeds a supplemental memorandum of action setting forth the names of the interested parties and the description of the property, *held* inapplicable where the amendment merely adds additional parties defendant and substitutes a more specific description of the condemned land for the original description in the complaint. G.S. 136-104.

2. **Statutes § 5— statutory construction**

Words of a statute must be construed, insofar as possible, to effectuate the legislative intent.

3. **Eminent Domain § 7— supplemental memorandum of action — requisites of filing**

The filing of the supplemental memorandum of action pursuant to G.S. 136-104 is required only where the condemnor's amendment to the complaint and declaration of taking affects the property taken.

4. **Eminent Domain § 7— condemnation by Department of Administration — Fort Fisher Historic Site — compliance with statutory procedures — findings of fact**

Trial court properly ruled that the State of North Carolina, acting through the Department of Administration, complied with applicable statutory requirements prior to the institution of its action to condemn lands adjacent to Fort Fisher Historic Site, where there were findings of fact, supported by competent evidence, that (1) the Department of Archives and History had applied to the Department of Administration for the acquisition of all "the subject lands" described in the complaint; (2) the Department of Administration made a full and adequate investigation of the land to be condemned; and (3) the Department of Administration made a specific determination that the acquisition of the land was in the best interest of the State. G.S. 146-23; G.S. 146-24(a).

5. Appeal and Error § 57— findings of fact — conclusiveness on appeal

Findings of fact by the trial court, if supported by any competent evidence, are conclusive on appeal, and this is so notwithstanding evidence to the contrary.

6. Deeds § 26— effect of Torrens registration — publication of notice

A recital in a final Torrens decree of registration that "publication of notice has been duly made" is conclusive evidence of that fact, and a party may not thereafter show that the Torrens proceeding was publicized for only four weeks instead of the required eight weeks. G.S. 43-10; G.S. 43-26.

7. Statutes § 6— construction of provisos

The words of a proviso must be construed to effectuate rather than to defeat the purpose of the statute.

8. Waters and Watercourses § 6— navigable waters — accretion and avulsion

"Accretion" denotes the act of depositing, by gradual process, of solid material in such a manner as to cause that to become dry land which was before covered with water; it is the opposite of avulsion, which is the sudden and perceptible gain or loss of riparian land.

9. Waters and Watercourses § 6— effect of accretion — boundary line of lands joined by accretion

Where accretions form on each side of a body of water and eventually meet, displacing the water which formed the boundary, a new property line is formed at the point of contact, and the body of water is no longer the boundary.

10. Waters and Watercourses § 6— boundary line of coastal properties joined by accretion — effect of avulsion

In determining the boundary line of properties that had been situated north and south of a coastal inlet until the inlet was closed in 1933 by the natural fillings of sand (accretion), the southern boundary of the property lying north of the inlet was fixed on the ground at the point where the accretion acting from the north of the inlet finally connected with the accretion acting from the south to close the inlet; the location of the boundary line so formed was affected neither by the avulsive opening in 1944 of a new inlet north of the pre-1933 inlet nor by the imperceptible southward shifting of the 1944 inlet towards and through the location of the pre-1933 inlet.

11. Deeds § 26— assertion of right-of-way over land registered under Torrens Act — failure to show compliance with Torrens Act

Claimants failed to establish a right-of-way over lands the title to which was registered under the provisions of the Torrens Law from 1916 to 1966, where the deed on which the claimants based their right-of-way was not recorded in the Torrens registration of title book, nor was there any notice of the existence of the right-of-way in the Torrens registration book or upon the Torrens Certificate of Title. G.S. 43-18; G.S. 43-22.

12. Easements § 2— right-of-way by reservation — ownership of the land affected by right-of-way

The claimants of a right-of-way by reservation must show ownership in the lands over which they purportedly reserved a right-of-way.

13. Trespass to Try Title § 2; Adverse Possession § 21— condemnation proceeding — presumption that title is out of the State

In a condemnation proceeding in which the State was a party for purposes of the condemnation but in which the question of land ownership was between individual litigants, there is a statutory presumption that title is out of the State. G.S. 1-36.

14. Ejectment § 6— proof of ownership of land — reliance upon title

In an action of ejectment and in other actions involving the establishment of land titles, he who asserts ownership must rely upon the strength of his own title.

15. Adverse Possession § 25— color of title — requirement that description in deed must fit the land — sufficiency of evidence

Individual litigant in a condemnation proceeding failed to establish his ownership by adverse possession under color of title in the lands sought to be condemned by the State, where (1) the descriptions in the deeds offered by the litigant were never fitted to the land in controversy and (2) the evidence of adverse possession was inadequate.

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

Chief Justice BOBBITT concurring.

Justice SHARP joins in concurring opinion.

APPEAL by Additional Defendants, Frank O. Sherrill and wife Ruth J. Sherrill, from judgment of *Cowper, J.*, at March 31, 1970, Special Session, NEW HANOVER Superior Court. The appeal was transferred from the Court of Appeals to the Supreme Court under general order of this Court dated July 31, 1970, and docketed and argued as No. 91 at the Fall Term 1970.

Action by plaintiff against the original defendants to condemn a certain tract of land described in the complaint. The action was commenced June 28, 1968, by the filing of the complaint and declaration of taking, the deposit in court of the sum of $237,500 as estimated compensation, and the issuance of summons. The original defendants were served with copies of the complaint and declaration of taking and notice of deposit.

On February 13, 1969, the State filed an amendment to its complaint and declaration of taking and notice of deposit

making Frank O. Sherrill and wife Ruth J. Sherrill additional parties defendant and alleging that the Sherrills have or claim to have an interest in the land condemned by virtue of a deed from Sherrill and wife to Hugh MacRae and Company, Inc., dated December 9, 1943, recorded in Book 355, page 209, New Hanover County Registry, in which deed the Sherrills purportedly reserved a right-of-way from their lands to the southern end of U. S. 421 south of Old Fort Fisher. (Exhibit P-8) The amendment, together with notice thereof, was served on all of the original defendants except Michael DeLoach, Del-Cook Lumber Company, Inc., and Westwind Corporation, who in their answers disclaimed any interest in the land. The defendants Sherrill were the only defendants who filed answer to the amended complaint, and they alleged in effect that they have an easement across the lands condemned by virtue of said deed and further alleged that they were the owners in fee simple of all the land, beach land, and marsh land lying south of a certain agreed boundary line shown on a map or plat recorded in Book 355, page 211, in the New Hanover County Registry. (Exhibit M-14)

On April 7, 1970, the State again amended its complaint and declaration of taking by striking Paragraph 13 of the complaint and inserting a new Paragraph 13 containing a specific description by metes and bounds of 333.518 acres of land condemned in lieu of a more general description of said land initially used in the complaint.

The cause came on for hearing before Cowper, J., pursuant to G.S. 136-108, to determine all issues raised by the pleadings other than the ultimate jury issue of just compensation. At that hearing the parties stipulated and agreed that, except for the issue of compensation, the pleadings raise only the following issues: (1) Has the State complied with the statutory requirements necessary for the taking of the lands in this action? (2) What is the status of title to the area between high and low water marks? (3) What is the status of title as between the defendants?

All parties were present with their counsel and presented evidence in support of their contentions. The court, having considered the pleadings, the evidence presented, and the argument of counsel both oral and written, made findings of fact with

respect to each issue. These findings are quoted in the numbered paragraphs below:

"ISSUE I. FINDINGS OF FACT

"1. This action was duly instituted on the 28th day of June, 1968, by the issuance of Summons, filing of Complaint and Declaration of Taking and Notice of Deposit, and by the depositing of $237,500.00 as estimated just compensation; that memorandum of action was duly filed in the Office of the Register of Deeds; that the lands sought to be condemned are those described in the Complaint and Declaration of Taking and more specifically described in the Amended Complaint and Declaration of Taking and shown on the State's map hereinafter referred to; that the estate sought to be condemned is an estate in fee simple; and that the State fully complied with all procedural matters set forth in Article 9 of Chapter 136 of the General Statutes of North Carolina.

"2. That all parties were duly served and answered in apt time; that all parties were properly before the court.

"3. That a map of the property condemned was filed in apt time and prior to the hearing, the purpose of which was to settle all issues raised by the pleadings, other than the issue of just compensation as provided in G.S. 136-108.

"4. That the North Carolina Department of Archives and History, pursuant to a resolution adopted, applied to the Department of Administration for acquisition of the subject lands, said resolution setting forth the needs of the Department of Archives and History to acquire the lands; that the Department of Administration, through its duly qualified and acting State Property Officer, immediately investigated all aspects of the requested acquisition, said investigation being based upon substantial information delivered to him by the Department of Archives and History resulting from an extensive investigation made by that department, a map of the lands desired to be acquired, and was based upon the personal knowledge of the lands by the State Property Officer. Considering that the unique nature and historical value of Fort Fisher was in imminent danger of and was, in fact, being destroyed, that the preservation of the Fort and adjacent lands was needed, that no other land, state owned or otherwise, could serve the purposes and needs of the Department of Archives and History, and that funds were avail-

able to pay for said lands if acquired, the investigation was full and adequate under the circumstances. That the Department of Administration through the State Property Officer reported to the Governor and Council of State the results of the investigation and recommended that the acquisition of the lands was needed by the Department of Archives and History and that it was the determination of the Department of Administration that it was in the best interest of the State to acquire the same, and that said lands were thought to contain 270 acres and to run southwardly from the Fort itself to the inlet. That by resolution of the Governor and Council of State, the Department of Administration was authorized and instructed to acquire said lands even by condemnation if necessary to effect the acquisition. That the Department of Administration proceeded to negotiate with the owners of the lands for the purchase thereof, but the negotiations with the owners were unsuccessful and the office of the Attorney General was thereupon requested to institute this action to acquire said lands by condemnation. That the requirements of Article 6, Chapter 146 of the General Statutes of North Carolina were fully complied with prior to the institution of this action.

"ISSUE II. FINDINGS OF FACT

"1. That the waters adjoining the lands condemned as shown on the State map are the Atlantic Ocean, the inlet and Still Water Bay. The evidence clearly establishes that all of these waters are used for navigation and are navigable, in fact.

"2. That the deed under which Johnson and Killingsworth and their predecessors in title claim title calls for the low water mark of the Atlantic Ocean, the inlet and Still Water Bay as boundary lines.

"3. The defendants did not offer in evidence any grant from the State, authorized by any legislation of the General Assembly, to cover any lands below the high water mark.

"ISSUE III. FINDINGS OF FACT

"1. That the Defendants Michael DeLoach, Del-Cook Lumber Company, Inc., and Westwind Corporation, by their Answers filed in the cause, have and claim no interest in the lands condemned.

"2. That the Defendants William L. Hill, II, Trustee, and the Southern National Bank of North Carolina, have an inter-

est in approximately 28 acres of condemned land by virtue of a Deed of Trust to the Trustee for the bank dated June 6, 1968, and duly recorded in Book 834, Page 227, New Hanover County Registry.

"3. That Agnes M. Cocke Mayer, Trustee, and Hugh M. Morton and wife, Julia T. Morton, have an interest in said condemned lands by virtue of a Deed of Trust dated the 5th day of July, 1967, and recorded in Book 813, Page 26, New Hanover County Registry, subject, however, to the release of 83.4 acres, more or less to Johnson and Killingsworth by Deed of Release dated 5 June, 1968, and recorded in Book 834, Page 221.

"4. That the Defendants James E. Johnson, Jr., Albert S. Killingsworth and wife, Elizabeth E. Killingsworth (herein referred to as Johnson and Killingsworth) and Agnes M. Cocke Mayer, Trustee, Hugh M. Morton and wife, Julia T. Morton (herein referred to as Morton) all claim the subject lands under a basic common chain of title. The defendants Johnson and Killingsworth did not offer in evidence, as a part of their chain of title, the map, Exhibit M-14, which followed Exhibit P-8, Deed from Sherrill, *et ux,* to Hugh MacRae & Company, Inc.

"5. The defendants named in finding of Fact #4 proved a connected chain of title beginning with a deed dated February 25, 1884, and recorded in Book UUU, Page 140, New Hanover County Registry covering the extreme north portion of the lands condemned and a grant from the State of North Carolina dated March 15, 1887, and recorded in Book 1, Page 601, New Hanover County Registry, covering the remaining north portions of the lands condemned. The southern boundary of the lands granted by the State in 1887 was an inlet.

"6. That in the year 1916 the then owners of said lands instituted a proceeding under the Torrens Act and secured a decree dated July 28, 1916, which decree was approved by a Superior Court Judge on August 16, 1916, and duly recorded in the Registration of Title Book in the Office of the Register of Deeds of New Hanover County. The lands described in said proceeding had as their southern boundary the inlet above referred to.

"7. Thereafter there were eight certificates duly filed in the Registration of Title Book transferring the entire interest in the lands, with Certificate #8 registering the lands in the name of Hugh MacRae & Company, Inc., which Certificate #8

was duly filed in the Registration of Title Book on January 25, 1935.

"8. That the lands lying south of the inlet referred to in the above mentioned State grant were claimed by Frank O. Sherrill and wife, Ruth J. Sherrill, or their predecessors in title, and said inlet was the boundary line dividing the properties claimed by Sherrill and those owned by Hugh MacRae & Company, Inc.

"9. That in the early 1930's, said inlet closed by natural filling of sands and Hugh MacRae & Company, Inc., the registered title owner of the lands north of the former inlet, and Frank O. Sherrill and wife, the claimants of the lands south of the former inlet, exchanged deeds dated December 9, 1943, seeking thereby to establish the location of the inlet when it closed. The deed from Frank O. Sherrill and wife to Hugh MacRae & Company, Inc., purported to convey all lands lying north of a line drawn from the center of the second leg of the U. S. Government Rock Dam as said line is shown upon a map attached to said deed, said deed and map being duly recorded in Book 355, Page 209, *et seq.*, New Hanover County Registry and indexed in the general index only in the name of Sherrill and wife, grantors, and Hugh MacRae and Company, Inc., grantee.

"10. That the deed from Hugh MacRae & Company, Inc., to Frank O. Sherrill and wife, also dated December 9, 1943, purported to convey to Sherrill and wife all lands lying south of the above mentioned line. That said deed from Hugh MacRae & Company, Inc., to Sherrill and wife was duly recorded in Book 76, Page 480, Brunswick County Registry but not in the New Hanover County Registry.

"11. That in the deed from Frank O. Sherrill and wife to Hugh MacRae & Company, Inc., referred to in Finding of Fact #9, Sherrill and wife sought to reserve a right of way and easement from the Sherrill lands to Fort Fisher.

"12. There was no entry indicating the existence of either of these deeds or map referred to in Finding of Fact #9, #10 and #11 made in the Registration of Title Book in New Hanover County Registry, and no entry thereof was made upon Certificate #8 held by Hugh MacRae & Company, Inc.

"13. That thereafter in the year 1944, an inlet opened across the beach north of where the inlet above referred to had closed. That this inlet opened upon the lands of Hugh MacRae & Com-

pany, Inc. This 1944 inlet has remained open and active from that date and is the one and the same inlet as that shown on the State's map as the southern boundary of the lands condemned.

"14. That said 1944 inlet has by gradual and imperceptive action of the tide, water, wind and sand, ('forces of nature'), moved southward, eroding lands to the south and depositing and making lands by accretion on the north side thereof. That there has been no sudden or avulsive change in the location of said inlet and all movement has taken place gradually and imperceptively.

"15. That Hugh M. Morton and others by petition in the original Torrens proceeding referred to above in Finding of Fact #6, secured a decree in 1966 declaring the petitioners to be the owners of the land covered by said registration and declaring the title to said land removed from the Torrens system for the purpose of future conveyances. This judgment was duly filed on January 18, 1966, and was duly recorded in the Registration of Title Book in the office of the Register of Deeds for New Hanover County.

"16. From the entry of the decree in 1916 placing the lands under the Torrens Act until the decree of January 18, 1966, removing the title to said lands from the Torrens Act, there was no entry in the Registration of Title Book in the New Hanover County Registry on any certificate or margin thereof which in any way changed the description of the lands from that set forth in the original decree, which said description was set forth in the final decree in 1966, nor was any entry of any kind made in the Registration of Title Book or any certificate issued indicating any claim to any lands or any right of way on the part of Frank O. Sherrill and wife as to the registered lands.

"17. The defendants named above in Finding of Fact #4 completed their chain of title by deed from Morton to Johnson and Killingsworth conveying the lands by the identical description set forth in the original Torrens decree in 1916, running southwardly to the inlet, but excepting lands acquired by the United States of America and the State of North Carolina.

"18. The defendants Frank O. Sherrill and wife sought to prove their claim by introducing a deed from D. C. Boyd to Frank O. Sherrill dated the 29th day of November, 1938, and recorded in Book 66, Page 515, Brunswick County Registry, and thereupon sought to show possession of the lands described in

said deed. These defendants failed to offer any evidence that the lands described in said deed covered the lands or any portion of the lands condemned in this action. Their evidence of possession showed no possession of any of the lands condemned in this action sufficient to perfect title by adverse possession under the laws of the State of North Carolina.

"19. The defendants Sherrill introduced the deed from Hugh MacRae & Company, Inc., to them as set forth in Finding of Fact #10 above which said deed has not been recorded in New Hanover County. This deed does not, nor does any other deed or grant in evidence, purport to convey any right of way to Frank O. Sherrill and wife. The sole evidence of any claim on the part of Frank O. Sherrill and wife for any right of way was that sought to be reserved by them in the Deed to Hugh MacRae & Company, Inc., as set forth above in Finding of Fact #9 and #11."

Upon the foregoing findings of fact Judge Cowper concluded as a matter of law that the State had complied with all statutory requirements necessary for the taking of the lands in question; that the area between high and low water marks is owned by the State of North Carolina subject to the riparian rights of the highland owners; and that defendants Frank O. Sherrill and wife have proved no title to any of the lands condemned in this action and own no right-of-way over the condemned lands. The action was thereupon dismissed as to the additional defendants Frank O. Sherrill and wife. Judge Cowper further concluded with respect to the third issue that defendants James E. Johnson, Jr., and Albert S. Killingsworth and wife, Elizabeth E. Killingsworth, were the owners of all the lands condemned subject only to the two monetary encumbrances set out in Findings of Fact Nos. 2 and 3. Judgment was signed accordingly and Frank O. Sherrill and wife appealed assigning errors discussed in the opinion.

Stevens, Burgwin, McGhee & Ryals by Karl W. McGhee and Richard M. Morgan, Attorneys for Frank O. Sherrill and wife, Ruth J. Sherrill, defendant appellants.

Robert Morgan, Attorney General; Parks H. Icenhour, Assistant Attorney General, for the State of North Carolina, plaintiff appellee.

Alan A. Marshall and Lonnie B. Williams (Marshall, Williams & Gorham), Attorneys for James E. Johnson, Jr., Albert S.

Killingsworth and wife, Elizabeth E. Killingsworth, defendant appellees.

HUSKINS, Justice.

We note at the outset that appellants have abandoned their exception and assignment of error addressed to the findings of fact and conclusions of law with respect to the second issue. As to the first and third issues, however, appellants strenuously insist that the trial judge committed reversible error. This requires examination of the exceptions and assignments relating to those issues. We shall deal with them in numerical order.

ISSUE I

This action was instituted under authority conferred by Article 6 of Chapter 146 of the General Statutes which provides for acquisition of lands on behalf of the State. G.S. 146-24(c), as amended by Chapter 512 of the 1967 Session Laws, provides that if negotiations are unsuccessful, "the Department of Administration may request permission of the Governor and Council of State to exercise the right of eminent domain and acquire any such land by condemnation in the same manner as is provided for the State Highway Commission by article 9 of chapter 136 of the General Statutes." Thus the procedures for acquisition to the time of condemnation are governed by Article 6 of Chapter 146, while the condemnation, if required, is regulated by Article 9 of Chapter 136. Appellants assign errors with regard to both the procedure employed and the condemnation itself.

[1] Appellants contend that the trial judge erred in finding that the State complied with "all procedural matters set forth in Article 9 of Chapter 136 of the General Statutes." The State did not comply, say the Sherrills, with G.S. 136-104 which provides that upon "the amending of any complaint and declaration of taking affecting the property taken" a supplemental memorandum of action must be filed with the register of deeds of the county. This document must contain various information, including names of interested parties, descriptions of the property affected, and the relevant facts about the lawsuit. The State admits that it did not file such a supplement but contends it was not required to do so inasmuch as the amendments to its complaint did not *affect the property taken* within the meaning of the statute.

The complaint and declaration of taking was amended twice. The first amendment added Sherrill and wife as additional defendants and alleged "upon information and belief that . . . [they] have or claim to have an interest in the land described in this Complaint. . . ." The second amendment substituted a new description of the land to be taken for the original description in the complaint.

[2, 3] Words of a statute must be construed, insofar as possible, to effectuate the legislative intent. *Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273 (1970); *In re Dillingham*, 257 N.C. 684, 127 S.E. 2d 584 (1962). The purpose of paragraph one of G.S. 136-104 is to vest title in the State upon the filing of the complaint, the declaration of taking, and the deposit in cash of the estimated compensation. *Highway Commission v. Industrial Center*, 263 N.C. 230, 139 S.E. 2d 253 (1964). The manifest purpose of the second paragraph of the statute is to assure public record of the change in ownership. The second sentence of the second paragraph, with which we are concerned here, was inserted by the 1963 Legislature. It reads: "Upon the amending of any complaint and declaration of taking affecting the property taken, the State Highway Commission shall record a supplemental memorandum of action." The obvious intent of the sentence is to assure that any change in the complaint or declaration of taking that *affects the property* will likewise be entered into the land records of the county. Appellants' contention that said sentence means that a supplemental memorandum of action must be filed as to all amendments, significant or insignificant, to the original complaint is not sound. Where the purpose of the statute is to require notice of ownership, an amendment to the complaint which only adds additional parties defendant who may or may not share in the proceeds requires no supplemental notice to the public. The same is true with respect to an amendment that only substitutes a more specific metes and bounds description for a description less exact, both descriptions covering the same property. We therefore hold that a supplemental memorandum is required only where the amendment to the complaint and declaration of taking *affects the property taken.* This assignment of error is overruled.

[4] Appellants next assign as error the conclusion of the trial judge that the requirements of Article 6 of Chapter 146 of the General Statutes were fully complied with prior to the institution of this action. G.S. 146-23 and 146-24 provide, in substance,

that a State agency desiring to acquire land must file a statement of needs with the Department of Administration, and that department must then investigate "all aspects of the requested acquisition." If that department determines that it is in the best interest of the State to acquire the land, it must negotiate with the owners for its purchase. If the negotiations are successful, a proposal is submitted to the Governor and Council of State for the purchase of the property. If negotiations are unsuccessful the Department of Administration may petition the Governor and Council of State for permission to condemn the land in the manner set out in Chapter 136 of the General Statutes. *State v. Club Properties,* 275 N.C. 328, 167 S.E. 2d 385 (1969).

In the instant case, appellants first contend that the Department of Archives and History made no request for acquisition of all the lands described in the complaint, some 333.518 acres, but requested only an area comprising about twenty-five acres. This contention is based on appellants' interpretation of a letter from the Director of the Department of Archives and History to the Department of Administration which apparently alerted that department to the needs of the Department of Archives and History with respect to the land in question. That letter, in pertinent part, reads: "In pursuance of our telephone conversation of a few minutes ago, the Department of Archives and History hereby requests the Department of Administration, Property Control and Construction Division, to take immediate legal action to stop or prevent any steps or measures which might damage or destroy remains or relics of Confederate Fort Fisher, in the area immediately south of present Fort Fisher Historic Site, in New Hanover County."

[4, 5] The trial court found as a fact that the application was for acquisition of "the subject lands." Findings of fact by the trial court, if supported by any competent evidence, are conclusive on appeal. *Truck Service v. Charlotte,* 268 N.C. 374, 150 S.E. 2d 743 (1966); *Mills v. Transit Co.,* 268 N.C. 313, 150 S.E. 2d 585 (1966); *Wall v. Timberlake,* 272 N.C. 731, 158 S.E. 2d 780 (1968). And this is so notwithstanding evidence to the contrary. *Equipment Co. v. Equipment Co.,* 263 N.C. 549, 140 S.E. 2d 3 (1965); *Highway Commission v. Brann,* 243 N.C. 758, 92 S.E. 2d 146 (1956); 2 McIntosh, N. C. Practice and Procedure (2d Ed., 1956) § 1782(6). Here, the record contains competent evidence that the letter referred to above related to the entire area south of Fort Fisher and that the request was so under-

stood by the Department of Administration, the Governor, and the Council of State. This finding of fact and the conclusion of law based thereon will not be disturbed.

Appellants further contend that no investigation was made of the need of the property condemned, and particularly the southernmost portion comprising the end of the peninsula south of Fort Fisher. They contend that no attempt was made to establish the actual site of Old Fort Fisher for the purpose of determining how best to preserve its historical and archaeological value. The trial judge, however, found as a fact that "the investigation was full and adequate under the circumstances." There is evidence to support that conclusion and it will not be disturbed, notwithstanding that there is some evidence to the contrary. *Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772 (1967). There is evidence in the record that the Department of Administration had at its disposal reports of the Department of Archives and History relevant to the investigation; that the area was personally visited by representatives of the department; that these representatives flew over the land; and that various maps were consulted. Hence there is evidence to support the findings of the trial judge, and his findings support his legal conclusions. *Highway Commission v. Nuckles, supra.* This assignment is overruled.

Appellants' assignment of error that no report of an investigation was made to the Governor and Council of State is based on the premise that no investigation was made. Inasmuch as we uphold the finding of fact of the trial judge that a full investigation was made, this assignment fails.

Finally, appellants contend that the Department of Administration made no specific finding that the purchase or acquisition of said property is in the best interest of the State. G.S. 146-24(a) provides: "If, after investigation, the Department determines that it is in the best interest of the State that land be acquired, the Department shall proceed to negotiate with the owners of the desired land for its purchase." Since the Department did in fact proceed to acquire the land, it is a permissible inference that such a determination was made. The statute does not require a specific written report that the acquisition is in the best interest of the State. The trial judge found that such a determination was made and the totality of the evidence supports that finding.

It is worthy of note that under present law no request from a State agency is necessary. Chapter 1091 of the 1969 Session Laws, ratified 1 July 1969, empowers the Department of Administration to acquire property "by purchase, gift, condemnation or otherwise" for certain authorized purposes, including the acquisition of "(6) Lands involving historical sites, together with such adjacent lands as may be necessary for their preservation, maintenance and operation." Since this action was instituted before the effective date of that enactment, it does not apply to this litigation. *Ashley v. Brown,* 198 N.C. 369, 151 S.E. 725 (1930). Even so, it would be meaningless to hold this proceeding defective on strained procedural technicalities no longer required.

We hold that the State has complied with the statutory requirements necessary for the taking of the lands involved in this action. The findings and conclusions of the trial judge in that respect will be upheld.

ISSUE III

[6] What is the status of title as between the defendants? Appellants contend that the Torrens registration of 1916 was invalid for failure to comply with statutory requirements as to publication. Chapter 128 of the 1915 Public Laws amended the Torrens Act to require eight weeks publication instead of four. A publisher's affidavit shows that publication lasted only four weeks. Appellants say this defect is jurisdictional and therefore the lower court erred in finding as a fact and concluding as a matter of law that the property in question was duly registered under the Torrens system from 1916 to 1966, at which time it was removed by judicial decree. This requires examination of the Torrens Act and its application to the facts appearing of record in this case.

The judicial system of registering titles to land was enacted in North Carolina by Chapter 90 of the 1913 Public Laws, now codified as Chapter 43 of the General Statutes. It is known generally as the Torrens Law. "The principle of the 'Torrens System' is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations." *Cape Lookout Company v. Gold,* 167 N.C. 63, 83 S.E. 3 (1914); Frederick B. McCall, The Torrens System—After Thirty-Five Years, 10 N.C.L. Rev. 329 (1932).

The Torrens Law authorizes any person in the peaceable possession of land in North Carolina who claims an estate of inheritance therein to "prosecute a special proceeding in rem against all the world in the superior court for the county in which such land is situate, to establish his title thereto, to determine all adverse claims and have the title registered." G.S. 43-6.

Such proceeding for the registration of title is commenced "by a petition to the court by the persons claiming, singly or collectively, to own or have the power of appointing or disposing of an estate in fee simple in any land, whether subject to liens or not." The petition must be signed and verified by each petitioner, must contain a full description of the land to be registered together with a plot of same by metes and bounds, must show when, how and from whom it was acquired, list all known liens, interests, equities and claims, adverse or otherwise, vested or contingent, and give full names and addresses, if known, of all persons who may be interested by marriage or otherwise, including adjoining owners and occupants. G.S. 43-8.

When such petition is filed the clerk is required to issue a summons directed to the sheriff of every county in which named interested persons reside, naming them as defendants. The summons is returnable as in other cases of special proceedings, "except that the return shall be at least sixty days from the date of summons." It must be served at least ten days before the return thereof and the return recorded in the same manner as in other special proceedings. G.S. 43-9.

The clerk is required, at the time of issuing the summons, to publish a notice of filing of the petition in some secular newspaper published in the county wherein the land is situate, once a week for eight issues of such paper. The notice shall be addressed "To whom it may concern" and shall set forth the title of the proceeding, the relief demanded, and state the return day of the summons. "The provisions of this section, in respect to the issuing and service of summons, and the publication of the notice, shall be mandatory and essential to the jurisdiction of the court to proceed in the cause: Provided, that the recital of the service of summons and publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner as hereinafter provided, shall be conclusive evidence thereof." G.S. 43-10.

The petition is then set for hearing upon the pleadings and exhibits filed. If any person files an answer claiming an interest in the land described in the petition, the matter is referred to the "examiner of titles" who hears the cause on such parol or documentary evidence as may be offered, makes such independent examination of the title as may be necessary, and files with the clerk a report of his conclusions of law and fact, setting forth the state of the title, together with an abstract of title to the lands. G.S. 43-11(a), (b). Any party to the proceeding may file exceptions to said report, whereupon the clerk must transmit the record to the judge of superior court for his determination. If title is found to be in the petitioner, "the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided." G.S. 43-11(c).

Judgment by default is not permitted. The court must require an examination of the title in every instance except as to parties who, by proper pleadings, admit petitioner's claim. If no answer is filed, the clerk must refer the matter to the examiner of titles anyway. If title is found in the petitioner, then the clerk enters a decree to that effect, declares the land entitled to registration, and certifies it for registration after approval by the judge of the superior court. G.S. 43-11(d).

"Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, whether mentioned by name in the order of publication, or included under the general description, 'to whom it may concern'; and every such decree so rendered . . . shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this State of his or its right or title thereto." G.S. 43-12.

The county commissioners are required to furnish a book to the register of deeds, to be called "Registration of Titles," in which the register shall enroll, register and index (1) the decree of title mentioned in G.S. 43-11(c) and (d), (2) the copy of the

plot contained in the petition, (3) all subsequent transfers of title, and (4) all voluntary and involuntary transactions in any wise affecting the title to the land, authorized to be entered thereon. G.S. 43-13. Upon the registration of such decree, the register of deeds is directed to issue an "owner's certificate of title," the form of which is prescribed, bearing a number which is retained as long as the boundaries of the land remain unchanged. G.S. 43-15; G.S. 43-16.

Every registered owner of land brought under the Torrens System (with certain exceptions not pertinent here) holds the land free from any and all adverse claims, rights or encumbrances not noted on the certificate of title. G.S. 43-18. And "[n]o title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession." G.S. 43-21.

The only way to transfer or affect the title to registered land is by registration of the writing, instrument or document by which such transfer is accomplished. Thus no voluntary or involuntary transaction affects the title to registered lands until registered, *and the registration of titles book is the sole and conclusive legal evidence of title.* G.S. 43-22.

No decree of registration and certificate of title issued pursuant thereto prior to March 10, 1919, may be adjudged invalid, revoked or set aside unless the action or proceeding in which their validity is attacked be commenced, or the defense alleging the invalidity be interposed, before March 10, 1920. G. S. 43-26.

Any person claiming any right, title or interest in registered land adverse to the registered owner, arising after the date of the original decree of registration, may file with the register of deeds of the county in which such decree was rendered or certificate of title thereon was issued, a verified written statement setting forth fully the right, title or interest claimed, how or from whom it was acquired, referring to the number, book and page of the certificate of title of the registered owner, together with a metes and bounds description of the land, and containing the adverse claimant's address and place of residence, and such statement must be noted and filed by the register of deeds. An action to enforce such claim may then be maintained provided it is commenced within six months of the filing of the statement. G.S. 43-27. If action is not timely commenced as re-

quired, the register of deeds must make a memorandum notation to that effect and cancel upon the registry the adverse claim so asserted. G.S. 43-28.

The sale and transfer, in whole or in part, of registered land is accomplished by the execution and acknowledgment of a paperwriting in the form set out in G.S. 43-31, which paperwriting has the full force and effect of a deed in fee simple. This paperwriting must be presented to the register of deeds together with the seller's certificate of title, and the transaction is then duly noted and registered in accordance with the provisions of the Torrens Law. G.S. 43-31; G.S. 43-32; G.S. 43-33; G.S. 43-37.

The other sections of the Act have no bearing upon the questions now before the Court. This summary of the pertinent parts of the Torrens Act shows that it "not only manifests a purpose on the part of the General Assembly to establish a title in the registered owner, impregnable against attack at the time of the decree, but also to protect him against all claims or demands not noted on the book for the registration of titles, and to make that book a complete record and the only conclusive evidence of the title." *Dillon v. Broeker,* 178 N.C. 65, 100 S.E. 191 (1919).

"The general purpose of the Torrens system is to secure by a decree of court, or other similar proceedings, a title impregnable against attack; to make a permanent and complete record of the exact status of the title with the certificate of registration showing at a glance all liens, encumbrances, and claims against the title; and to protect the registered owner against all claims or demands not noted on the book for the registration of titles. The basic principle of this system is the registration of the official and conclusive evidence of the title of land, instead of registering, as the old system requires, the wholly private and inconclusive evidences of such title." Frederick B. McCall, The Torrens System—After Thirty-Five Years, 10 N.C.L. Rev. 329 (1932); *Cape Lookout Co. v. Gold,* 167 N.C. 63, 83 S.E. 3 (1914); 8A Thompson on Real Property (Grimes Ed., 1963), § 4353.

Pertinent language from G.S. 43-10, the section specifying that eight weeks publication is necessary, reads as follows: "The provisions of this section, in respect to the issuing and service of summons and the publication of the notice, shall be mandatory and essential to the jurisdiction of the court to proceed in the cause: *Provided, that the recital of the service of summons and*

publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner as hereinafter provided, shall be conclusive evidence thereof." (Emphasis added.) In the case before us the final decree of registration recites, ". . . it appearing that summons has been duly served upon all parties in interest, and that publication of notice has been duly made. . . ."

[7] The words of a proviso must be construed to effectuate rather than to defeat the purpose of the statute. "A proviso should be construed together with the enacting clause or body of the act, with a view to giving effect to each and to carrying out the intention of the legislature as manifested in the entire act and acts in *pari materia.*" 82 C.J.S., Statutes, § 381; *Lockwood v. McCaskill,* 261 N.C. 754, 136 S.E. 2d 67 (1964); 7 N. C. Index 2d, *Statutes,* § 6.

When viewed in light of the stated purpose of the Torrens Act, it is clear that the proviso in G.S. 43-10 is intended to cure any jurisdictional defect with respect to issuance and service of summons and the publication of notice so as to foreclose all jurisdictional attacks on a Torrens title.

Our conclusion in that respect is fortified by Article 5 of Chapter 43 of the General Statutes which prescribes the methods for bringing forward and asserting adverse claims after registration of title. G.S. 43-26 provides in pertinent part:

> "No decree of registration heretofore entered, and no certificate of title heretofore issued pursuant thereto, shall be adjudged invalid, revoked, or set aside, unless the action or proceeding in which the validity of such decree of registration or certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from March 10, 1919."

[6] We therefore hold that the recital in the final Torrens decree of registration that "publication of notice has been duly made" is *conclusive* evidence of the fact, and that any attack on the 1916 decree is foreclosed by the limitation imposed in G.S. 43-26. *Northwest Holding Co. v. Evanson,* 265 Minn. 562, 122 N.W. 2d 596 (1963). The appellants cannot go behind the conclusive language of the decree.

Appellants contend that the boundary which separated Hugh MacRae and Company lands from Sherrill lands was irrevocably fixed by the exchange of deeds in 1943 and that the forces of natural accretion and erosion have no effect upon the present boundary. We now examine the validity of that contention.

[8] " 'Accretion' denotes the act of depositing, by gradual process, of solid material in such a manner as to cause that to become dry land which was before covered with water." 5A Thompson on Real Property (Grimes Ed., 1957), § 2560; 6 Powell on Real Property, § 983 *et seq.* It is the opposite of *avulsion,* which is the "sudden and perceptible gain or loss of riparian land." 5A Thompson, *supra,* § 2561. Avulsion usually results from sudden, powerful, natural forces, such as a flood or a hurricane. Avulsion, unlike accretion, works no change in legal title. 5A Thompson, *supra,* § 2561.

[9] Moreover, where accretions form on each side of a body of water and eventually meet, displacing the water which formed the boundary, a new property line is formed at the point of contact, and the body of water is no longer the boundary. *Hogue v. Bourgois,* 71 N.W. 2d 47, 54 A.L.R. 2d 633 (N.D. 1955). The rule is correctly stated in 4 Tiffany on Real Property (3d Ed., 1939), § 1228, as follows:

> "In the case of an island, the same rule applies as in the case of land bounded by water on one side only, that is, the boundaries are presumed to vary with any gradual change in the line between the land and the water or, as it is otherwise expressed, the owner of an island is entitled to land added thereto by accretion to the same extent as the owner of land on the bank or shore of the mainland. . . . In case accretions to the island and to the mainland eventually meet, the owner of each, it is said, owns the accretions to the line of contact, or, as we would prefer to express it, the boundary of an island, as that of the mainland, changes as its edge or shore line changes, and when there is no longer any island, owing to the growth of the accretions, he to whom the island belonged owns to where its edge or shore line was last visible."

"Where the stream forms the boundary between two tracts of land, and both shore lines receive accretions until they come together, the line of contact will then be the division line." 93

C.J.S., Waters, § 76. The following cases support this principle: *Buse v. Russell,* 86 Mo. 209 (1885) ; *Polack v. Steinke,* 100 Ark. 28, 139 S.W. 538 (1911) ; *Glassell v. Hansen,* 135 Cal. 547, 67 P. 964 (1902) ; *Waldner v. Blachnik,* 65 S.D. 449, 274 N.W. 837 (1937) ; *People v. Ward Redwood Co.,* 225 Cal. App. 2d 385, 37 Cal. Rptr. 397 (1964) ; *Durfee v. Keiffer,* 168 Neb. 272, 95 N.W. 2d 618 (1959). *See* Annotation, Applicability of rules of accretion and reliction so as to confer upon owner of island or bar in navigable stream title to additions, 54 A.L.R. 2d 643 (1957).

[10] That New Inlet completely closed by accretion in 1933 thus has controlling significance. When New Inlet was in existence, the land south of New Inlet was in effect an island, and the land to the north of New Inlet was mainland. Therefore, upon the closing of the inlet, the southern boundary line of the lands described in the Torrens decree and in Certificate of Title No. 8 was fixed by law on the ground where the accretion from the north finally connected with the accretion from the south to close the channel.

The avulsive reopening of a different inlet in 1944 at a point north of New Inlet's 1933 location worked no change in the location of that boundary line or in the legal title to the lands lying north and south of it. The newborn inlet was not the southern boundary of the MacRae lands. 5A Thompson, *supra,* § 2561. Rather, Hugh MacRae and Company became riparian owners on both sides of it. Then the natural forces of accretion and erosion began anew. The location of the inlet shifted slowly and imperceptibly southward by continuous wearing and washing away of sands on the south, and, at the same time, by slow and imperceptible alluvion and reliction resulting in sand accumulations on the north. After many years of this process, this inlet has moved south more than a mile and a half, passing through the old location of New Inlet on the way. When, in this fashion, it shifted southward into the old location of New Inlet, it did not, by reincarnation, become New Inlet and the boundary line. The boundary between the owners had already become fixed by law at an ascertainable line on dry land without reference to any waterline, and the southward movement of the avulsive inlet had no effect on the fixed boundary. This is true without regard to the exchange of deeds between Hugh MacRae and Company and the Sherrills on 9 December 1943. These deeds had no effect whatever on the southern boundary of the lands described in the Torrens decree and in Certificate of Title No. 8. G.S. 43-22.

We held in *Fishing Pier v. Town of Carolina Beach,* 277 N.C. 297, 177 S.E. 2d 513 (1970), that *where a body of water constitutes the boundary of a tract of land,* and where the gradual and imperceptible forces of erosion or accretion change the high water mark of that body of water, the boundary is accordingly changed. In the instant case, however, New Inlet no longer existed and no longer constituted the legal boundary. Of course, as the new and different 1944 inlet churned its way inexorably to the south, its location for a short time was on the very spot where the pre-1933 New Inlet had flowed years earlier. Even so, a "traveling inlet" does not uproot and supplant a boundary line as it passes over it unless such inlet in fact was the boundary when it started its journey.

Our position is supported by cases from other jurisdictions. In *Sweringen v. St. Louis,* 151 Mo. 348, 52 S.W. 346 (1899), it was said: "It is fundamental in the law of accretions that the lands to which they attach must be bounded by the river or stream to entitle its owner to such increase." The general principles to which we adhere in this case—that accretion and erosion do not change boundaries unless the body of water is a boundary line—finds support in the following authorities: *State v. Esselman,* 179 S.W. 2d 749 (Mo. App., 1944); *People v. Spencer,* 5 Mich. App. 1, 145 N.W. 2d 812 (1966); *Perry v. Sadler,* 76 Ark. 43, 88 S.W. 832 (1905); *Street Co. v. Cleveland,* 36 N.E. 2d 196 (Ohio App., 1941).

Moreover, textual treatments of the law of accretion and erosion prescribe the qualification that the watercourse must constitute the boundary of the property to entitle the riparian or littoral landowner to the benefits of accretion or to take from him the losses caused by erosion. See, for example, 5A Thompson, *supra,* § 2560, which reads: "Where a water-line is the boundary of a lot or tract of land, such line, no matter how it shifts, remains the boundary. . . ." *See also,* 11 C.J.S., Boundaries, § 34; 65 C.J.S., Navigable Waters, § 82; 12 Am. Jur. 2d, Boundaries, § 12, *et seq.;* 56 Am. Jur., Waters, § 477; 4 Tiffany on Real Property (3d Ed., 1939), § 1220. For the reasons above set out, we hold that the southern boundary of the Hugh MacRae and Company lands, and its successors in title, is at the point where the accretion from the north connected with the accretion from the south to close New Inlet in 1933.

[11] We further hold that defendants Frank O. Sherrill and wife do not have a right-of-way over the Johnson and Killings-

worth lands from the vicinity of Old Fort Fisher to the southern boundary of said lands. The Torrens Law provides that the registration of title book "shall be and constitute sole and conclusive legal evidence of title." G.S. 43-22. Title to the lands over which a right-of-way is claimed by the Sherrills was registered under the provisions of the Torrens Law from 1916 to 1966. The deed from Frank O. Sherrill and wife to Hugh MacRae and Company, Inc., in 1943 seeking to establish a boundary line and reserving a right-of-way across the lands of Hugh MacRae and Company, Inc., was not recorded in the registration of title book in New Hanover County. No notice of the existence thereof was made in said registration of title book or upon Certificate of Title No. 8 held by Hugh MacRae and Company, Inc. Hence said deed and purported reservation of right-of-way by the Sherrills had no effect whatever on the lands covered by the Torrens title. G.S. 43-18; G.S. 43-22.

[12] Furthermore, the Sherrills claim a right-of-way *by reservation* and not by grant. Yet they have never owned any of the lands over which they purportedly *reserved* a right-of-way. "An easement can be created only by a person who has title to or an estate in the servient tenement." 25 Am. Jur. 2d, Easements and Licenses, § 15; *see* C.J.S., Easements § 24 and cases cited. This alone is fatal to their right-of-way claim.

Frank O. Sherrill and wife allege in their pleadings and now contend that they own all of the land, beach land and marsh land lying south of a certain agreed boundary line established by an exchange of deeds between them and Hugh MacRae and Company, Inc., in 1943, said line being at the point where New Inlet was located in 1933 prior to closing.

[13] In all actions involving title to real property, title is conclusively presumed to be out of the State unless it is a party to the action. G.S. 1-36. The question of ownership here is essentially an action between individual litigants. The State, although a party for purposes of condemnation, claims title only by virtue of this condemnation and not otherwise. Hence, we indulge the presumption on this appeal that title is out of the State. Even so, there is no presumption in favor of one party or the other. Each litigant asserting ownership has the burden of showing title in himself. *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627 (1920); *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759 (1953).

In support of their claim of ownership, the Sherrills offered in evidence a deed from D. C. Boyd and wife to Frank O. Sherrill dated 29 November 1938 and recorded 19 December 1938 in Book 66, page 515, Brunswick County Registry. (S-5) The description in that deed reads as follows:

> "BEGINNING at the mouth of Lighthouse Creek, four beacon posts, and runs with Lighthouse Creek in a southeasterly direction about four miles to the Atlantic Ocean; thence with the Atlantic Ocean in a northeasterly direction to new inlet; thence with New Inlet to the Cape Fear River; thence with the Cape Fear River to the beginning, This being the balance of the property bought by T. F. Boyd about 20 years ago less that part which he has already sold to other parties."

The Sherrills also offered in evidence a deed from Hugh MacRae and Company, Inc., to Frank O. Sherrill dated 9 December 1943 and recorded 14 December 1943 in Book 76, page 480, Brunswick County Registry. (S-6) The description in this deed reads as follows:

> "BEGINNING in the center of the middle cord of the Rock Dam across New Inlet, the point being marked with a cross cut in the Rock Dam it being the beginning corner of a tract of land conveyed by the party of the second part to the party of the first part by deed of even date, and running from said point.
>
> "1. South 70 degrees 20 minutes East Seven Thousand one-hundred and fifty (7150) feet crossing what is known as Still Water Basin to low water mark on the shore of the Atlantic Ocean, the line being marked by an iron monument on the beach One-hundred and ten (110) feet from low water mark.
>
> "2. Thence with low water mark of the Atlantic Ocean South 15 degrees West Forty-two Thousand (42,000) feet to the point of Cape Fear.
>
> "3. Thence with the Southern shore of Bald Head Island with low water mark North 62 degrees West Twenty-Thousand (20,000) feet to a point beyond the Western shore of said Island in the ship channel of Cape Fear River.

"4. Thence up the various courses of the ship channel of the Cape Fear River in a Northeasterly direction to a point in said channel North 70 degrees and 20 minutes West Two-Thousand and three hundred (2300) feet from the point of beginning.

"5. Thence South 70 degrees and 20 minutes East Two-Thousand three hundred (2300) feet, to the beginning.

"Including the property generally known as the Bald Head Island Tract."

[14] The various methods of showing *prima facie* title to land in actions of ejectment and other actions involving the establishment of land titles are enumerated in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142 (1889). In such actions, he who asserts ownership must rely upon the strength of his own title. *Mobley v. Griffin, supra; Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800 (1903); *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627 (1920). The burden of proof is upon the claimant. *Smith v. Benson,* 227 N.C. 56, 40 S.E. 2d 451 (1946).

[15] In the present action Frank O. Sherrill, without exhibiting any grant from the State, attempts to show open, notorious, continuous, adverse possession of a portion of the lands condemned, under color of title in himself and those under whom he claims for seven years or more before this action was brought—one of the methods by which title may be shown.

Taking the evidence offered by the Sherrills in the light most favorable to them, we are of the opinion, and so hold, that there is a total failure of proof as to the location of the land described in the two deeds offered by them. In *Smith v. Fite,* 92 N.C. 319 (1885), the first headnote summarizes the opinion in these words: "Where a party introduces a deed in evidence, which he intends to be used as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession." In other words, the Sherrills must not only offer the deeds upon which they rely, they also "must by proof fit the description in the deed to the land it covers—in accordance with appropriate law relating to course and distance, and natural objects called for as the case may be." *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673 (1951). Every litigant who affirmatively asserts his ownership of land "must show that the very deeds upon which he relies convey, or the descriptions therein

contained embrace within their bounds, the identical land in controversy. If one or more of his deeds convey less than the whole, he must show that the land conveyed thereby lies within the bounds, and forms a part, of the *locus in quo*. As to the identity of the land conveyed, a deed seldom, if ever, proves itself. Fitting the description contained in the deed to the land in controversy, or *vice versa*, must be effected by evidence *dehors* the record." *Skipper v. Yow*, 238 N.C. 659, 78 S.E. 2d 600 (1953). Accord, *Seawell v. Fishing Club*, 249 N.C. 402, 106 S.E. 2d 486 (1959); *Scott v. Lewis*, 246 N.C. 298, 98 S.E. 2d 294 (1957); *McDaris v. "T" Corporation*, 265 N.C. 298, 144 S.E. 2d 59 (1965).

The trial judge held that the Sherrills had failed to show title to any lands being condemned. We concur for that (1) the descriptions in the deeds offered were never fitted to the land in controversy, and (2) the evidence of adverse possession of *any portion* of the lands condemned was woefully inadequate. Adverse possession which will ripen into title must be for the prescribed period of time and be clear, definite, positive and notorious. It must be continuous, adverse, hostile, under known and visible lines and boundaries, and exclusive during the statutory period under a claim of title to the land occupied. *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907); *Snowden v. Bell*, 159 N.C. 497, 75 S.E. 721 (1912); *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347 (1912); *Barfield v. Hill*, 163 N.C. 262, 79 S.E. 677 (1913); *Vance v. Guy*, 223 N.C. 409, 27 S.E. 2d 117 (1943); *Mallett v. Huske*, 262 N.C. 177, 136 S.E. 2d 553 (1964). No such possession is shown. In fact, with respect to the lands lying north of Corncake Inlet and south of New Inlet as it was located in 1933 prior to closing, evidence of adverse possession by the Sherrills is practically nonexistent.

For the reasons stated in this opinion, we hold that (1) the State has complied with the statutory requirements necessary for the condemnation of the lands described in the amended complaint; (2) James E. Johnson, Jr., and Albert S. Killingsworth and wife, Elizabeth E. Killingsworth, were the owners in fee simple at the time of the taking (subject only to the monetary encumbrances set forth in Findings of Fact #2 and #3, Issue III) of all the lands condemned which lie north of a line on the ground where accretion from the north connected with accretion from the south to close the channel of New Inlet in 1933; and (3) Frank O. Sherrill and wife, Ruth J. Sherrill, have

proven no title to any of the lands condemned. The judgment below is modified accordingly.

Modified and affirmed.

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

Chief Justice BOBBITT concurring.

I concur in the decision and all of the Court's opinion except the portion thereof which holds that, by reason of the proviso in G.S. 43-10, "the recital of the service of summons and publication in the decree or in the final judgment" shall be "conclusive evidence thereof," *notwithstanding the court file discloses affirmatively that such service was not made.* Although I disagree as to this particular point, other grounds set forth in the Court's opinion amply support the decision.

Justice SHARP joins in this concurring opinion.

THURMAN L. KELLY v. INTERNATIONAL HARVESTER COMPANY

No. 41

(Filed 10 March 1971)

1. **Rules of Civil Procedure § 50— ruling on directed verdict — findings of fact**

In resolving the question whether plaintiff's evidence was sufficient to go to the jury, it was not required or appropriate that the trial court make "Findings of Fact" and state "Conclusions of Law."

2. **Rules of Civil Procedure § 50— motion for directed verdict — question presented**

The motion for a directed verdict under Rule 50(a) presents substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit under [former] G.S. 1-183, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. G.S. 1A-1, Rule 50(a).

3. **Rules of Civil Procedure § 50— motion for directed verdict — consideration of evidence**

On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable

to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff.

4. **Rules of Civil Procedure § 50— motion for directed verdict — right to jury trial**

Defendant's motion for a directed verdict does not operate as a waiver of jury trial.

5. **Rules of Civil Procedure § 50— directed verdict — role of the jury**

The granting of a motion for a directed verdict requires no perfunctory act from the jury. G.S. 1A-1, Rule 50(a).

6. **Rules of Civil Procedure §§ 41, 50— granting of directed verdict — right to judgment**

When a motion for a directed verdict under Rule 50(a) is granted, the defendant is entitled to judgment unless the court permits a voluntary dismissal of the action under Rule 41(a)(2).

7. **Rules of Civil Procedure §§ 41, 52— motion for directed verdict — findings of fact**

Rule 41(b), which requires the court to make findings of fact when rendering judgment on the merits against the plaintiff, has no application on a motion for a directed verdict in a jury trial. G.S. 1A-1, Rule 41(b) and Rule 52(a).

8. **Contracts § 32— interference with contractual rights by third persons — employment by farm equipment dealership — manufacturer's threatened termination of franchise agreement**

A plaintiff who was discharged from employment as the general manager of a farm equipment dealership failed to offer sufficient evidence that the defendant farm equipment manufacturer had wrongfully and maliciously interfered with his contract of employment with the dealership, the defendant having disapproved of the plaintiff's employment and having threatened the immediate cancellation of the dealership franchise if plaintiff were not discharged, where (1) the defendant had a right under the franchise agreement to terminate the dealership upon a substantial change in its operation and management and (2) there were no special circumstances in the case that would impair the defendant's right of termination.

Justice HIGGINS concurs in result.

APPEAL by plaintiff from *Collier, J.*, May 18, 1970 Regular Civil Session of GUILFORD Superior Court (High Point Division), transferred from the Court of Appeals and certified for initial appellate review in the Supreme Court under G.S. 7A-31(a), docketed and argued as No. 35 at Fall Term 1970.

Plaintiff, Thurman L. Kelly, instituted this civil action against defendant, International Harvester Company (Harvester Company), to recover actual and punitive damages al-

legedly caused by defendant's wrongful and malicious interference with plaintiff's contract of employment with Earnhardt Truck Sales and Service, Inc. (Earnhardt), a franchised dealer of defendant at Salisbury, North Carolina.

Plaintiff alleged in substance that on Tuesday, October 1, 1968, he was employed by William L. Earnhardt (Mr. Earnhardt), Earnhardt's president, under an agreement whereby beginning October 8, 1968, he was to be Earnhardt's general manager and as such receive a salary of $1,000.00 per month, plus 25% of its net profits before taxes, plus plaintiff's travel and transportation costs; that he entered upon his employment under said contract on Tuesday, October 8, 1968; that Mr. Earnhardt discharged plaintiff on Monday, October 14, 1968, then paying him one week's salary plus certain expenses incurred by plaintiff's move from Florida to Salisbury, N. C.; that Mr. Earnhardt discharged plaintiff solely because defendant, through Don H. Gummerson (Gummerson), defendant's district manager, had advised Mr. Earnhardt it would not tolerate Earnhardt's employment of plaintiff and threatened to terminate Earnhardt's franchise if plaintiff were not discharged; and that the sole reason asserted by defendant for requiring Earnhardt's discharge of plaintiff was that plaintiff had too many friends in the High Point area where he had worked for many years and to whom he had sold International trucks and his employment by Earnhardt in Salisbury would adversely affect sales by the franchised dealer in High Point.

Answering, defendant admitted that Gummerson, at all times referred to in the complaint, was defendant's district manager and was acting in the course and within the scope of his employment. Except as stated, defendant denied all of plaintiff's essential allegations. After answering, defendant alleged three separately stated further answers and defenses, which include, *inter alia,* allegations as to what was said in conversations between Gummerson and Mr. Earnhardt concerning Earnhardt's employment of plaintiff.

The only evidence was that offered by plaintiff. Six witnesses testified. Plaintiff and Mr. Earnhardt testified as to matters referred to in the complaint. The other witnesses testified as to plaintiff's good general reputation and competence.

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict in its favor. The agreed statement of case on appeal states simply that the "Court granted" defendant's motion. The "APPEAL ENTRIES" contain this statement: "Upon the sustaining of Defendant's motion for a directed verdict the Court, on motion of the Plaintiff, entered Findings of Fact and Conclusions of Law."

The judgment includes seventeen "Findings of Fact" and five "Conclusions of Law." Most of these findings relate solely to evidential facts, *e.g.*, "4. On Friday, October 11, 1968, William L. Earnhardt called Don H. Gummerson, District Manager of Defendant for the North Carolina and South Carolina District, concerning the employment of Plaintiff by Earnhardt Truck Sales & Service, Inc." Some involve a weighing of the evidence rather than consideration thereof in the light most favorable to plaintiff, *e.g.*, "12. In none of the above conversations did Don H. Gummerson say to Plaintiff or William L. Earnhardt that he would terminate the franchise agreement at Earnhardt Truck Sales & Service, Inc. if Plaintiff was not discharged by William L. Earnhardt."

The judgment concludes as follows: "IT IS THEREFORE, ORDERED, that plaintiff have and recover nothing of the defendant and that defendant have and recover from plaintiff its cost."

Plaintiff excepted and appealed. Although the "APPEAL ENTRIES" state that plaintiff, in apt time, excepted to designated findings of fact and conclusions of law, and excepted to the court's denial of plaintiff's motion that the judgment be set aside and that he be granted a new trial, plaintiff's only assignments of error are the following: "(1) The Trial Judge erred in sustaining defendant's motion for a directed verdict"; (2) the court erred in ordering "that plaintiff have and recover nothing of defendant and that defendant have and recover from plaintiff its cost"; and (3) the court erred in the signing and entry of the judgment.

Schoch, Schoch & Schoch by Arch K. Schoch for plaintiff appellant.

Ervin, Horack & McCartha by C. Eugene McCartha for defendant appellee.

BOBBITT, Chief Justice.

Plaintiff states, as the sole question presented, the following: "Was *the evidence* presented at trial, taken in the light most favorable to the plaintiff, sufficient to withstand motion for a directed verdict?" (Our italics.) In the discussion of this question, plaintiff ignores all particular findings of fact and conclusions of law made by Judge Collier and undertakes to establish that *the evidence* "presented a question for the jury."

[1] The question now presented correctly by plaintiff is the identical question which was presented to the trial court by defendant's motion for a directed verdict, namely, whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury. In resolving this question, it was not required or appropriate that the trial court make "Findings of Fact" and state "Conclusions of Law." To pass upon the single question of law presented, namely, the sufficiency of plaintiff's evidence to withstand defendant's motion for a directed verdict, we must look to the evidence and base decision thereon without regard to the trial court's "Findings of Fact" and "Conclusions of Law."

[2] When plaintiff presented his evidence and rested, defendant's motion for a directed verdict in its favor was the procedure prescribed by Rule 50(a) of the Rules of Civil Procedure, G.S. 1A-1, for challenging the sufficiency of plaintiff's evidence for submission to the jury. The motion for a directed verdict under Rule 50(a) presents substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit under the (repealed) statute formerly codified as G.S. 1-183. See Comment by Phillips in 1970 Pocket Part at p. 21 to McIntosh North Carolina Practice and Procedure, 2d ed., § 1488.15, hereinafter cited as Phillips. The motion for judgment of involuntary nonsuit under G.S. 1-183 presented a question of law for decision by the court, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. *Lake v. Express, Inc.*, 249 N.C. 410, 106 S.E. 2d 518, and cases cited; *Barefoot v. Joyner*, 270 N.C. 388, 154 S.E. 2d 543; *Chandler v. Chemical Co.*, 270 N.C. 395, 154 S.E. 2d 502. The same question of law is now presented by a motion for a directed verdict under Rule 50(a).

[3] "On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, *as a matter of law,* the evidence is insufficient to justify a verdict for the plaintiff." 5 Moore's Federal Practice, § 41.13(4) at 1155 (2d ed. 1969). This statement is fully supported by well-considered decisions, including the following: *O'Brien v. Westinghouse Electric Corporation,* 293 F. 2d 1 (3d Cir. 1961); *Wolf v. Reynolds Electrical & Engineering Co.,* 304 F. 2d 646 (9th Cir. 1962); *Bragen v. Hudson County News Company,* 321 F. 2d 864 (3d Cir. 1963).

[4] Nothing in Rule 50(a) suggests that defendant's motion for a directed verdict operated as a waiver of jury trial. Indeed, Rule 50(a) expressly provides that "(a) motion for a directed verdict which is not granted is not a waiver of trial by jury *even though all parties* to the action have moved for directed verdicts." (Our italics.)

[5] Rule 50(a) concludes with this sentence: "The order granting a motion for a directed verdict shall be effective without any assent of the jury." The words, "without any assent of the jury," are used to dispel any apprehension that the jury is required to perform a perfunctory act in connection with the verdict in a case which is not submitted to it for determination. 5 Moore's Federal Practice, § 50.02(3), at 2331 (2d ed. 1969).

[6] When a motion for a directed verdict under Rule 50(a) is granted, the defendant is entitled to judgment unless the court permits a voluntary dismissal of the action under Rule 41(a)(2). Under this rule, at the instance of the plaintiff, the court *may* permit *a voluntary dismissal* upon such terms and conditions as justice requires. *Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 217, 91 L. Ed. 849, 853, 67 S.Ct. 752, 755 (1947); Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Intra. L. Rev. 1, 38 (1969). Here, prior to judgment, plaintiff did not request a voluntary dismissal and, subsequent to judgment, the motion by plaintiff was that the judgment be set aside and that he be granted a new trial.

[7] Apparently, the "Findings of Fact" and "Conclusions of Law" made by the court at the instance of plaintiff's counsel were made under the apprehension that Rule 41(b) was or

might be applicable. The ground for dismissal under Rule 41(b) is that *"upon the facts* and the law the plaintiff has shown no right to relief." (Our italics.) When applicable, Rule 41(b) requires that the court, when rendering judgment on the merits against the plaintiff, shall make findings of fact as provided in Rule 52(a). See Phillips, § 1375, p. 35; Sizemore, *op. cit.* at 35. However, Rule 41(b) has no application when considering a motion for a directed verdict in a jury trial. See Phillips, § 1488.5, p. 19; Sizemore, *op. cit.* at 36-38. By its express terms, Rule 41(b) applies only "in an action tried by the court without a jury."

In the present case, the "Findings of Fact" and "Conclusions of Law" were not required or appropriate and have no legal significance. Indeed, the briefs proceed on this assumption. Neither brief attributes significance to any finding of fact or any conclusion of law. They proceed on the assumption that the case is to be decided on the basis of *the sufficiency of the evidence* to go to the jury.

The evidence with reference to plaintiff's employment and discharge by Earnhardt, Harvester Company's franchised dealer in Salisbury, must be considered in the light of the existing relationships between Harvester Company and Earnhardt and of the Harvester Company's dealership in High Point and plaintiff's former involvement in the High Point dealership.

The evidence as to the relationship between Harvester Company and Earnhardt preceding and at the time of plaintiff's employment by Earnhardt (October 1, 1968) tends to show the following:

In meetings and discussions for several months prior to October 1, 1968, Gummerson expressed disapproval of Mr. Earn-

hardt's management of the Earnhardt dealership. According to Mr. Earnhardt's testimony, there was friction because of disagreements as to the respective liabilities of Earnhardt and Harvester Company to purchasers of International products under warranties issued in connection with sales. By letter(s) of termination dated August 19, 1968, the Harvester Company notified Earnhardt that its dealership was terminated as of February 20, 1969. Mr. Gummerson spoke of this as placing defendant *on probation.* Some two months prior to October 1, 1968, Mr. Earnhardt, with Gummerson's approval, had hired one Al Carter as general manager of Earnhardt's Harvester Company business. On October 1, 1968, Mr. Earnhardt employed plaintiff to replace Carter as such general manager. On Wednesday, October 10, 1968, George White, Zone Manager in the Harvester Company's Motor Truck Division, visited Earnhardt's place of business. On October 11, 1968, Mr. Earnhardt called Gummerson and advised him of plaintiff's employment by Earnhardt and that White had made statements indicating that the employment of plaintiff would not be acceptable to the Harvester Company. When expressing his disapproval of the hiring of plaintiff as general manager of Earnhardt's business for the Harvester Company, Gummerson told Mr. Earnhardt "that Mr. Carter was doing a good job."

The evidence as to the Harvester Company's dealership in High Point and plaintiff's former involvement in the High Point dealership tends to show the following:

Plaintiff was and is a "truck specialist." Prior to September, 1961, he had been employed as sales manager of a franchised dealer in Corbett motor trucks, Diamond motor cars, etc.

In September, 1961, Truck and Trailer Sales, the Harvester Company's franchised dealer in High Point, "lacked about $75,000.00 of having anything." For organizing a corporation, Carolina Truck and Trailer Sales, Inc. (Carolina), to take over the business and put it "on its feet," plaintiff received 25% of the corporate stock and was made "Vice President in charge of sales." Plaintiff worked for Carolina until June, 1968, when his services "were terminated . . . by mutual agreement." During the last eighteen months of his employment by Carolina, plaintiff was also working for and president of a separate corporation, Continental Truck Leasing Company (Continental),

"which was a part of Carolina Truck and Trailer Sales." During this period, the leasing company purchased from the sales company International trucks in the amount of "say $150,000.00."

During the last eighteen months of his employment by Carolina, plaintiff was having "marital difficulties" and also "a drinking problem." Too, on account of necessary surgery, he was absent from the business for approximately five weeks. Carolina's volume of business dropped from $1,600,000.00 in fiscal year 1966 to $1,300,000.00 in fiscal year 1967. In fiscal year 1968, which ended in August, 1968, the volume "had dropped to $700,000," but "that had been made up by Continental Leasing to the tune of $300,000.00 on a more profitable level than Carolina." (Note: Continental also leased trailers which it purchased from Dorsett Distributing Company.) Fiscal year 1968 ended some two months after the termination of plaintiff's employment in June, 1968. Until two months before plaintiff's employment was terminated, a Mr. Mickey had been general manager. Plaintiff had been vice president and sales manager of Carolina and also president of Continental. Through "a maneuver by (plaintiff's) partners," John Ray was made general manager although "he owned no stock." John Ray had been general manager for approximately two months when plaintiff's employment was terminated "by mutual agreement."

The evidence as to what occurred from the termination of plaintiff's employment by Carolina (June, 1968) until plaintiff's employment by Earnhardt (October 1, 1968) tends to show the following:

After the termination of his employment with Carolina, plaintiff, while visiting his brother in Panama City, Florida, met Mr. Bull Cowart and negotiated with him with reference to employment by the Cowart Motor Company. Cowart Motor Company was a dealer under "several different franchises," including a franchise from the Harvester Company. At plaintiff's request, Mr. Cowart called Mr. Gummerson and was advised by Mr. Gummerson that plaintiff was "highly qualified," had "excellent knowledge of the product," and was "a go-getter." In response to Gummerson's statement that he understood "that Tom (plaintiff) has had a drinking problem and some personal problems," Mr. Cowart stated that he knew "all about that," that plaintiff had "explained all that." Gummerson remarked:

"That is like Tom; he will tell you the truth about it." Plaintiff was offered immediate employment by the Cowart Motor Company, "to organize the International Harvester franchise end" of its business, at $300.00 per week, plus new car transportation, plus all expenses." Plaintiff advised Mr. Cowart he could not go to work that day, that he had "to get back to North Carolina," and that he would "be back to work in ten days."

Plaintiff returned to Panama City and worked under his employment by Cowart Motor Company for six or seven weeks. While so employed, plaintiff and Mr. Earnhardt met in Atlanta, Georgia, on October 1, 1968, to discuss the employment of plaintiff by Earnhardt. At this meeting, plaintiff was employed as Earnhardt's general manager of its Harvester Company business. Pursuant to their agreement, plaintiff began work for Earnhardt on October 8, 1968, at a salary of $1,000.00 per month, plus 25% of Earnhardt's net profits before income taxes, plus new car transportation and expenses.

The evidence with reference to the circumstances immediately preceding and at the time of the discharge of plaintiff by Earnhardt tends to show the following:

As a result of the telephone conversation on Friday, October 11, 1968, between Mr. Earnhardt and Gummerson, referred to above, plaintiff conferred with Gummerson in Charlotte, N. C., on Monday, October 14, 1968. In the course of their conversation, Gummerson stated that if plaintiff were employed as Earnhardt's general manager plaintiff "would indeed be gravitating toward High Point, . . . would pull the business out of there and that John Ray (was) struggling"; and that if plaintiff were to "go to High Point it would muddy the water and make things difficult on the High Point dealership." Asked by plaintiff whether he would "lift" Earnhardt's franchise if Mr. Earnhardt kept plaintiff "in his employ," Gummerson replied: "I will answer that question to Mr. Earnhardt if you will have him call me." Later that day, after plaintiff's return to Salisbury, Mr. Earnhardt called Gummerson and plaintiff obtained Mr. Earnhardt's permission to "listen in" to their conversation. During this conversation, Mr. Earnhardt informed Gummerson that plaintiff had been employed to replace Al Carter as general manager. Gummerson explained that Earnhardt's employment of plaintiff "would gravitate toward High Point and pull the

sales from there and especially in Thomasville, where (plaintiff) had a very large account; and that he would not tolerate (plaintiff) being in the dealership." When asked by Gummerson what he was going to do about it, Mr. Earnhardt replied: "You give me no alternative, I will have to discharge him." Plaintiff's employment by Earnhardt was terminated October 14, 1968, at which time Earnhardt paid plaintiff a total of $310.00, $250.00 as salary for one week and $60.00 as reimbursement for expenses.

On October 23, 1968, plaintiff saw Gummerson in Greensboro and told him he "had been fired." On that occasion, in the course of an extended conversation, Gummerson told plaintiff "that John Ray, the man that replaced (him) at Carolina Truck and Trailer Sales . . . had applied for a co-op dealership and that this dealership was pending at this time predicated on his recommendation," adding: "Now, Tom, you know that John Ray worked for me for a long time and I feel personally responsible for John Ray . . . . I can't afford to let you go over there and hurt International Harvester or John Ray, because of this cooperative dealership." The proposed cooperative dealership would have involved a purchase by the Harvester Company of a three-fourths interest in the dealership business, John Ray to retain a one-fourth interest and "be in control and manage the dealership." Gummerson indicated he had "no doubt" the cooperative dealership would be approved and did not want plaintiff "over there muddying up the water." (Note: There was no evidence such a cooperative dealership came into existence.)

As promised in the conversation of October 23, 1968, on October 25, 1968, Gummerson wrote letters on stationery of International Harvester Motor Truck, Charlotte District Office, signed by him as "District Manager," in which he recommended plaintiff for employment to each of the following franchised dealers of the Harvester Company, *viz.:* (1) Surry Truck and Tractor Company, Mount Airy, North Carolina; (2) Edens Truck Center, Florence, South Carolina; (3) Burton Truck and Equipment Company, Columbia, South Carolina; (4) Hickory International Truck Sales, Inc., Hickory, North Carolina. Although plaintiff received these four letters of recommendation from Gummerson, he testified he "could not pursue them because at this time (he) had entered into litigation against them,

and (he) knew that it would be prohibited." With the exception noted below, plaintiff's efforts to obtain employment, and the employments obtained by him, were with businesses other than franchised dealers of the Harvester Company. At an unidentified time following plaintiff's conference with Gummerson on October 23, 1968, one Earl Ogburn, "heavy-duty truck sales manager" and an assistant to Gummerson, called plaintiff "at (his) home in High Point" and as a result plaintiff went to Whiteville, North Carolina, and interviewed Mr. Marks, "the International Harvester Dealer in that area," relative to employment. However, "they did not need anybody in that particular dealership."

The basis of our decision renders unnecessary a review of the evidence which bears solely on the issue of damages.

On cross-examination, Mr. Earnhardt's attention was directed to Paragraph 26 of the (Earnhardt-Harvester Company) Franchise Dealer Agreement, which had been marked as defendant's Exhibit No. 1, specifically to a portion of Subsection A-1. After Mr. Earnhardt had read "to himself" from the exhibit, he was asked the following question:

"So, Mr. Earnhardt, isn't it true that under your franchise agreement with International, that International could at its option terminate that agreement effective at once, if the dealer is a corporation and there is any change in the principal officers, directors, management, or stock ownership which in the opinion of the Company will effect a substantial change in the operation, management or control of the dealership?" His answer was: "Yes, sir."

[8] When considered in the light most favorable to plaintiff, there was sufficient evidence to permit a jury to find that Earnhardt discharged plaintiff because of Gummerson's refusal to approve his employment as Earnhardt's general manager and the prospect of immediate termination of its franchise if plaintiff were not discharged. The crucial question is whether the evidence, when considered in the light most favorable to plaintiff, would permit a finding that Gummerson's actions were tortious rather than in the exercise of the Harvester Company's legal rights.

Plaintiff relies largely on *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176 (petition for rehearing dismissed, 242 N.C. 123,

86 S.E. 2d 916), where this Court held that "an action in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party." The opinion of Justice (later Chief Justice) Parker sets forth in detail the essential elements of this cause of action, one being "that in so doing the outsider acted without justification." *Id.* at 674, 84 S.E. 2d at 181.

In *Wilson v. McClenny,* 262 N.C. 121, 132, 136 S.E. 2d 569, 578, following a discussion of Childress, Justice Sharp states: "The distinction between Childress and the case *sub judice* is that defendants here are not *outsiders.* They are all stockholders and directors of Gateway. . . . As either directors or stockholders, they were privileged purposely to cause the corporation not to renew plaintiff's contract . . . if, in securing this action, they did not employ any improper means and if they acted in good faith to protect the interests of the corporation."

The Harvester Company was not *an outsider.* Its franchise agreement with Earnhardt antedated the negotiations between Mr. Earnhardt and plaintiff and was in effect at the time of such negotiations. Its primary interest under the contract was the sale of its products in the Salisbury area through Earnhardt. To accomplish this, Gummerson had approved Al Carter as Earnhardt's general manager of its Harvester Company business. Gummerson thought Carter was doing a good job when Earnhardt employed plaintiff to replace him.

The pertinent common-law rule is set forth in Restatement of Torts, § 773, as follows: "One is privileged purposely to cause another not to perform a contract, or enter into or continue a business relation, with a third party by in good faith asserting or threatening to protect properly a legally protected interest of his own which he believes may otherwise be impaired or destroyed by the performance of the contract or transaction." See also *Raycroft v. Tayntor,* 68 Vt. 219, 35 A. 53 (1896).

Apart from the Harvester Company's legal right under the common law to protect and promote its own interests in the conduct and success of Earnhardt's business, the franchise contract provided expressly that the Harvester Company had the right, at its option, to terminate the agreement, "effective at once," in the event of any change in Earnhardt which, in the opinion of the Harvester Company, "will effect a substantial change in the operation, management or control of the dealership." Plaintiff's

brief states: "The defendant, indeed, possessed a contractual right to terminate the franchise agreement if there were a substantial change in management." Unquestionably, the employment by Earnhardt of plaintiff as the new general manager of its Harvester Company business, effected "a substantial change in the operation, management or control of the dealership." Absent *special circumstances,* neither the exercise nor the threat to exercise a legal right may be considered tortious conduct.

"Absolute rights, including primarily rights incident to the ownership of property, *rights growing out of contractual relations,* and the right to enter or refuse to enter into contractual relations, may be exercised without liability for interference without reference to one's motive as to any injury directly resulting therefrom. This is in contrast to the exercise of common and qualified rights which may be exercised only where there is justification therefor. In other words, acts performed with such an intent or purpose as to constitute legal malice and without justification, which otherwise would amount to a wrongful interference with business relations, are not tortious where committed in the exercise of an absolute right." (Our italics.) 45 Am. Jur. 2d, Interference § 23.

Plaintiff contends the general rule is not applicable because of these *special circumstances:* He asserts the evidence, when considered in the light most favorable to him, tends to show that Gummerson's refusal to "tolerate" plaintiff's employment as Earnhardt's general manager was not based upon his lack of qualifications to develop Earnhardt's business but was to protect the High Point dealership from competition by Earnhardt. In making these contentions, plaintiff stresses the testimony as to statements by Gummerson with reference to a proposal for a a "cooperative dealership" in High Point in which the Harvester Company would acquire a three-fourths interest.

Although the evidence discloses that Gummerson was satisfied with Al Carter's service as Earnhardt's general manager, there was evidence tending to show that Gummerson's primary objection to plaintiff as Earnhardt's general manager was the apprehension that he would "gravitate" from the High Point dealership to the Salisbury dealership sales to customers in the High Point area and especially customers who had bought from him while he was employed by Carolina. The evidence affords ample grounds for this apprehension. Until June, 1968, and for

ten years or more prior thereto, plaintiff had sold International products in the High Point area. His principal contacts as well as his home were in High Point.

Over a period of three years prior to the termination of plaintiff's employment at Carolina "by mutual agreement," Carolina's volume of business had decreased drastically. In October, 1968, Carolina, the High Point dealership, was referred to as "struggling." When considered in context, the evidence as to a proposed "cooperative dealership" in High Point in which the Harvester Company was to acquire a direct financial interest indicates that the High Point dealership had fallen into desperate straits to warrant consideration by the Harvester Company of such a cooperative dealership. Nothing in the record suggests that such a cooperative dealership came into existence.

If otherwise lawful, plaintiff contends Harvester Company's conduct is tortious because it was an unlawful attempt to stifle competition by a division of territory in violation of the Sherman Act. 15 U.S.C.A. § 1 *et seq.* Plaintiff cites *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967), as authority for the proposition that a manufacturer which sells its products to a dealer cannot lawfully restrict the territory in which the dealer may sell these products. Conceding, *arguendo,* it is authority for the proposition stated by plaintiff, the cited case does not apply to the factual situation now under consideration.

It is first noted that the franchise agreement (other than the provision as to termination referred to in Earnhardt's testimony) is not in the record. Whether the Harvester Company sells to its dealers or consigns products for sale on commission does not appear. Nor is there evidence bearing upon the sale or resale prices of any International products. Nor does it appear that Gummerson sought to place any restrictions upon Earnhardt as to the territory in which it could make sales. In ordinary course, it would be expected that the principal market for the Salisbury dealer would be in the Salisbury area.

It is noteworthy that Gummerson undertook to assist plaintiff in finding employment with other International dealers. Gummerson recommended plaintiff for the employment plaintiff obtained in Panama City, Florida. After the termination of plaintiff's employment with Earnhardt, Gummerson gave plaintiff letters of recommendation to International dealers. Referring

to the dealers to whom Gummerson addressed these letters, plaintiff asked Gummerson: "Don, if I go to one of these other boys are you still going to do the same thing if I sell in High Point?" Gummerson replied: "Well, Tom, you know that nobody can really control that. . . . But we are not going to tolerate your muddying up the water in High Point." Under the circumstances here disclosed, no division of territory in violation of the Sherman Act is involved.

We think the evidence as to *special circumstances*, when considered in the light most favorable to plaintiff, is insufficient to impair the Harvester Company's legal right (option) to terminate (or threaten to terminate) the franchise agreement when there is "a substantial change in the operation, management or control of the dealership."

For the reasons indicated, we hold the evidence insufficient for submission to the jury and that defendant's motion for a directed verdict was properly allowed. Hence, the judgment of the court below is affirmed.

Affirmed.

Justice HIGGINS concurs in result.

STATE OF NORTH CAROLINA v. DEE D. ATKINSON

No. 2

(Filed 10 March 1971)

1. **Jury § 7; Criminal Law § 135— rape case — exclusion of jurors who would never return death penalty**

The trial court in a rape case properly sustained the State's challenge for cause to those jurors who stated that they were irrevocably committed before the trial to vote against the death penalty regardless of the facts and circumstances which might be revealed by the evidence.

2. **Jury § 5— selection of jurors — selection of 12 jurors by the State**

It was proper in a rape case for the State to pass upon a panel of twelve prospective jurors before any jurors were tendered to the defense.

3. Criminal Law § 76— admissibility of confession — sufficiency of findings on voir dire

Trial court properly admitted defendant's confession in evidence where all the testimony on the *voir dire* was to the effect that the defendant, while subject to custodial interrogation, was fully warned of his rights and that the defendant appeared to be coherent and to understand the proceedings.

4. Criminal Law § 76— admission of confession — corroborative testimony — voir dire hearing

The admission of a police officer's testimony which corroborated previous testimony relating to defendant's confession does not require a second *voir dire* hearing on the voluntariness of defendant's confession.

5. Criminal Law §§ 42, 43; Rape § 4— rape prosecution — admission of exhibits — clothing — photographs — maps

In a prosecution charging defendant with the rape of his four-year-old stepdaughter, who died as a result of the offense, the trial court properly admitted in evidence the following exhibits of the State: the clothes worn by the stepdaughter at the time of the offense, the washcloth used by the defendant to wipe blood from the child, color photographs taken of the child in the morgue, and the map drawn by defendant to guide the officers to the place where the body was buried.

6. Criminal Law § 53; Rape § 4— rape prosecution — testimony by pathologist

In a prosecution charging defendant with the rape of his four-year-old stepdaughter, testimony by the examining pathologist that the victim had been penetrated and that her injuries could have been caused by a male organ, *held* admissible, and such testimony did not constitute an invasion of the province of the jury.

7. Criminal Law § 34— rape prosecution — allusion to the murder of the rape victim

In a prosecution charging defendant with the rape of his four-year-old stepdaughter, who died as a result of the offense, allusions to the child's murder by the trial witnesses and by the solicitor in his argument to the jury were not erroneous, the murder having been so closely connected with the rape in both time and circumstance as to constitute the same transaction.

8. Criminal Law §§ 114, 120— rape case — instructions on punishment — expression of opinion

In a prosecution charging defendant with the rape of his four-year-old stepdaughter, trial court's instruction that "if the jury do not recommend that defendant's punishment shall be imprisonment for life it will be the duty of this court, and you may rest assured that the court will comply with its duty and sentence him to die," *held* not prejudicial to defendant. G.S. 1-180.

9. Constitutional Law § 36; Rape § 7— rape prosecution — death penalty — cruel and unusual punishment

Imposition of the death penalty upon defendant's conviction of the rape of his four-year-old stepdaughter is not cruel and unusual punishment. U. S. Constitution, VIII Amendment; N. C. Constitution, Art. I, § 14; G.S. 14-21.

Justice SHARP dissenting.

Chief Justice BOBBITT joins in dissenting opinion.

APPEAL by defendant from *Bailey, J.*, at the August 1970 Criminal Session of JOHNSTON Superior Court.

The bill of indictment, proper in form, charges defendant with the forcible rape of Catherine Carr in Johnston County on 16 December 1967, a violation of G.S. 14-21.

The State's evidence—defendant offered none—tends to show that Catherine (Kathy) Carr, age four years, was living in Smithfield, Johnston County, with her maternal grandmother on 16 December 1967. The defendant was her stepfather. He lived in Smithfield and the child's mother, who at the time was living separate and apart from defendant, lived in Durham. Prior to the separation they had all lived together at defendant's home.

At approximately 5 p.m. on 16 December 1967 defendant drove his station wagon to the home of the grandmother and told her he wanted to take Kathy to see her mother in Durham. They located Kathy at the home of a relative, picked her up and returned to the grandmother's home where a change of clothing was assembled for the child. Defendant and Kathy then left together. The grandmother, an experienced hospital nurse's aide, observed nothing unusual about defendant. He appeared to her to be perfectly normal.

About 9:45 p.m. defendant, driving his station wagon, pulled up in front of the Charcoal Inn Restaurant in Smithfield. There was no one else in the station wagon. He got out and entered the restaurant. His clothing was disarranged. He went to the restroom and remained there about five minutes. When he emerged his hair had been combed, his shirttail was tucked in and his clothing properly arranged. He purchased a Coca-Cola, drank some of it, went out to his station wagon, opened the door but never got in. He immediately shut the door, returned to the

restaurant, and announced that someone had kidnapped his child. He made conflicting statements as to where the child had been in the vehicle. In the opinion of a police officer who was seated in the restaurant in civilian clothes, and who had observed the station wagon through the window from the time it arrived until defendant announced that someone had stolen the child, he acted normal at the time.

Investigating officers warned defendant "that he had an absolute right to remain silent, that he did not have to answer any questions, or make any statements to me whatsoever; that anything that he did say could be used against him in a court of law; that he was entitled to a lawyer at any time he so desired; that if he could not afford a lawyer and wanted a lawyer, that one would be appointed for him by the State of North Carolina. I also told him that if he elected to answer questions that he could terminate the interview at any time he so desired and that a lawyer would be appointed for him if he wanted one. I also asked him if he understood each of these rights. He stated that he did. I asked him if he wanted a lawyer and he stated that he did not want one." Defendant first told the officers that after he left the home of the maternal grandmother with Kathy he drove to his home to call his parole officer for permission to leave the county in order to go to Durham; that he was unsuccessful in contacting his parole officer; that after the second unsuccessful call he and Kathy rode around looking at Christmas lights in Smithfield and Selma until about 10 o'clock, when he stopped at the Charcoal Inn Restaurant to visit the restroom; that Kathy was standing on the seat beside him and when he stopped she lay down on the seat and he covered her with his field jacket; that when he returned from the restroom Kathy was gone; that he so informed the people inside the restaurant and requested that the police department be called; that the officers came, searched the area, but were unable to locate her. This statement was made on 17 December 1967 at about 12:30 p.m. He repeated the same story to the officers the following day at 12:30 p.m.

Defendant was taken to SBI Headquarters in Raleigh, again warned of his constitutional rights, and interviewed by SBI Agent Robert D. Emerson. This interview took place on 18 December 1967 from 6:05 to 6:46 p.m. He told Mr. Emerson that after he picked up his stepdaughter Kathy Carr he left the grandmother's home and drove to his residence; that he attempted un-

successfully to telephone his parole officer and then decided to have intercourse with Kathy; that he did so and that she screamed and struggled; that the child was torn and he used a sheet and a washcloth to wipe the blood from the child; that he dressed her, took her to his station wagon and left with her. Defendant then drew a map, without assistance, using paper and pen supplied by the officer. The map was accurate, and, accompanied by defendant, the officers found Kathy's body buried in a pine woods in Wayne County, eighteen miles from defendant's home.

A postmortem examination by Dr. Dewey Harris Page, pathologist, revealed that Kathy had been penetrated and had suffered a tear in the posterior vaginal wall.

The jury found defendant guilty of rape and the presiding judge pronounced a sentence of death as required by law. Defendant appealed to the Supreme Court assigning errors discussed in the opinion.

Robert A. Spence, Attorney for defendant appellant.

Robert Morgan, Attorney General; Andrew A. Vanore, Jr., Assistant Attorney General, and Charles A. Lloyd, Staff Attorney, for the State of North Carolina.

HUSKINS, Justice.

[1] Appellant first contends that the trial court erred in allowing the State to successfully challenge for cause certain prospective jurors because of their stated views on capital punishment.

The law with regard to this issue is well established. "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois,* 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968). *See State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593 (1968). On the other hand, as the United States Supreme Court said in *Witherspoon,* footnote 21: "The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and

circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out. . . ." *Accord, Boulden v. Holman,* 394 U.S. 478, 22 L. Ed. 2d 433, 89 S.Ct. 1138 (1969).

On the record before us seven jurors were excused for cause because of their objections to the death penalty, and one challenge by the State based on such objection was disallowed. In each instance where the challenge was sustained the prospective juror testified on *voir dire* in substance that there were no circumstances under which he or she could conscientiously return a verdict which would result in a death penalty. A fair appraisal of the statements of each venireman successfully challenged points unerringly to the conclusion that he or she was irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances which might be revealed by the evidence. Such irrevocable commitment is valid cause for challenge in accord with both the letter and the spirit of *Witherspoon.* This assignment of error is accordingly overruled.

[2] Appellant next contends that the trial court erred in departing from the customary procedure for the selection of jurors in a capital case by requiring that a panel of twelve be passed on by the State before any jurors were tendered to the defense. Such procedure was recently considered and approved by this Court in *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729 (1970). There, Justice Higgins, for the Court, wrote: "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." The procedure followed here meets this standard. See Braswell, *Voir Dire*—Use and Abuse, 7 Wake Forest Law Review 49 (1970) for an informative discussion on *voir dire* examination of jurors and witnesses. This assignment of error is without merit.

[3] For his third assignment defendant contends that the trial court erred in admitting into evidence his purported confession as related by Officer Emerson and corroborated by Officer Crocker.

When the testimony of Emerson was challenged at the trial a *voir dire* examination was conducted in the absence of the jury following which the trial judge found that defendant had been warned of his constitutional rights as outlined in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), and was thoroughly aware of them at all times when interrogation took place. The judge concluded that defendant freely, voluntarily and understandingly waived his right to remain silent and his right to have counsel present during interrogation. Officer Emerson's testimony of the confession was accordingly admitted and thereafter the testimony of Officer Crocker, who was not examined on the *voir dire,* was admitted over objection without a further *voir dire.*

All the evidence on the *voir dire* is to the effect that the defendant, while subject to custodial interrogation, was fully warned of his rights each time he was questioned. He appeared to be coherent and to understand the proceedings. Indeed, there is no suggestion in the record of any coercion whatsoever. Defendant did not take the stand during the *voir dire* and offered no evidence from any source to rebut the testimony of the officers that the confession was completely voluntary and was knowingly and understandingly made. The record shows, therefore, that the State carried its burden of proof and demonstrated with undisputed evidence that defendant's confession was freely and voluntarily obtained. *See State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171 (1968). The findings of the judge are supported by all the evidence adduced on the *voir dire,* and those findings will not be disturbed. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966).

[4] The testimony of Officer Crocker, who was present while defendant was questioned by Emerson, is corroborative of Emerson's testimony and therefore admissible. Stansbury, N. C. Evidence (2d Ed., 1963), § 50. No second *voir dire* on the voluntariness of defendant's confession was required for admission of Crocker's testimony.

[5] Defendant contends various exhibits of the State, admitted over objection, were inflammatory and prejudicial. Included among the exhibits were clothes worn by the victim, the bloody washcloth, photographs of the victim in the morgue, and the map drawn by defendant to guide the officers to the place where

the body was buried. Authentication of the items admitted into evidence is not questioned.

Garments worn by the victim of a rape and murder showing the location of a wound upon the person of the deceased, or which otherwise corroborate the State's theory of the case, are competent. *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294 (1949); *State v. Fleming,* 202 N.C. 512, 163 S.E. 453 (1932). When relevant, articles of clothing identified as worn by the victim at the time the crime was committed are always competent evidence, and their admission has been approved in many decisions of this Court. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968). *See* Stansbury, N. C. Evidence (2d Ed., 1963), § 118.

Photographs are admissible in this State to illustrate the testimony of a witness. *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824 (1948); *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970). *See generally,* Stansbury, *supra,* § 34. Here, the jury was properly instructed to consider the photographs in question for illustrative purposes only. Their admission was not error. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916 (1955); *State v. Perry,* 212 N.C. 533, 193 S.E. 727 (1937).

That a photograph might inflame the passions of the jurors does not render it inadmissible. "The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony." *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969). *Accord, State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967). Furthermore, the fact that photographs are in color does not affect their admissibility. *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329 (1968). Thus the color photographs depicting the condition of the child's body when examined by Dr. Pate were competent for the purpose of illustrating the doctor's testimony.

The officers testified that defendant drew the map to which defendant objects and that they followed it to the scene where defendant had buried the victim's body. Obviously, the map was admissible to illustrate their testimony. Stansbury, *supra,* § 34.

The washcloth was properly admitted in evidence over defendant's objection. Decisions of this Court establish the rule that objects which have a relevant connection with the case are admissible in evidence in both civil and criminal trials. *State v. Mordecai,* 68 N.C. 207 (1873); *State v. Wall,* 205 N.C. 659, 172 S.E. 216 (1934); *State v. Harris,* 222 N.C. 157, 22 S.E. 2d 229 (1942); Stansbury, *supra,* § 118.

[6] Appellant's fifth assignment of error concerns the testimony of the Pathologist, Dr. Pate, who examined the victim at the morgue and testified at the trial with respect to the condition of Kathy Carr's body. Appellant contends the doctor was allowed to testify regarding the very question the jury was required to answer, *i.e.,* whether the victim had been raped, citing *State v. Hightower,* 187 N.C. 300, 121 S.E. 616 (1924). There is no factual basis for this contention. The record shows that the pathologist testified only that the victim had been penetrated and that the injuries could have been caused by a male organ. He did not testify that the defendant or anyone else raped Kathy Carr, a subject on which he obviously had no information. His testimony was properly admitted. *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494 (1945); *State v. Perry,* 250 N.C. 119, 108 S.E. 2d 447 (1959); Stansbury, *supra,* § 135; *State v. Atkinson, supra.*

[7] In several instances during the trial witnesses alluded to the fact that the victim was dead. The solicitor argued as much to the jury. Here, with defendant on trial for rape and not for murder, the contention is made that any allusion, in either the evidence or the argument, to the fact that Kathy Carr was murdered is reversible error.

The general rule in this State is that all evidence of the commission of other offenses must be excluded in the prosecution for a particular crime. *State v. Vinson,* 63 N.C. 335 (1869); *State v. Beam,* 179 N.C. 768, 103 S.E. 370 (1920); *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954); Stansbury, *supra,* § 91. To this general rule, however, there are several exceptions, and they are fully set out by Justice Ervin in *State v. McClain, supra.* The exception pertinent here provides that evidence of another offense is competent and admissible "when the two crimes are parts of the same transaction, and by reason thereof are so connected in point of time or circumstance that one cannot be fully shown without proving the other." *State v. McClain,*

supra. Such is the case here. While the State introduced no direct evidence of the murder, mention of it inevitably occurred during the trial. It is obvious from the record that the jury was well aware that the victim of the rape was also killed in the same transaction. Even so, this was not error. It was unavoidable because the crimes were so closely interrelated. But for the fact that the rape and the murder occurred in different counties defendant would likely have been tried for both crimes at the same time before a single jury. This assignment of error is overruled.

[8] After having outlined the factual findings upon which it would be the duty of the jury to return a verdict of guilty as charged in the bill of indictment, and after having informed the jury of its unbridled discretionary right to recommend life imprisonment if it found defendant guilty, the judge used the following language in his charge: "If you find him guilty of rape as charged in the bill of indictment and say no more; that is to say, if you do not recommend that his punishment shall be imprisonment for life it will become the duty of this court, and you may rest assured that the court will comply with its duty and sentence him to die." Defendant excepts to the quoted portion of the charge and assigns it as error, contending that it amounts to an expression of opinion on the evidence in violation of G.S. 1-180.

It is the duty of the trial judge at all times to be absolutely impartial. *Nowell v. Neal,* 249 N.C. 516, 107 S.E. 2d 107 (1959). G.S. 1-180 forbids the judge to intimate his opinion in any form whatever, and it is the intent of the law to insure every litigant a fair and impartial trial before the jury. *State v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378 (1946). Any opinion or intimation of the judge at any time during the trial which prejudices a litigant in the eyes of the jury is reversible error. *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412 (1966). The judge must abstain from conduct or language which tends to prejudice the accused or his cause with the jury. *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951).

Applying these principles to the quoted portion of the charge, we hold that the language assigned for error is insufficient to constitute an expression of opinion. Rather, the language pointedly brings to the attention of the jury that, absent its recommendation of life imprisonment, the court will pronounce a sentence of death, a duty required of him by law. The

jury was thus apprised of the importance of its task and of the punishment to result from its verdict. In our view the language used was more apt to invite a recommendation of life imprisonment than to even remotely suggest its omission. When the charge is considered as a whole, as we are required to do, it is free of prejudicial error.

[9] Finally, appellant contends that the sentence of death in this case is cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution of the United States.

Article I, Section 14, of the Constitution of North Carolina and the Eighth Amendment to the Federal Constitution, now applicable to the states, *Robinson v. California,* 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962), prohibit cruel and unusual punishments. When the punishment imposed, however, does not exceed the limits fixed by statute it cannot be classified as cruel and unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. *State v. Davis,* 267 N.C. 126, 147 S.E. 2d 570 (1966); *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966); *State v. Greer,* 270 N.C. 143, 153 S.E. 2d 849 (1967); *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854 (1967).

G.S. 14-21 provides that the punishment for rape is death unless the jury at the time of rendering its verdict recommends life imprisonment. Here, no recommendation was made and defendant was sentenced to death. The death penalty is not prohibited as cruel and unusual in the constitutional sense, and its imposition upon conviction of the crime of rape is not unconstitutional *per se. State v. Yoes* and *Hale v. State,* 271 N.C. 616, 157 S.E. 2d 386 (1967); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969). See *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404 (1971), decided this date, in which Justice Moore discusses the pertinent authorities and reaffirms this Court's judicial determination that the death penalty is not constitutionally prohibited.

Appellant relies on *Ralph v. Warden,* 438 F. 2d 786 (4th Cir., 1970), a recent Maryland case in which the Fourth Circuit Court of Appeals held that imposition of the death penalty for rape where the victim's life is neither taken nor endangered violates the Eighth Amendment prohibition against cruel and unusual punishments. It suffices to say that the facts in that case are distinguishable, the logic employed is not persuasive, and the decision is not binding on this Court. *State v. Barnes,*

264 N.C. 517, 142 S.E. 2d 344 (1965); 20 Am. Jur. 2d, Courts, § 230; Annot., 147 A.L.R. 857 (1943).

Our law prescribes the penalty of death for the crime of rape unless the jury recommends otherwise. The enormity of the act committed upon a four-year-old child, attended by her screams and struggles, understandably accounts for the absence of a recommendation by the jury. While the wisdom of capital punishment in such cases is not for courts to consider, we have heretofore judicially determined and upheld its constitutional validity in numerous cases. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (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). A careful review of the record reveals no errors of law.

No error.

Justice SHARP dissenting.

Had defendant been convicted in a trial free from prejudicial error my vote would be to vacate the sentence of death and to remand the case to the Superior Court for the imposition of a life sentence for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in *State v. Atkinson,* 275 N.C. 288, 323-328, 167 S.E. 2d 241, 262-265. *See also* the dissenting opinions in *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885; *State v. Ruth,* 276 N.C. 36, 170 S.E. 2d 897; *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886; *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487. However, it is my conviction that the judge committed prejudicial error entitling defendant to a new trial when he charged the jury as follows:

"If you find him guilty of rape as charged in the bill of indictment and say no more; that is to say, if you do not recommend that his punishment shall be imprisonment for life, it will become the duty of this court, AND YOU MAY REST ASSURED THAT THE COURT WILL COMPLY WITH ITS DUTY AND SENTENCE HIM TO DIE."

I find astonishing the statement in the majority opinion that the foregoing language "was more apt to invite a recommendation of life imprisonment than to even remotely suggest its omission." It is inconceivable to me that the jury could have interpreted the gratuitous statement by the able and forceful

trial judge to mean anything except that he believed defendant had committed a crime so dastardly that death was the only commensurate punishment.

Jurors know that a judge is bound by the law. They assume he will apply it to the best of his knowledge and expect no guaranty from him that he will do so. Judge Bailey's specific assertion, that if the jury's verdict so required they could "rest assured" the court would comply with its duty and sentence defendant to die, suggests that the jurors should likewise perform their duty with respect to the death penalty.

Our law, G.S. 1-180, forbids a judge, at any time during a trial, to intimate an opinion as to the guilt or innocence of a defendant whether the crime for which he is being tried be a misdemeanor or a capital felony. This Court has always been quick to award a new trial in any case in which the judge has transgressed this statute, no matter how inadvertently he may have done so. *State v. Hopson,* 265 N.C. 341, 144 S.E. 2d 32; *State v. Tessnear,* 265 N.C. 319, 144 S.E. 2d 43; *State v. Pugh,* 250 N.C. 278, 108 S.E. 2d 649; *State v. Oakes,* 249 N.C. 282, 106 S.E. 2d 206. "The books disclose the fact that able and upright judges have sometimes overstepped the limit fixed by the law; but as often as it has been done this Court has enforced the injunction of the statute and restored the injured party to the fair and equal opportunity before the jury which had been lost by reason of the transgression, however innocent it may have been; and we must do as our predecessors have done in like cases." *Withers v. Lane,* 144 N.C. 184, 190, 56 S.E. 855, 857.

When, as here, an accused has been convicted of a crime for which the punishment is either life or death, the decision is in the "unbridled discretion" of the jury. *State v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212. In such a case the defendant is entitled to "the cold neutrality of the impartial judge" not only upon the issue of his guilt but also upon the question of his punishment. The jury's discretion may not be influenced by any intimation from the judge.

In this case the solicitor inquired of each of the forty prospective jurors whether he had such moral or religious scruples against the death penalty that he could not return a verdict which would require the imposition of the death penalty even though he was convinced beyond a reasonable doubt that the defendant

was guilty as charged. Each juror who gave an affirmative answer to this question was successfully challenged by the State. The State's evidence tended to show that defendant was guilty of raping his four-year-old stepdaughter. It revealed a horrible and incomprehensible crime. Defendant offered no evidence. As a practical matter the only question for the jury was whether defendant should suffer death or life imprisonment for his crime. In such a situation it was incumbent upon the judge "at all times to be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as minister of justice, he is supposed, figuratively speaking, to hold in his hand." *Withers v. Lane, supra* at 192, 56 S.E. at 857.

Judge Bailey's reaction to the crime for which defendant now stands convicted is understandable. Notwithstanding, the law has strictly enjoined the judge from imparting to the jury any knowledge of his own opinion of the case. In speaking to trial judges in 1822, almost one hundred and fifty years ago, Chief Justice Taylor said, "I am not unaware of the difficulty of concealing all indications of the conviction wrought on the mind by evidence throughout a long and complicated cause; but the law has spoken and we have only to obey." *Reel v. Reel,* 9 N.C. 63, 92.

For the reasons stated I vote for a new trial.

Chief Justice BOBBITT joins in this dissenting opinion.

BLYTHE M. LINK v. JAMES C. LINK

No. 46

(Filed 10 March 1971)

1. **Trial § 40; Rules of Civil Procedure § 49— issues submitted to jury**

It is the duty of the trial judge to submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings.

2. **Trial § 40; Rules of Civil Procedure § 49— form and number of issues**

While G.S. 1A-1, Rule 49(b), provides that issues shall be framed in concise and direct terms and that prolixity and confusion must be avoided by not having too many issues, the form and number of issues to be submitted is nevertheless a matter which rests in the sound dis-

cretion of the trial judge, assuming that the issue is raised by the pleadings, liberally construed.

3. **Fraud § 9; Duress; Cancellation of Instruments § 3; Husband and Wife § 4— fraud, duress, undue influence — sufficiency of allegations**

Allegations that defendant husband induced plaintiff wife to transfer to him certain securities by fraudulent concealment and that he "coerced" and "extracted" her signature to the transfer by threats and abuse are sufficient to justify submission to the jury of questions of fraud, duress and undue influence.

4. **Fraud § 1; Duress; Cancellation of Instruments §§ 2, 3— fraud, duress, undue influence**

While fraud, duress and undue influence are related wrongs and, to some degree, overlap, they are not synonomous, and proof of facts sufficient to show one does not necessarily constitute proof of either of the other two.

5. **Fraud § 1; Duress; Cancellation of Instruments §§ 2, 3— fraud, duress, undue influence**

Fraud rests upon deception by misrepresentation or concealment; duress is the result of coercion and may exist even though the victim is fully aware of all facts material to his decision; undue influence may exist where there is no misrepresentation or concealment of a fact and the pressure applied to procure the victim's consent to the transaction falls short of duress.

6. **Fraud § 7; Cancellation of Instruments § 2— confidential relationship — duty of disclosure — constructive fraud**

Where a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto, and his failure to do so constitutes fraud.

7. **Fraud §§ 4, 7— constructive fraud — intent to deceive**

Intent to deceive is not an essential element of constructive fraud resulting from breach of a fiduciary or confidential obligation.

8. **Husband and Wife § 1— confidential relationship between spouses**

The relationship of husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable.

9. **Husband and Wife § 4; Cancellation of Instruments § 2— confidential relationship — separation of spouses**

The fact that the transactions in question occurred after the husband's departure from the home, following the wife's disclosure of her own misconduct, does not show that the previously established confidential relationship between them had terminated so as to free the husband to deal with the wife as if they were strangers.

10. Cancellation of Instruments § 2; Husband and Wife § 4— transfer of wife's stock to husband — husband's duty to disclose stock value

The husband had a clear duty to disclose to his estranged wife the value of stock transferred by her to the husband without consideration where, in addition to the confidential husband-wife relationship, the husband was the president of the corporation whose stock was being transferred and so had full information of its value, the husband knew that the wife had neither such information nor general understanding of corporate securities, the stock is unlisted and is closely held by the husband's family, and the wife was laboring under great emotional strain at the time the stock was transferred.

11. Duress — wrongful act or threat

An essential element of duress is a wrongful act or threat.

12. Duress; Cancellation of Instruments § 3— duress — threat to institute legal proceedings

While ordinarily it is not wrongful and, therefore, not duress for one to procure a transfer of property by stating in the negotiations therefor that, unless the transfer is made, he intends to institute or press legal proceedings to enforce a right which he believes in good faith that he has, the threat to institute criminal or civil legal proceedings which might be justifiable *per se* becomes wrongful if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings.

13. Duress; Cancellation of Instruments § 3— duress — action not wrongful per se — totality of circumstances

Where a transaction is brought about by the use of threats to take action, not wrongful *per se*, the presence or absence of duress depends upon the totality of circumstances.

14. Duress; Cancellation of Instruments § 3; Husband and Wife § 4— threat to obtain custody of children — coercion to obtain transfer of wife's property — duress

An announcement by a husband, to whom the wife has confessed her adultery, that he intends to separate himself from her and to institute legal proceedings to obtain the sole custody of their children constitutes duress when made for the purpose of coercing her into transferring, without consideration, her individual property to the husband, the proposal being to leave the children in her custody if she make such transfer.

15. Cancellation of Instruments § 3; Husband and Wife § 4— transfer of wife's property to husband — undue influence

In an action to set aside the wife's transfer of corporate stock and debentures to her estranged husband, the evidence was sufficient to support a jury finding of undue influence, even if the jury found that there was no threat sufficient to constitute duress.

16. Cancellation of Instruments § 12— submission of separate issues on fraud, duress and undue influence

In an action to set aside the wife's transfer of corporate stock and debentures to her estranged husband, the trial court did not abuse

its discretion in the submission to the jury of three separate issues on fraud, duress and undue influence, since an answer of any of the three in favor of plaintiff wife would have entitled her to relief, and the submission of those three possibilities to the jury in a single issue would have been confusing and would have necessitated an exceedingly complicated charge.

17. **Cancellation of Instruments § 6; Fraud § 8— transaction procured by fraud, duress or undue influence — ratification**

While a transaction procured by fraud, duress or undue influence may be ratified by the victim so as to preclude a subsequent suit to set aside the transaction, an act of the victim will not constitute ratification unless, at the time of such act, the victim had full knowledge of the facts and was then capable of acting freely.

18. **Cancellation of Instruments § 6; Fraud § 8— wife's transfer of securities to husband — fraud, duress, undue influence — ratification — insufficiency of evidence**

In the wife's action to set aside a transfer of corporate securities to her estranged husband on grounds of fraud, duress and undue influence, defendant husband's evidence was insufficient to show ratification of the transaction by the wife when she signed a gift tax return prepared by his accountant which reported the transfer as a gift from the wife to the husband, where the husband's evidence disclosed that the wife signed the gift tax return believing she was under compulsion of law to do so and that her refusal to sign would be costly to her.

19. **Cancellation of Instruments § 11; Fraud § 13— failure to instruct on ratification**

In the wife's action to set aside on grounds of fraud, duress and undue influence the transfer to her estranged husband of her interest in corporate securities, there was no error prejudicial to defendant husband in the failure of the trial court to instruct the jury as to his contention that the wife had ratified the transaction where the evidence was insufficient to support a finding of ratification. G.S. 1A-1, Rule 51(a).

20. **Cancellation of Instruments § 11; Fraud § 13— fraud, duress, undue influence — instructions — contentions of defendant**

In the wife's action to set aside her transfer of corporate stock and debentures to her estranged husband, the trial court did not fail in its instructions to apply the facts as contended by defendant to the issues submitted to the jury as to whether the wife's endorsements of the securities were obtained by fraud, duress or undue influence.

ON *certiorari* to the Court of Appeals to review its decision, reported in 9 N.C. App. 135, 175 S.E. 2d 735, granting a new trial upon appeal by the defendant to it from *Anglin, J.*, at the 12 January 1970 Schedule "C" Civil Session of MECKLENBURG. This case was docketed and argued as No. 59 at the Fall Term 1970.

Plaintiff and defendant were married in 1948. They lived together until 2 December 1967, when he left home following a discussion, in the course of which, according to his allegation and testimony, she informed him she had been guilty of adultery. Their three children were then 15, 13 and 10 years of age, respectively. She instituted this action to have declared void assignments by her to him of 147½ shares of common stock of Royal Crown Bottling Company of Charlotte and of three 5% debentures of the Royal Crown Bottling Company of Houston, Texas, in the amount of $1,000 each. She alleges that the assignments were obtained by fraud, duress and undue influence. It is alleged and admitted that the defendant was, and is, an experienced business man and that the plaintiff, while well educated, had no business experience.

The stock in question is a one-half interest in 295 shares given to the plaintiff and the defendant by his parents, the stock certificates, dated 12 May 1966, being issued to "James Cole Link and Blythe Link as joint tenants with rights of survival." The printed transfer form on the back of each certificate was signed by the plaintiff. It is dated December 30, 1967, and purports to be a transfer by her to the defendant of all her interest in and to the shares represented by the certificates. Other than her signature, the entire transfer form, including the date, is either printed or typewritten. The plaintiff testified that she signed it on 18 December 1967, sixteen days after the separation. The defendant testified that she signed it on or about 29 December 1967. He acknowledged that no consideration was paid to the plaintiff for this transfer, testifying that it was a gift from her to him.

The three debentures issued to the plaintiff 3 January 1956, were a gift to her from the defendant's grandfather. On the reverse of each debenture is the signature of the plaintiff. Above this is typed, "This Debenture is transferred, assigned and conveyed to" and beneath that, in a handwriting other than that of the plaintiff, is "James C. Link 12/15/67." This is plaintiff's Exhibit E.

Plaintiff's Exhibit F is entitled "STATEMENT." It consists of a typewritten, unsigned statement, in the name of the plaintiff, certifying that she is the sole owner of the above debentures, which are therein described, and, beneath this, the statement, in the plaintiff's handwriting and signed by her, "I waive all rights to these debentures."

A further document, plaintiff's Exhibit H and defendant's Exhibit I, is a statement, signed by the defendant, certifying that he is the owner of the above described debentures transferred to him by the plaintiff on December 15, 1967.

The plaintiff alleges that the 147½ shares of stock were worth in excess of $75,000 and the debentures were worth in excess of $3,000 when so transferred by her to the defendant. The defendant alleges that the stock was then worth $43,564.13 and the debentures were worth $3,000.

The following issues were submitted to the jury:

"1. Did the defendant procure the plaintiff's endorsement of the stock certificates and the debentures by fraud?

"2. Did the defendant procure the plaintiff's endorsement of the stock certificates and the debentures by duress?

"3. Did the defendant procure the plaintiff's endorsement of the stock certificates and the debentures by undue influence?

"4. Did the plaintiff make a gift to the defendant of:

A. The debentures:

B. The certificates of stock?"

The jury answered each of the first three issues, "Yes." It did not answer the fourth issue, having been instructed by the court not to answer it if they answered any one of the first three issues "Yes." Upon this verdict, the Superior Court entered judgment that the plaintiff and the defendant jointly own the 295 shares of stock and that the plaintiff is the sole owner of the debentures, ordering the defendant to deliver the securities, so endorsed, to the plaintiff, and to pay her interest received by him on the debentures. The defendant's motions for judgment notwithstanding the verdict and for a new trial were denied.

The evidence of the plaintiff, in addition to the above exhibits, was to the following effect:

She has had no experience in dealing in corporate securities, in attending stockholders' meetings or in the preparation of tax returns. The defendant handled the preparation of all their tax returns, she simply signing them as he directed. At the time of

their separation, she had no property other than these securities, the value of which she did not know, her interest in the home (apparently held by the entireties) and an automobile. She was unemployed and had no income. On 18 December 1967, she learned the defendant had deposited in her bank account $3,000, the proceeds of three other debentures formerly owned by her and sold by him pursuant to her endorsement. (The defendant was then president or manager of the corporation which issued the stock in question and his salary was $50,000.)

Prior to the conversation on 17 November 1967, in which she disclosed her own misconduct, the family situation was deteriorating, the children had gotten into difficulties at school and her purpose was to clear up the domestic problems. In the course of that conversation, the defendant became angry. The following day he told her she could no longer stay in the house. The next day he told her: "I could kill you but that would be too easy. * * * I want you to suffer." He left the home 2 December 1969. She was upset and concerned about being separated from the children and consulted a psychiatrist, becoming his patient.

On 16 December the defendant came to the house and asked the plaintiff to sign over to him her interest in the house and its contents and her interest in the stock. He then told her that, if she did not so transfer the stock to him, he would take the house and the children, but, if she would agree to his "conditions" and would transfer to him her interest in the house and in the stock, he would let her stay in the house with the children until the youngest child reached the age of 20 or married, and would provide $100 a month for the support of each child, but nothing for her other than a car for her use every six years. He told her he had discussed the matter with three lawyers. No agreement was reached that day.

On 18 December the defendant returned to the house with papers, which he instructed the plaintiff to sign "on the dotted line." This she did. She then knew nothing as to the value of the stock or as to the "workings of this business." She did not have an opportunity to examine the stock certificates, which she had never seen before, and did not know how many shares the certificates represented. She was nervous, tired and desperate. At the same time, she signed the above mentioned waiver of her rights in the three debentures, her recollection being that she

wrote this waiver on a blank sheet of paper. She does not recall the unsigned typed statement now appearing above this waiver on Plaintiff's Exhibit F. She does not recall whether she put her signature on the reverse of the three debentures, but if she was instructed to do so she did. At the time she signed these documents she had consulted no attorney. The defendant did not suggest that she do so and did not tell her the value of the stock. There was no conversation about her making a gift to the defendant. Her reason for signing was that she was "meeting a demand." She learned about the value of the stock at a hearing concerning support, held in October 1968.

In April 1968, just prior to the deadline for filing them, the defendant brought to her some 1967 tax returns for her signature. Her attorney was out of town. The defendant told her that if she did not sign the returns there would be a penalty which she could not afford to pay, so she had better sign, which she did, not knowing one was a gift tax return which reported the stock transfer as a gift from her to the defendant. The defendant did not go over the return with her. She was not consulted about its preparation and gave no information to the person who prepared it.

(This gift tax return, dated April 11, 1968, Plaintiff's Exhibit A, showed a gift by her to the defendant of the stock and debentures and stated the stock had a book value of $43,564.13 and the debentures a face value of $3,000. Apparently, the defendant had this return prepared to correct an error as to the marital deduction made in the preparation, by his representatives of an earlier gift tax return, Plaintiff's Exhibit G, the record copy of which shows no date and no signature by the plaintiff. The defendant testified the plaintiff signed the first return in February 1968.)

She is a graduate of the University of Illinois and read the letter from her father-in-law telling of his gift of the stock to her and the defendant jointly, but she did not understand the explanation therein of the procedure followed by him in making that gift (a somewhat complex series of transactions designed to minimize or eliminate the father-in-law's gift tax liability).

The defendant's evidence was to the following effect:

He is the manager of the corporation which issued the stock in question. The stock was given to him and the plaintiff by his

father, whose letter of transmittal in 1966 explained how the gift was being handled due to the gift tax liability of the donor. He and the plaintiff discussed it at that time, including the then value of the stock.

When the plaintiff informed him on 17 November 1967 of her misconduct, he was shocked. On 2 December 1967, he moved from the house. On 5 December 1967, he took the three debentures, together with three others, issued by another corporation and also given to the plaintiff by his father or grandfather, all of which he had been keeping in his lock box, to the house and, in the presence of the plaintiff's father who was visiting her there, he explained that his uncle wanted to buy some debentures. The plaintiff then endorsed all six debentures.

His uncle purchased the other three debentures but not the three here in question. The proceeds of that sale ($3,000) he deposited in the plaintiff's bank account on 18 December 1967. On that date, he went to the house to see the plaintiff and explained to her what he had done. He then also told her that the new owners of the Houston Company (issuer of the debentures here in question) required a statement as to who then owned these debentures and, therefore, she would have to sign the statement on Plaintiff's Exhibit F that she owned them. Thereupon, the plaintiff stated she wanted nothing to do with the debentures and proceeded to write out and sign the above mentioned waiver of all her interest in them. The defendant reported this to his father, who, upon learning the plaintiff had previously endorsed the debentures in anticipation of the above mentioned sale to the defendant's uncle, advised the defendant to send them to him and "they" would transfer the debentures to the defendant "as someone had to own them." Plaintiff never made any complaint to the defendant concerning the debentures prior to her testimony at the present trial.

On 29 December 1967, he went to see the plaintiff about the stock. He told her, "This is the stock that my parents gave the two of us and I think I should own it." She replied: "I don't want any part of your old company. Here, let me have it and I will sign it." Thereupon, she signed the certificates, which were duly sent by him for transfer on the company's books. Subsequently, he put the stock in a trust fund for the children, which trust he has power to revoke.

In April 1968, he carried the gift tax return, Plaintiff's Exhibit A, which he had employed an accountant to prepare, to the plaintiff. This return showed no gift tax was due. At the same time, he took to her the income tax returns which he had caused to be prepared. He went over these with her and explained the advantage of a joint income tax return, including a resulting refund, half of which he agreed to and did pay over to her. The plaintiff signed the returns without objection after examining them. She had previously signed a gift tax return, prepared by his representatives, in which there was an error concerning the marital deduction.

His income at the time of the separation and the transfer of the securities was $50,000 per year. At the time of the trial, he lived in the home with the two boys and the plaintiff had an apartment elsewhere.

Bradley, DeLaney and Millette by Ernest DeLaney, Jr., for plaintiff appellant.

Warren C. Stack for defendant appellee.

LAKE, Justice.

The Court of Appeals concluded that the Superior Court erred in: (1) Submitting the four issues to the jury instead of a single issue, "Did the defendant procure the plaintiff's endorsement of the stock certificates and the debentures by fraud?"; and (2) in not applying "the facts as contended by the defendant to the first three issues in the charge to the jury." In both of these conclusions, it is our opinion that the Court of Appeals was in error.

[1, 2] It is the duty of the trial judge to submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings. *Johnson v. Lamb,* 273 N.C. 701, 161 S.E. 2d 131; *Heating Co. v. Construction Co.,* 268 N.C. 23, 149 S.E. 2d 625; *Stanback v. Haywood,* 209 N.C. 798, 184 S.E. 831; *Tucker v. Satterthwaite,* 120 N.C. 118, 27 S.E. 45. Rule 49(b) of the Rules of Civil Procedure provides, "Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues." Nevertheless, the form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, assuming that the issue is raised by the pleadings, liberally construed. *Rubber*

Co. v. Distributors, 253 N.C. 459, 117 S.E. 2d 479; *Lumber Co. v. Construction Co.,* 249 N.C. 680, 107 S.E. 2d 538; *O'Briant v. O'Briant,* 239 N.C. 101, 79 S.E. 2d 252; *Griffin v. Insurance Co.,* 225 N.C. 684, 36 S.E. 2d 225.

[3] The complaint in the present action alleges, and the answer denies, that the defendant induced the plaintiff to transfer to him the securities in question by fraudulent concealment and that he "coerced" and "extracted" her signature to the transfers by threats and abuse. The allegations of the complaint are sufficient to justify the submission to the jury of the questions of fraud, duress and undue influence.

[4, 5] These are related wrongs and, to some degree, overlap. See: *Joyner v. Joyner,* 264 N.C. 27, 140 S.E. 2d 714; *In re Will of Franks,* 231 N.C. 252, 260, 56 S.E. 2d 668; *Little v. Bank,* 187 N.C. 1, 121 S.E. 185. They are, however, not synonomous. Proof of facts sufficient to show one does not necessarily constitute proof of either of the other two. Fraud rests upon deception by misrepresentation or concealment. Duress is the result of coercion. It may exist even though the victim is fully aware of all facts material to his or her decision. Undue influence may exist where there is no misrepresentation or concealment of a fact and the pressure applied to procure the victim's ostensible consent to the transaction falls short of duress. See, *Edwards v. Bowden,* 107 N.C. 58, 12 S.E. 58.

The plaintiff alleged and offered evidence tending to show that she was inexperienced in matters of corporate securities and finance and that, throughout the marriage, she had relied upon the defendant to handle the family business affairs, habitually signing without question documents, such as tax returns, prepared under his direction and presented to her by him for signature. She alleged and offered evidence tending to show the defendant was an experienced business man and the president of the corporation which issued the stock in question. Her evidence further tends to show that, when the defendant requested her to sign the transfer forms on the reverse of the stock certificates, she knew nothing about the value of the stock and the defendant did not advise her concerning its value or suggest that she procure the advice of an attorney. The defendant offered evidence tending to show that, when the stock was given to them by his father, the defendant explained the transaction and the value of the stock to the plaintiff.

As to the debentures, the defendant's evidence tends to show that the plaintiff's endorsements on the debentures were not intended to transfer them to him but were for the purpose of enabling him, as the plaintiff's agent, to sell them to his uncle. The plaintiff's testimony as to the debentures was that, at the time she signed the separate paper on which, above her signature, she wrote, "I waive all rights to these debentures," she did not understand the nature of debentures or "the workings of this business," and had not had any legal advice with reference to the effect of signing such a document.

The defendant's further testimony in relation to the debentures was to the effect that he explained their significance to the plaintiff when his grandfather gave them to her, eleven years prior to her alleged transfer to him. He testified that when he took these three endorsed debentures back to the plaintiff, following his failure to sell them to his uncle, he informed the plaintiff that the new owners of the issuing company needed to know who owned the debentures, so it was necessary for her to sign a statement, as to each debenture, that she owned it. Thereupon, the plaintiff stated that she did not want anything to do with the debentures and signed the waiver of her right therein. He testified that on that occasion he told the plaintiff the debentures were worth $3,000. At a later date his name was put on the debentures by his father as the transferee thereof.

[6, 7] Where a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do so constitutes fraud. *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d 202. Such a relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory,* 201 N.C. 577, 598, 160 S.E. 896. Intent to deceive is not an essential element of such constructive fraud. *Miller v. Bank,* 234 N.C. 309, 67 S.E. 2d 362. Any transaction between persons so situated is "watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party." *Rhodes v. Jones,* 232 N.C. 547, 61 S.E. 2d 725.

[8, 9] As Justice Sharp said in *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562, "The relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable." In that case, the transaction in question was a separation agreement between the parties to a collapsing marriage. Thus, the fact that the transactions here in question occurred after the defendant's departure from the home, following the disclosure by the plaintiff of her misconduct, did not show the previously established confidential relationship between them had terminated so as to free the defendant to deal with the plaintiff as if they were strangers.

[10] In addition to the husband-and-wife relationship, the defendant was the president or manager of the corporation whose stock was being transferred and so had full information of its value. He knew that the plaintiff had neither such information nor general understanding of corporate securities. For a discussion of authorities in other jurisdiction relating to the existence of a duty of disclosure resting upon a director who purchases, from another stockholder, stock in his corporation, see, "The Use for Personal Profit of Knowledge Gained While a Director," 9 Miss. Law Journal 427, 439-454. In *Abbitt v. Gregory, supra,* this Court found it unnecessary to decide whether the circumstance that the purchaser was the general manager of the issuing corporation was sufficient, standing alone, to prove the existence of a fiduciary relationship between him and the selling stockholder with respect to a transfer of stock. When, as here, there are added the further circumstances that the transferor is the wife of the transferee, she is inexperienced in business affairs and is laboring under great emotional strain, the stock is unlisted, is closely held within the family of the transferee and has never paid dividends, the duty of disclosure is clear.

In view of the conflict in the evidence, the jury could have found that the plaintiff knew the value of the stock and understood the nature and value of the debentures issued by the second corporation so that there was no fraudulent concealment of any material fact. Even so, the plaintiff would, nevertheless, be entitled to relief if, as she alleged and testified, the transfer of the securities was the result of duress. Her testimony was to the effect that she signed the documents in question, because the defendant told her that, unless she did so, he would put her out of the house and take the children, but, if she transferred these

properties to him, he would permit her to continue to live in the home with the children and would make payments to her for their support.

[11, 12] It has been said, "Duress exists where one, by the *unlawful* act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." (Emphasis added.) See, *Smithwick v. Whitley,* 152 N.C. 369, 67 S.E. 913, quoted in *Joyner v. Joyner, supra.* Unquestionably, an essential element of duress is a *wrongful* act or threat. Restatement of the Law, Contracts, § 492; Williston on Contracts, 3d Ed., § 1606; 25 Am. Jur. 2d, Duress and Undue Influence, §§ 1 and 3. Ordinarily, it is not wrongful and, therefore, not duress for one to procure a transfer of property by stating in the negotiations therefor that, unless the transfer is made, he intends to institute or press legal proceedings to enforce a right which he believes, in good faith, that he has. See: *Bank v. Smith,* 193 N.C. 141, 136 S.E. 358; *Edwards v. Bowden, supra;* 25 Am. Jur. 2d, Duress and Undue Influence, §§ 14, 16 and 18; Williston on Contracts, 3d Ed., § 1606. To hold otherwise would make it impossible to settle lawsuits. The law with reference to duress has, however, undergone an evolution favorable to the victim of oppressive action or threats. The weight of modern authority supports the rule, which we here adopt, that the act done or threatened may be wrongful even though not unlawful, *per se;* and that the threat to institute legal proceedings, criminal or civil, which might be justifiable, *per se,* becomes wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings. *Fowler v. Mumford,* 48 Del. 282, 102 A. 2d 535; *Coleman v. Crescent Insulated Wire & Cable Co.,* 350 Mo. 781, 168 S.W. 2d 1060; *Hochman v. Zigler's, Inc.,* 139 N.J. Eq. 139, 50 A. 2d 97; *Miller v. Eisele,* 111 N.J.L. 268, 168 A. 426; *Adams v. Irving Nat. Bank,* 116 N.Y. 606, 23 N.E. 7; *Hogan v. Leeper,* 37 Okla. 655, 133 P. 190; *Fox v. Piercey,* 119 Utah 367, 227 P. 2d 763; Restatement of the Law, Contracts, § 492(g); Williston on Contracts, 3d Ed., § 1607; 25 Am. Jur. 2d, Duress and Undue Influence, §§ 12, 16.

[13] The above cited section of the Restatement says: "[A]cts that involve abuse of legal remedies or that are wrongful in a moral sense, if made use of a means of causing fear, vitiate a transaction induced by that fear, though they may not in themselves be legal wrongs." Professor Williston says, in section 1607

of his treatise, "[M]eans in themselves lawful, may be used so oppressively as to constitute an abuse of legal remedies. * * * [I]t is not duress to threaten or make *good faith* use of legal processes available or the remedies prescribed under a contract. But where a threat of civil action or use of an available remedy is made *only* for the purposes of extortion duress may be found." Thus, where a transaction is brought about by the use of threats to take action, not wrongful *per se,* the presence or absence of duress depends upon the totality of the circumstances.

[14] An announcement by a husband, to whom the wife has confessed her adultery, that he intends to separate from her and to institute legal proceedings to obtain the sole custody of their children would not, *per se,* constitute duress when the transaction induced by such statement of intent was the execution of a separation and custody agreement. See, *Joyner v. Joyner, supra.* The situation is completely different, however, when the threat to take the children from the wife is for the purpose of coercing her into transferring, without consideration, her individual property to the husband, the proposal being to leave the children in her custody if she make such transfer. Thus, in the present case, there was evidence to support a finding of duress, even if the jury had found that there was no concealment of facts justifying a finding of fraud.

[15] Upon the evidence of the defendant, however, the jury could have found there was no threat sufficient to constitute duress. Notwithstanding such a finding, it could also have found the presence of undue influence, which was alleged in the complaint. In *Edwards v. Bowden, supra,* this Court quoted with approval the following statements from Pollock on Contracts and Pomeroy on Equity Jurisprudence:

> "In equity there is no rule defining inflexibly what kind or what amount of compulsion shall be sufficient ground for avoiding a transaction. * * * The question to be decided in each case is whether the party was a free and voluntary agent. Any influence brought to bear upon a person entering into an agreement or consenting to a disposal of property, which, having regard to the age, capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is

a ground for setting aside the act procured by its employment." Pollock on Contracts, 524.

"Where there is no coercion amounting to duress, but a transaction is the result of a *moral, social* or *domestic* force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances, undue influence naturally has a field to work upon in the conditions or circumstances of the person influenced, which renders him peculiarly susceptible and yielding; his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like." Pomeroy, Equity Jurisprudence, 951.

[16] In view of the complex circumstances of this case, to submit to the jury in a single issue these several possibilities of constructive fraud, duress and undue influence would have been confusing and would have necessitated an exceedingly complicated charge. We see no abuse of the trial court's discretion in the submission of the three separate issues on fraud, duress and undue influence. While, upon the evidence in the record, the jury might have answered any, or all of these issues in favor of the defendant, an answer of any of the three in favor of the plaintiff would have entitled her to relief and the jury answered all three in her favor. There is nothing in the record to indicate that the jury was confused by the submission of the three separate issues.

We concur in the conclusion of the Court of Appeals that the trial judge "gave full instruction as to the applicable law" concerning these three bases for granting the plaintiff relief from this alleged gift of her entire separate property to her husband, who had announced his intention of leaving her without providing for her support.

The second ground for the decision of the Court of Appeals is, in our opinion, equally untenable. While it is not entirely clear from the answer that the defendant intended to plead the plaintiff's execution of the gift tax return as a ratification by her of the transaction, as distinguished from a mere pleading of evidence supporting his contention that she intended, at the time of the transaction, to make a gift to him, we interpret the plead-

ing, most favorably to him, as an allegation of such ratification. However, the record does not contain evidence which would support a finding of ratification.

[17] It is elementary that a transaction procured by either fraud, duress or undue influence may be ratified by the victim so as to preclude a subsequent suit to set the transaction aside. *May v. Loomis,* 140 N.C. 350, 52 S.E. 728; 25 Am. Jur. 2d, Duress and Undue Influence, §§ 28 and 41. It is equally clear, however, that an act of the victim of any of these wrongs will not constitute a ratification of the transaction thereby induced unless, at the time of such act, the victim had full knowledge of the facts and was then capable of acting freely. 25 Am. Jur. 2d, Duress and Undue Influence, §§ 28, 29 and 41; Annot., 77 A.L.R. 2d 426, 431 and 446.

[18] The only act of the plaintiff, relied upon by the defendant to show ratification of the transfer of the securities to him, was her signing of a gift tax return, prepared without her knowledge by his accountant and brought to her by him for her signature, along with a joint income tax return, similarly prepared. The defendant testified that these returns were presented by him to the plaintiff for her signature shortly before the deadline for filing such returns and less than four months after the transfer of the securities. The defendant further testified that, at the time of the plaintiff's execution of these returns, he told her that if she signed the returns so presented to her, there would be no gift tax due from her, but "if she filed a gift tax return on an individual basis [*i.e.,* if she did not sign the return so presented by him to her], then there would be $669.04 due to be paid by her to the government." In the same conversation, he presented the joint income tax return for her signature, telling her that, if she joined in signing it, there would be a substantial refund, one-half of which he would give to her. She was then represented by counsel but her counsel was out of the city and could not be reached by her, which circumstance the defendant knew. There is nothing in the record to indicate that the defendant's threat to take the children from her custody if she did not acquiesce in the transfer of the securities to him had been modified. The plaintiff testified that when the defendant presented these tax returns to her, he informed her that if she did not sign the gift tax return, she would be liable for a penalty which she could not afford to

pay. The defendant denied making this statement. Taking the defendant's evidence at its full face value, it is not sufficient to support a finding of ratification of the transaction in question by the plaintiff. Clearly, she signed the tax return believing she was under compulsion of law to do so and her refusal to sign would be costly to her.

[19] There being no evidence to support a finding of ratification, there was no error prejudicial to the defendant in the failure of the trial court to instruct the jury as to the defendant's contention with respect thereto. The duty of the judge is to declare the law *arising on the evidence* and to explain the application of the law thereto. Rule 51(a) of the Rules of Civil Procedure; *Westmoreland v. Gregory,* 255 N.C. 172, 120 S.E. 2d 523. The trial court, in the charge to the jury, reviewed with substantial accuracy the evidence of both parties concerning the transactions under attack and the signing of the tax return. On each of the issues of fraud, duress and undue influence, the court instructed the jury correctly as to the law with reference to such wrong and as to the facts which they must find in order to answer such issue "Yes," and that if they did not find such facts, they would answer such issue "No." With reference to the issues of fraud and duress, the judge further instructed the jury that if they found that the plaintiff would have made the transfer of the securities, regardless of their nature and value, they would answer such issue "No." By inadvertence, no doubt, this instruction was not given with reference to the issue of undue influence, but in view of the affirmative answers to the issues of fraud and duress this cannot be deemed an error prejudicial to the defendant, since such answers to those issues entitled the plaintiff to the judgment which was rendered.

[20] The court further instructed the jury correctly as to the law of gifts and that if they answered the issues of fraud, duress and undue influence in the negative, they would then consider the fourth issue, which was whether the plaintiff had made a gift to the defendant of the debentures and the stock certificates, requiring, in that event, a separate answer as to each type of security. In this connection, the court instructed the jury correctly as to the facts which it must find, as to each type of security considered separately, in order to answer the fourth issue "Yes," and that if the jury did not so find, it would answer such issue "No." We do not find in the charge

any failure to apply the facts as contended by the defendant to the several issues submitted to the jury.

The judgment of the Court of Appeals is, therefore, reversed and this cause is remanded to that court with direction to enter a judgment affirming the judgment of the Superior Court.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DONALD JAMES BENFIELD

No. 19

(Filed 10 March 1971)

1. **Larceny § 9— verdict of "guilty" — larceny from the person — consideration of issue being tried, evidence and charge**

In this prosecution upon an indictment charging the larceny of property of a value of more than $200, the verdict of "guilty" returned by the jury must be interpreted as a verdict of guilty of larceny of $40 from the person of the victim when considered in connection with the issue being tried, the evidence and the charge of the court.

2. **Larceny §§ 4, 9— larceny from the person — sufficiency of indictment**

An indictment charging larceny of property having a value of more than $200, but which contains no allegation of larceny from the person, will not support a verdict finding defendant guilty of the felony of larceny of $40 from the person of the victim, and the verdict must be considered as a verdict of guilty of simple larceny of $40. Statements to the contrary in prior decisions are no longer authoritative.

3. **Larceny § 4— felonious larceny — indictment**

To convict of felony-larceny, the indictment must allege and the State must prove beyond a reasonable doubt, as an essential element of the crime, that the value of the property exceeded $200, or that the larceny was from the person, or that the larceny was from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57, or that the property involved was an explosive or incendiary device or substance. G.S. 14-72.

4. **Larceny § 4— property of value over $200 — other factors making crime a felony — indictment**

When the available evidence indicates that the value of the property exceeds $200 and also that the larceny is either (1) from the person, or (2) from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57, or (3) that the property involved is an explosive or incendiary device or substance, the solicitors would do well to incorporate both allegations

in the indictment so that if proof of one should fail the prosecution can proceed on the other.

ON *certiorari* to review decision of the Court of Appeals.

Defendant was tried at March 9, 1970 Session of BURKE Superior Court before *Judge Harry C. Martin* and a jury on a bill of indictment which charged that defendant, on June 24, 1969, in said county, "Two Hundred Forty Dollars in United States Currrency ($240.00) of the value of more than Two Hundred Dollars, of the goods, chattels and moneys of one Mr. & Mrs. Tom Mace then and there being found, feloniously did steal, take and carry away," etc.

The jury returned a verdict of "guilty"; and judgment, which imposed a prison sentence of seven years, was pronounced.

Defendant excepted and appealed. On account of defendant's indigency, the court appointed counsel (Thomas M. Starnes, Esq.) to perfect defendant's appeal to the Court of Appeals.

The Court of Appeals found "No Error." 9 N.C. App. 657, 177 S.E. 2d 306. This Court granted defendant's application for *certiorari.* 277 N.C. 458, 178 S.E. 2d 225.

Attorney General Morgan, Assistant Attorney General Eagles and Staff Attorney Walker for the State.

Thomas M. Starnes for defendant appellant.

BOBBITT, Chief Justice.

In his charge, the court instructed the jury they could return one of two verdicts, either guilty of larceny from the person or not guilty. They were instructed it would be their duty to return a verdict of guilty of larceny *from the person* if satisfied from the evidence beyond a reasonable doubt "that the defendant Benfield took and carried away forty dollars ($40.00) of United States money, from the person of Tom Mace, without his consent and against his will; that such money was taken and carried away by the defendant with the felonious intent to deprive Tom Mace of his money permanently and to convert it to the defendant's use. . . . " If they were not so satisfied, they were instructed to return a verdict of not guilty.

"It is well settled in this jurisdiction that the verdict should be taken in connection with the issue being tried, the evidence, and the charge of the court." *Davis v. State,* 273 N.C. 533, 539, 160 S.E. 2d 697, 702.

[1] When considered in connection with the issue being tried, the evidence, and the charge of the court, the verdict of "guilty" returned by the jury must be interpreted as a verdict of guilty of larceny of forty dollars from the person of Tom Mace. It was so considered by the trial judge who, after reciting that defendant had been found guilty "of the offense of larceny . . . which is a violation of G.S. 14-70-72 and of the grade of felony," pronounced judgment which imposed a prison sentence of seven years.

[2] Consideration of defendant's assignments discloses no error sufficient to entitle plaintiff to a new trial. Therefore, the verdict will not be disturbed. However, since the indictment contains no allegation of larceny *from the person,* we are of opinion, and so hold, that the verdict must be considered a verdict of guilty of the larceny of forty dollars of Tom Mace's money.

Candor requires recognition of the fact that certain prior decisions of this Court lend support to Judge Martin's instructions and judgment and to the decision of the Court of Appeals. Although the question was not presented in that case, the *dictum* in *State v. Bowers,* 273 N.C. 652, 161 S.E. 2d 11 (1968), quoted in Judge Brock's opinion, indicated rather strongly that this Court was disposed to reconsider prior decisions relating to whether a person may be convicted and punished for the felony of larceny *from the person* when the indictment on which he is tried fails to charge him with larceny *from the person.* The question is squarely presented in the present case; and, although Judge Brock, writing for himself and for Judges Morris and Graham, indicated their concurrence with the views expressed in this opinion, the Court of Appeals rightly considered that this Court alone was the tribunal to reconsider and overrule, if appropriate, its prior decisions.

At common law, the crime of larceny was a felony. *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91.

The Act of 1895 (Public Laws of 1895, Chapter 285) entitled, "An act to limit the punishment in certain cases of larceny," provided:

"SECTION 1. That in all cases of larceny where the value of the property stolen does not exceed twenty dollars, the punishment shall, for the first offense, not exceed punishment in the penitentiary, or common jail, for a longer term than one year.

"SEC. 2. That if the larceny is from the person, or from the dwelling by breaking and entering in the day time, section one of this act shall have no application.

"SEC. 3. That in all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen."

Under the 1895 Act, larceny was a felony notwithstanding (1) the value of the stolen property did not exceed twenty dollars; (2) the larceny was not from the person; and (3) the larceny was not from the dwelling by breaking and entering in the daytime. *State v. Harris,* 119 N.C. 811, 814, 26 S.E. 148. These matters were not considered essential ingredients of the crime of larceny but were matters "in amelioration of the punishment, to be raised and determined at the instance of the defendant . . . . " *In re Holley,* 154 N.C. 163, 170, 69 S.E. 872, 875 (1910). Having adopted the view that these matters were not essential elements of the crime of larceny, the Court held an indictment for larceny need not contain an allegation with reference to any of these matters. Thus, when a person was charged and convicted of larceny of described personal property, the crime was punishable by imprisonment for a period not exceeding ten years unless it appeared *from the evidence* (1) that the value of the property stolen was less than twenty dollars, and (2) that the larceny was *not* from the person, and (3) that the larceny was *not* from the dwelling by breaking and entering in the daytime. Although defendant contended and offered evidence tending to show that he was in no way connected with the alleged larceny, it was incumbent upon him to bring forward evidence of these matters in order to qualify for "amelioration of the punishment."

Decisions based on the 1895 Act include those discussed in the following two paragraphs.

In *State v. Bynum,* 117 N.C. 749, 23 S.E. 218 (1895), and in *State v. Harris, supra,* the value of the stolen property did not exceed twenty dollars. Based upon evidence tending to show the larceny was from the person, prison sentences in excess of one year were affirmed. With reference to the de-

fendant's contention that the indictment had not alleged the larceny was from the person, the Court in *State v. Harris, supra,* stated succinctly: "Laws 1895, ch. 285, does not make it necessary that an indictment for the larceny of a sum less than $20 should charge the taking from the person or from a dwelling-house in the daytime." *State v. Davidson,* 124 N.C. 839, 32 S.E. 957 (1899), is based on *Bynum* and *Harris. Bynum* and *Harris* are cited in *State v. R. R.,* 125 N.C. 666, 671, 34 S.E. 527, 529 (1899); and *Bynum* is cited in *State v. Hankins,* 136 N.C 621, 625, 48 S.E. 593, 594 (1904).

In *In re Holley, supra,* the prisoner was tried on an indictment which charged larceny of property of the value of ten dollars. In reviewing on *certiorari* a judgment in a *habeas corpus* proceeding, the Court held that the sentence of imprisonment for five years pronounced by the trial judge was permissible when "it clearly appeared that the property was largely more than $20 in value, to wit, from $250 to $300 . . . . " *Id.* at 171. Accord: *State v. Dixon,* 149 N.C. 460, 464, 62 S.E. 615, 616 (1908).

Other decisions of this Court based on the 1895 Act are reviewed in *State v. Cooper, supra* at 374-376, 124 S.E. 2d at 92-94.

The Act of 1913 (Public Laws of 1913, Chapter 118) entitled, "AN ACT TO MAKE UNIFORM THE CRIME OF LARCENY IN THE STATE OF NORTH CAROLINA," provides:

"SECTION 1. That the larceny of and receiving of stolen goods knowing them to be stolen, of the value of not more than twenty dollars, *is hereby declared a misdemeanor,* (our italics) and the punishment therefor shall be in the discretion of the court. If the larceny is from the person or from the dwelling by breaking and entering, this section shall have no application: *Provided,* that this act shall not apply to horse stealing; *Provided, further,* that this act shall have no application to indictments or presentments now pending nor to acts or offenses committed prior to the ratification of this act.

"SEC. 2. That the Superior Court of North Carolina shall have exclusive jurisdiction of the trial of all cases of the larceny of or the receiving of stolen goods, knowing them to be stolen, of the value of more than twenty dollars.

"SEC. 3. That all laws and clauses of laws in conflict with this act are hereby repealed."

The Act of 1913 was codified as G.S. 14-72. Amendments to G.S. 14-72 (prior to 1969) and decisions based thereon are reviewed in *State v. Cooper, supra.* It was held in *Cooper* that, except in those instances where G.S. 14-72, as amended, did not apply, whether a person who committed the crime of larceny was guilty of a felony or a misdemeanor depended solely upon whether the value of the stolen property exceeded two hundred dollars; and that, to convict of felony-larceny on the ground the value of the stolen goods exceeded two hundred dollars, it was necessary that the State allege and prove beyond a reasonable doubt, *as an essential element of the crime,* that the value of the stolen property exceeded two hundred dollars. The legal propositions stated in *State v. Cooper, supra,* were reaffirmed in *State v. Jones,* 275 N.C. 432, 168 S.E. 2d 380 (1969), and decisions in conflict were overruled.

G.S. 14-72, as amended, provided expressly that it did not apply where the larceny was "from the person," or where the larceny was from the "dwelling or any storehouse, shop, warehouse, banking house, counting house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be, by breaking and entering." To be guilty of a felony where the value of the goods did not exceed two hundred dollars, the larceny had to be either (1) from the person or (2) from the dwelling or any storehouse, etc., by breaking and entering.

In *State v. Fowler,* 266 N.C. 667, 147 S.E. 2d 36 (1966), the defendant was found guilty as charged in the first and second counts of a three-count bill of indictment. In the first count, the defendant was charged with feloniously breaking and entering a certain building occupied by one J. M. McLamb; and, in the second count, the defendant was charged with the larceny of $128.34, the property of J. M. McLamb. Judgment on the first count, which imposed a prison sentence of six years and three months, was affirmed. Judgment on the second count, which imposed a prison sentence of ten years to commence upon expiration of the sentence on the first count, was vacated and the cause remanded for the entry of a new judgment based upon the defendant's conviction of the (simple) larceny of

property of the value of two hundred dollars or less, to wit, a misdemeanor. The ground of decision was that the second count contained "no allegation the larceny was from a building by breaking and entering or by other means of such nature as to make the larceny a felony" and therefore the maximum prison sentence was two years.

In *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198 (1966), the defendant was tried on a two-count bill of indictment and found guilty of a felonious breaking and entry as charged in the first count and of larceny of property of a value of less than two hundred dollars as charged in the second count. On each count, the court sentenced the defendant to imprisonment for not less than five nor more than seven years, the sentences "to run concurrently." The opinion states: "The jury found defendant guilty of the larceny of property of the value of less than $200, a misdemeanor. G.S. 14-72 does not apply because the second count in the indictment does not allege that the alleged larceny was committed pursuant to a felonious breaking and entry. It was error for the judge to impose upon the conviction of larceny as alleged in the second count in the indictment a prison sentence of five to seven years, and it is hereby vacated. *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91."

In *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165 (1966), it was stated: "The crime charged in the second count was the (simple) larceny of property of the value of $200.00 or less, a misdemeanor for which the maximum sentence is two years. See *S. v. Fowler, ante,* 667, 147 S.E. 2d 36. However, no separate sentence based on defendant's conviction of larceny as charged in the second count . . . was pronounced."

In *State v. Morgan,* 268 N.C. 214, 222, 150 S.E. 2d 377, 383 (1966), the opinion of Chief Justice Parker contains the following: "The second count in the second indictment charges the larceny of property of the value of $18, and does not charge that the larceny was from a building by breaking and entering, or by any other means of such nature as to make the larceny a felony. Consequently, the larceny charged in the second count in the indictment is a misdemeanor. *State v. Fowler,* 266 N.C. 667, 147 S.E. 2d 36. No separate sentence based on defendant's conviction of larceny as charged was pronounced."

Decisions of this Court subsequent to the Act of 1913 which contain references to decisions based on the Act of 1895 include the following:

In *State v. Flynn,* 230 N.C. 293, 52 S.E. 2d 791 (1949), the defendant was indicted, tried and convicted of the larceny of $500.00 from the person of one Dale Winters. On appeal, the defendant contended the court erred in that in defining larceny no reference was made to larceny from the person. In the course of disposing of this assignment of error, the opinion states: "Since the fact that larceny was from the person is but an aggravation of the offense, and it is not necessary to charge it in order to prove it, and since the court correctly defined the crime of larceny as is usually done, the objection seems to be without merit. *S. v. Bynum,* 117 N.C. 749, 23 S.E. 218."

In *State v. Massey,* 273 N.C. 721, 161 S.E. 2d 103 (1968), the defendant was indicted for robbery with firearms from the person of one Floyd Walton. He was found guilty of larceny from the person and sentenced to a prison term of not less than three nor more than five years; and, upon appeal, this Court found "No error." In the opinion reference was made to *State v. Bynum, supra,* and *State v. Harris, supra,* as based on the Act of 1895, and attention was called to the apparent conflict between those decisions and later cases including *State v. Cooper, supra,* and *State v. Bowers, supra.*

In *State v. Bowers, supra,* the defendant was tried *de novo* in the Superior Court for misdemeanor-larceny upon a warrant which charged the larceny of $20.00 in U. S. Currency by trick. Upon conviction, the judgment pronounced imposed a prison sentence of twelve months. A new trial was awarded because of a remark made by the court to the jury before the jurors had agreed upon their verdict, to wit: "You have to reach a verdict." In remanding the case, the Court said: "The State, having affirmatively elected to treat the accusation set forth in the warrant as a charge of simple larceny of $20.00, could not and cannot prosecute for the felony of larceny from the person on account of what transpired between Honeycutt and defendant on July 21, 1967. The State was not required to prosecute for the felony. It elected, and had a right to do so, to restrict the prosecution to an accusation of and trial for a misdemeanor. Having done so, we are of opinion, and so decide, that defendant

can be retried only for the simple larceny of $20.00, a misdemeanor."

The opinion in *State v. Bowers, supra,* in discussing the prior decision of *State v. Stevens,* 252 N.C. 331, 113 S.E. 2d 577 (1960), said: "In *State v. Stevens, supra,* the indictment charged defendants with the larceny of $104.00 in cash. When arraigned thereon, each defendant entered a plea of *nolo contendere* 'of larceny from the person.' Judgments imposing prison sentences of 3-8 years and of 3-5 years, respectively, were pronounced. Seemingly, Stevens stands for the proposition that an indictment charging the larceny of property of the value of two hundred dollars or less is a sufficient basis for a conviction of larceny from the person or a plea of guilty or *nolo contendere* to larceny from the person. The present appeal does not necessitate reconsideration of the decision in Stevens. However, solicitors would do well to include in bills of indictment the words 'from the person' if and when they intend to prosecute for the felony of larceny from the person."

The opinion in *State v. Bowers, supra,* also stated: "Where an indictment charges larceny of property of the value of two hundred dollars or less, but contains no allegation the larceny was from a building by breaking and entering, this Court has held the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering." In support of this statement, decisions in *Fowler, Ford, Smith,* and *Morgan,* discussed above, are cited.

The decision in *State v. Stevens, supra,* in respect of the question now under consideration, seems to have been based largely on *State v. Brown,* 150 N.C. 867, 64 S.E. 775 *(1909).* In *State v. Brown, supra,* the defendant was *indicted, tried* and *found guilty* in the Superior Court *of larceny from the person* of a pocketbook of the value of one dollar. On appeal, the defendant contended the Recorder's Court of Winston had exclusive original jurisdiction and therefore the court should have granted his motion in arrest of judgment. The judgment was affirmed on the ground that the punishment *for larceny from the person* may be as much as ten years in the State's prison and that the offense was one of which the Superior Court has exclusive juris-

diction. It would seem that *Brown* was not a solid basis for the decision in *Stevens.*

As rewritten by Chapter 522, Session Laws of 1969, in full force and effect from and after its ratification on May 19, 1969, G.S. 14-72 now provides:

"Larceny of property; receiving stolen goods not exceeding two hundred dollars in value.—(a) Except as provided in subsections (b) and (c) below, the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars ($200.00) is a misdemeanor punishable under G.S. 14-3(a). In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen.

"(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:

(1) From the person; or

(2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57; or

(3) Of any explosive or incendiary device or substance. As used in this section, the phrase 'explosive or incendiary device or substance' shall include . . . .

"(c) The crime of receiving stolen goods knowing them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question."

Under the provisions of G.S. 14-72, quoted above, it is now held:

1. Larceny of property of a value in excess of two hundred dollars is a felony.

2. Larceny from the person is a felony, without regard to the value of the property.

3. Larceny from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57 is a felony, without regard to the value of the property.

4. Larceny of any explosive or incendiary device or substance is a felony.

5. Larceny of property of the value of two hundred dollars or less is a misdemeanor unless it is (1) from the person, or (2) from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57, or (3) the property is an explosive or incendiary device or substance.

[3] To convict of felony-larceny, the indictment must allege and the State must prove beyond a reasonable doubt, as an essential element of the crime, that the value of the property exceeded two hundred dollars, or that the larceny was from the person, or that the larceny was from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57, or that the property involved was an explosive or incendiary device or substance.

[4] When the available evidence indicates that the value of the property exceeds two hundred dollars *and also* that the larceny is either (1) from the person, or (2) from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57 or (3) that the property involved is an explosive or incendiary device or substance, the solicitors would do well to incorporate both allegations in the bill of indictment so that if the proof as to one should fail the prosecution can proceed on the other. Too, trial judges should bear in mind that instructions requiring proof beyond a reasonable doubt and *jury findings* as to *all* essential elements thereof are prerequisite to a conviction of felony-larceny.

[2] In view of the foregoing, decisions based on the Act of 1895, including *State v. Bynum, supra,* and *State v. Harris, supra,* and other decisions based thereon, are no longer authoritative. Too, decisions subsequent to the Act of 1913, and at variance with the legal propositions stated herein, for example, *State v. Flynn, supra,* and *State v. Stevens, supra,* to the extent of such variance, are overruled.

For the reasons stated, the verdict, interpreted by this Court as a verdict of guilty of (simple) larceny of forty dollars, will not be disturbed. However, the judgment pronounced thereon is vacated and the cause is remanded to the Court of Appeals which will remand the cause to the Superior Court of Burke County for the pronouncement of a new judgment within the limits provided by G.S. 14-3(a).

Judgment vacated and cause remanded.

STATE OF NORTH CAROLINA v. EARLINE WOODS

No. 57

(Filed 10 March 1971)

1. **Homicide § 14— presumptions — unlawfulness of homicide — malice — proof of intentional assault with deadly weapon**

The presumption that a homicide was unlawful and done with malice arises not only upon proof or admission of an intentional killing with a deadly weapon but also when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted.

2. **Homicide § 14— presumptions — burden of proof on the State — proximate cause of death**

No presumption arises against a defendant and no burden is cast upon him until the State has satisfied the jury beyond a reasonable doubt, or the defendant has judicially admitted, that he assaulted the deceased with a deadly weapon and thereby inflicted a wound which proximately caused his death.

3. **Homicide § 23— instructions on proximate cause of death**

Femme defendant who testified that she intentionally fired a rifle in the deceased's direction and that its discharge hit him, but who did not admit that the wound so inflicted caused his death, *is held* entitled to the explicit instruction that the jury should return a verdict of not guilty if the State failed to prove beyond a reasonable doubt that the bullet wound proximately caused the deceased's death.

4. **Homicide § 23— instructions on return of not guilty verdict**

Instructions in a homicide prosecution which permitted the jury to return a verdict of not guilty only if they found that defendant acted in lawful self-defense, *held* reversible error.

5. **Homicide § 9— self-defense — use of excessive force**

A defendant who had reasonable grounds to believe that it was necessary to shoot the deceased to save herself from death or great bodily harm did not use excessive force in shooting the deceased.

6. **Homicide § 9— self-defense — use of excessive force**

One who uses excessive force while fighting in self-defense is guilty of voluntary manslaughter, not involuntary manslaughter.

7. **Homicide § 11— accident or misadventure — burden of proof**

Accident or misadventure is in no sense an affirmative defense shifting the burden of proof to a defendant in a homicide prosecution, but it is merely a denial that defendant has committed the crime.

State v. Woods

8. **Homicide § 11— homicide prosecution — question of accident — insufficiency of evidence**

The question of accident did not arise in a homicide prosecution in which the defendant testified that she "aimed to miss" the deceased and that she shot him "accidentally" while intending to shoot close enough to scare him.

9. **Homicide §§ 5, 21— second-degree murder — firing at close range in deceased's direction**

A defendant who intentionally fired her gun at close range in the deceased's direction and thereby caused his death would be guilty of murder in the second degree unless she was entitled to shoot in self-defense.

10. **Homicide § 23— instructions on proximate cause of death — disapproval of the phrase "natural and probable result"**

A manslaughter instruction that the jury must be satisfied beyond a reasonable doubt that the victim's death was the "natural and probable result" of a wound intentionally inflicted by defendant is disapproved, the crucial question being whether the death was *proximately caused* by the wound.

APPEAL by defendant from *Long, J.*, June 1970 Session of ROWAN, transferred for initial appellate review by the Supreme Court under an order entered pursuant to G.S. 7A-31(b)(4), argued at the Fall Term 1970 as Case No. 94.

Defendant was tried upon indictment which charged her with the first-degree murder of Edward Terry on 1 May 1970. The solicitor, however, elected not to prosecute defendant for murder in the first degree. Evidence for the State tended to show:

Defendant resided at 1126 West Bank Street in the City of Salisbury, where she and Terry lived together. About 12:15 a.m. on 1 May 1970, John Chambers saw defendant standing alone on the corner of Lloyd and Banks Streets. She asked him if he had seen Terry. He had not, and she told him she was going to shoot Terry.

About 12:40 a.m., in response "to a complaint about some shooting," Police Officer R. E. Raper went to defendant's home. He found her on the front porch. She told him she had heard some shooting but had done none herself. While defendant and the officer were talking, Terry appeared between defendant's house and the house next door. Terry was intoxicated and defendant appeared "quite upset" with him. She told Terry

that she was going to give him a whipping which would send him to the hospital. The officer advised them to settle their difference without resorting to violence. Defendant told him that "talking would not do any good, but that there would be no shooting." When Officer Raper drove away, Terry was sitting in a chair on the porch, and defendant had gone into the house.

After the officer left, Janet Muskelly, who lived next door, was "having a remark" with defendant, who had returned to her porch. Defendant said to Mrs. Muskelly, "I heard the remark you said. That is my husband and I'll shoot him when I get ready." At that time defendant had a rifle in her hand, and Terry was standing behind the house. After explaining that it was another woman who had been "remarking," Mrs. Muskelly went into the house. Within a few minutes she heard two shots.

In consequence of another complaint, Officer Raper returned to West Bank Street about 1:05 a.m. He found defendant standing in the street about 75 feet from her house. She said to him, "I think he'll live; I shot him." Terry was lying unconscious on the sidewalk in front of the house. The officer called an ambulance and Terry was carried to the hospital. He was dead on arrival. In the opinion of the physician, who examined Terry, death resulted from a bullet wound. The bullet had entered his thigh, "crossed the femoral artery and vein, and lodged in his stomach."

After the ambulance left, defendant handed Officer Raper a .22-caliber semi-automatic rifle. From it he removed four bullets of the "long rifle type." He arrested defendant and took eight rounds of live ammunition from her pocketbook.

Defendant's testimony tended to show: She and deceased were married "only by common law." They had lived together as husband and wife ten years, five months, and two days. Terry had difficulty keeping a job because of his drinking. On 1 May 1970 he got off work about 6:00 p.m., but he did not come home until midnight. At that time he was "high on whiskey." His alibi did not withstand defendant's cross-examination, and they were in the midst of "an argument" when Officer Raper arrived the first time. He left Terry and defendant wrestling over the rifle on the porch. The rifle fell to the floor; defendant got it and backed into the house against a chair just opposite the

door. When Terry started in defendant said to him, "Don't come in; I am not going to let you get this rifle and shoot me no more." His reply was, "Hell, I'm going to take it." Intending to scare him by shooting past him she "shot to miss him and hit him." She said, "I intended to shoot past him. I intended to scare him. . . . I did not intend to shoot him or to hurt him in any way."

Terry, defendant said, "was wonderful when he was sober, but when he started drinking he'd always come home to jump on (her)." The preceding Easter he had shot her in the head and, because of that episode, prior shootings and beatings, she was afraid of him on that night. After he was shot she went across the street to telephone for an ambulance. It was then that she saw Officer Raper. When he asked her what happened she told him that she shot Terry in the leg to keep him away from her; that she "was shooting by him" and did not mean to hit him. Defendant denied making the statements attributed to her by Chambers and Muskelly. She admitted prior convictions for "fighting," aggravated assault, drunkenness, selling nontaxpaid whiskey, "drunk and disorderliness and resisting arrest."

Defendant's sister, one of deceased's co-workers, and a neighbor corroborated defendant's testimony that Terry had shot defendant without provocation the preceding Easter, had assaulted her at other times, and that "he was a pretty rough fellow when he was drinking."

The court charged the jury it could return one of four verdicts: Guilty of murder in the second degree, voluntary manslaughter, involuntary manslaughter, or not guilty. The verdict was guilty of voluntary manslaughter. From the judgment of the court that she be imprisoned for a term of not less than six nor more than twelve years defendant appealed.

Attorney General Robert Morgan; Assistant Attorney General William W. Melvin; and Trial Attorney Donald M. Jacobs for the State.

Robert M. Davis for defendant appellant.

SHARP, Justice.

Defendant brings forward only assignments of error relating to the charge. Assignments Nos. 3 and 6 require discussion.

The portion of the charge which is the subject of Assignment No. 3 follows:

"Where a killing is shown to be intentional, and without legal provocation, and without just cause or excuse or where the killing is shown to be done with a deadly weapon, or in a cruel or in a brutal manner, then the law implies that it was done with malice. When it is established by the evidence that the defendant intentionally killed the deceased with a deadly weapon the law raises two and only two presumptions against him. First, that the killing was unlawful and second, that it was done with malice; an unlawful killing with malice is Murder in the Second Degree.

"When the intentional killing of a human being with a deadly weapon is established by the evidence, there is cast upon the defendant in this case, Earline Woods, the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence, nor beyond a reasonable doubt, but simply to the satisfaction of the jury—the legal provocation that will rob the crime of malice and thus reduce it to manslaughter or that will excuse it altogether upon the grounds of self-defense, accident or misadventure."

Following the excerpt quoted above the judge gave a further exposition of murder in the second degree, instructions upon voluntary and involuntary manslaughter, and a statement of the law of self-defense. Then, after a brief summary of the evidence, he delivered his final mandate. The substance of this instruction, which is the basis of Assignment No. 6, is summarized below:

If the State has satisfied you beyond a reasonable doubt that defendant, by means of a deadly weapon, intentionally inflicted the wound which produced Terry's death it would be your duty to return a verdict of guilty of murder in the second degree unless defendant has satisfied you that she shot Terry in self-defense. If you are satisfied beyond a reasonable doubt that defendant intentionally shot Terry and that his death "was the natural and probable result," but you are not satisfied be-

yond a reasonable doubt that she shot him with malice, your verdict will be voluntary manslaughter unless defendant has satisfied you she shot Terry in self-defense. If you are not satisfied beyond a reasonable doubt that defendant shot Terry intentionally but are satisfied beyond a reasonable doubt that she shot him in the commission of some unlawful act and his death "was a natural and probable result," your verdict will be guilty of involuntary manslaughter "even though the wounding of the deceased was unintentional," unless defendant has satisfied you she shot in self-defense. Although the State may have satisfied you beyond a reasonable doubt that defendant shot and killed Terry, if she has satisfied you that she was not the aggressor and that she shot Terry under circumstances which created in her mind the reasonable belief that it was necessary to shoot him in order to save herself from death or great bodily harm, it would be your duty to return a verdict of not guilty. However, even if defendant has satisfied you she was not the aggressor and she shot Terry under circumstances which reasonably caused her to believe "that the shooting of the deceased was necessary in order to save herself from death or great bodily harm," yet if she "fails to satisfy you that the forces used were not excessive under the circumstances, it would be your duty to return a verdit of guilty of involuntary manslaughter, or if you find the defendant was the aggressor then the plea of self-defense would not be available to her."

Defendant asserts that the foregoing excerpts from the charge are fatally defective in the following respects: (1) The judge failed to instruct that until the State satisfied the jury beyond a reasonable doubt defendant intentionally shot Terry *and* thereby proximately caused his death, no presumption arose that the killing was either unlawful or done with malice. (2) Although the judge instructed the jurors under what circumstances they should return a verdict of guilty of murder in the second degree or manslaughter, and how murder in the second degree could be reduced to manslaughter, it was only in the event they found defendant to have acted in lawful self-defense that he specifically told them they could or should return a verdict of not guilty. These contentions must be sustained.

The State's evidence tended to show that defendant intentionally shot Terry after having announced her intention to kill him and that he died as a result of the bullet wound she

inflicted. Defendant's evidence (her testimony) tended to show that after scuffling with Terry over the rifle on the front porch of their residence she got possession of the weapon and went into the house; that Terry said he was going to take the rifle from her and, despite her warning to him not to come in, he started into the house; that, because he had previously shot her, she was afraid of him, and she "shot to miss him and hit him"; that her only purpose in shooting was to scare him. All the evidence, therefore, tends to show that defendant intentionally fired the shot which struck Terry. It must be kept in mind, however, that she made no judicial admission that he died as a result of the wound she inflicted.

[1, 2] The presumption that a homicide was unlawful and done with malice arises not only upon proof or admission of an intentional killing with a deadly weapon but also "when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted." *State v. Gordon,* 241 N.C. 356, 358, 85 S.E. 2d 322, 323, and cases cited; *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328; *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Price,* 271 N.C. 521, 157 S.E. 2d 127; *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337. However, no presumption arises against a defendant and no burden is cast upon him until the State has satisfied the jury beyond a reasonable doubt, or the defendant has judicially admitted, that he assaulted the deceased with a deadly weapon and thereby inflicted a wound which proximately caused his death. Here a specific instruction to this effect was not given.

[3] Although defendant testified that she intentionally fired the rifle in Terry's direction and that its discharge hit him, she did not admit that the wound thus inflicted caused his death. She was, therefore, entitled to the explicit instruction, even in the absence of a specific request therefor, that the jury should return a verdict of not guilty if the State failed to prove beyond a reasonable doubt that a bullet wound inflicted by defendant proximately caused Terry's death. "The necessity for such instruction is not affected by the fact there was plenary evidence upon which the jury could base (such) a finding. . . . " *State v. Ramey,* 273 N.C. 325, 329, 160 S.E. 2d 56, 59; *State v. Howell,* 218 N.C. 280, 10 S.E. 2d 815. In *State v. Redman,* 217 N.C. 483, 486, 8 S.E. 2d 623, 625, Justice Barnhill (later Chief Justice)

said: "For the failure of the court . . . to require the jury to find beyond a reasonable doubt, upon the evidence offered, that the defendant killed the deceased with a deadly weapon, before casting any burden upon the defendant to go forward with proof tending to mitigate the killing or to excuse it altogether, there must be a new trial."

[4] Both the factual situation and the charge in this case are similar to those in *State v. Ramey, supra,* and defendant has apparently based her assignments of error upon the opinion in that case. In awarding a new trial in *Ramey,* Chief Justice Bobbitt said:

"The only portions of the charge in which the jury was instructed as to circumstances under which they might return a verdict of not guilty relate directly and solely to the return of a verdict of not guilty in the event the jury found defendant acted in the lawful exercise of his right of self-defense.

". . . .

". . . It is noted that no instruction was given that if the State failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant was guilty of murder in the second degree, and failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant was guilty of manslaughter, the jury should return a verdict of not guilty." *State v. Ramey, supra* at 328, 329, 160 S.E. 2d at 58, 59.

Upon the authority of *State v. Ramey, supra,* and the cases cited therein, we award defendant a new trial for the errors indicated. However, we also deem it appropriate to call attention to certain additional errors in the charge.

[5, 6] In the mandate, the judge instructed the jurors to return a verdict of *involuntary* manslaughter in the event defendant satisfied them she shot Terry in the reasonable belief "that the shooting of the deceased was necessary in order to save herself from death or great bodily harm" but failed to satisfy them that the force she used was not excessive under the circumstances. Obviously this charge incorporates contradictions. If defendant had reasonable grounds to believe that it was necessary to shoot Terry to save herself from death or great bodily harm, she did not use excessive force in shooting him. Furthermore, when one who is fighting in self-defense uses excessive force he is guilty

of *voluntary* manslaughter. *State v. Ramey, supra; State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305. There was in this case no evidence which would have justified a verdict of involuntary manslaughter.

In the second paragraph of the excerpt from the charge quoted at the beginning of this opinion, the judge instructed that once "the intentional killing of a human being with a deadly weapon" is established, it is encumbent upon the defendant to satisfy the jury of facts which would reduce the crime to manslaughter or excuse it altogether on the ground of self-defense, *accident or misadventure.*

[7] We have repeatedly held that accident or misadventure is in no sense an affirmative defense shifting the burden of proof to the defendant to exculpate himself from a charge of murder. On the contrary, it is merely a denial that the defendant has committed the crime, and the burden remains on the State to prove that the defendant *intentionally assaulted* the deceased with a deadly weapon and thereby proximately caused his death before any presumption arises against him. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652; *State v. Mercer, supra; State v. Fowler,* 268 N.C. 430, 150 S.E. 2d 731; *State v. Phillips, supra.* Nothwithstanding, the phrase "accident or misadventure" lingers in the notebooks of trial judges and continues to haunt their charges with reference to the burden of proof which devolves upon a defendant to rebut the presumptions arising from a killing proximately resulting from the intentional use of a deadly weapon.

[8, 9] Defendant makes no contention that she discharged the rifle accidentally. Her contention is that she "aimed to miss"; that intending to shoot close enough to scare him but not to hit him, she shot him "accidentally." However, defendant shot from a front room, or hall, through the front door toward Terry, who had started to come into the house from the porch. Under these circumstances the question of accident does not arise. At such close range and in such close quarters, if defendant intentionally fired the gun in Terry's direction and thereby caused his death, she would be guilty of murder in the second degree unless she was entitled to shoot in self-defense. *State v. Price, supra; see State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461; *State v. Cooper, supra.*

[10] In his mandate with reference to second-degree murder the judge correctly charged that the State must prove beyond a

reasonable doubt that defendant "intentionally inflicted with a deadly weapon *the wound which produced the death*" of Terry. Subsequently, however, in charging upon manslaughter he twice told the jury they must be satisfied beyond a reasonable doubt that Terry's death "was the (a) natural and probable result" of a wound intentionally inflicted by defendant. The use of the phrase "natural and probable result" is disapproved. The crucial question is whether a wound inflicted by an unlawful assault *proximately caused* the death—not whether death was a natural and probable result of such a wound and should have been foreseen. Foreseeability is not an element of proximate cause in a homicide case where an intentionally inflicted wound caused the victim's death.

New trial.

PAUL R. ERVIN, EXECUTOR OF THE ESTATE OF CLEORA C. DOANE, DECEASED v. IVIE L. CLAYTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 49

(Filed 10 March 1971)

1. **Executors and Administrators § 30; Taxation § 32— personal representative — intangibles tax**

   The personal representative is responsible for the intangible personal property owned by the decedent and for the payment of intangibles tax thereon during the temporary period the intangibles are held and controlled by him in the course of his active administration of the estate.

2. **Executors and Administrators § 30; Taxation § 32— intangibles tax — personal representative of resident decedent — property held for nonresident**

   Portion of G.S. 105-212 which exempts from intangibles tax property held or controlled by a fiduciary domiciled in this State for the benefit of a nonresident does not apply to intangibles held or controlled by the personal representative of a resident decedent during the period such personal representative is engaged in the active administration of the estate in accordance with law.

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

CROSS appeals by plaintiff and by defendant from the judgment entered by *Arbuckle, J.*, at February 2, 1970 Civil Session

of MECKLENBURG County District Court, transferred under G.S. 7A-31(a) for initial appellate review by the Supreme Court, docketed and argued as No. 72 at Fall Term 1970.

Civil action under G.S. 105-266.1(c) to recover the amount of intangible personal property taxes for the years 1964 and 1965 paid by the executor of Cleora C. Doane on corporate stocks held by him as executor on December 31, 1964, and on December 31, 1965.

Cleora C. Doane, a resident of Mecklenburg County, North Carolina, died testate on September 27, 1964. Her will was duly probated in Mecklenburg County. She appointed Paul R. Ervin, a resident of Mecklenburg County, as her executor. Mr. Ervin qualified as executor on September 28, 1964.

The hearing before Judge Arbuckle was on stipulated facts.

The provisions of Mrs. Doane's will, summarized or quoted, are set forth below.

Item One provides for the payment of debts, funeral expenses and taxes.

Item Two, quoted in full, is as follows:

"ITEM TWO: If, and only if, my daughter, Anne Doane Mack, survives me I will and bequeath to her the following:

"A. All of my household goods (not otherwise hereinafter disposed of) and personal effects, and any automobiles which I may own at the time of my death.

"B. One-half of all stocks and bonds, of whatever type and description and wherever located, that I may own at the time of my death. My said daughter shall have the right and privilege of choosing which stocks and bonds shall pass to her under the provisions of this Item; provided, however, that the value of the stocks and bonds included in my estate shall, for the purpose of this Item, be determined by their fair market value at the date of my death, and the quotation of any reputable securities brokerage firm shall be conclusive as to valuation.

"C. The residum *(sic)* of all money in banks not used in the administration of my estate, the payment of taxes thereupon or not otherwise disposed of herein."

Item Three provides for a bequest of $1,000.00 to Elizabeth Blair Memorial Scholarship Fund at Queens College.

Items Four and Five provide for bequests of sums of money and of articles of property to various persons *if, and only if,* her daughter, Anne Doane Mack, does not survive the testatrix.

Item Six contains the following quoted provisions:

"ITEM SIX: All of the rest, residue and remainder of my estate, I give, devise, and bequeath to the First Union National Bank of North Carolina as Trustee, in trust for the following uses and purposes and upon the following conditions:

"A. I direct my Trustee to hold the trust principal during a trust term to be measured as follows:

(1) If my daughter, Anne Doane Mack, survives me by as much as ten years, then in that event my trust shall terminate on the tenth anniversary of my death.

(2) If my daughter, Anne Doane Mack, does not survive me by as much as ten years, then in that event this Trust shall terminate on the date upon which the youngest child, either natural or adopted, of Anne Doane Mack, surviving me, lives to attain the age of 21 years or would have attained that age if such child dies during the trust term."

Other portions (B, C, D and E) of Item Six prescribed the authority and duty of the trustee in respect of (1) the disbursement of income, (2) the disbursement of corpus to meet emergency needs, (3) the investment of assets of the trust, and (4) the disbursement of the principal and accumulated income upon termination of the trust.

Item Seven contains the provisions by which the testatrix appointed Mr. Ervin as her executor.

Anne Doane Mack survived Cleora C. Doane. Mrs. Mack, throughout 1964 and 1965, "was not a resident or domiciliary of North Carolina."

Paul R. Ervin, as executor, filed North Carolina Intangibles Tax Returns for 1964 and 1965. In his 1964 return, he listed shares of corporate stocks having a taxable value of $261,254.34 as of December 31, 1964, and paid taxes thereon in the amount of $653.14. In his 1965 return, he reported shares of stock having a taxable value of $288,357.35 as of December 31, 1965, and paid taxes thereon of $720.89.

The shares of stock listed in these 1964 and 1965 returns were held by Paul R. Ervin as executor from Mrs. Doane's death

on September 27, 1964, until September, 1966, when one-half was delivered to Mrs. Mack under Item Two(B) and the remaining one-half was delivered to the First Union National Bank as trustee under Item Six.

From the time of his appointment as executor until the delivery of the shares in September, 1966, the estate of Cleora C. Doane was in the active process of administration by Paul R. Ervin, the executor thereof.

The record does not include the inventory, annual account(s) or final account, if any, filed by Paul R. Ervin as executor. The record does not show: (1) Whether the shares of stock listed on the executor's 1964 and 1965 intangibles returns were in excess of the shares delivered by the executor in September, 1966; (2) what dividends, if any, were received by the executor while the corporate stocks were held and controlled by him; (3) the distribution, if any, by the executor of dividends received by him on corporate stocks held and controlled by him prior to September, 1966; and (4) the income tax returns filed and income taxes paid in respect of income received by Mrs. Doane prior to September 27, 1964, and in respect of income received thereafter by the executor.

On August 23, 1967, Paul R. Ervin, as executor, filed with the North Carolina Department of Revenue a claim for a refund of the $653.14 and of the $720.89 he had paid as Intangible Personal Property Taxes for the years 1964 and 1965, respectively, asserting that "the Estate of Cleora C. Doane was exempt from intangible taxes in that the Executor held the assets of the Estate as a fiduciary domiciled in this State for the benefit of a non-resident beneficiary." After the initial refusal of the claim, the executor requested a hearing by defendant. In accordance with this request, the matter was heard by defendant on March 27, 1968, and again on April 18, 1968. On April 23, 1968, defendant entered a formal order "that refund of the intangibles tax paid by Paul R. Ervin, executor for the estate of Cleora C. Doane for the years 1964 and 1965 be refused."

It was stipulated that all necessary administrative procedures preliminary to the bringing of this action were complied with and that all parties were properly before the court.

As conclusions of law, Judge Arbuckle held (1) the one-half of the "stocks and bonds" bequeathed in Item Two(B) to Mrs.

Mack, a nonresident, were exempt from intangible personal property taxes for the years 1964 and 1965, and (2) that the remaining one-half, bequeathed in Item Six to a testamentary residuary trust, were not exempt therefrom.

In the judgment entered by Judge Arbuckle, it was ordered, adjudged and decreed that Paul R. Ervin, as executor of the estate of Cleora C. Doane, recover from defendant $326.57 (one-half of $653.14) with interest from April 5, 1965, *and* the sum of $360.45 (one-half of $720.89) with interest from April 12, 1966, and that each party pay one-half of the costs of the action.

Each party excepted to the portion of the judgment adverse to him and appealed therefrom; and, in this Court, each party has filed a brief as appellant and a separate brief as appellee.

Ervin, Horack & McCartha, by James M. Talley, Jr., for plaintiff appellant-appellee.

Attorney General Morgan and Assistant Attorney General Banks for defendant appellant-appellee.

BOBBITT, Chief Justice.

G.S. 105-212, in pertinent part, provides:

"If any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section from the tax imposed by this article, such intangible personal property shall be partially or wholly exempt from taxation under the provisions of this article in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which the taxes levied by this article are imposed, bears to the entire net income derived from such intangible personal property during such calendar year. 'Net income' shall be deemed to have the same meaning that it has in the income tax article. Where the intangible personal property for which this exemption is claimed is held or controlled with other property as a unit, allocation of appropriate deductions from gross income shall be made to that part of the entire gross income which is derived from the intangible personal property by direct method to the extent practicable; and otherwise by such other method as the Commissioner of Revenue shall find to be reasonable:

Provided, that each fiduciary claiming the exemption provided in this paragraph shall, upon the request of the Commissioner of Revenue, establish in writing its claim to such exemption. No provision of law shall be construed as exempting trust funds or trust property from the taxes levied by this article except in the specific cases covered by this section."

The *stocks* here involved were owned by Cleora C. Doane on September 27, 1964, the date of her death. On December 31, 1964, and on December 31, 1965, her estate was being actively administered by her executor who, on those dates, held and controlled the stocks.

Nothing in the record indicates that Mrs. Mack exercised "the right and privilege of choosing which stocks and bonds" were to pass to her under Item Two(B) of Mrs. Doane's will prior to the actual division of the stocks by the executor in September, 1966. Then, as shown by the receipts, the executor delivered to Mrs. Mack and to the First Union National Bank as trustee an equal number of shares of each block of stock.

In *Allen v. Currie, Commissioner of Revenue,* 254 N.C. 636, 119 S.E. 2d 917, this Court considered whether intangibles of the estate of Samuel G. Allen were exempt from the tax imposed by G.S. 105-203. The testator and his widow, who qualified as co-executor of his will, were residents of Moore County, North Carolina. As co-executor, she filed returns and paid taxes on the intangibles held and controlled by her on December 31, 1956, and on December 31, 1957. She instituted the action to recover three-fourths of the amount of the intangibles taxes so paid, asserting that three-fourths of the gross estate of Samuel G. Allen, under the terms of his will, vested in and was distributable to nonresidents, and that the income received by the executors subsequent to the death of Samuel G. Allen had been so distributed. She based her asserted right to these refunds on the exemption provided in the quoted portion of G.S. 105-212.

In Allen, no *specific* property, tangible or intangible, was bequeathed to any of the nonresident beneficiaries. Each was entitled to a specified portion of the residue of the testator's estate. It was held that the exemption provided in the quoted portion of G.S. 105-212 "was not intended to apply, and does not apply, to intangibles constituting general assets held and controlled by an executor of an estate during the process of admin-

istration." Hence, the asserted right of the co-executor to recover for alleged overpayments was denied.

Seemingly, Judge Arbuckle considered the opinion in Allen indicated that a different result would have been reached if the nonresidents involved had been legatees of *specific intangibles.* It was not so intended. The *decision* was based on the quoted portion of G.S. 105-212 as related to the facts then under consideration. *Dicta* in the opinion adumbrated the present decision.

Under well established legal principles set forth in Allen, the personal property of the testatrix vested upon her death in her executor; and the fiduciary obligation of her executor was to pay her debts as provided by law and to administer her estate in compliance with the provisions of her will.

[1] The personal representative is responsible for the intangible personal property owned by the decedent and for the payment of intangibles tax thereon during the temporary period the intangibles are held and controlled by him in the course of his active administration of the estate. Here, pursuant to G.S. 105-206, the executor filed the required returns and paid the tax thereon.

G.S. 28-162 provides that an executor, administrator or collector, immediately after the expiration of two years from his qualification, shall divide, deliver and pay to the persons entitled thereto under the will all of the estate remaining after payment of legal debts, charges and disbursements. Here, the executor delivered the intangibles listed on the receipts to Mrs. Mack and to the First Union National Bank as trustee within two years from the date of his qualification. Nothing in the record indicates that any beneficiary demanded or was entitled to these intangibles prior to the delivery thereof by the executor.

Our decision on this appeal is not based on factual similarities or differences in Allen and in the present case. We deem it appropriate to decide whether the exemption provided in the quoted portion of G.S. 105-212 is available to any personal representative of a resident decedent in respect of intangibles held and controlled by him as such personal representative during the period he is engaged in the active administration of the estate in accordance with law.

The exemption was incorporated in the quoted portion of G.S. 105-212 in 1947. Session Laws of 1947, Chapter 501, Sec-

tion 7. It exempts intangible personal property held or controlled for the benefit of a nonresident or nonresidents by "a fiduciary *domiciled in this State.*" (Our italics.)

In our consideration thereof in Allen, it was stated: "In our view, the intent and purpose of the 1947 amendment was not to exempt any intangibles theretofore subject to the intangible personal property tax but to dispel any idea that intangibles otherwise exempt would be subject to the intangible personal property tax *because* a fiduciary domiciled in this State held and controlled such intangibles. Under its provisions, a resident or nonresident creator of a trust, consisting wholly or in part of intangibles, can name as fiduciary a person, bank or trust company domiciled in North Carolina with the assurance that the interests of nonresident beneficiaries of the trust will not suffer on account thereof. Moreover, we think the 1947 amendment was intended to apply to an established or continuing trust, not to intangibles constituting general assets of an estate in process of administration."

The fiduciary obligation of the personal representative of a decedent is distinguishable from that of the trustee (by whatever name called) of an established or continuing trust. An executor, as the resident decedent's personal representative, is obligated to administer the estate in accordance with law and the provisions of the will. As such personal representative, he must ascertain and pay the funeral expenses and debts, including inheritance and estate taxes as well as taxes on income received by the decedent prior to death and on income received by him as personal representative. Until this has been done, the status of intangibles constituting assets of the estate remains unsettled. What intangibles, if any, a particular beneficiary is entitled to receive cannot be determined with exactitude until the estate is ready for final settlement. As noted in Allen: "Ordinarily, distribution of assets or of income prior to final settlement is made by an executor at his own risk. *Mallard v. Patterson,* 108 N.C. 255, 13 S.E. 93."

[2] We are of opinion and now hold that the exemption from intangibles tax provided in the quoted portion of G.S. 105-212 does not apply to intangibles held and controlled by the personal representative of a resident decedent during the period such personal representative is engaged in the active administration of the estate in accordance with law. This decision renders un-

necessary a determination as to whether the "(o)ne-half of all stocks and bonds" owned by the testatrix at the time of her death, referred to in Item Two(B), are considered general assets of the estate or the subject of a specific bequest.

On account of the death of Paul R. Ervin during the pendency of these appeals, Benj. S. Horack, the duly qualified administrator c.t.a., d.b.n. of the estate of Cleora C. Doane, has been substituted and is now acting as party plaintiff herein.

Having reached the conclusion plaintiff is not entitled to any refund, the portion of the judgment which denies recovery for one-half of the amounts paid, involved in plaintiff's appeal, is affirmed, but the portion which allows recovery for one-half of the amounts paid, involved in defendant's appeal, is reversed. Hence, the District Court will enter a judgment in conformity with this decision and therein tax the plaintiff with all costs.

On plaintiff's appeal, affirmed.

On defendant's appeal, reversed.

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

RALEIGH-DURHAM AIRPORT AUTHORITY, APPELLANT (PLAINTIFF) v. GEORGE STEWART AND CLYDE LEASING, INC., TRADING AND DOING BUSINESS AS BUDGET RENT-A-CAR, APPELLEES (DEFENDANTS)

No. 9

(Filed 10 March 1971)

Aviation § 1; Carriers §§ 2, 13— airport authority — right of car rental company to pick up and discharge passengers

Although an airport authority may grant one or more concessions to car rental companies and may permit them to enter and remain upon its premises for the solicitation of business, while denying that privilege to other car rental companies, it may not forbid such other companies, in an otherwise lawful and proper manner, to enter its premises and remain thereon for such time as is reasonably necessary to discharge an outgoing passenger and his baggage or to pick up an incoming passenger and his baggage pursuant to an actual, previously made contract or a previously received request for such service, since to do so would deny the passenger his right to convenient ingress and egress to and from the airport terminal. G.S. 63-53(3).

ON *certiorari* to the Court of Appeals to review its decision, reported in 9 N.C. App. 505, 176 S.E. 2d 912, reversing the judgment of *Bailey, J.*, at the 8 June 1970 Civil Session of WAKE.

The Airport Authority, a municipal corporation organized pursuant to Chapter 168 of the Public-Local Laws of 1939, operates and controls the Raleigh-Durham Airport. The properties of the Airport are owned by the Cities of Raleigh and Durham and the Counties of Wake and Durham, having been acquired and developed with non-tax public funds. The corporate defendant is engaged in the business of renting automobiles to the public. The individual defendant is its president.

The Airport Authority brought this action to enjoin the defendants from entering upon the Raleigh-Durham Airport premises for the conduct of such car rental business. The matter was heard in the Superior Court upon facts stipulated by the parties, who waived a jury, and agreed that, based upon such facts and conclusions drawn therefrom, the court might enter its judgment.

The court entered judgment setting forth its findings of fact, which do not vary materially from the stipulations. Upon such findings, the court concluded that the Airport Authority operates the Airport in a proprietary capacity, that the Airport may deny the use of its parking areas, roadways, walkways and other facilities for the conduct of any private business not authorized by it, and that the conduct of the corporate defendant constituted a continuing trespass upon the property of the Airport and a use thereof for its private business purposes without permission of the plaintiff. The judgment permanently enjoined the defendant "from using the roadways, parking areas, loading areas, Terminal Building, and any other facilities or property of the Raleigh-Durham Airport Authority in the conduct of its business, including picking up persons and baggage and transporting them over the lands comprising the Raleigh-Durham Airport and transporting and discharging them over the lands of the Raleigh-Durham Airport, as a part of and in connection with its business of leasing motor vehicles for hire." The court's findings of fact, pertinent to this review, renumbered, may be summarized as follows:

1. The Airport Authority is authorized to operate, regulate, or grant to others the right to operate on the Airport premises

various businesses, amusements and concessions, including automobile rental services.

2. The Airport Authority has granted to three other companies (Hertz, Avis and National) the authority to conduct their respective car rental businesses on and from the Raleigh-Durham Airport.

3. The corporate defendant, affiliated by contract with Budget Rent-a-Car, has no contract with or authority from the Airport Authority to operate its car rental business on and from the Raleigh-Durham Airport, but has leased property adjacent to the Airport property, from which leased property it conducts its business.

4. In such business the corporate defendant leases automobiles to airline passengers in response to telephone calls from such passengers or other arrangements previously made with such passengers.

5. In the conduct of such business, the corporate defendant regularly picks up its customers at the Raleigh-Durham Airport and transports them to its leased premises, where arrangements for the rental of its automobile by the passenger are completed. As part of its contract with the passenger, the corporate defendant also transports the passenger and his baggage back to the Airport Terminal Building from its leased premises when his use of its car is concluded. In such transportation of its customer from and to the Airport Terminal Building, the corporate defendant uses the roads, parking and baggage pickup areas of the Airport, customarily providing such transportation in the same vehicle which it leases to its customer.

6. The Airport Authority advised the corporate defendant that such conduct of its business, without a contract with the Airport Authority, constituted a trespass upon the Airport property and requested the corporate defendant to cease all such operations on the property of the Airport.

7. Thereupon, the corporate defendant applied to the Airport Authority for permission to operate on the Airport, but the application was denied and no such permission has been granted by the Airport Authority to the corporate defendant. Nevertheless, the corporate defendant continues and proposes to continue its operation, making use of the Airport properties as above described.

Stipulated facts, not specifically set forth in the judgment as found by the court, include these:

(1) The three car rental companies, with whom the Airport Authority has concession contracts, pay to the Authority fixed annual amounts, plus a percentage of their gross receipts from their business at the Airport and rent for space used by them on the Airport premises for the storage of automobiles and other business purposes. These companies do not use the loading and unloading areas maintained by the Airport Authority in front of the Terminal Building for temporary use by the public, but lease from the Authority specified areas for such purposes.

(2) The contracts between the corporate defendant and its customers are consummated in one of the following ways: (a) The customer may go in person to the defendant's place of business, off the premises of the Airport, and there sign a rental agreement and accept delivery of an automobile; (b) the customer may call the corporate defendant from a public telephone in the Airport terminal, whereupon it will dispatch an automobile, driven by its employee, to the Airport Terminal Building, locate the customer, pick him up with his baggage and transport him to the defendant's place of business where the rental agreement is signed and the automobile is delivered to the customer; (c) the customer may make arrangements prior to the arrival at the Airport, in which event he is met at the designated time at the terminal by the defendant's employee and he and his baggage are transported to the defendant's place of business for the signing of the agreement and delivery of the automobile to him.

(3) At the termination of the rental agreement, the customer returns the leased automobile to the defendant's place of business off the premises of the Airport, whereupon the corporate defendant transports him and his baggage to the Airport Terminal Building and returns the automobile, used for this purpose, to its own place of business, customarily using for such transportation the same automobile originally rented to the customer.

(4) In so serving its customers, the corporate defendant uses the driveways, waiting areas and parking facilities of the Airport.

The Airport Authority does not contend that the defendant solicits customers upon the Airport premises or that the vehicles

of the corporate defendant remain upon those premises otherwise than in the normal course of picking up and discharging customers as above described.

Purrington & Purrington by A. L. Purrington, Jr., for plaintiff appellant.

Tally, Tally & Bouknight by J. A. Bouknight, Jr., for defendant appellees.

LAKE, Justice.

In *Harrelson v. Fayetteville,* 271 N.C. 87, 155 S.E. 2d 749, we held that a municipal corporation, owning and operating a public airport, is authorized to grant an exclusive franchise for the operation of a common carrier limousine service for the transportation of passengers and their baggage to and from the airport. We there cited, with approval, as authority for the proposition that, in so doing, the municipality is acting in a proprietary capacity: *Miami Beach Airline Service v. Crandon,* 159 Fla. 504, 32 So. 2d 153, 172 A.L.R. 1425; *North American Co. v. Bird,* 61 So. 2d 198 (Fla.); Ex Parte Houston, 93 Okla. Crim. 26, 224 P. 2d 281; *Stone v. Police Jury of Parish of Calcasieu,* 226 La. 943, 77 So. 2d 544; *City of Oakland v. Burns,* 46 Cal. 2d 401, 296 P. 2d 333. This Court so held in *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371, rehear. den., 230 N.C. 759, 53 S.E. 2d 313. In the Miami Beach Airline Service case, *supra,* the Supreme Court of Florida said, "When given authority to do so a governmental entity is expected to perform a proprietary function under like rules and regulations as those pursued by private individuals."

We further cited in support of our conclusion in the Harrelson case, *supra,* the statement in 8 Am. Jur. 2d, Aviation, § 56, that such authority of the municipality extends to the granting of "an exclusive taxicab or limousine or car-rental concession at the airport."

G.S. 63-53(3) provides that a municipality is authorized "to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities; provided that in each case in so doing the public is not deprived of its rightful, equal and uniform use thereof."

In Rhyne, Municipal Law, § 22-16, it is said that the courts unanimously recognize the authority of a municipal corporation operating a publicly owned airport to grant an exclusive concession to one company to furnish taxicab or limousine service at the airport. See also: *Rocky Mountain Motor Co. v. Airport Transit Co.*, 124 Colo. 147, 235 P. 2d 580; *Associated Cab Co. v. City of Atlanta*, 204 Ga. 591, 50 S.E. 2d 601; *Hertz Drive-Ur-Self System v. Tucson Airport Authority*, 81 Ariz. 80, 299 P. 2d 1071.

Our attention has been directed to no decision, or other authority, to the effect that a municipal corporation, operating a public airport, or other public transportation terminal, has more extensive authority to exclude persons or vehicles from the terminal grounds than does a privately owned common carrier operating such a terminal for the use and convenience of its passengers. Again, we have been cited to no authority making a distinction in this respect between an airport and a railroad or steamship terminal, and we perceive no basis for such a distinction.

It is well settled that a railroad company may grant to a single taxicab company the exclusive right to enter, or remain upon, the premises of its passenger terminal for the purpose of soliciting the patronage of potential users of taxicab service, or may exclude all persons from so using its premises for such solicitation. *Black and White Taxicab, etc. Co. v. Brown and Yellow Taxicab, etc. Co.*, 276 U.S. 518, 48 S. Ct. 404, 72 L. Ed. 681, 57 A.L.R. 427; *Delaware, L. & W. Railroad Co. v. Town of Morristown*, 276 U.S. 182, 48 S. Ct. 276, 72 L. Ed. 523; *Donovan v. Pennsylvania Company*, 199 U.S. 279, 26 S. Ct. 91, 50 L. Ed. 192; *Skaggs v. Kansas City Terminal Railway Co.*, 233 F. 827 (W. D. Mo.). A distinction is made, however, between the authority of such a carrier to grant such an exclusive permit, or concession, to enter or stand upon its property for solicitation of patronage and its authority to deny admission to its premises to discharge a passenger and his baggage, or to pick up a passenger and his baggage, pursuant to a contract previously made between such passenger and the taxicab operator. In neither respect is there any basis for distinction between the operator of a taxicab business and the operator of a car rental agency.

The source of the right of the operator of a taxicab to drive upon the premises of the common carrier of passengers to

discharge thereon, or pick up therefrom, a passenger of the common carrier, from whom the taxicab operator has already received a request for his service, is not an independent right of the operator of the taxicab to use the station grounds, but is the right of the passenger to convenient ingress and egress to and from the terminal of the common carrier. As Justices Brandeis and Holmes observed, concurring in part in the decision in *Delaware, L. & W. Railroad Co. v. Town of Morristown, supra:*

> "In these days, the ability of the traveller to obtain conveniently, upon reaching the street door of the station, a taxicab to convey him and his hand-baggage to his ultimate destination, is an essential of adequate rail transportation. The duties of a rail carrier are not necessarily limited to transporting freight and passengers to and from its stations. It must, in connection with its stations, provide adequately for ingress and egress."

The importance to the passenger of transportation between the terminal of the common carrier and his ultimate destination, or point of origin, in the community is even greater in the case of the modern airport, situated several miles from the center of the city.

The leading case recognizing this right of an incoming passenger at the terminal of a common carrier to be met and picked up on the terminal premises by a hackman, for whose services the passenger had made previous arrangements, even though the hackman had been forbidden by the terminal proprietor to solicit or stand upon its grounds, is *Griswold v. Webb,* 16 R.I. 649, 19 A. 143. There, Stiness, J., speaking for the Court, said:

> "[A] railroad station or steamboat wharf is, to some extent, a public place. The public have the right to come and go there for the purpose of travel; for taking and leaving passengers; and for other matters growing out of the business of the company as a common carrier. But the company has the right to say that no business of any other character shall be carried on within the limits of his property. It has the right to say that no one shall come there to solicit trade, simply because it may be convenient for travellers, and so to say that none, except those whom it permits, shall solicit in the business of hacking * * *

"But, while this is so, the company cannot deprive a passenger of the ordinary rights and privileges of a traveller, among which is the privilege of being transported from the terminus in a reasonably convenient and usual way. A company cannot compel a passenger to take one of certain carriages, or none at all; nor impose unreasonable restrictions, which will amount to that. If a passenger orders a carriage to take him from the terminus, such carriage is *pro hac vice*, a private carriage * * *"

Numerous opinions from other jurisdictions intimate support for this view that, while a railroad company may grant an exclusive permit or concession to solicit patronage upon its terminal premises, and may forbid others to park their vehicles thereon to wait there in the mere hope of employment by an arriving passenger, it may not deny access to its property to one who comes to deliver or pick up a passenger pursuant to the passenger's request that he do so. See: *Black and White Taxicab, etc. Co. v. Brown and Yellow Taxicab, etc. Co., supra; Donovan v. Pennsylvania Co., supra; Skaggs v. Kansas City Terminal Railway Co., supra; Yellow Cab Co. of Ashland v. Murphy,* 243 S.W. 2d 42, 45 (Ky.); *Old Colony Railroad Co. v. Tripp,* 147 Mass. 35, 37, 17 N.E. 89; *Godbout v. St. Paul Union Depot Co.,* 79 Minn. 188, 81 N.W. 835; *Hedding v. Gallagher,* 72 N.H. 377, 387, 57 A. 225; *Thompson's Express & Storage Co. v. Mount,* 91 N.J. Eq. 497, 111 A. 173, 15 A.L.R. 351; *Long Island Railroad Co. v. Summers,* 263 N.Y. App. Div. 889; *Norfolk & Western Railway Co. v. Old Dominion Baggage Co.,* 99 Va. 111, 37 S.E. 784. See also: 13 CJS, Carriers, § 567; and Note, 37 Harv. L. Rev. 377. More recent intimations that this concept extends to the right to enter the premises of an airport for such purpose are found in: *Friend v. Lee,* 221 F. 2d 96 (Cir. Ct. D.C.); *Patton v. Administrator of Civil Aeronautics,* 217 F. 2d 395 (9th Cir.); and *United States v. Jenkins,* 130 F. Supp. 808 (E.D. Va.).

There is, in the case before us, no contention that the defendant's employees solicit patronage on the premises of the Airport Authority, or that its vehicles remain thereon longer than necessary to discharge an outgoing passenger and his baggage or to locate and pick up an incoming passenger, and his baggage, which passenger has previously requested the defendant's service by telephone or otherwise. To forbid the defend-

ant to enter the terminal premises, in response to such a call by the passenger, would be to require the passenger to use a rental car service he does not wish to patronize, use no such service, or walk and carry his own baggage from the terminal to the defendant's place of business or to some intermediate point of contact, and, upon completion of his mission in the community, to walk back, carrying his baggage, from the defendant's place of business, or the entrance to the airport premises, to the terminal building. This would deny the passenger his right to convenient egress and ingress from and to the terminal.

We, therefore, hold that although the plaintiff may grant one or more concessions to other car rental companies and may permit them to enter and remain upon its premises for the solicitation of business, while denying such privilege to the defendant, it may not forbid the defendant, in an otherwise lawful and proper manner, to enter its premises and remain thereon for such time as is reasonably necessary to discharge an outgoing passenger, with his baggage, or to pick up an incoming passenger, with his baggage, pursuant to an actual, previously made contract or a previously received request for such service.

The judgment of the Court of Appeals, reversing the judgment of the Superior Court and, thereby, vacating the injunction granted by the Superior Court is

Affirmed.

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. 91

(Filed 10 March 1971)

Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate determination — rate base — plant under construction — interest charged to construction

In determining the rates for a telephone company, it was error of law for the Utilities Commission (1) to include in the rate base the value of the company's plant that was under construction at the end of the test period but not yet in operation and (2) to add to the

company's operating revenue for the test period the interest that was charged to construction during the test period.

ON rehearing, allowed for the sole purpose of extending the discussion of the propriety of the inclusion in the applicant's rate base of its property under construction at the end of the test period used by the Utilities Commission in fixing rates to be charged for telephone service, which discussion appears at page 273 in the opinion of this Court, filed 18 November 1970, and reported in 277 N.C. 255, 177 S.E. 2d 405.

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 our opinion heretofore filed in this matter, 277 N.C. 255, 177 S.E. 2d 405, we held that it was error for the Commission to include in the rate base of a public utility the value of plant under construction at the end of the test period and that it was also error for the Commission to add to the company's operating revenue for the test period interest charged to construction during the test period, these being approximately offsetting errors in the process of fixing rates to be charged for service in the future.

The basic, underlying theory of using the company's operating experience in a test period, recently ended, in fixing rates to be charged by it for its service in the near future is this: Rates for service, in effect throughout the test period, will, in the near future, produce the same rate of return on the company's property, used in rendering such service, as was produced by them on such property in the test period, adjusted for known changes in conditions.

During such test period, the previously established rates for the company's service produced X dollars in gross revenue.

During the test period, which is usually twelve months, certain changes in conditions have taken place, such as, for example, an increase in the number of telephones in operation or other increase in the volume of revenue. *Pro forma* adjustments to revenue are, therefore, made to reflect what the revenues would have been in the test period had these present conditions prevailed throughout that period. When these adjustments are made, the result shows what revenues will be produced in twelve months by application of the previously established rates for service to conditions existing at the end of the test period; *i.e.*, at the date, nearest the present, for which data are available.

Similarly, when operating revenue deductions (operating expenses, depreciation, taxes and all other proper deductions from revenue) for expenditures actually made in the test period are likewise adjusted, *pro forma*, for changes in conditions during the test period, such as an increase in the wage rate, the result reflects what would have been the total of such deductions had the conditions, prevailing at the end of the test period, prevailed throughout it. When this is done, revenue deductions to be anticipated in a period of twelve months have also been computed on the basis of conditions prevailing at the most recent date for which data are available.

The next step is to substract the revenue deductions, so computed, from the revenues so computed, the difference being the company's net operating income. This having been done, it has been determined what net operating income this company may anticipate under the previously established rates, in a period of twelve months, during which all presently known conditions prevail. Such net operating income, divided by the rate base, gives the rate of return which the company may anticipate, on its properties used in rendering its service, under the previously established rates for service, in a period of twelve months, throughout which all presently known conditions prevail.

Obviously, conditions do not remain static. As the company enlarges its plant, and thereby serves more telephones, or otherwise increases its volume of service, its revenues, under the previously established rates, will increase. Its operating expenses, allowance for depreciation, taxes and other revenue deductions will also increase and its rate base will increase. If, however, the only change in condition is an enlargement of plant to increase the number of units of service, the previously estab-

lished rates, when applied also to those new units, will produce, in a period of twelve months, the same revenue, per unit, from the new units as was produced from the old units during the test period, adjusted *pro forma*. Likewise, the additional revenue deductions, on account of the new units, will be approximately the same, per unit, as those applicable to the old units, adjusted *pro forma*. Similarly, the rate base, per unit, of service will remain approximately the same as in the test period, adjusted *pro forma*, and so the rate of return will not be changed appreciably.

Consequently, if the rate of return derived from the previously established rates during the test period, adjusted *pro forma*, was less than a fair rate of return, the statute, G.S. 62-133(b), requires the Commission to raise the company's rates for service, assuming for present purposes that the quality of service is adequate. Conversely, if the rate of return derived from the previously established rates for service during the test period, adjusted *pro forma*, was in excess of a fair rate of return, the statute requires the Commission to reduce the rates for service. If the rate of return derived from the previously established rates for service during the test period, adjusted *pro forma*, was fair, no change in the rates for service is justified. In this State the test of a fair rate of return is that laid down by the Supreme Court of the United States in the Bluefield Water Company case, 262 U.S. 679, 43 S.Ct. 675, 67 L. Ed 1176; that is, if the company continues to earn such a rate of return, will it be able to attract on reasonable terms the capital it needs for the expansion of its service to the public? See, G.S. 62-133(b)(4).

In recent years the process of inflation has pushed upward the cost of plant additions. As a result, it is a fair generalization to say that units of service, such as telephones, added to plant, now require a greater investment in plant, per unit, than did the older units previously put in service. In consequence, continued application of the established rates for service, assuming no other change of condition, results in a gradual erosion of the rate of return from the plant as a whole. An accepted method of taking this circumstance into account in rate making is to fix rates for service sufficient, presently, to bring to the company a rate of return, on its present rate base, slightly in excess of that which is necessary to meet the foregoing test of

reasonableness. As new plant additions gradually erode this rate of return, it will sink to the reasonable level and then to a point slightly below reasonable. By thus averaging the rate of return at the reasonable figure over a period of years, the Commission can set rates for service at a level which will not require readjustment too frequently.

Assuming that the foregoing process has been followed with reasonable accuracy, the rates for service, so established, will, as a general proposition, produce, from investments by the company in additions to its plant, the same rate of return so found by the Commission to be fair. This is so because the new addition will put into service new units producing revenue and necessitating expenses, just as the old units produced revenue and necessitated expenses. Of course, this is not precisely correct with reference to every single addition to plant. For example, the construction of an office building does not, directly, add to revenues. Similarly, a large addition to central office equipment of a telephone company, or the extension of a power company's transmission line into a new territory, prior to the tapping on of a distribution system, will not immediately produce an addition to revenues, at least not an addition commensurate with the addition to the rate base. On the other hand, a subsequent investment in the distribution system, which the transmission line is designed to serve, or the installation of telephones, which the central office equipment is designed to serve, will result in an addition to revenues far in excess of an addition commensurate with the investment in such distribution system or telephones, considered alone. It is impossible to fix rates which will give the utility each day a fair return, and no more, upon its plant in service on that day. The best that can be done, both from the standpoint of the company and from the standpoint of the persons served, is to fix rates on the basis of a substantial period of time. Otherwise, rate hearings and adjustments would be a perpetual process.

Obviously, plant under construction at the end of the test period contributed nothing whatever to the revenues produced during that test period. To add the value of such plant, still under construction, to the rate base, without a *pro forma* adjustment to operating revenues and operating revenue deductions, would, necessarily, depress the rate of return, computed on the basis of the company's actual experience in the test period and

on the basis of the fair value of the properties which produced that return. This would clearly be unfair to the rate payers of the future, for whom the Commission is being requested to fix rates. It would be unfair because the rates for service would be fixed as if this addition to plant, when completed and put into service, were not going to produce any revenues, whereas in fact, under the previously established rates for service, this addition to plant, like the previously constructed plant, will produce revenue sufficient to yield a rate of return comparable to that earned by the old plant in the test period.

There is no unfairness to the utility company in excluding plant under construction from the rate base. Of course, when this addition to plant begins to serve the public, the utility is entitled then to begin to earn a fair return on that portion of its total investment, just as it does on the remainder of the plant. It is not entitled to earn a return on its investment in the plant addition before the plant addition is completed and begins to serve the public. This does not mean, however, that the utility forever loses the interest (or other cost of capital) which it pays (or incurs) during the construction of this addition to plant.

Of course while the addition is under construction, and so producing no revenue, because it renders no service, the company, either having borrowed money with which to build the addition or having put its own equity capital into this construction, incurs a cost of capital, which for convenience we shall call interest. Superficially, it appears that if this investment in plant under construction is not added to the rate base, the company is being deprived of a return, during construction, on its capital invested in the construction of the plant addition. Not so. The interest on the investment in this addition to plant, during the construction, is a part of its cost, just as truly as is the purchase price of the bricks, steel, copper wire, labor, etc., which go into the construction. Thus, when the addition to plant is completed and put into service the entire cost of it, including this interest, is added to the rate base of the company. The fair value, at that time, of the new addition would almost certainly be found to be its total cost and, thereafter, would be found by considering such cost and the reproduction, or trended, cost, including interest during construction. The interest during construction is recovered by the company, in full, through annual

charges to depreciation, just as the rest of the cost of the construction of the addition is recovered. In the future, the company earns a fair rate of return on that part of the construction cost, just as it does on the remainder.

On the other hand, to add to the rate base, which produced the test period revenues, the cost (fair value) of the addition to plant before the addition begins to render any service, without making any offsetting adjustment to net revenues on account of the customers to be served by this plant addition, would be unfair to the company's customers. It is so because to do this would result in a setting of rates for future service on the assumption that the addition to plant will never produce any revenue. If the plant under construction is to be added to the rate base, which produced the test period revenues, then there must, in fairness to the customers, be added to the test period net revenues an amount equal to the net revenue to be produced, under the previously established rates for service, from the telephones (or other units for service) resulting from the addition to the company's plant. Such a *pro forma* adjustment of net revenues would require *pro forma* adjustments of gross revenues and of all revenue deductions. Such *pro forma* adjustments can probably not be calculated with a reasonable degree of accuracy, certainly not without exceedingly complex calculations. If they could be calculated accurately, the end result would be to leave the company and its customers in substantially the same position as they would occupy had there been no addition to the rate base because of plant under construction and no offsetting adjustments to net revenue. There is no purpose to be served by such a procedure.

As we said in our previous opinion in this case, the addition of plant under construction to the rate base, together with the addition to test period revenues of "interest charged to construction," would not justify a remand of the matter to the Commission, the present record not being sufficient to show whether the company, the customers, or neither of them, suffered injury by these two approximately offsetting adjustments. However, these adjustments are, in our opinion, errors of law for the following reasons:

G.S. 62-133 prescribes the formula which the Commission is required to follow in fixing rates for service to be charged by a public utility. In paragraph (b) this statute states:

"(b) In fixing such rates, the Commisison shall:

"(1) Ascertain the fair value of the public utility's property *used and useful in providing the service* rendered to the public within this State * * * ." (Emphasis added)

The fair value of that property is the rate base. Paragraph (c) of this statute provides:

"(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)

The clear meaning of paragraph (c) is that the company's property which is "used and useful in providing the service rendered to the public" is to be determined "as of the end of the test period." A then half-completed generating plant of a power company, or a then half-completed line of telephone wire, cannot be deemed property "used in providing the service" "as of the end of the test period used in the hearing." Neither can it be deemed property "useful" in rendering the service at that time. This is not to say that such half-completed addition to plant has not economic value. Of course, it has economic value, but it is not property of the type which the Legislature has specifically stated is the only type of property to be included in the rate base.

Paragraph (c) of the above statute clearly provides that the Commission is to include in "the probable future revenues" of the company only those revenues "based on the plant and equipment *in operation* at that time" (emphasis added) ; *i.e.*, at the end of the test period. Thus, this provision of the statute makes it error for the Commission to make a *pro forma* adjustment to revenues, by adding to the actual revenue earned in the test period the item called "interest charged to construction," since, by hypothesis, the plant under construction is not "in operation" at the end of the test period.

The exclusion from the rate making process of both plant under construction at the end of the test period and "interest charged to construction" works no injustice upon either the company or its customers. To include in the rate making process

either of these items, without the other, would be an unjust distortion of the test period data for purposes of fixing future rates. The statute authorizes neither of these items to be included in the rate making process. Until it is changed by the Legislature, both the Commission and this Court must follow the statute as presently written.

Our former opinion in this matter is, therefore,

Reaffirmed.

STATE OF NORTH CAROLINA v. PHILLIP LEIGH

No. 23

(Filed 10 March 1971)

1. **Obstructing Justice; Arrest and Bail § 6— obstructing officer's investigation of crime — use of loud and abusive language — sufficiency of evidence**

In a prosecution charging defendant with obstructing a police officer in the performance of his duties, evidence of the State tending to show that defendant, by the repeated use of loud and abusive language over a period of several minutes, prevented a deputy sheriff from talking with a suspect at the scene of a reported crime, *held* sufficient to be submitted to the jury. G. S. 14-223.

2. **Obstructing Justice; Arrest and Bail § 6; Statutes §§ 5, 10— resisting or obstructing officer — charge of the crime in the disjunctive**

The statute making it unlawful for any person to "resist, delay or obstruct" a public officer in the discharge of his duties applies to cases falling within any one of the descriptive words, since the words are joined by the disjunctive "or." G.S. 14-223.

3. **Criminal Law § 132— motion to set aside verdict**

Where there was sufficient evidence to support the verdict, trial court acted within its discretion in denying defendant's motion to set aside the verdict.

4. **Obstructing Justice; Arrest and Bail § 6— resisting or obstructing officer — sufficiency of warrant**

Warrant was sufficient to charge the statutory offense of obstructing an officer in the performance of his duties.

5. **Constitutional Law § 18; Obstructing Justice; Arrest and Bail § 6— freedom of speech — obstruction of police officer by use of loud and abusive language**

The First Amendment right of freedom of speech does not protect a defendant who, by the use of loud and abusive language, wilfully obstructed a police officer in the investigation of a reported crime. U. S. Constitution, Amendments I and XIV; G.S. 14-223.

6. **Constitutional Law § 18— freedom of speech — nature of the right**

Freedom of speech is not an unlimited, unqualified right, but it may be subordinated to other values and considerations and may be reasonably restrained as to time and place.

7. **Constitutional Law § 18— freedom of speech — legislative restrictions**

Within proper limits, the right of free speech is subject to legislative restriction when such restriction is in the public interest.

8. **Constitutional Law § 18— freedom of speech — illegal conduct by use of words**

When a course of conduct has been otherwise properly declared illegal, there is no abridgment of freedom of speech because the illegal conduct is initiated or carried out by the spoken or written word.

9. **Constitutional Law § 18— freedom of speech — extent of the right**

The protection of the First Amendment does not extend to every use and abuse of the spoken and written word.

10. **Obstructing Justice; Arrest and Bail § 6— right of citizen to advise another of constitutional rights**

A citizen may lawfully advise a person under police investigation of his constitutional rights as long as the advice is given in an orderly and peaceable manner.

APPEAL by defendant from *May, S.J.*, April 27, 1970 Criminal Session of WASHINGTON Superior Court.

Defendant was tried in the District Court upon a warrant which charged that on 20 January 1970 he "unlawfully, and willfully delayed and obstructed Deputy Sheriff Walter Peel, a duly empowered law enforcement officer of Washington County, in the discharge of his duty. Said officer was investigating a reported assault and attempting to prevent a breach of the peace on Main Street in Creswell. The hindrance, delay and obstruction of the officer was accomplished by abusive language directed at the officer and by Phillip Leigh trying to convince the person being investigated from cooperating with said officer. The offense charged was committed against the peace and dignity of the State and in violation of G.S. 14-223."

Defendant entered a plea of not guilty in the District Court. He was adjudged to be guilty and was sentenced to imprisonment for four months, the execution of the sentence of imprisonment being suspended upon condition that he pay a fine of $250. Defendant appealed to Superior Court. In Superior Court defendant was tried on the original warrant. Before pleading, defendant's attorney moved to quash the warrant. The trial judge denied the motion to quash and defendant thereupon entered a plea of not guilty.

The State offered evidence which tended to show that on the night of 20 January 1970, shortly before 11:30, Deputy Sheriff James W. Peel received at his home a complaint from Ivory Joe Simpson and Larry Spencer concerning an assault that took place on the main street of Creswell, North Carolina. Deputy Peel immediately went to the main street of Creswell for the purpose of investigating the complaint. It was his intention to talk with Raymond Blount as a part of the investigation. He found Blount sitting in defendant's car. The Deputy Sheriff testified:

"I was not able to talk to Blount because of Phillip Leigh. I couldn't get any information from Blount because of Leigh. I asked Blount to get out of the car and come on go with me and Leigh said 'You don't have to go with that Gestapo Pig.' There was a surrounding of people there and I could not navigate properly and I told Blount to come on and go with me. When he started toward my car, Leigh kept saying 'You don't have to go with that Pig.' . . . Phillip Leigh went to my car and told him to roll the window down and said that he did not have to go with that Pig and to give him five, and I pushed Raymond. Leigh was right up close to me. I pushed him back and told him to move out of the way. He kept coming up to the car when I was trying to put the man in the car.

. . . .

"I did not place him under arrest [at that time].

. . . .

" . . . Blount got out of Leigh's car and walked straight to my car. I opened the door. Blount did not get right in because of Leigh interfering and telling him not to go.

Leigh followed me over to my car. He was right behind me. He didn't prevent me from opening my door. He just kept interfering by teling Blount not to go with that Pig. . . ."

In addition to the testimony of Deputy Peel, the State offered the testimony of Ivory Joe Simpson and Larry Spencer. Their testimony tended to corroborate the testimony of Deputy Peel. Larry Spencer, among other things, testified:

"After Peel got to the scene, he went to Phillip Leigh's car to talk to Raymond Blount. Phillip Leigh was talking in a loud voice. Peel started talking to Raymond Blount. Leigh said pig to Peel. Leigh talked in a loud voice for 5, 7 or 8 minutes."

Defendant's evidence tended to show that he did not delay or obstruct Deputy Sheriff Peel in the performance of his official duties as a law enforcement officer; that he did advise Raymond Blount of his rights and that he told Raymond, "You ain't got to tell that Pig anything" only after the Deputy Sheriff had referred to him as a "nigger." Defendant's evidence further tended to show that he did not touch Deputy Sheriff Peel and that the officer never touched defendant.

The jury returned a verdict of guilty as charged. Defendant appealed from judgment sentencing him to imprisonment for a period of six months.

Attorney General Morgan and Staff Attorney Ernest L. Evans for the State.

John H. Harmon for defendant.

BRANCH, Justice.

[1] Defendant contends that the trial court committed prejudicial error in not allowing his motion for nonsuit and in denying his motion to set aside the verdict as being against the weight of the evidence.

G.S. 14-223 provides:

"If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a

misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

Unquestionably, Deputy Sheriff Peel was discharging or attempting to discharge a duty of his office when he began an investigation of a crime reported to him by eyewitnesses, under circumstances which appeared to threaten a further breach of the peace.

We therefore consider whether the actions of defendant were such as to "resist, delay or obstruct Officer Peel while he was discharging or attempting to discharge the duties of his office."

In Webster's New International Dictionary the word "obstruct" is defined: "Hinder from passing, action, or operation; . . . to be or come in the way of"; and "delay" is defined, "to stop, detain, or hinder for a time; . . . to cause to be slower or to occur more slowly than normal." In Black's Law Dictionary "resist" is defined: "To oppose. This word properly describes an opposition by direct action and *quasi* forcible means." "Obstruct" is defined: "To hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment of difficult and slow."

In Wharton's Criminal Law and Procedure, Vol. 3, Obstructing Justice, Section 1284, pp. 633 and 634, it is stated:

> "As a general rule, under statutes containing the words 'obstruct, resist, or oppose,' or 'resist, obstruct, or abuse,' or the single word 'resist' the offense of resisting an officer can be committed without the employment of actual violence or direct force, and without making threats. . . .
>
> "To 'obstruct' is to interpose obstacles or impediments, to hinder, impede, or in any manner intrude or prevent, and this term does not necessarily imply the employment of direct force or the exercise of direct means."

In the case of *State v. Estes*, 185 N.C. 752, 117 S.E. 581, this Court construed former C.S. 7140, which in part provided that "any person or persons who willfully interfere with or obstruct the officers of the State Board of Health in the discharge of any of the aforementioned duties shall be guilty of a misdemeanor. . . . " In construing this statute the Court said:

"Section 7140 contains the words 'willfully interfere with or obstruct.' To procure a conviction under this section the State must show that the officer was obstructed or interfered with, and that such obstruction or interference was willful on the part of the defendant. We do not hold that actual violence or demonstration of force is indispensable to such obstruction or interference. To 'interfere' is to check or hamper the action of the officer, or to do something which hinders or prevents or tends to prevent the performance of his legal duty; and to 'obstruct' signifies direct or indirect opposition or resistace to the lawful discharge of his official duty."

For other cases upholding conviction for obstructing justice in the absence of violence or direct force, see: *United States v. Lukins,* 3 Wash. C. C. 335, Fed. Cas. 15,639; *United States v. McDonald,* 8 Biss. 439, Fed. Cas. 15667; *Drifoos v. Jonesboro,* 107 Ark. 99, 154 S.W. 196; *Reed v. State,* 103 Ark. 391, 147 S.W. 76; *State v. Scott,* 123 La. 1085, 49 So. 715; *Woodworth v. State,* 26 Ohio St. 196. See also Note "Obstructing Officer," 48 A.L.R. 746.

[2] As used in G.S. 14-223, the words "delay" and "obstruct" appear to be synonymous. Perhaps the word "resist" would infer more direct and forceful action. However, since the words describing the act are joined by the disjunctive (or), the statute will apply to cases falling within any one of the descriptive words. *Davis v. Granite Corporation,* 259 N.C. 672, 131 S.E. 2d 335; *Patrick v. Beatty,* 202 N.C. 454, 163 S.E. 572.

The language and conduct of defendant occurred in a setting in which a lone police officer, in response to a report that a crime had been committed, went to the main street of Creswell, North Carolina, at approximately 11:30 p.m., to investigate the alleged crime. He found about 25 people in the area, including "a bunch of boys from Columbia [who] kept me from talking to Blount also. They were interfering with me." Blount was sitting in defendant's automobile with defendant and at least one other person. There were two plainly visible shotguns lying in defendant's automobile. Upon this background the State, in instant case, offered evidence which tended to show that defendant's actions and his loud, raucous and abusive language delayed and obstructed for a period of several minutes the officer's attempt to continue his investigation by talking

to Raymond Blount. Further, the evidence tended to show that when Raymond Blount left defendant's automobile and entered the officer's automobile, defendant followed, and by his continuing acts and language forced the officer to leave the scene in order to talk to Blount.

Conceding that no actual violence or force was used by defendant, application of the descriptive words of the statute in their common and ordinary meaning, or as interpreted by the courts, to the facts of this case leads us to conclude that there was plenary evidence to support a jury finding that defendant did by his actions and language delay and obstruct the officer in the performance of his duties.

[3] Neither does this record show abuse of discretion in the trial court's denial of defendant's motion to set aside the verdict as being against the greater weight of the evidence, since there was sufficient evidence to support the verdict. *Robinette v. Wike,* 265 N.C. 551, 144 S.E. 2d 594; *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909.

[4] We agree with the Court of Appeals that although the warrant upon which defendant was tried "is not a model one," we think it was sufficient to charge an offense under the statute.

[5] Defendant also contends that his constitutional rights were violated by indicting, prosecuting and convicting him of engaging in a constitutionally protected activity. He cites and relies heavily upon the case of *Street v. New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S.Ct. 1354. In that case the defendant burned an American flag on a New York Street corner, and among other statements, said: "We don't need no damn flag." The defendant was charged with and convicted under a new statute which made it a misdemeanor "publicly [to] mutilate, deface, defile . . . or cast contempt upon, either by words or act [any flag of the United States]." In reversing his conviction, the United States Supreme Court in a five to four decision held that the accused had a constitutional right publicly to express his opinion about the flag, even when it was contemptuous and defiant. The Court held that he could not be punished for his public utterances. The Court further held that since it could not be determined whether the accused's words were the sole basis for his conviction, or whether he was convicted for both

his words and his deeds, his conviction could not be permitted to stand.

Instant case differs from *Street v. New York, supra,* in that in Street defendant's speech constituted a violation of the statute merely because of the content of the words spoken. Here, the offense involved not the content of the words spoken but defendant's continued integrated course of conduct which prevented Deputy Peel from conducting his investigation.

[6, 7] Freedom of speech is not an unlimited, unqualified right. Speech may be subordinated to other values and considerations, and may be reasonably restrained as to time and place. *State v. Wiggins,* 272 N.C. 147, 158 S.E. 2d 37; *Dennis v. United States,* 341 U.S. 494, 95 L. Ed. 1137, 71 S.Ct. 857. It is well settled that, within proper limits, the right of free speech is subject to legislative restriction when such restriction is in the public interest. *Valentine v. Chrestensen,* 316 U.S. 52, 86 L. Ed. 1262, 62 S.Ct. 920.

[8, 9] When a course of conduct has been otherwise properly declared illegal, there is no abridgment of freedom of speech because the illegal conduct is initiated or carried out by the spoken or written word. The constitutional right of freedom of speech does not extend its immunity to conduct which violates a valid criminal statute. *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 93 L. Ed. 834, 69 S.Ct. 684. Neither does the protection of the First Amendment extend to every use and abuse of the spoken and written word. *Stromberg v. California,* 283 U.S. 359, 75 L. Ed. 1117, 51 S.Ct. 532.

In the case of *Communist Party v. Control Board,* 367 U.S. 1, 6 L. Ed. 2d 625, 81 S.Ct. 1357, it is stated:

> " . . . To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve. *Schenck v. United States,* 249 U.S. 47, 63 L. ed. 470, 39 S.Ct. 247; *Dennis v. United States,* 341 U.S. 494, 95 L. ed. 1137, 71 S.Ct. 857; *American Communications Asso. v. Douds,* 339 U.S. 382, 94 L. ed. 925, 70 S.Ct. 674."

[5] The provisions of G.S. 14-223 provide for safeguards that are essential to the welfare of the public. The necessity for adequate protection of life and property of the individual has never before been so real and demanding as in this era, when disrespect for the law and those who enforce it has become rampant. The purpose of the statute is to enforce orderly conduct in the important mission of preserving the peace, carrying out the judgments and orders of the court, and upholding the dignity of the law. When the limited restrictions imposed by the statute are weighed against the constitutional guarantees, the value of the restrictions to public need demands that the restrictions in the statute be enforced.

We do not think that the First or Fourteenth Amendment to the United States Constitution precludes prosecution and conviction of defendant for violation of the provisions of a criminal statute enacted in the public interest.

[10] A more serious question is presented by defendant's contention that the trial judge failed to explain and apply the law to the evidence. He contends that under the charge as given the jury could have easily convicted defendant of the mere exercise of free speech which is constitutionally protected.

The general rule is that merely remonstrating with an officer in behalf of another, or criticizing or questioning an officer while he is performing his duty, when done in an orderly manner, does not amount to obstructing or delaying an officer in the performance of his duties. 39 Am. Jur., Obstructing Justice, Sec. 10, p. 508; Anno.: Obstructing Officer, 48 A.L.R. at 753; *People v. Magnes,* 187 N.Y.S. 913; *City of Chicago v. Brod,* 141 Ill. App. 500. It logically follows that a citizen may advise another of his constitutional rights in an orderly and peaceable manner while the officer is performing his duty without necessarily obstructing or delaying the officer in the performance of his duty. *People v. Pilkington,* 199 Misc. 665, 103 N.Y.S. 2d 64.

In the charge in instant case the trial judge stated defendant's contentions as follows:

> "He says and contends, members of the jury, that he was advising one Raymond Blount of his rights under the Constitution of the United States of America, to wit, the Fifth Amendment. However, he says and contends that the words that he used were not intended to in any way hinder,

delay, obstruct or otherwise resist the officer in his attempt to carry out his duties or to investigate the situation at Boone's shop or place of business, to determine whether or not any law had been violated there. And he says and contends that under all of the evidence in this case you should have a reasonable doubt of his guilt and that you should return as to him a verdict of not guilty."

Nowhere in the charge did the trial judge explain the law or apply the law to the evidence concerning defendant's contention. Of course, if all defendant did was to advise Blount of his constitutional rights in an orderly and peaceable manner, defendant would not be guilty of the offense charged. It was error for the trial judge to fail to so charge. Neither did the court in its charge apply the law to the facts which the State contends would support a verdict of guilty.

For error in the charge there must be a new trial.

We do not deem it necessary to consider defendant's other assignments of error since they may not recur at the next trial.

This case is remanded to the North Carolina Court of Appeals with direction that it remand it to Superior Court of Washington County for a new trial in accordance with the principles herein stated.

New trial.

STATE OF NORTH CAROLINA v. JAMES JUNIOR JOHNSON, ALIAS BUDDY LOVE

No. 8

(Filed 10 March 1971)

1. Homicide § 21— first degree murder — motion to dismiss — question presented

On motion to dismiss a charge of murder in the first degree, the trial court must determine the preliminary question whether the evidence in its light most favorable to the State is sufficient to permit the jury to make a legitimate inference and finding that defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished the purpose.

2. Homicide § 18— premeditation and deliberation — proof

Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation by deceased; (2) the conduct of defendant before and after the killing; and (3) the dealing of lethal blows after deceased has been felled and rendered helpless.

3. Homicide § 4— premeditation

Premeditation is thought beforehand for some length of time, however short.

4. Homicide § 4— deliberation

Deliberation means an intention to kill, executed in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose.

5. Homicide § 21— first degree murder — sufficiency of evidence

Evidence tending to show that the victim's death resulted from four blows to the head rendered by defendant with a board, that defendant bound the victim's hands and feet while he was still alive, and that defendant attempted to hide the body, with the other circumstances, was sufficient to sustain a verdict of guilty of murder in the first degree.

6. Criminal Law §§ 74, 104— State's introduction of confession — portions favorable to defendant

Where the State introduces defendant's confession, defendant is entitled to claim the benefit of any part thereof which is favorable to him.

7. Homicide § 28— failure to instruct on self-defense

Evidence that a dispute arose about payment for fuel oil delivered by deceased to defendant, that the deceased took steps toward defendant, and that defendant immediately seized a board and used it with deadly effect, *held* insufficient to justify an instruction that the jury could return a verdict of not guilty on the ground of self-defense, there being no evidence that defendant used the weapon to repel a felonious assault or to save himself from great bodily harm, or that he struck believing he was in danger.

8. Homicide § 9— self-defense — voluntary entry into fight — notice of withdrawal

The right of self-defense is available only to a person who is without fault, and if one voluntarily, that is aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it and gives notice to his adversary that he has done so.

9. Homicide § 14— intentional killing with deadly weapon — malice

A presumption of malice arises from a killing which results from the intentional use of a deadly weapon.

State v. Johnson

APPEAL by defendant from *McKinnon, J.*, August 10, 1970 Regular Criminal Session, CUMBERLAND Superior Court.

The defendant, James Junior Johnson, alias Buddy Love, was charged by bill of indictment, proper in form, with the capital felony of murder in the first degree in the killing of Bailey E. Wilson. The offense occurred on January 9, 1970.

On arraignment the defendant pleaded not guilty. The State introduced evidence in support of the charge, including a confession which, after challenged as involuntary, was found to have been voluntarily made. The jury returned a verdict finding the defendant guilty of murder in the first degree; and as a part of the verdict, recommended that punishment be imprisonment for life. From the mandatory life sentence, the defendant appealed.

Robert Morgan, Attorney General, Burley B. Mitchell, Jr., Staff Attorney for the State.

Brown, Fix and Deaver by Bobby G. Deaver attorneys for defendant appellant.

HIGGINS, Justice.

By Questions 1 and 2 discussed in his well prepared brief, defense counsel argues the evidence for the State, (1) was insufficient to be submitted to the jury on the charge of murder in the first degree; and (2) the court committed error in charging that murder in the first degree was a permissible verdict under the evidence in the case. These questions require a review of the State's evidence which included the defendant's confession. The two questions involved the same principle of law and may be considered together.

The evidence disclosed that Bailey E. Wilson, the deceased, was an oil deliveryman in the City of Fayetteville. On January 9, 1970, at about 6:45 p.m., he received a telephone call requesting a delivery of heating oil to the home of the defendant. Wilson left alone in his oil truck to make the delivery. About two hours thereafter, his truck ran into a ditch and stalled near a dead-end street on the outskirts of Fayetteville. On account of the peculiar noise of the engine and the frantic efforts of the driver to get out of the ditch, a neighbor became suspicious and

called the law enforcement officers. When the officers arrived on the scene, they found the dead body of Bailey E. Wilson in the cab of the truck with his hands and feet tied together by strands of copper wire.

The pathologist, who performed the post mortem, testified he found several abrasions and deep bruises about the hands and feet. "There were four lacerations of the scalp which were up to 3 or 4 inches in length. The edges were kind of ragged. They tended to curve in a front to back direction and they were the kind of damage that would be caused by a blunt instrument. The lacerations went through the scalp to the skull. There were four different areas of fracture of the skull. . . . I have an opinion satisfactory to myself that his death was due to the hemorrhage of the brain as a result of trauma inflicted to the outside of the head."

The officers found in the truck a ticket showing the delivery of oil to the defendant. The officers immediately went to the defendant's house where they were admitted and given permission to search. They found on the night stand in the bedroom a duplicate of the oil ticket signed by Wilson, showing the delivery. They found in a garbage can in the kitchen a piece of copper wire similar to the wire which bound Wilson's hands and feet. They found blood in the house and on the defendant's clothes. Outside the house near a trash can they found three oak boards, on one of which there were blood stains. These boards, though introduced in evidence, are not otherwise described in the record.

After being properly advised of his rights, the defendant made a confession. When it was reduced to writing, he signed it before a justice of the peace. The written confession, which was admitted in evidence, contained the following: "Sergeant H. B. Parham . . . a deputy sheriff . . . states that he is conducting an investigation of murder of Bailey E. Wilson of which I am a suspect and under arrest. I have been told, warned and advised that I have an absolute constitutional right to remain silent and not to answer any question . . . and that anything that I say may be later used as evidence against me. . . . I have been told . . . that I have a right to consult with counsel . . . and have been offered the right to telephone any lawyer or member of my family, before making a statement or answering any question. I now of my own free will voluntarily made the

following statement: 'I, Buddy Love, am twenty years old and live . . . at 2324 Clinton Road, Apartment Number 1. . . . (M)y wife . . . called Mr. Bailey E. Wilson and told him that we were out of fuel and Mr. Bailey Wilson said that he would deliver the oil to my house. . . . When Mr. Bailey Wilson arrived, he backed his truck up to the corner of my house and started to fill the oil drum. When he finished . . . and was making out the ticket for the oil, I said, "Mr. Bailey, I don't have the money to pay for the oil, but I will pay you . . . Monday." Mr. Bailey Wilson said, "You what? . . . You are going to give me the money." I said, "Bailey, I don't have the money." Bailey Wilson put his hand in his pocket and there was a piece of board lying on the ground beside the house. I picked up the board and said, "I don't have the money, but I will pay you Monday." Bailey Wilson stepped towards me and I hit him over the head with the board. Bailey Wilson fell backward and hit his head on the steps to my house, and rolled over and started groaning. . . . I picked up a cord (electrical cord) that was lying on top of the old heater that was setting behind my house and started to tie Bailey Wilson's legs. Bailey Wilson started to move. I tied his feet together and then tied his hands behind his back. I then drug Bailey Wilson backwards and put his head and body in the seat of the oil truck and then put his legs in last. I got into the truck and drove off to hide Bailey Wilson so that no one could find him. . . . I drove down this street and ran into a ditch and got stuck. I tried to get the oil truck out of the ditch, but could not. I heard some people coming and I jumped out of the truck and ran. . . . I took about two hundred dollars out of Bailey Wilson's shirt pocket.' "

When questioned whether he had been drinking whiskey or beer that night, the defendant answered, "No, sir, but I had taken some scag about eleven p.m. . . . Bailey Wilson arrived at my house about seven-thirty p.m. I had taken about two Darvons, about two tablets." Officers testified the defendant was normal at the time he made the incriminating admissions.

The defendant stated that he had taken the money from Wilson's pocket and had hidden it under the sink in the kitchen. The officers searched the place indicated and found $280.00 in twenties, tens and fives.

The indictment in this case is in the usual form charging murder in the first degree. The charge would permit the State

to show that the intentional kiling was after premeditation and deliberation or in the perpetration, or attempt to perpetrate, a robbery. However, in this case the court eliminated robbery and confined the jury to a finding of premeditation and deliberation as prerequisites to the return of a verdict of guilty of murder in the first degree.

[1-4] "On a motion to dismiss a count in the indictment charging murder in the first degree, the trial court must determine the preliminary question whether the evidence in its light most favorable to the State is sufficient to permit the jury to make a legitimate inference and finding that the defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished the purpose." *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541; *State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484. "Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances from which the facts sought to be proved may be inferred. . . . 'Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: Want of provocation on the part of deceased. . . . The conduct of defendant before and after the killing. . . . The dealing of lethal blows after deceased has been felled and rendered helpless . . . . ' " *State v. Walters, supra.* "The courts define premeditation as 'thought beforehand for some length of time, however short. . . . Deliberation means . . . an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose. . . .' " *State v. Perry, supra.*

[5] The defendant argued that the evidence was insufficient to justify or permit a verdict of murder in the first degree. However, the defendant's account of the killing is contradicted by many of the circumstances disclosed by the evidence. The results of the *post mortem* refute defendant's statement that he struck only one blow. The pathologist testified the wounds caused by four blows were curved from front to back and were similar in shape and depth and that beneath each was a skull fracture. The blood in the house, the duplicate oil ticket on the night stand in the bedroom and copper wire in a trash can in the house tended to contradict the defendant's statement that one blow was delivered outside the house and the deceased's hands and feet were also bound outside the house. The number and ex-

tent of the fatal injuries, the binding of the victim's hands and feet while he was still alive, and the attempt to hide his body "so that no one could find him," with the other circumstances were sufficient to sustain a verdict of guilty of murder in the first degree.

The court charged that the jury, according to its finding of fact from the evidence, should return one of these verdicts: (1) Guilty of murder in the first degree; (2) Guilty of murder in the first degree with the recommendation that punishment be imprisonment for life in the State's prison; (3) Guilty of murder in the second degree; (4) Guilty of voluntary manslaughter; or (5) Not guilty.

[6, 7] The defendant neither testified nor offered evidence. However, the State, having introduced his confession, he is entitled to claim the benefit of any part thereof which is favorable to him. *State v. McLawhorn,* 270 N.C. 622, 155 S.E. 2d 198. A fair interpretation of his statement shows that he called for the delivery of oil after hours and during extremely cold weather; that he failed to notify the deceased that he was unable to pay for the oil until after it had already been transferred to his tank; and that a dispute arose about payment. According to the defendant's story, the deceased took steps toward him. The defendant immediately seized a weapon and used it with deadly effect. The defendant does not contend the deceased was armed or made any attempt to use any weapon. The defendant does not contend that he was put in fear for his own safety. The evidence fails to show that he used the weapon to repel a felonious assault or to save himself from great bodily harm, or that he struck believing he was in danger.

[8, 9] "The right of self defense is available only to a person who is without fault, and if a person voluntarily, that is, aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self defense unless he first abandons the fight and withdraws from it and gives notice to his adversary that he has done so." *State v. Davis,* 225 N.C. 117, 33 S.E. 2d 623; *State v. Church,* 229 N.C. 718, 51 S.E. 2d 345. The defendant complains that the judge should have charged the jury that under the evidence it might render a verdict of not guilty on the grounds the defendant fought in his self defense. The trial court, however, was careful to charge that the jury should consider the evidence that the de-

ceased was in the act of advancing towards the defendant and determine whether that fact was sufficient to rebut the presumption of malice arising from the intentional use of a deadly weapon, and thus reduce the offense to manslaughter. A presumption of malice arises from a killing which results from the intentional use of a deadly weapon. A finding of malice rules out manslaughter in this case. *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *State v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83; *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337; *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65. The record is devoid of evidence which would permit the jury to render a verdict of not guilty upon the ground the defendant struck the fatal blows in self defense. *State v. Davis, supra; State v. McLawhorn, supra; State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461. The court would have committed error had it charged the jury that a verdict of not guilty on the ground of self defense was permissible under the evidence. *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328; *State v. Duncan,* 264 N.C. 123, 141 S.E. 2d 23.

The defendant's counsel was diligent in the preparation of the record on appeal and careful to present a number of objections to the court's rulings, all of which we have examined and have found to be non-prejudicial.

No error.

STATE OF NORTH CAROLINA v. DAVID L. JONES

No. 20

(Filed 10 March 1971)

1. **Criminal Law §§ 134, 136— sentencing of defendant — commitment for psychiatric treatment prior to sentencing**

Action of the trial judge in accepting defendant's plea of guilty to burglary and assault and then committing defendant to a State hospital for psychiatric treatment prior to sentencing him, *held* not prejudicial to the defendant, although it would have been the better practice if the trial judge had sentenced the defendant and thereafter requested the prison authorities to give him necessary medical treatment.

2. **Criminal Law § 23— voluntariness of guilty plea — sufficiency of findings of fact**

Where the evidence supports the finding that defendant entered a plea of guilty voluntarily and with full knowledge of his rights, the acceptance of the plea will not be disturbed.

3. **Criminal Law § 161— assignment of error — exceptions**

An assignment of error not supported by an exception is ineffectual and will not be considered on appeal.

4. **Criminal Law § 136— mental capacity to receive sentence**

A defendant who had sufficient mental capacity to plead had sufficient mental capacity to receive sentence.

5. **Criminal Law § 167— harmless error — new trial**

Harmless error is not sufficient to justify a new trial.

6. **Courts § 9— superior court judge — overruling order of previous judge**

Ordinarily, one superior court judge may not modify, overrule, or change the judgment of another superior court judge previously made in the same action.

7. **Criminal Law § 23— withdrawal of guilty plea — lack of duress**

In the absence of any evidence that defendant's plea of guilty before the first superior court judge was obtained through duress, second superior court judge properly denied defendant's motion that he be allowed to withdraw his guilty plea and to enter a plea of not guilty.

8. **Criminal Law § 5— responsibility for crime — insanity**

The test for insanity which precludes responsibility for crime is the ability to distinguish the difference between right and wrong.

9. **Criminal Law § 29— mental capacity to stand trial**

If a defendant is capable of understanding the nature and object of the proceedings against him and of conducting his defense in a rational manner, he is sane for the purpose of being tried, though on some other subject his mind may be deranged.

10. **Criminal Law §29— mental capacity to enter plea of guilty — sufficiency of evidence — defendant's sociopathic personality**

Although there was some evidence that the defendant was suffering from a sociopathic personality, the trial court correctly determined that defendant had mental capacity to enter a plea of guilty to three charges of first-degree burglary, where (1) the State's evidence showed that defendant had no specific mental disturbance and that he knew the difference from right and wrong and could assist in his own defense, and (2) the defendant's own witness testified that defendant was without psychosis and could determine right from wrong.

APPEAL by defendant from *Cooper, J.*, October 12, 1970 Criminal Session of CUMBERLAND Superior Court.

On 22 May 1968 defendant was arrested on three first degree burglary charges and one charge of an assault on a female with intent to commit rape. On 27 June 1968, upon motion of defendant's court-appointed counsel, defendant was committed to Dorothea Dix Hospital for observation and treatment, under

the authority of G.S. 122-91. On 30 July 1968 Dr. Andrew Laczko, Director of Forensic Unit of Dorothea Dix, after finding defendant was well oriented, with no impairment of memory, with a general fund of knowledge above average, and consistently free of psychotic symptoms, reported:

> "*Physical Examination:* Revealed a well developed and nourished, white male with all findings essentially within normal limits. The laboratory findings including x-ray and blood serology were normal. The psychological testing revealed a Full-Scale I.Q. of 104 which places him in the average intellectual functioning.
>
> "*Diagnosis:* Without Psychosis (Not insane).
>
> *APA Code: 91.10*
>
> "*Recommendations:* The examination, observation and testing revealed no evidence of psychosis (insanity) or any such mental disturbance which would interfere with this patient's ability to plead to the Bill of Indictment. He does know the difference between right and wrong, he is able to assist in his own defense and he is fully aware of the consequences of his acts. Mr. Jones should be returned to the court."

On 29 October 1968 Dr. Assad Meymandi, an expert in the field of psychiatry, conducted a private psychiatric examination of defendant. His evaluation was that defendant was not insane, that he did know the difference between right and wrong at the time of the crime, but he did suffer from an impulse disorder diagnosed as a sociopathic personality, impulsive behavior and uncontrollable acts. Dr. Meymandi recommended: "Regardless of the outcome of the patient's trial, I believe that this individual is in need of intensive and prolonged psychiatric treatment."

At the December 2, 1968 Criminal Session, Canaday, J., presiding, defendant, through privately employed counsel, W. Ritchie Smith, Jr., entered pleas of guilty to one of the charges of first degree burglary and to the charge of assault with intent to commit rape, and filed a written plea of guilty to which he was sworn. In the written plea defendant stated he understood the charges against him; that he was not under the influence of any alcohol, drugs, narcotics, medicines, or other pills; that

he understood that he had the right to plead not guilty and to be tried by a jury; that his plea was guilty as charged and that in fact he was guilty; that he understood that he would be sentenced to life imprisonment for first degree burglary and could be sentenced to as much as 15 years imprisonment for assault with intent to commit rape; that no one had influenced him by any promise or threat to plead guilty; that he had had time to confer with his lawyer and that he was ready for trial; that he freely, understandingly, and voluntarily authorized his attorney to enter a plea of guilty on his behalf. Judge Canaday examined defendant as to the voluntary nature of his plea and found that defendant entered the plea of guilty freely, understandingly, and voluntarily, without undue influence, compulsion or duress, and without promise of leniency, and ordered the plea accepted.

After the plea was accepted, defendant's attorney moved that defendant be sent to the hospital for treatment, pursuant to Chapter 122 of the General Statutes of North Carolina. In support of his motion, defendant's counsel offered the testimony of Dr. Meymandi, who testified that his examination of the defendant revealed, first, that the patient knew the difference between right and wrong; second, that the patient is suffering from a sociopathic personality, impulsive behavior, and impulse disorder; and, third, that he is not suffering from any neurological deficit, as tested by neurological examination—the brain wave test. He further testified that based upon the knowledge that he had about the patient's history, the patient would benefit by psychiatric treatment, and that it is not only desirable but necessary that the patient undergo intensive therapy; that the patient is not dangerous to himself but is dangerous to other people; that the patient has average general function, if anything a little above normal; that his IQ is over 100; and that at the time he examined the patient, the patient definitely knew the difference between right and wrong and was able to assist his attorney in his defense of these cases. Based upon this testimony, Judge Canaday concluded that defendant's mental condition was such as to render him dangerous; that he was incapable of receiving sentence; and that he should be committed to the hospital designated in G.S. 122-85, to be kept in custody therein for treatment and care as provided by law. Judge Canaday then ordered defendant committed to a State hospital, pursuant to the provisions of G.S. 122-84.

Defendant remained in Dorothea Dix Hospital until 19 October 1970, when he was brought before Thomas D. Cooper, Jr., judge presiding at the October 12, 1970 Session of Cumberland for sentencing. Defendant then moved in open court to be allowed to withdraw his plea of guilty on the ground that such plea was obtained through duress, and to be allowed to enter a plea of not guilty. This motion was denied. On 22 October 1970, defendant notified Judge Cooper that he had dismissed his attorney, W. Ritchie Smith, Jr., and requested that the court appoint William S. Geimer, Assistant Public Defender for the Twelfth Judicial District, to represent him. Mr. Geimer was appointed and renewed the motion of 19 October 1970 to allow defendant to withdraw his plea of guilty entered on 5 December 1968, alleging as a further ground defendant's lack of capacity to enter such plea. Judge Cooper thereupon found as a fact that the defendant executed and swore to his written plea of guilty before Harry E. Canaday, Judge of the Superior Court in Cumberland County, on 5 December 1968, at which time defendant was duly interrogated by Judge Canaday as to the voluntariness of his plea of guilty, and denied the defendant's motion. Defendant then moved for a hearing on the admissibility of his plea of guilty, which motion was also denied. Judge Cooper sentenced the defendant to life imprisonment on the burglary charge and to 15 years imprisonment on the charge of assault with intent to commit rape. From these sentences, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Millard R. Rich, Jr. for the State.

William S. Geimer, Assistant Public Defender, for defendant appellant.

MOORE, Justice.

[1] Defendant first contends the court erred in ordering defendant committed to a State hospital on 5 December 1968.

[2] Defendant is a man of above average intelligence, a high school graduate who had completed three semesters of business college. He received specialized medical training in the Army Medical Corps and had been stationed in Womack General Hospital. Originally he was arrested on three charges of first degree burglary and one charge of assault on a female with intent to

commit rape. At his trial on 5 December 1968 on one bill of indictment charging burglary in the first degree and on another charging assault on a female with intent to commit rape, defendant entered pleas of not guilty. While a jury was being selected, the defendant, through his privately retained counsel, withdrew his pleas of not guilty and entered a plea of guilty as charged in both cases. Judge Canaday carefully examined defendant concerning the voluntariness of his plea and found that it was freely and voluntarily entered. Such findings were supported by the evidence. Where the evidence supports the findings that defendant entered a plea of guilty voluntarily and with full knowledge of his rights, the acceptance of the plea will not be disturbed. *Brady v. United States,* 397 U.S. 742, 25 L. Ed. 2d 747, 90 S.Ct. 1463 (1970); *Parker v. North Carolina,* 397 U.S. 790, 25 L. Ed. 2d 785, 90 S.Ct. 1458 (1970); *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34; *State v. Coleman,* 266 N.C. 355, 146 S.E. 2d 30; *Wiggins v. Smith,* 434 F. 2d 245 (5th Cir., 1970); 2 Strong's N.C. Index 2d, Criminal Law § 23, p. 511.

On the plea of guilty to the charge of burglary in the first degree, the trial court had no discretion as to punishment. Punishment by life imprisonment was prescribed by statute, G.S. 15-162.1, then in force but repealed in 1969. On the plea of guilty to the charge of assault on a female with intent to commit rape, Judge Canaday could have imposed sentence of not less than one nor more than fifteen years. But before sentence was pronounced, defendant's counsel moved that defendant be sent to a mental hospital under the provisions of G.S. 122-84 and offered the testimony of Dr. Meymandi in support of this motion. The court then entered the order of 5 December 1968 committing the defendant to the hospital for treatment. This order was entered at defendant's request. No exception was taken to its entry, and the defendant does not attempt to show that he was prejudiced by being sent to a hospital for treatment before being imprisoned.

[1, 3-5] An assignment of error not supported by an exception is ineffectual and will not be considered on appeal. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *State v. Thompson,* 267 N.C. 653, 148 S.E. 2d 613; *State v. Maness,* 264 N.C. 358, 141 S.E. 2d 470; *Tynes v. Davis,* 244 N.C. 528, 94 S.E. 2d 496; 3 Strong's N.C. Index 2d, Criminal Law § 161, p. 113. Since no

exception was taken to the entry of Judge Canaday's order of 5 December 1968, there is no basis for this assignment of error, and no question of law is presented to this Court for decision. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29; *Tynes v. Davis, supra; Riysbee v. Perkins,* 242 N.C. 502, 87 S.E. 2d 926. See Rules 19(3) and 21, Rules of Practice in the Supreme Court, 254 N.C. 783. Nevertheless, due to the seriousness of the case, we have considered this assignment. It is evident from the record that had defendant been sent to prison before treatment, he would have been a menace to others. Judge Canaday properly concluded that defendant should be treated before imprisonment. The procedure used and the words contained in the order committing defendant to the hospital were perhaps unfortunate. If defendant had sufficient mental capacity to plead, he had sufficient mental capacity to receive sentence. The action of the trial judge in accepting the plea but then sending defendant to the hospital for treatment before sentencing created an apparent contradiction. The record shows defendant had ample mental capacity both to plead and to be sentenced. To avoid any apparent conflict, the trial judge would have been better advised to have sentenced defendant after accepting the plea and then to have requested the prison authorities to give defendant such medical treatment as he might require. Doubtless the trial judge in entering his order worded it in such a manner as to assure defendant the benefit of treatment under G.S. 122-84. Conceding *arguendo* that the entry of the order committing defendant to a State hospital was error, it is impossible to see how defendant was prejudiced thereby. Such error, if any, was harmless. Harmless error is not sufficient to justify a new trial. The defendant must show that the error was material, prejudicial, and amounted to a denial of some substantial right. *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406; *State v. Honeycutt,* 237 N.C. 595, 75 S.E. 2d 525; 3 Strong's N.C. Index 2d, Criminal Law § 167.

[6, 7] Defendant next assigns as error the court's denial of his motion to withdraw the plea of guilty and to allow him to enter a plea of not guilty. He first contends that the plea of guilty was obtained through duress. The record does not so indicate. There is no evidence of duress, and the defendant did not attempt to offer such evidence. Judge Canaday at the 5 December 1968 hearing, after examining defendant, expressly

found that the plea was entered freely, understandingly, and voluntarily, without undue influence, compulsion or *duress*. ". . . (O)rdinarily one Superior Court judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action. . . ." 2 Strong's N.C. Index 2d, Courts § 9, p. 446; *Bank v. Hanner,* 268 N.C. 668, 151 S.E. 2d 579; *Stanback v. Stanback* 266 N.C. 72, 145 S.E. 2d 332; *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581. In the absence of any evidence of duress, Judge Cooper properly overruled the motion on that ground.

Defendant next contends that defendant lacked mental capacity to enter his plea. This contention is without merit.

[8] A clear distinction must be drawn between the insanity which precludes responsibility for crime and insanity which precludes trial. 21 Am. Jur. 2d, Criminal Law § 63 (1965). The test for insanity which precludes responsibility for crime is the ability to distinguish the difference between right and wrong. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Spence,* 271 N.C. 23, 38, 155 S.E. 2d 802, 813; *State v. Johnson,* 256 N.C. 449, 124 S.E. 2d 126; *State v. Willis,* 255 N.C. 473, 121 S.E. 2d 854; *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916; 2 Strong's N. C. Index 2d, Criminal Law § 5.

[9] "In determining a defendant's capacity to stand trial, the test is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed." 21 Am. Jur. 2d, *ibid; State v. Propst, supra;* 2 Strong's N. C. Index 2d, Criminal Law § 29. If a defendant is capable of understanding the nature and object of the proceedings against him and to conduct his defense in a rational manner, he is sane for the purpose of being tried, though on some other subject his mind may be deranged. This is the common law rule to determine a defendant's capacity to stand trial. 21 Am. Jur. 2d, *ibid.*

[10] Defendant's own witness, Dr. Meymandi, testified on 2 December 1968 that defendant was without psychosis (not insane); that he knew right from wrong and was able to assist his attorney in his defense of these cases. The evidence for the State specifically shows that defendant had no mental dis-

turbance which would interfere with his ability to plead to the bill of indictment. It further shows that defendant knew the difference between right and wrong, that he was able to assist in his own defense, and was fully aware of the consequences of his acts.

Dr. Meymandi further testified that defendant was suffering from a sociopathic personality, which he explained meant that defendant was without conscience. In *People v. McElroy*, 125 Ill. App. 2d 237, 260 N.E. 2d 410 (1970), the Court, in a case involving the mental capacity of the defendant to plead guilty, said: " . . . While a defendant may possess a sociopathic personality and suffer from psychological and social disturbances, these circumstances without more are not sufficient to raise a *bona fide* doubt as to his competence. The *People v. Hammond*, Ill. 1970, 259 N.E. 2d 44."

Defendant was charged with three capital crimes and another serious felony. On advice of counsel of his own choosing, defendant decided to enter a plea of guilty in one of the capital cases and the felony charge, and accept life imprisonment, as then provided by law on such plea, rather than face the dangers posed by three capital charges. The fact that the trial court, on motion of defendant and on recommendation of defendant's doctor, prescribed treatment for the defendant before imposing punishment does not warrant a new trial.

In the proceeding in Superior Court, we find no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. ELMO BARBER

No. 16

(Filed 10 March 1971)

1. **Criminal Law § 76— confession — voir dire hearing**

When defendant objected to testimony relating to inculpatory statements purportedly made by him, the trial judge properly held a *voir dire* hearing to determine whether the statements were in fact voluntarily and understandingly made.

2. **Criminal Law § 76— admissibility of confession**

When one is on trial for an alleged criminal offense, a confession or admission by him may not be admitted in evidence over his objection unless it was made voluntarily and understandingly and was not induced through use by the police of the slightest emotions of hope or fear.

3. **Criminal Law § 76— confession — voir dire hearing — court's findings and conclusions**

In this prosecution for first degree burglary and rape, there was competent evidence to support the findings of fact made by the trial court at the conclusion of a *voir dire* hearing on the admissibility of defendant's confession, and the findings of fact support the court's conclusions that defendant's statements were freely, voluntarily, knowingly and intelligently made.

4. **Criminal Law § 60— fingerprints taken after arrest — admissibility**

Evidence of fingerprints taken while defendant was in custody under a warrant charging him with two capital crimes was not rendered inadmissible by the decision of *Davis v. Mississippi,* 394 U.S. 721, relating to fingerprints taken without arrest during a dragnet proceeding.

5. **Criminal Law § 60— admissibility of fingerprints**

Exhibits containing fingerprints lifted from the crime scene and fingerprints taken from defendant after his arrest were sufficiently identified for their admission into evidence.

6. **Constitutional Law § 36; Burglary § 8; Rape § 7— death penalty — first degree burglary — rape — cruel and unusual punishment**

Statutes providing for capital punishment for rape and for burglary in the first degree are not unconstitutional on the ground that the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States. G. S. 14-21; G.S. 14-52.

7. **Constitutional Law § 36— cruel and unusual punishment**

When punishment does not exceed the limits fixed by statute, it cannot be classified as cruel and unusual in a constitutional sense.

8. **Constitutional Law § 29; Criminal Law § 135— death penalty — federal decisions**

The death penalty has not been abolished in North Carolina by decisions of the United States Supreme Court and the Fourth Circuit Court of Appeals.

9. **Criminal Law § 68; Rape § 4— hair found at crime scene — defendant's hair**

In this prosecution for first degree burglary and rape, the trial court properly admitted testimony by an F.B.I. agent assigned to the hair and fiber unit of the Bureau that hair found on linen taken from the bed where the rape occurred was Negro pubic hair and that it was microscopically identical to hair taken from defendant.

APPEAL by defendant from *James, J.*, August 1970 Criminal Session of PITT.

Defendant was charged jointly with Thomas Earl Stocks, in two separate bills of indictment, with rape and first degree burglary. Defendant was tried on both bills and was found guilty as charged, with recommendations of life imprisonment on each charge. From judgment pronounced in accordance therewith, defendant appealed.

At trial the State offered evidence which indicated the following: On 27 April 1970 at approximately 1:30 a.m., two men, a Negro and a white man, entered the home occupied by Mrs. Ann Baker Barry and her infant daughter, and each raped Mrs. Barry by force and against her will. Mrs. Barry's husband was away from home on this occasion, and she and her thirteen-months-old daughter were alone in the house. Before she went to bed about 11 p.m., Mrs. Barry locked the doors to the house. When she awoke later and saw the two men in her bedroom she screamed. One of the men pressed a knife against her throat and threatened her and her infant daughter; when she attempted to resist, the knife was pressed harder against her throat, inflicting a number of cuts or nicks. After raping her, the two men left. Mrs. Barry waited a short time and then summoned the assistance of a neighbor and officers from the Pitt County Sheriff's Department.

Officers from the Sheriff's Department arrived at the home about 2:30 a.m. and found that the back screen was ripped open, the lock to the main door was chipped on the side, and this door was open. There were also scratches on the sliding glass doors to the den. Fingerprints located on the door to

Mrs. Barry's bedroom were later identified as defendant's. Other physical evidence removed at this time included bed linens on which samples of human hair were found.

About one week later, on Friday, May 1, 1970, two members of the Pitt County Sheriff's Department questioned the defendant concerning this crime. The defendant denied any knowledge concerning it. The next day the defendant was again questioned, at which time the defendant admitted that he and Stocks broke into the home of Mrs. Barry and that each of them raped her. He then took the officers to his home where he gave them the knife which he said was pressed against Mrs. Barry's throat while she was being raped.

Dr. Edgar S. Douglas, an obstetrician and gynecologist, examined Mrs. Barry at 3:45 a.m. on the night the crime was committed. He found a series of marks on her neck, fresh scratch marks, and his examination revealed the presence of male spermatozoa in Mrs. Barry's vagina.

Defendant only offered the testimony of Dr. Bruce Kyles. This testimony and other evidence germane to the decision in this case will be discussed in the opinion.

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

M. E. Cavendish for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that the trial court erred in admitting the confession of the defendant.. When the defendant objected to the testimony relating to the inculpatory statements purportedly made by him, the trial judge properly held a *voir dire* hearing to determine whether the statements were in fact voluntarily and understandingly made. *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885; *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681; *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104. Both the defendant and the State offered evidence on the *voir dire.*

Defendant's evidence tended to show that he was first taken into custody by the officers on 1 May 1970 and was questioned for some one and one-half hours, after which he was

released; that he was again taken into custody on May 2 about 2:00 or 2:30 p.m. and was held without a warrant until around 7:30 or 9:00 a.m. on May 3; that when he was taken into custody on May 2 at his home he had been drinking gin and beer and was intoxicated; that during some five hours of questioning in the presence of several officers he repeatedly denied his guilt; that while he was being questioned one officer had a blackjack in his hand, and there was a can of mace sitting on the table; that he was promised he would be released under a $10,000 bond if he would confess. He further testified that he was not given any supper, and no lawyer was appointed to represent him. The testimony of Dr. Kyles shows that defendant has an IQ of 73, or the equivalent of a mental age of about fourteen years old.

The State offered the testimony of Deputy Sheriff Respess, corroborated by Deputy Sheriff Oakley, Sheriff Tyson, Deputy Sheriff Martin, and State Bureau of Investigation Agent Gilbert. This testimony tends to show that the defendant was given ample warnings concerning his rights; that he stated he understood his rights and that he did not want an attorney; that on both days he was interrogated the defendant came with the officers voluntarily; that on May 2 when questioned the defendant was not intoxicated, and that during the times he was being questioned he was not under arrest, but after having been interrogated on the first day, he was allowed to return home; that while being questioned on the second day he was not fed supper because he said he did not want any, but he was permitted to go to the drink machine to get a Pepsi Cola and nabs; that no promise concerning a bond was made to the defendant; that the defendant was not threatened or mistreated in any manner; that he confessed about 7:30 p.m. and was then taken into custody; and that a warrant was secured and served on him early next morning. The evidence further showed that the defendant had finished the sixth grade in school; that he had been on probation and understood his right to have a lawyer; that according to Dr. Bruce Kyles, an expert in the field of psychiatry, the defendant was able in all respects to consult with his counsel and to participate in his own defense, and that he understood his situation quite well.

[2] It is well-settled law in this State that when one is on trial for an alleged criminal offense a confession or admission by

him may not be admitted in evidence over his objection unless it was made voluntarily and understandingly, not induced through use by the police of "the slightest emotions of hope or fear." *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. Justice Lake stated in *Gray:*

> "However, the mere fact that a confession was made while the defendant was in the 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. Barnes, supra* [264 N.C. 517, 142 S.E. 2d 344]; *State v. Crawford, supra* [260 N.C. 548, 133 S.E. 2d 232]; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *State v. Thompson,* 224 N.C. 661, 32 S.E. 2d 24. The test of admissibility is whether the statement by the defendant was in fact made voluntarily. *State v. Rogers, supra; State v. Gosnell,* 208 N.C. 401, 181 S.E. 323; *State v. Livingston,* 202 N.C. 809, 164 S.E. 337. 'Any circumstance indicating coercion or lack of voluntariness renders the admission incompetent.' *State v. Guffey, supra* [261 N.C. 322, 134 S.E. 2d 619]. The fact that the defendant was in custody when he made the statement is a circumstance to be considered. *State v. Guffey, supra.* The mental capacity of the defendant is also a circumstance to be considered. *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396. There may, of course, be coercion of the mind without physical torture or threat thereof. *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620.
>
> "Whether the defendant did or did not make the statement attributed to him is a question of fact to be determined by the jury from the evidence admitted in its presence. *State v. Guffey, supra.* Whether the statement, assuming it to have been made, was made voluntarily and understandingly, so as to permit evidence thereof to be given in the presence of the jury, is a question of fact to be determined by the trial judge in the absence of the jury upon the evidence presented to him in the jury's absence. *State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847, *cert. den.,* 369 U.S. 807, 82 S.Ct. 652, 7 L. Ed. 2d 555."

[3] At the conclusion of the *voir dire* hearing in the present case, the trial judge made full findings of fact. Such findings of fact, so made by the trial judge, are conclusive if they are

supported by competent evidence in the record. No reviewing court may properly set aside or modify those findings if so supported. Here, there was competent evidence to support the findings of fact, and the findings of fact supported the conclusions that the defendant's statements were freely, voluntarily, knowingly, and intelligently made. *State v. Wright, supra; State v. Gray, supra; State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620.

This assignment is overruled.

[4] Defendant next contends that under *Davis v. Mississippi,* 394 U.S. 721, 22 L. Ed. 2d 676, 89 S.Ct. 1394 (1969), State's Exhibit 7, showing fingerprints taken from the defendant while in custody, was improperly admitted into evidence. The present case is clearly distinguishable from *Davis.* In *Davis,* an 86-year-old white woman had been raped by a Negro youth. Beginning on December 3 and for a period of ten days, the Meridian Police, without warrants, took at least 24 Negro youths to the police station where they were fingerprinted and released without charge. The police also interrogated 40 or 50 other youths. On December 12 the police drove Davis 90 miles to Jackson without a warrant or probable cause for his arrest, where he was fingerprinted a second time. The Federal Bureau of Investigation reported that these prints matched those taken from the window in the home of the woman who had been raped. The United States Supreme Court held that this dragnet proceeding, without arrest, rendered the use of the fingerprints illegal. In the case at bar the fingerprints of the defendant shown on State's Exhibit 7 were taken on May 4 while he was being held in custody under a warrant which charged him with two capital crimes. Under these facts, *Davis* does not apply. *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343; 2 Strong's N. C. Index 2d, Constitutional Law § 33, p. 270.

[5] Defendant further contends that the fingerprints shown on State's Exhibits 6 and 7 were not properly identified. Both exhibits were mailed from the Greenville Police Department to the Federal Bureau of Investigation in Washington, D. C. The defendant contends there is no evidence as to how Mr. Conover, the witness from the Federal Bureau of Investigation who testified concerning them, received these exhibits, or as to what might have happened to them after they were taken. Euel

H. Atkinson, an officer trained in fingerprinting, testified without objection as to how he removed and placed on tape the latent fingerprints from the door in Mrs. Barry's bedroom. He further testified that he placed his initials on the tape, and that the fingerprints on State's Exhibit 6 are the ones which he took from Mrs. Barry's bedroom door at approximately 3 a.m. on 27 April 1970. Sergeant W. H. Tripp, an officer trained in fingerprinting, testified that he took defendant's fingerprints on 4 May 1970 on a card identified as State's Exhibit 7, that both he and Elmo Barber signed the card at the time he took the fingerprints, and that the prints appearing on State's Exhibit 7 are Elmo Barber's fingerprints. Mr. Philip W. Conover, a fingerprint examiner with the Federal Bureau of Investigation, testified that he had examined State's Exhibits 6 and 7 and had made a comparison of the fingerprints appearing on these two exhibits. He further testified that he had photographed the two exhibits, had the photographs enlarged or blown up, and that the prints on State's Exhibits 6 and 7 were made by the same person. He also testified that a fingerprint card with the name Elmo Barber thereon was received by the Federal Bureau of Investigation on 21 November 1966, and that the prints on that card were the same as those on State's Exhibits 6 and 7. There was no evidence that the prints appearing on State's Exhibits 6 and 7 had been in any manner altered or tampered with. To the contrary, both exhibits were identified by the officers making them as being the same as when made. These exhibits were properly admitted into evidence, and this assignment of error is without merit. *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326; *Bynum v. United States,* 274 F. 2d 767 (D.C. Cir., 1960); 32 C.J.S. Evidence § 607(a), p. 766.

[6, 7] Defendant next assigns as error the denial of his motion to quash the bill of indictment. Defendant contends that the North Carolina statutes providing for capital punishment are unconstitutional in that punishment by death is a cruel and unusual punishment and violates the Eighth Amendment to the Constitution of the United States. Defendant relies on *Ralph v. Warden,* 438 F. 2d 786 (4th Cir., 1970), which holds that in a rape case where no physical injury occurred, the death penalty was cruel and unusual. This is a Maryland case from the Fourth Circuit Court of Appeals and is not binding on this Court. *State v. Barnes, supra;* 2 Strong's N. C. Index 2d, Constitutional Law § 1; 20 Am. Jur. 2d Courts § 230; Annot., 147 A.L.R.

857, 858. G.S. 14-21 provides for the death penalty for rape, and G.S. 14-52 provides for the death penalty for burglary in the first degree. Both statutes provide that the jury may recommend life imprisonment, and if the jury so recommends, the punishment shall be life imprisonment. The punishment imposed in this case was life imprisonment. When punishment does not exceed the limits fixed by statute, it cannot be classified as cruel and unusual in a constitutional sense. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *State v. Greer,* 270 N.C. 143, 153 S.E. 2d 849; *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216; *State v. Davis,* 267 N.C. 126, 147 S.E. 2d 570.

In *Trop v. Dulles,* 356 U.S. 86, 2 L. Ed. 2d 630, 78 S.Ct. 590 (1958), the Supreme Court of the United States said: "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

This assignment is overruled.

[8] The defendant's contention that the death penalty has been abolished in North Carolina by the decisions in *United States v. Jackson,* 390 U.S. 570, 20 L. Ed. 2d 138, 88 S.Ct. 1209 (1968), and *Alford v. North Carolina,* 405 F. 2d 340 (4th Cir., 1968), is without merit. *North Carolina v. Alford,* 400 U.S. 25, 27 L. Ed. 2d 162, 91 S.Ct. 160 (1970), reversing the decision of the Fourth Circuit Court of Appeals reported in 405 F. 2d 340; *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593; *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568.

[9] Defendant next contends that the court erred in admitting testimony about hair fibers found at the scene of the crime, in that the testimony was of a speculative nature and, therefore, inadmissible.

"Testimony is relevant if it reasonably tends to establish the probability or improbability of a fact in issue." *Freeman v. Ponder,* 234 N.C. 294, 67 S.E. 2d 292; Stansbury, N. C. Evidence §§ 77-78 (2d ed., 1963).

In *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457, a Negro was tried for rape of a white woman. Testimony was introduced as to hair found in the car where the alleged rape occurred. Chief Justice Parker said:

> " . . . The trial court properly refused to strike out the evidence that laboratory tests of the F.B.I. showed that on the lower front portion of the sweater and on the left sleeve of the sweater turned over to the police by Mary Ann Gibson were reddish brown smears that came from human blood, for the simple reason that the jury could make a reasonable inference from the evidence that the sweater was a garment worn by the defendant at the time named in the indictment, and bore stains corroborative of the State's theory of the case. *S. v. Speller,* 230 N.C. 345, 53 S.E. 2d 294; *S. v. Bass,* 249 N.C. 209, 105 S.E. 2d 645; *People v. Hartley* (Dist. Ct. of Appeals), 17 Cal. Rptr. 286. *For the same reason the court properly admitted into evidence the testimony of a special agent of the F.B.I., whose particular specialty is the microscopic examination of hairs and fibers, textile material, and related materials in criminal cases, that on the sweater introduced in evidence there was hair possessing Negro characteristics. Nicholas v. State* (Court of Criminal Appeals), 270 S.W. 555; *People v. Kirkwood,* 17 Ill. 2d 23, 160 N.E. 2d 766; 75 C.J.S. Rape §§ 47 and 59.
>
> "The court properly admitted into evidence the expert testimony that hair possessing Negro characteristics was found in the debris of Mrs. Jeane Daily's automobile where the alleged rape took place. Certainly no constitutional rights of defendant were violated by the search of Mrs. Jeane Daily's automobile." (Emphasis ours.)

In the case at bar, Myron Scholberg, an agent with the Federal Bureau of Investigation assigned to the hair and fiber unit of the Bureau, testified that hair found on the sheet and bedspread taken from Mrs. Barry's bed soon after the commission of the crime was Negro pubic hair, and that this hair found on Mrs. Barry's bed linen and hair taken from the defendant were microscopically identical in all identifying characteristics. He concluded that these hairs from the bed could have come from the defendant. This evidence is a link in the

chain proving that the crime was committed by a Negro, and that that Negro was the defendant.

This assignment is overruled.

The Court has carefully examined all defendant's assignments of error which have been brought forward in his brief, and no error is made to appear which would warrant disturbing the verdicts and judgments below. All assignments of error of defendant are overruled.

In the trial in Superior Court we find

No error.

STATE OF NORTH CAROLINA v. JAMES HANOVER GRISSOM THOMPSON

No. 56

(Filed 10 March 1971)

1. **Criminal Law § 66— in-court identification of defendant — sufficient evidence of prior identification**

Trial court properly allowed an armed robbery victim to make an in-court identification of the defendant as the perpetrator of the robbery, the victim having had a good opportunity to view the defendant both during the robbery and at the scene where his goods were recovered.

2. **Criminal Law § 66— in-court identification of defendant — testimony by cab driver**

A cab driver who carried the defendant to the locality where an armed robbery was committed later that night was properly allowed to identify the defendant at the trial for armed robbery.

3. **Robbery § 3— armed robbery prosecution — admission of stolen articles**

The saddle, radios, guns, TV set, typewriter, adding machine, diamond ring, and other articles that were forcibly removed at gunpoint from a home and that were recovered from defendant's bedroom in a boarding house a few hours later, *held* properly admitted as exhibits in the trial of defendant for armed robbery, the articles being so unusual in character and in combination as to raise an overwhelming inference of defendant's guilt.

4. Searches and Seizures § 1; Arrest and Bail § 3 — arrest without warrant — seizure of stolen goods — probable cause

Where officers sitting in the living room of defendant's boarding-house could look through an open door into the defendant's bedroom and see therein the articles that had been forcibly removed at gun-point from a home some four hours earlier, the officers had probable cause to arrest the defendant without a warrant for armed robbery; consequently, the seizure of the articles following the arrest was lawful.

5. Criminal Law § 170— argument of solicitor — statement that defendant and witnesses were lying — harmless effect

It was improper for the solicitor to state, during his argument to the jury, that he was of the opinion that the defendant and his witnesses were lying; however, in view of the overwhelming evidence of defendant's guilt, the solicitor's indiscretion did not warrant a new trial.

APPEAL by defendant from *Martin (Harry C.), J.* August 12, 1970, Schedule A Session, MECKLENBURG Superior Court. This case was argued at the Fall Term as No. 92.

The defendant, James Hanover Grissom Thompson, was charged by grand jury indictment, proper in form, with the armed robbery of Hugh Perry Caldwell, feloniously taking from him articles of personal property of the total value of $1956.00.

Upon a showing of indigency, William F. Hamel was appointed by the court to represent the defendant.

At the trial the State's evidence disclosed that on April 8, 1970, Hugh Perry Caldwell lived on David Cox Road outside the city limits of Charlotte. At that time his wife was away from home. Bruce Blackman, a Negro boy of seventeen, occasionally did work at odd jobs around the house for Caldwell. On that date Caldwell requested Blackman to have his girl friend come out and clean up the house and prepare the evening meal. Blackman's girl friend is a sister of the defendant Thompson. She brought two other girls to the Caldwell house. During the evening meal and its preparation there was a great deal of drinking, especially by Caldwell. When the evening meal was over about 9:30, Blackman and the girls left.

Approximately at midnight, Blackman returned. Caldwell admitted him and instructed him to go to bed in an upstairs room. Within a few minutes Caldwell answered another knock at the door and admitted a colored male who struck him on the side of the head with a pistol, inflicting serious injuries.

While he was down, the intruder bound and tied him with a telephone wire. Blackman came down from the bedroom and the intruder went through the motion of tying him also. After the intruder left, Blackman untied himself and then untied Caldwell who notified the police.

After checking with the officers, the witness, Caldwell, found that his wife's diamond ring, one rifle, one shotgun, two radios, one TV set, one adding machine, one western type saddle and the automobile were missing.

Officer Smith of the County Police Department, suspecting that Blackman was implicated in the hold-up, questioned him and from the leads obtained from Blackman, the officers, accompanied by Caldwell and Blackman, appeared at the Miller boardinghouse in Charlotte at five o'clock on the morning of April 9. The owner of the boardinghouse invited the officers into the living room. Officer Smith testified: "I asked her who lived there. We were standing right there in the living room. From where we were standing you could see this saddle at the foot of a bed in the next room, and TV and radios around the bed. . . . After we observed a portion of these items, the saddle, and radios, we entered the room. The door was open. . . . James Thompson was in bed. We grabbed him, got the gun." We placed him under arrest for robbery.

The officers found in the room numerous articles identified by Caldwell as having been taken from his home about four hours earlier. (In addition to the other articles taken, the intruder took something less than $100.00 in cash.) At the time of the arrest they read from a card "the defendant's rights." Mr. Caldwell, who was with the officers, identified Thompson as the person who assaulted him with a pistol, bound him with wire, and took his property. Caldwell also identified various articles and the State introduced them in evidence as exhibits.

The defendant testified: "On the morning of April 9, 1970, the police came to my house at about 5 a.m. . . . I did not invite them in the house . . . . I went to sleep that night at about one o'clock . . . . I woke up the next morning just before daybreak . . . . I started to the restroom . . . . I stumbled on an adding machine or typewriter one, right there in the door, just as I went to go out. It was all inside my room. . . . I started looking at the stuff to, trying to figure out where it came from. The

first thought that came to my mind was they had broke into someone's house or something and brought it there, so I took the guns out of the cases. I looked at them to see whether they were loaded. . . . Then I was still messing with the stuff, looking in all the boxes. I found a pasteboard box also beside the wall with a wallet in it that had been ripped open . . . and a diamond ring was in the box . . . . I found the pistol and this money laying on the table. . . . I found the money and put it in the change purse and took the pistol and laid it under my pillow. . . . I didn't know where the money came from. The only thing I could figure was that they may left it there for me to maybe keep this merchandise, maybe lock my room and don't say anything about it. . . . The next thing I knew, my room door was being cracked. . . . The officers did not ask me if you could search my room. They did not show me a search warrant."

Bruce Blackman, as a witness for the defendant, testified in substance: He and the three girls left the Caldwell home about 9:30 on the night of April 8 and went to the girls' home. After about an hour he went to the defendant's room at the Miller boardinghouse. "Jackie Stewart was there too and I don't know the other dude's name. . . . I left with Jackie Stewart and his friend. They were taking me out to Caldwell's. . . . These boys let me out, at Caldwell's house. They drove up in the driveway. They did not come in with me."

Blackman further testified that he went to bed upstairs and before he went to sleep he heard Mr. Caldwell call his name. He came downstairs. "As I was turning the corner, Jackie had Caldwell by the shirt and had the gun . . . and he put the gun up in my face . . . and told me not to move. . . . (S)o Caldwell tried to get up . . . so Jackie hit Caldwell up side the head with the pistol . . . . I was still tied. I was laying in the hallway." He (Caldwell) was not tied up then. The witness could see Jackie and the dude ransacking the house and carrying things outside. " . . . I could see lights . . . and they pulled out of the yard."

The State offered into evidence the articles found in Thompson's room. The defendant objected on the ground the search was without warrant and was illegal. The defendant further objected to the introduction of the recovered articles on the grounds the officers arrested him without a warrant and without probable cause; and hence the items identified by Mr.

Caldwell as having been taken from him were not taken incident to a lawful arrest.

In ruling on the defendant's motion to suppress on the foregoing grounds, the trial judge found facts and concluded the evidence was admissible. The jury returned a verdict, guilty as charged. From the judgment of imprisonment, the defendant appealed.

Robert Morgan, Attorney General, Thomas B. Wood, Assistant Attorney General for the State.

William F. Hamel for the defendant-appellant.

HIGGINS, Justice.

The appellant assigns as error the court's failure to exclude:

(1) The in-court identification of Thompson by the victim, Caldwell; (2) The articles recovered from the defendant's room on the alleged grounds they were obtained by an illegal search. The defendant also assigned as error: (1) The refusal of the court to direct a verdict of not guilty at the close of the evidence; (2) The failure to order a mistrial because of the solicitor's argument in which he expressed his personal opinion that the defendant and his witnesses were lying.

[1, 2] Mr. Caldwell had good opportunity to view his assailant during the robbery. He next saw the defendant about four hours later at his boardinghouse. The evidence (direct and circumstantial) tended to remove all reasonable probability of a mistaken identity. *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50. Likewise untainted was the identification by Price, the cab driver, who picked up the defendant and Blackman and carried them to David Cox Road where he left them about midnight on April 8. These identifications strongly complement and support each other. *Russell v. U.S.,* 408 Fed. 2d 1280; *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581. The arresting officers had knowledge of these facts at the time of the arrest.

[3] The saddle, radios, guns, TV set, typewriter, adding machine, diamond ring, and other articles recovered from the defendant's room at the boardinghouse in less than four hours from the time they were forcibly removed at gun point from the Caldwell home were properly admitted in evidence, unless,

of course, the officers recovered possession as a result of unlawful search or incident to unlawful arrest. The articles stolen were unusual in character and in combination, and when found so soon after the taking, the inference of the possessor's guilt is overwhelming unless explained. A saddle in a bedroom is out of the ordinary. The officer testified that Bruce Blackman admitted he helped set up the robbery and that he and Thompson went to the Caldwell home in a cab. Bruce Blackman testified that he told Officer Smith that he went to the Caldwell home in a cab. He told Officer Andrews that James Thompson, the defendant, might be able to give some information concerning Jackie Stewart and his friend whom he had seen at Thompson's boardinghouse.

[4] Mrs. Miller, owner of the boardinghouse, invited the officers into the living room. While she was talking to them, Officer Robinson looked through an open door into the defendant's bedroom. There he saw a western type saddle, radios and a TV set. Thereupon the officers entered through the open door and found the defendant in bed armed with a pistol and his bed surrounded by the purloined articles. The possession of these unusual articles, within less than five hours after they were taken, furnished the officers ample evidence to warrant the defendant's arrest. "In determining probable cause, all the information in the officer's possession, fair inferences therefrom, and observations made by him, are generally pertinent; and facts may be taken into consideration that would not be admissible on the issue of guilt." 5 Am. Jur. 2d, Arrest, § 48. See *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440.

"When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed." *Beck v. Ohio*, 379 U.S. 89, 13 L. Ed. 2d 142, 85 S.Ct. 223.

In this case the trial judge believed the testimony of the officers and disbelieved the testimony of the defendant's unreasonable explanation that the articles were unloaded in his room while he was asleep. The articles introduced in evidence were recovered by a lawful search and incident to a lawful arrest. The trial court findings were supported by the evidence.

The evidence made out a strong case, and amply supported the guilty verdict. The motions to suppress were properly overruled.

[5] The case on appeal contains the following: "THE COURT: Let the record show that during the Solicitor's argument to the jury, he stated that he was of the opinion that the defendant and the defendant's witnesses were lying. The defendant objected. Objection overruled. Exception No. 13."

The solictor's argument was improper. He had not been a witness. He had the right to argue the evidence, and the legitimate inferences which the jury might draw from that evidence. But his private opinion, that the defendant and his witnesses were lying, was a step out of bounds. In expressing his private opinion, the solicitor was not well advised. Perhaps, too, the judge would have been better advised if he had sustained the objection and cautioned the jury not to permit the solicitor's personal opinions to have weight against the defendant. However, in view of the overwhelming evidence of guilt, the solicitor's indiscretion was of small moment. While it would appear from the record before us that the objection to the argument should have been sustained; however, this court did not hear the argument of defense counsel. The presiding judge did hear it. The solicitor's inadvertence does not appear of sufficient moment to warrant a new trial. "The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge. He sees what is done, and hears what is said. He is cognizant of all the surrounding circumstances, and is a better judge of the latitude that ought to be allowed to counsel in the argument of any particular case. It is only in extreme cases of the abuse of the privilege of counsel, and when this is not checked by the court, and the jury is not properly cautioned, this Court can intervene and grant a new trial." *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; *State v. Bryan,* 89 N.C. 531; *State v. Underwood,* 77 N.C. 502.

Just cause to upset the verdict and judgment does not appear in this record.

No error.

STATE OF NORTH CAROLINA v. DONALD RAY TERRY and SAMUEL LEE JACKSON

No. 53

(Filed 10 March 1971)

1. **Robbery § 4— armed robbery — sufficiency of evidence**

Evidence tending to show that the two defendants and a companion entered a store together, that one defendant "cased" the store and returned to their automobile, that the companion drew a pistol and by its threatened use forced the cashier to surrender the store's money, and that defendants and their companion fled the crime scene in the same automobile, *held* sufficient to be submitted to the jury on issues of defendants' guilt of armed robbery.

2. **Criminal Law § 9— aider and abettor — guilt as principal**

When two or more persons aid and abet each other in the commission of a crime, all are principals and equally guilty.

3. **Robbery § 3— use of pistol by one robbery participant — imputation to other participants**

When one party to a robbery points a pistol, the act is deemed to be the act of the other participants.

4. **Robbery § 5— armed robbery prosecution — failure to submit common law robbery**

In an armed robbery prosecution, the trial court did not err in failing to submit to the jury the issue of common law robbery where all the evidence disclosed that defendants' companion drew a pistol and by its threatened use forced the cashier of a store to surrender the store's money.

APPEAL by defendants from *Collier, J.*, June 1, 1970 Criminal Session, GUILFORD Superior Court. This case was docketed and argued as No. 86 at the Fall Term 1970.

The defendants, Donald Ray Terry and Samuel Lee Jackson, were indicted for forcibly taking from the Ma-jik Market, Inc. the sum of $51.81 by the threatened use of a pistol, whereby the life of Freida Burgin, manager, was endangered and threatened. The offense in violation of G.S. 14-87 occurred on March 18, 1970.

The court found both defendants were indigent and appointed R. D. Douglas III, attorney to represent them.

When arraigned, the defendants pleaded not guilty. The State's evidence in summary, except when quoted, disclosed the following: The Ma-jik Market is located on Phillips Avenue

in Greensboro. On March 18, 1970, just before closing time, Freida Burgin, the manager, was at the check-out counter near the front door. "There were three of them that came in together. Yes sir, two of those three are these defendants. . . . Winchester and Terry went directly to the telephone, . . . Jackson walked around the store about a minute or so and then he left. . . . (H)e walked up the hill toward the apartments. . . . They (Winchester and Terry) walked up to me, and I was behind the register, and they leaned over and pulled out a gun. . . . Winchester and Terry look so much alike to me that I can't positively say who pulled the gun. I know it was a big automatic. When the weapon was pulled out, he said, 'this is a stick up, give me your money.' . . . When I opened the register I just stood back and the one with the gun leaned over and grabbed what little money there was in there. . . . Then he said, 'I know you have got a twenty dollar bill, where is it at?' . . . (H)e said, 'Lift the change tray up,' so I did, and . . . I handed him . . . . The twenty, a few ones and maybe a five or two. . . . I believe we came up $51.81 short."

The witness watched the two men leave, followed them, and saw them enter a two tone Javelin. "They took off in a great deal of a hurry." The witness alerted the police who spotted and chased the Javelin in and out of traffic, sometimes at a speed of more than one hundred miles per hour. Finally, the get-away car with the three men was stopped by a running road block. Jackson and Winchester "bailed out" of the front seat and ran. Terry, riding in the back seat of the two door vehicle, was arrested on the spot. Two officers chased Winchester and Jackson who separated in the woods. The officer who followed Winchester, came upon his dead body with a 45 automatic near his right shoulder. Substantially the same amount of money that the store had lost was in his pocket. The officer who chased, caught and searched Jackson, found he was unarmed. However, four rounds of 32 caliber pistol ammunition were in his pocket. On the floorboard of the Javelin were two pistols, one a 32 caliber revolver.

After the State's evidence was completed, the defendant, Donald Ray Terry, testified as a witness for the defense. He admitted that he, Winchester and Jackson went to the market together; that he and Winchester went to the telephone and while there Winchester suggested that they till the cashier.

" . . . Mr. Winchester turned to me and suggested that he and I try to till the operator of the Ma-jik Market. Tilling is a method of flimflam, where one person trys to distract the cashier and another person gets the money. No, I did not agree at that time to help Mr. Winchester do that. . . . I knew how to do it, but I didn't want to beat up the woman. . . . (H)e went to the counter first. Yes, I was a little behind him. . . . No, I did not know at that time that Mr. Winchester was going to pull a gun on Miss Burgin and rob her."

After the argument and court's charge, the jury rendered verdicts of guilty as to both Terry and Jackson. From the prison sentences imposed by the court, they appealed.

Robert Morgan, Attorney General, Christine Y. Denson, Assistant Attorney General for the State.

R. D. Douglas III, Assistant Public Defender for defendant-appellants.

HIGGINS, Justice

The appellants challenge the validity of their trial on these grounds: (1) The evidence was insufficient to make out a case of armed robbery, and their motion for a directed verdict of not guilty should have been allowed; and (2) if the court holds the evidence sufficient to make out a case of robbery, the trial judge should have charged the jury that the lesser included offense of common law robbery was a permissible verdict for the jury to render under the evidence in the case, and the failure of the court so to charge was error which entitles the defendants to a new trial.

[1] The evidence, including the testimony of the defendant Terry, disclosed that Winchester, Terry and Jackson were companions. They entered the Ma-jik Market together. Jackson "cased the joint" and went back to their automobile. Winchester and Terry approached the cashier. Winchester drew a large automatic pistol and announced, " ' . . . (T)his is a stick up, give me your money!' " Winchester took the contents of the cash register, which a check up showed to have been $51.81. He and Terry, who was with him at the cash register, then immediately fled and joined Jackson who was waiting in Winchester's automobile. The cashier saw Winchester and Terry go to the automobile. She immediately notified the police. By radio, patrolling

officers were alerted and a number of police vehicles joined in the chase. By means of a moving road block they pushed the get-away vehicle off the road. As it stopped, Winchester and Jackson "bailed out" and headed for the woods. One of the officers chased, caught and arrested Jackson. Another officer chased Winchester and caught up with his dead body in the woods. Winchester's 45 automatic pistol was lying near his right shoulder. A sum of money, in the denominations and amount closely approximating the market's loss, was recovered from his pocket. Other officers arrested Terry at the scene of the road block. Two revolvers, one a 32 caliber, were found on the rear floorboard of Winchester's vehicle. The only possible reference to gunfire came from Terry who testified that during the arresting process he "heard bullets."

[2, 3] Clearly the evidence implicates Winchester, Jackson and Terry in planning and executing the hold up, and in attempting to escape together. When two or more persons aid and abet each other in the commission of a crime, all are principals and equally guilty. *State v. Sellers,* 266 N.C. 734, 147 S.E. 2d 225; *State v. Horner,* 248 N.C. 342, 103 S.E. 2d 694. When one party to a robbery points a pistol, the act is deemed to be the act of the other participants. *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241.

[4] The court did not commit error in failing to charge the jury that common law robbery was a permissible verdict in the case. All the evidence, including Terry's, disclosed that Winchester drew a large automatic pistol and by its threatened use forced the cashier to surrender the market's money. True, only Winchester brandished the pistol, but his partners in the crime each making his separate contribution, are equally guilty of armed robbery. *State v. Kelly, supra.* In *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670, this Court said: "It is thoroughly established law in North Carolina . . . when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty." (Citing many cases).

All the evidence disclosed a robbery by the threatened use of a large automatic pistol. Evidence of any lesser included offense is absent. The court followed the precedents in refusing to submit the issue of common law robbery.

No error.

STATE OF NORTH CAROLINA v. BERNARD COOKE

No. 7

(Filed 10 March 1971)

1. **Witnesses § 1; Rape § 4— rape prosecution — competency of seven-year-old victim to testify**

A seven-year-old victim of rape who stated that she knew the meaning of an oath and the consequences of a falsehood was competent to testify in the trial of her assailant.

2. **Witnesses § 1— competency of witness — age of witness**

There is no age below which one is incompetent as a matter of law to testify.

3. **Witnesses § 1— test of competency**

The test of competency is the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts.

4. **Witnesses § 1— determination of competency — discretion of court**

Competency is to be determined at the time the witness is called to testify and rests mainly, if not entirely, in the sound discretion of the trial court in the light of his examination and observation of the particular witness.

5. **Witnesses § 2— competency of seven-year-old witness — conflicting testimony on voir dire**

The competency of a seven-year-old victim of rape to testify as a witness in the trial of her assailant was not affected by her conflicting testimony on the *voir dire* examination.

6. **Criminal Law § 104— motion for nonsuit — sufficiency of the evidence**

Where taken in the light most favorable to the State, there is sufficient evidence from which a jury could find that the offense charged had been committed and that defendant committed it, nonsuit should be denied.

7. **Rape § 5— rape of seven-year-old girl — sufficiency of evidence**

In a prosecution charging the fifteen-year-old defendant with the rape of a seven-year-old girl, the testimony of the girl, which was corroborated in part by her mother, her grandmother, and the examining physician, was sufficient to withstand defendant's motion for nonsuit.

8. **Criminal Law § 127— arrest of judgment — defect on face of record**

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

APPEAL by defendant from *Hall, J.*, August 2, 1970 Regular Schedule "B" Session of WAKE County Superior Court.

State v. Cooke

Criminal prosecution upon a bill of indictment, proper in form, charging defendant with raping Bertha Ann Dickens, a seven-year-old girl, in violation of G.S. 14-21. The jury returned a verdict of guilty as charged, with the recommendation of life imprisonment. From judgment in accordance therewith, the defendant appealed.

The prosecutrix testified in substance that she is seven years old and lives with her mother and grandmother across the street from the defendant. On the afternoon the crime was committed she went to defendant's home to play with defendant's little brother; defendant invited her to come into his bedroom and lie down upon the bed, which she did, and the defendant closed the door, partly removed her panties and had sexual intercourse with her. His actions caused her to bleed and she went home and changed her panties, putting those which had blood on them in the dirty clothes. Her mother found these panties that night, and when questioned, she told her mother and grandmother what had happened. She was then taken to the hospital where she was examined by Dr. McDowell.

The prosecutrix' mother and grandmother testified that the panties with blood on them were not found until five days later, and it was then that the prosecutrix told them what the defendant had done, and she was then taken to Dr. McDowell for an examination.

Dr. McDowell testified that he examined the prosecutrix and that her hymen had been ruptured by some object.

Detective L. W. Godwin of the Raleigh Police Department testified a warrant charging defendant with rape was issued on 6 May 1970, the day after the prosecutrix was examined by Dr. McDowell, but that he was unable to locate the defendant until he was found at the bus station on 5 June 1970 with a canvas bag packed with clothes.

Defendant, sixteen years of age, testified that the prosecutrix did not come to his house on the day in question; and that he did not have sexual intercourse with her or molest her in any manner. He further testified he knew the police were looking for him, that he ran away from home because he was scared of them, and that he was on his way to Pennsylvania to visit his aunt when he was found at the bus station.

Thomas Leonard Bridges, a fifteen-year-old friend of the defendant, testified that the prosecutrix told him the day after the crime was alleged to have been committed that the defendant had not touched her.

Attorney General Robert Morgan and Assistant Attorney General Sidney S. Eagles, Jr. for the State.

Charles O'H. Grimes for defendant appellant.

MOORE, Justice.

The defendant's assignments of error are: (1) The trial court erred in ruling that the seven-year-old prosecuting witness was competent to testify, and (2) the court erred in denying defendant's motions for nonsuit and arrest of judgment.

[1-4] There was no error in holding that the child who was the victim of this offense was a competent witness. There is no age below which one is incompetent as a matter of law to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth with respect to the ultimate facts which it will be called upon to decide. Competency is to be determined at the time the witness is called to testify and rests mainly, if not entirely, in the sound discretion of the trial judge in the light of his examination and observation of the particular witness. *State v. Bowden,* 272 N.C. 481, 158 S.E. 2d 493; *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406; *Artesani v. Gritton,* 252 N.C. 463, 113 S.E. 2d 895; *State v. Merritt,* 236 N.C. 363, 72 S.E. 2d 754; 7 Strong's N. C. Index 2d, Witnesses § 1; Stansbury's N. C. Evidence § 55 (2d ed., 1963); 2 Wigmore on Evidence §§ 505-509 (3d ed., 1940); 3 Jones on Evidence § 757 (5th ed., 1958); Annot., 81 A.L.R. 2d 386.

In *McCurdy v. Ashley,* 259 N.C. 619, 131 S.E. 2d 321, Justice Parker (later Chief Justice) quotes with approval from *Wheeler v. United States,* 159 U.S. 523, 40 L. Ed. 244, 16 S.Ct. 93 (in which a boy nearly five and one-half years old was held to be a competent witness in a murder case), as follows:

> " 'That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant

only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities.' "

In the instant case the prosecutrix was examined in the absence of the jury with reference to her intelligence, understanding, and religious belief concerning the telling of a falsehood. Among other things, she related where she lived, what school she attended, the names of her teachers and the grades she made. She further testified that she regularly attended the House of Prayer Church with her mother where she was taught about God and the Bible; that she knew an oath meant that she was to tell the truth and if she did not tell the truth, she would get a whipping and get punished.

[5] The defendant contends that due to certain conflicting statements made by the prosecutrix on the *voir dire* examination, the court erred in finding that the prosecutrix was a competent witness. "Conflicts in the statements by a witness affect the credibility of the witness, but not the competency of the testimony." 7 Strong's N. C. Index 2d, Witnesses § 2; *Graham v. Spaulding,* 226 N.C. 86, 36 S.E. 2d 727. And where there is conflicting evidence offered in the *voir dire* hearing, the judge's findings of fact are binding on this Court if 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. In the present record there is ample evidence to support the judge's finding that the prosecutrix was a competent witness.

[6, 7] Defendant next assigns as error the trial court's denial of his motion for judgment as of nonsuit. This assignment is without merit. Where, taken in the light most favorable to the State, there is sufficient evidence from which a jury could find that the offense charged had been committed and that defendant committed it, nonsuit should be denied. *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Lipscomb,* 274 N.C. 436, 163 S.E. 2d 788; *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Davis,* 272 N.C. 469, 158 S.E. 2d 630; 2 Strong's N. C. Index 2d, Criminal Law § 104. The testimony of the prosecuting witness, corroborated in part by her mother, her grandmother, and the examining physician, is sufficient to withstand a motion for judgment as of nonsuit.

[8] Defendant finally assigns as error the court's denial of his motion in arrest of judgment. "A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. . . . A judgment in a criminal prosecution may be arrested on motion duly made when, and only when, some fatal error or defect appears on the face of the record proper." 3 Strong's N. C. Index 2d, Criminal Law § 127, pp. 42-43; *State v. Benton,* 275 N.C. 378, 167 S.E. 2d 775; *State v. Stokes,* 274 N.C. 409, 163 S.E. 2d 770; *State v. Ingram,* 271 N.C. 538, 157 S.E. 2d 119; *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681. The defendant did not point out any such error or defect, and a careful examination of the record discloses none.

No error.

STATE OF NORTH CAROLINA v. DAVID G. LINDSAY

No. 26

(Filed 10 March 1971)

1. **Robbery § 4— armed robbery — sufficiency of evidence**

Evidence of defendant's guilt of armed robbery was sufficient to withstand his motion for a directed verdict of not guilty at the close of the State's evidence.

2. **Criminal Law § 170— solicitor's reference to defendant's failure to testify**

Solicitor's improper reference to the failure of defendant to testify and to offer evidence in his defense was cured by the trial court's prompt and explicit instructions to the jury to ignore the reference.

ON October 1, 1970, the North Carolina Court of Appeals, on motion, allowed *certiorari* to review the judgment of *Ervin, J.*, June 10, 1970 Session, GASTON Superior Court. The cause was docketed and heard in the Supreme Court pursuant to its rule of July 31, 1970.

The defendant, David G. Lindsay, age 18, was indicted for the armed robbery of Herbert Gullick. Based upon proper findings, the trial court appointed James H. Atkins as attorney for the defendant. On arraignment the defendant entered a plea of not guilty. The State's evidence, in short summary, disclosed that on March 22, 1970, the defendant and two others assaulted Herbert Gullick with a pistol and forcibly took from his person, his wallet containing twenty to thirty dollars and other valuables. The identity of the defendant as the one who actually removed the wallet from the pocket of the witness was established by Mr. Gullick, by his wife and strong corroborating evidence by the investigating officers. The defendant did not testify and did not offer evidence. The jury returned a verdict of guilty. The court imposed a sentence of eight years to be served in the prison for youthful offenders.

The court permitted the defendant to appeal as a pauper and again appointed Mr. James H. Atkins to prosecute the appeal.

Robert Morgan, Attorney General, William Lewis Sauls, Staff Attorney for the State.

James H. Atkins for defendant appellant.

HIGGINS, Justice.

[1] The defendant by Assignment of Error No. 3 contends the trial court committed error by denying his motion for a directed verdict of not guilty interposed at the close of the State's case. The evidence was direct, complete and made out a strong case of armed robbery as defined by G.S. 14-87. *State v. Miller,* 268 N.C. 532, 151 S.E. 2d 47; *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826; *State v. Stephens,* 262 N.C. 45, 136 S.E. 2d 209. The defendant's motion to dismiss was properly denied.

[2] The defendant, by his Assignment of Error No. 4, challenges as error the court's failure to grant his motion for a mistrial because of the solicitor's comment to the jury that the defendant had failed to testify and had failed to offer evidence in his defense. When the attention of the trial judge was called to the solicitor's remarks, the trial judge charged the jury as follows:

> " 'I instruct you members of the jury that the defendant has no duty to establish anything and that his decision not to take the witness stand is not to be held against him by you in the course of the deliberations, so if anything was said to you on the point, you are to disregard it, and I will instruct you again on that point in the course of the charge.' In the Judge's charge he instructed the Court as follows: 'The Court instructs you that the defendant in this case, David Lindsay, has not testified. That is to say, he did not go upon the witness stand and offer evidence on his own behalf. In this connection the Court instructs you that the law of North Carolina gives him this privilege. That is to say, the law says that he has the right to decide whether he will testify or whether he will remain off the witness stand. This is the right of every defendant in every criminal prosecution and the law which gives him this right to make this choice also assures him that his decision not to testify will not be used against him. Therefore, the Court instructs you that you must be very careful in the course of your deliberations not to allow the defendant's silence or the defendant's decision not to offer testimony in his own behalf to influence your decision in any way for to do so would be to penalize him for exercising a right which our law says he has and which our law recognizes and which our law assures him that he will not be preju-

diced or penalized by electing to do what the law says he has a perfect right to do.' "

The solicitor's reference to the defendant's failure to testify was a transgression of proper trial procedure and was error. However, as this court said in *State v. Lewis,* 256 N.C. 430, 124 S.E. 2d 115, and repeated, amplified and emphasized in *State v. Stephens, supra,* any harmful effect was removed by the court's prompt and explicit instructions to the jury to disregard the reference. The error was rendered harmless by the court's prompt and vigorous action. We have no cause in this instance to believe the jury failed to heed the court's instuctions.

No error.

JAMES G. McKINNEY, FOR AND ON BEHALF OF HIMSELF AND OTHER RESIDENTS AND TAXPAYERS OF THE WILLIAMSBURG SCHOOL DISTRICT OF ROCKINGHAM COUNTY v. THE BOARD OF COMMISSIONERS FOR ROCKINGHAM COUNTY, WESLEY D. WEBSTER, RUSSELL S. NEWMAN, VIRGINIA TILLER, C. W. ROBERTS, AND J. LEONARD POWELL AND THE ROCKINGHAM COUNTY BOARD OF ELECTIONS, ALBERT J. POST.

No. 25

(Filed 10 March 1971)

Appeal and Error § 9; Schools § 3— dismissal of appeal — moot question — proceeding to restrain school consolidation election

In a proceeding to restrain a school consolidation election, plaintiff's appeal from a judgment stating that he was not entitled to the injunctive relief sought is dismissed as moot by the Supreme Court, where the election had been held prior to the entry of judgment.

APPEAL by plaintiff from *McConnell, J.,* at the 21 May 1970 Civil Session of ROCKINGHAM, heard prior to determination by the Court of Appeals.

On 12 March 1970, the Board of Commissioners of Rockingham County adopted a resolution calling an election to be held 2 May 1970 among the qualified voters of Williamsburg Township, a portion of the Rockingham County School Administrative Unit, upon the question of whether such portion of that unit should be consolidated with the Reidsville City School Administrative Unit. The resolution provided that if the result

of the election should be in favor of the proposal, the consolidation would take effect 1 July 1970, and thereafter the same school taxes should be levied in the township as in other portions of the City Administrative Unit. The resolution recited that it had been made to appear to the commisisoners that a majority of the qualified voters who had resided for the preceding twelve months in the township had petitioned to the County and the City Boards of Education to call such an election and that each such board of education had, by resolution, thereupon requested the Board of County Commissioners to do so.

On 23 March 1970, the plaintiff instituted an action in the Superior Court of Rockingham County and filed therein a verified "Motion for Judgment," which was treated as a complaint and as an affidavit in support of the injunctive relief for which he prayed. He alleged therein that he is a citizen and resident of Williamsburg Township, that the Board of County Commissioners had adopted the above mentioned resolution calling the election and that the petition, upon which the resolution was based, was invalid because of five alleged defects therein, including his contention that it "was not duly signed by a majority of qualified voters who had resided for the preceding twelve months in the affected area." The prayer for relief was that a hearing be granted to determine whether or not the defendants "should be permanently enjoined," the conduct or action to be so enjoined not being otherwise specified, and that an order issue enjoining the defendants "from proceeding further with the preparation for or the holding of said election until such time as the Court may fix for a hearing upon this matter."

Lupton, J., thereupon, without a hearing, issued an order restraining the defendants "until further orders of this Court" from proceeding further with preparations for or the holding of such election. This order, by its terms, was to expire 30 March 1970.

On 25 March 1970, the motion of the defendants to dissolve the temporary restraining order was called for hearing before McConnell, J., their verified answer denying the alleged defects in the petition being filed the same day. The plaintiff moved to continue the matter on the ground that he had not had two days' notice of the motion for dissolution, which he contended was required by Rule 65(b) of the Rules of Civil Procedure. Judge

McConnell denied the motion for continuance and, having received evidence in the form of affidavits and testimony, entered an order vacating the temporary restraining order. The plaintiff excepted to and gave notice of appeal from this order by Judge McConnell, but such appeal was never perfected.

On 27 March 1970, the plaintiff instituted a new proceeding against the same defendants and filed therein a new "Motion for Judgment," which has been treated as a complaint. This is identical with a former "Motion for Judgment," except that (1) the second document contains a new allegation that the petition contained forged signatures, and (2) the prayer for relief was that a "preliminary injunction," rather than "an order," issue enjoining the defendants from proceeding further with preparation for the holding of the election.

The defendants again filed their verified answer denying any defect in the petition and praying that the action be dismissed and that they be permitted to hold the election pursuant to the call therefor.

The plaintiff's motion for a preliminary injunction restraining the holding of the election thereupon came on for hearing before Long, J., at the 20 April 1970 Session of the Superior Court. On two successive days Judge Long heard contentions and arguments of counsel and the testimony of witnesses. At the outset Judge Long announced, in response to an inquiry by plaintiff's counsel, that he was including in the hearing a motion to dismiss on the ground that the County and City Boards of Education had the right to call such election with or without a petition from the residents of the area affected. Plaintiff's counsel thereupon objected "to the entire proceeding" on the ground that the defendant's motion to dismiss was not filed until the preceding day. After hearing the witnesses called in support of the motion to dismiss, Judge Long denied that motion.

The defendants then orally made a further motion to dismiss for the reason that the plaintiff had not alleged that the holding of the election would cause irreparable damage to him. Plaintiff's counsel thereupon requested permission to amend his "Motion for Judgment" to allege therein irreparable injury or damage. Judge Long stated he might do so and also granted him permission to amend his prayer for relief. Thereupon, the plain-

tiff requested a continuance of the matter on the ground that, the answer having been filed on 21 April 1970, "The issues in this case had not been formed as much as ten days." Judge Long then stated that he would allow the motion of the plaintiff "for additional time to prepare the case" and that he assumed, since there was not another term of court prior to the date set for the election, that the plaintiff would amend his prayer for judgment, depending upon the outcome of the election. The hearing before Judge Long then terminated without any ruling upon the plaintiff's motion for a preliminary injunction, Judge Long setting the case for hearing at the 18 May 1970 Session of the court.

On 21 May 1970, the matter was called for hearing before McConnell, J., there having been no amendment of the plaintiff's pleading. No evidence was introduced at this hearing. After some discussion with counsel, Judge McConnell entered judgment reciting the disposition of the first case, the stipulation of counsel that the election in question was held on 2 May 1970, the vote being 300 for and 249 against the proposed consolidation, the filings of the pleadings in the second case, the defendants' motion to dismiss, the hearing and denial thereof by Judge Long and the plaintiff's motion before Judge Long for continuance. The judgment then stated that the court found as a fact that the election was held on 2 May 1970, that the two Boards of Education had, in good faith, requested the election and that the Board of County Commissioners had not abused its discretion in calling the election. The judgment then stated that, the court being of the opinion "that the plaintiff is not entitled to the relief prayed for in his motion for a preliminary injunction restraining said election," adjudged that the plaintiff's "Motion for Judgment" be denied and the costs be taxed against the plaintiff.

It is from the last mentioned judgment that the plaintiff now appeals, assigning as error that it was entered "without giving to the plaintiff benefit of a hearing as to his contentions," in violation of Art. I, § 17, of the Constitution of North Carolina and Amendment V to the Constitution of the United States.

Benjamin P. Wrenn for plaintiff.

McMichael, Griffin & Post by Jule McMichael, Albert J. Post and Clark M. Holt for defendant.

PER CURIAM.

The record shows no amendment of the plaintiff's "Motion for Judgment" considered as a complaint. In it he sought an injunction to restrain the defendants from preparing for and holding the election which the Board of County Commissioners called to be held on 2 May 1970. He complains therein of no other action or proposed action. The election having been held, this appeal is moot and is hereby dismissed without prejudice to the right of the plaintiff, if so advised, to institute a new action for such relief as he may be entitled to have against any action taken or proposed to be taken by the defendants or others pursuant to the said election.

APPEAL dismissed.

BONE v. INSURANCE CO.

No. 31 PC.

Case below: 10 N.C. App. 393.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 April 1971.

BUILDERS SUPPLIES CO. v. GAINEY

No. 17 PC.

Case below: 10 N.C. App. 364.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 April 1971.

EVANS v. EVERETT

No. 28 PC.

Case below: 10 N.C. App. 435.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 6 April 1971.

HENDRIX v. ALSOP

No. 85.

Case below: 10 N.C. App. 338.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 April 1971.

STATE v. CROSBY

No. 19 PC.

Case below: 10 N.C. App. 363.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 April 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. JESSUP

No. 21 PC.

Case below: 10 N. C. App. 503.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 6 April 1971.

STATE v. PITTS

No. 20 PC.

Case below: 10 N.C. App. 355.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 April 1971.

WILLIFORD v. WILLIFORD

No. 29 PC.

Case below: 10 N.C. App. 451.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 April 1971.

WILLIFORD v. WILLIFORD

No. 33 PC.

Case below: 10 N.C. App. 529.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 April 1971.

In re Filing by Automobile Rate Office

IN THE MATTER OF A FILING BY THE NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE FOR A REVISION OF LIABILITY RATES ON PRIVATE PASSENGER VEHICLES

No. 39

(Filed 5 April 1971)

1. **Insurance § 1; Constitutional Law § 7— power of Commissioner to fix rates**

The only power the Commissioner of Insurance has to fix rates is such power as the General Assembly has delegated to and vested in him.

2. **Administrative Law § 4; Insurance §§ 1, 79.1— determination of automobile insurance rates — applicable rules of evidence**

The statute providing that the rules of evidence as applied in the superior and district courts shall be followed in all administrative proceedings before State agencies, *held* not applicable to a public hearing before the Commissioner of Insurance on proposals for a general revision of insurance rates submitted by a statutory rate-making bureau. G.S. 143-317; 143-318.

3. **Insurance § 1— rate-fixing power of the Commissioner**

The power of the Commissioner of Insurance to fix rates effective from a specified future date is a legislative power. G.S. 58-248.

4. **Insurance § 79.1— automobile insurance rate hearing — competency of evidence for rate hearing**

In fixing a 2.8% rate increase on passenger automobile liability insurance effective 28 January 1970, the Commissioner of Insurance could properly consider testimony and documentary evidence that had been compiled by the Automobile Rate Administrative Office from various sources, including (1) data furnished by the Statistical Agents of the Rate Office reflecting the composite experience of all licensed insurance companies and showing that losses for 1966 and 1967 had exceeded the proportion of the premiums allocated for the payment of losses under the then existing rates, and (2) data obtained from various state, federal and private agencies showing the increase in motor vehicle accidents, hospital charges, physicians' fees, automobile repair parts, and weekly gross earnings of production workers; the fact that much of this evidence would have been inadmissible in a trial in the superior or district courts does not affect the Commissioner's consideration of it in the rate hearing. G.S. 58-27.1; G.S. 58-248; G.S. 58-248.1.

5. **Insurance § 79.1— automobile insurance rates — showing of "expense loading" component**

Data submitted to the Rate Office by automobile liability insurers must reflect the insurers' underwriting profit and loss experience in North Carolina.

In re Filing by Automobile Rate Office

6. Insurance § 79.1— automobile insurance rate increase

An order of the Insurance Commissioner approving a 2.8% rate increase on passenger automobile liability insurance is supported by sufficient evidence and is affirmed by the Supreme Court, although the data submitted by the Rate Office failed to show the insurers' underwriting profit and loss experience in this State.

Justice LAKE dissenting.

APPEAL by the Attorney General from the judgment entered by *Bailey, J.*, on April 24, 1970, in WAKE Superior Court, certified in accordance with G.S. 7A-31(a) for initial appellate review by the Supreme Court, docketed and argued as No. 9 at Fall Term 1970.

On July 1, 1969, the North Carolina Automobile Rate Administrative Office (Rate Office) made a filing with the Commissioner of Insurance (Commissioner), pursuant to G.S. 58-248, which proposed a schedule of increased rates on private passenger automobile liability insurance in the amount of 1.5% for bodily injury insurance and 11.7% for property damage insurance, making an overall (composite) increase of 5.3%.

After due advertisement, the Commissioner, on September 16, 1969, conducted a public hearing, which was continued to and resumed on September 18, 1969. It was then continued to and resumed on October 6, 7, 9, 14 and 15, and November 12, 1969. It was concluded on November 18, 1969.

Prior to the hearing, to wit, on September 15, 1969, the Attorney General, as authorized by Chapter 535, Session Laws of 1969, intervened in behalf of "the insurance consuming public," and denied that "a rate increase for private passenger liability insurance is necessary or justified at this time."

At the hearing, the evidence presented by the Rate Office consisted of numerous exhibits and the testimony of its General Manager, Paul Mize, and of John C. Jeffries and J. Robert Hunter. The Commissioner called as witnesses George Edward King, Chief Fiscal Examiner, and Robert Holcombe, Assistant Fire and Casualty Actuary, both of the staff of the North Carolina Department of Insurance. The Attorney General offered no evidence. Statements presented by individual members of the public are not material to the present appeal.

In his order of December 18, 1969, which comprises eleven pages of the record, the Commissioner, after preliminary re-

citals, made certain "Findings of Fact," stated "Conclusions," and approved an increase in the rate level of 2.8% effective on and after January 28, 1970. He denied the requested overall rate level increase of 5.3%. The Attorney General excepted to the Commissioner's order and, in his petition for review, set forth ten assignments of error and prayed that "the Court set aside the Decision and Order of the Insurance Commissioner approving a 2.8% rate increase and cause this matter to be remanded to the Insurance Commissioner with instructions that the 1969 Filing of the Rate Administrative Office be denied in its entirety *for want of competent evidence.*" (Our italics.)

The Rate Office excepted to those portions of the Commissioner's order which denied the overall increase of 5.3% requested in its filing of July 1, 1969.

The judgment entered by Judge Bailey overruled the exceptions and assignments of error set forth in the petitions for review filed by the Attorney General and the Rate Office, respectively, and affirmed in its entirety the Commissioner's order of December 18, 1969.

The Attorney General excepted to the judgment entered by Judge Bailey and gave notice of appeal. The Rate Office did not appeal.

In the Superior Court and in the Supreme Court the North Carolina Fire Insurance Rating Bureau sought and received permission to appear and file a brief and to argue as *amicus curiae.*

Attorney General Morgan, Deputy Attorney General Benoy and Assistant Attorneys General Rosser and Hudson, appellant intervenor.

Allen, Steed & Pullen, by Arch T. Allen, for North Carolina Automobile Rate Administrative Office.

William T. Joyner for North Carolina Fire Insurance Rating Bureau, amicus curiae.

BOBBITT, Chief Justice.

STATUTORY FRAMEWORK

General Statutes of North Carolina, Chapter 58, known as "the Insurance Law," G.S. 58-1, is composed of seven sub-

chapters and is set forth on pages 346-592, both inclusive, of Vol. 2B, Replacement 1965.

In Subchapter I, the Insurance Department is established "as a separate and distinct department," G.S. 58-4, and the "Commissioner of Insurance" is designated the chief officer thereof, G.S. 58-5. Subchapter I contains provisions which set forth powers and duties of the Commissioner. G.S. 58-9(1) confers upon the Commissioner "power and authority to make rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this chapter . . . ." G.S. 58-9.2 relates to examinations, investigations and hearings conducted by the Commissioner. G.S. 58-9.3, which relates to court review of the Commissioner's orders and decisions, contains the following provision: "The order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper."

It is provided that the Commissioner "shall appoint" a chief deputy commissioner, a chief actuary and "such other deputies, actuaries, examiners, clerks and other employees as may be found necessary for the proper execution of the work of the Insurance Department, at such compensation as shall be fixed and provided by the Budget Bureau." G.S. 58-7.1; G.S. 58-7.2; G.S. 58-7.3. On or before March 1st of each year, every insurance company is required to file in the office of the Commissioner a statement, sworn to by its chief managing agent or officer, showing its "business standing and financial condition" on the preceding 31st day of December. G.S. 58-21.

G.S. 58, Subchapter 5, Article 25, consisting of G.S. 58-246 through G.S. 58-248.8, relates specifically to automobile liability insurance. These provisions are codifications of Chapter 394 of the Public Laws of 1939 and amendments thereto.

The 1939 Act created and established the Rate Office. G.S. 58-246; G.S. 58-248. The Commissioner has authority to grant permission to write liability insurance for bodily injury and for property damage on private passenger automobiles only to those insurance companies or organizations which subscribe to and become members of the Rate Office. G.S. 58-247(a). Each member is entitled to one representative and to one vote in the administration of its affairs. The members elect the Governing Committee. G.S. 58-247(b). The expenses are prorated

among the members in proportion to their respective gross premium receipts. G.S. 58-247(c).

G.S. 58-247(d) provides that the Commissioner, or such deputy as he may appoint, shall be *ex officio* chairman of the Rate Office; that he shall preside over all of its meetings, including those of its Governing Committee; and that he shall "determine any controversy that may arise by reason of a tie vote between the members of the governing committee." G.S. 58-248.6 authorizes any member to appeal to the Commissioner from any decision of the Rate Office.

One of the stated objects and functions of the Rate Office is "(t)o maintain rules and regulations and fix rates for automobile bodily injury and property damage insurance and equitably adjust the same as far as practicable in accordance with the hazard of the different classes of risks as established by said bureau."

G.S. 58-248 authorizes the Commissioner "to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the pure cost and expense loading of automobile bodily injury and property damage insurance in North Carolina and this information shall be available and for the use of the North Carolina Automobile Rate Administrative Office for the capitulation *(sic)* and promulgation of rates on automobile bodily injury and property damage insurance." G.S. 58-248 also provides that the rate "compiled and promulgated by such bureau shall be submitted to the Commissioner of Insurance for approval and no such rates shall be put into effect in this State until approved by the Commissioner of Insurance and not subsequently disapproved."

The statutory provisions referred to above are codifications of the provisions of the 1939 Act. They authorized the Rate Office to "fix rates for automobile bodily injury and property damage insurance." However, approval of the Commissioner was required before the rates could be put into effect.

In *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L. Ed. 1440 (1944), the Supreme Court of the United States considered an appeal by the United States from a decision of the United States District Court for the Northern District of Georgia dismissing an indictment which charged the appellees, an association of nearly

two hundred private stock fire insurance companies, and twenty-seven individuals, with violations of the Sherman Anti-Trust Act (15 U.S.C.A. §§ 1 and 2). The indictment charged two conspiracies, namely, (1) a conspiracy "to restrain interstate trade and commerce by fixing and maintaining arbitrary and non-competitive premium rates on fire and specified 'allied lines' of insurance in Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia"; and (2) a conspiracy "to monopolize trade and commerce in the same lines of insurance in and among the same states." The Supreme Court reversed, basing its decision upon the holding that insurance transactions which stretch across State lines constitute interstate commerce so as to make them *subject to regulation* by Congress under the Commerce Clause. (Note: Apparently, less than five of the two hundred and forty-eight companies represented in the July 1, 1969 Filing are North Carolina corporations.)

Soon after the decision in *United States v. South-Eastern Underwriters Association, supra,* the Congress of the United States enacted legislation (Act of March 9, 1945, 59 Stat. 33, codified as 15 U.S.C.A. §§ 1011-1015), which provided, *inter alia,* that after January 1, 1948 (by amendment, June 30, 1948), the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, "shall be applicable to the business of insurance *to the extent that such business is not regulated by State law.*" (Our italics.)

Seemingly in response to the decision in *United States v. South-Eastern Underwriters Association, supra,* and in anticipation of the enactment of federal legislation such as that embodied in the Act of March 9, 1945, known as the McCarran-Ferguson Act, the General Assembly enacted Chapter 381 of the Session Laws of 1945, codified as G.S. 58-248.1, which provides, *inter alia:* "Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reason-

able, adequate, not unfairly discriminatory, and in the public interest." Another new section added by the 1945 Act, to wit, G.S. 58-248.5, provided that a review of any order made by the Commissioner in accordance with the provisions of G.S. 58, Article 25, which is comprised of G.S. 58-246 through G.S. 58-248.8, was by appeal to the Superior Court of Wake County in accordance with G.S. 58-9.3.

In *Allstate Insurance Company v. Lanier*, a declaratory judgment involving our statutes, G.S. 58-246 through G.S. 58-248.8 (1965), was entered in the United States District Court for the Eastern District of North Carolina, 242 F. Supp. 73 (1965), and affirmed by the Court of Appeals, 361 F. 2d 870 (4th Cir. 1966). The plaintiffs, "five large insurance companies doing 29% of the total business in North Carolina," filed the suit to obtain a judgment declaring the North Carolina statutory provisions invalid "insofar as it restricts competition by prohibiting the offering of lower premium rates." 361 F. 2d at 871. A summary judgment dissolving the complaint was affirmed on the ground that, since the Rate Office "was established and administered under the active supervision of the State, it was not subject to attack under the federal antitrust laws, which condemn only *private* noncompetitive activities," and that the North Carolina statutory provisions had not been preempted either by the Sherman Act or by the McCarran-Ferguson Act. The opinion of Circuit Judge Sobeloff concludes with this observation: "Whether the statutory plan embodies the wisest and most effective type of regulation is, of course, not a judicial question."

Prior to the enactment of Chapter 943 of the Session Laws of 1965, no statute provided for periodic filings by the Rate Office with the Commissioner of the data referred to in G.S. 58-248, to wit, "data necessary to compile statistics for the purpose of determining the pure cost and expense loading of automobile bodily injury and property damage insurance in North Carolina." This Act of 1965 incorporated in G.S. 58-248 the following: "On or before July 1 of each calendar year the . . . Rate . . . Office shall submit to the Commissioner the data hereinabove referred to for bodily injury and property damage insurance on private passenger vehicles and a rate review based on such data. Such rate proposals shall be approved or disapproved by the Commissioner . . . ."

Except as indicated below, the foregoing constitutes the statutory framework for the consideration by the Commissioner of the Rate Office's filing of July 1, 1969.

STATISTICAL DATA

Regulation 21, made and promulgated by the Commissioner, provides, *inter alia:*

"Bureaus and companies to which the provisions of Article 25, entitled Regulation of Automobile Liability Insurance Rates, (apply) are requested to file all rate manuals, classification plans, rating plans, rating schedules, rating rules and statistical plans proposed to be used in North Carolina, relating to: Automobile Liability Coverages.

"Statistical agents for the various regulated lines are hereby appointed as follows:

1. Mutual Insurance Rating Bureau
2. Insurance Rating Board
3. National Association of Independent Insurers
4. National Independent Statistical Service

"These bureaus will annually collect and compile all experience data, prepare the necessary experience exhibits for rate making purposes and make such filings as may be required."

The Mutual Insurance Rating Bureau (MIRB) and the Insurance Rating Board (IRB) are licensed rate-making bureaus in many States. They are approved Statistical Agents in all States. The National Association of Independent Insurers (NAII) and the National Independent Statistical Service (NISS) are approved Statistical Agents for their member companies but are not licensed rate-making bureaus.

The testimony of Paul Mize, General Manager of the Rate Office, was to the effect that each of the licensed companies (then 251) is required to submit at regular intervals a statistical report, accompanied by a transmittal letter and affidavit from an official of the company, to one of the four designated statistical agents in accordance with a statistical plan or code approved by the Commissioner. According to Mize, these reports set forth in required detail the company's exposures, including the number of cars insured and the coverages, the amount of

the premiums, and the amounts of paid and outstanding claims. The data is checked by experienced employees of the Statistical Agent to correct errors and to insure conformity to the approved statistical plan or code. "The data is then tabulated on high-speed electronic computers and the tabulations are then filed with the Commissioner of Insurance and made available to the North Carolina Automobile Rate Administrative Office." The filing of July 1, 1969, submitted by the Rate Office to the Commissioner, was prepared under the supervision of Mize by direction of the Governing Committee of the Rate Office.

Every licensed company, irrespective of its size or the extent of its business in North Carolina, has equal representation and vote in the Rate Office. The data furnished the Rate Office by the Statistical Agents does not disclose the experience of any one company. It reflects the aggregate or composite experience of all licensed companies as if this were the experience of a single company. The statistical data submitted to it by the Statistical Agents is used by the Rate Office in preparing its July 1 Filing.

THE JULY 1, 1969 FILING

The private passenger automobile liability insurance rates in effect since April 9, 1969, are those approved by the Commissioner by order of March 20, 1969, as a result of the July 1, 1968 Filing submitted by the Rate Office. This 1968 Filing was based (mainly) on experience during 1965 and 1966.

On May 20, 1969, the Governing Committee of the Rate Office, after reviewing the statistical data compiled and furnished to it by the Statistical Agents adopted a schedule providing for an increase of 1.5% in the rates applicable to bodily injury insurance and an increase of 11.7% in the rates applicable to property damage insurance, or an overall (composite) increase of 5.3%. The July 1, 1969 Filing set forth the proposed increases, the experience and reasons asserted in justification thereof, and sought the approval of the proposed increases by the Commissioner. This 1969 Filing was based (mainly) on experience during 1966 and 1967.

Mize testified that the figures showing the effect of the proposed increases were based on the old manual rates or policy limits of 5/10/5 despite the fact a policy written or renewed after January 1, 1968, was required to have minimum limits of 10/20/5 to serve as proof of financial reponsibility (G.S. 20-309)

under G.S. 20-279.21. He explained that "the Rate Office had no actual experience on the 10/20/5 limits through the year 1967."

The rate-making process on which the 1969 Filing was based is substantially the same as that used as a basis for the filing in 1968 and prior years.

The 1969 Filing asserts as justification for the proposed increases that, during the years 1966 and 1967, weighted equally, the companies incurred losses ($151,733,706.00) in excess of premiums provided for losses ($141,146,346.00) in the amount of $10,587,360.00. In explanation, it was asserted: (1) That the increase in motor vehicle accidents was greater than the increase in automobile registrations; and (2) that the increase in accident frequency was compounded by the increases in claim settlements, attributable to increases in medical and hospital costs, wage losses, automobile labor repair charges, and the prices of automobile parts necessary to make repairs.

If the Commissioner determines, after a hearing, that the rates proposed by the Rate Office "are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest," it becomes his duty to issue an order to the Rate Office directing that the proposed rates "be altered or revised in the manner and *to the extent stated in such order* to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest." (Our italics.) G.S. 58-248.1.

In his order of December 18, 1969, the Commissioner altered or revised the proposals of the Rate Office in two particulars, *viz.:* First, he adopted a different methed for calculating the "factor to adjust losses" in determining the expense to be allocated for the payment of pending claims; and second, he found that the Rate Office "did not take into direct consideration the effect of investment income from unearned premium reserves." See G.S. 58-246(5). On these grounds, the Commissioner did not approve the overall increase of 5.3% requested in the 1969 Filing but did approve an increase of 2.8% to become effective on and after January 28, 1970.

THE EVIDENCE

The Rate Office relied on the data furnished to it by the Statistical Agents to support its assertion that the losses during 1966 and 1967 had exceeded the proportion of the premiums

allocated for the payment of losses under the then existing rates. It relied upon data it had obtained from the North Carolina Motor Vehicle Department to show the increase in motor vehicle accidents was greater than the increase in automobile registrations. It relied upon data obtained from the Consumer Price Index, Medical Care Sector, United States Department of Labor, to show the increase countrywide in hospital charges and physicians' fees. It relied upon data obtained from the Bureau of Labor Statistics, U. S. Department of Labor, to show the increases in the United States and in North Carolina in the weekly gross earnings of production workers engaged in manufacturing. It relied upon data obtained from National Market Reports, Inc., to show the increases in the prices of automobile repair parts. It offered the testimony of John C. Jeffries, who is engaged in the independent automobile damage appraisal business, to show the increase in automobile labor repair charges.

THE RATE-MAKING PROCEDURE

Since the Act of 1965, G.S. 58-248 has required the Rate Office *to submit to the Commissioner* the data "hereinabove referred to" for bodily injury and property damage insurance on private passenger vehicles and a rate review based on such data. The data "hereinabove referred to" consists "of all books, data, papers and records and any other data *necessary to compile statistics for the purpose of determining the pure cost and expense loading of automobile bodily injury and property damage insurance in North Carolina . . . .* " (Our italics.)

"For rate-making purposes, the components of a casualty insurance premium are the 'pure premium' and 'expense loading.' The 'pure premium' is the amount allocated for the settlement of casualty losses, including loss adjustment expenses. 'Expense loading' is the amount allocated for operating expenses and for underwriting profit and contingencies." *Virginia State AFL-CIO v. Commonwealth,* 209 Va. 776, 167 S.E. 2d 322 (1969).

The increases proposed by the Rate Office in its 1969 Filing are based on an allocation of 68.6% of the premium dollar to "Losses and Loss Adjustment Expenses" and the remaining 31.4% to "Expense Loading." The 31.4% is composed of the following items: Production cost, 16.8%, which is a composite of 10% for assigned risks and 20% for voluntary risks; gen-

eral administration, 5.5%; taxes, licenses and fees, exclusive of federal income taxes, 3.1%; inspection and bureau fees, 1%; and underwriting profit and contingencies, 5%.

A contingency contemplated in the allowance of 5% for "underwriting profit and contingencies" is federal income tax, approximately 50% of a company's net profit, if any.

The 68.6% allocated to "Losses and Loss Adjustment Expenses" is based on 1966 and 1967 experience as reported by the Statistical Agents upon their analysis of the reports submitted to them by all licensed companies. It is noteworthy that this proportion was greater than that on which prior filings have been based, thus leaving a smaller total percentage for allocation to "Expense Loading."

It does not appear that the licensed companies, in their reports to the Statistical Agents or otherwise, supplied data as to their actual experience in North Carolina in 1966 and 1967 with reference to the items constituting "Expense Loading." The Rate Office offered evidence that each of these allocations was reasonable and in line with allowances recognized as reasonable throughout the country. This evidence consisted of the opinion evidence of Mize, Holcombe and Hunter, and of statistics as to similar allowances approved elsewhere in the country.

The record contains no statistical or other evidence as to the profits and losses in North Carolina in 1966 and 1967 of any or all of the companies licensed to write automobile liability insurance in this State.

The evidence includes the tabulation by the Insurance Rating Board as of September 3, 1969, of the automobile liability insurance rates in effect in the twenty-five eastern States according to the latest information then obtainable. In this tabulation, North Carolina is twenty-third, the only *lower* rates being those of Delaware and of Georgia. Too, this tabulation indicates that the North Carolina rates are approximately 30% lower than the average of the rates in the twenty-five eastern States. The evidence does not disclose when, from whom or the circumstances under which the Insurance Rating Board obtained the information from which its tabulation was prepared.

Absence of Legislative Standards

If the Commissioner, after a hearing, determines that "the rates charged or filed . . . are excessive, inadequate, unreason-

able, unfairly discriminatory, or otherwise not in the public interest," G.S. 58-248.1 provides that "he shall issue an order . . . directing that such rates . . . be altered or revised in the manner and *to the extent stated in such order* to produce rates . . . which are reasonable, adequate, not unfairly discriminatory, and in the public interest." (Our italics.) However, no legislative provision purports to define what constitutes a "reasonable rate" or provides a formula or standards for the guidance of the Commissioner in the determination thereof.

[1] We pass, without discussion, questions relating to the power of the General Assembly to fix the rates for automobile liability insurance. It is noteworthy that a casualty insurance company, unlike a public utility, has no monopolistic or exclusive rights. All of the 251 competing companies are required to issue policies at the rate fixed by a State agency as a condition of doing business in North Carolina. Suffice to say, the only power the Commissioner has to fix rates is such power as the General Assembly has delegated to and vested in him.

"It is settled and fundamental in our law that the Legislature may not abdicate its power to make laws nor delegate its *supreme* legislative power to any other coordinate branch or to any agency which it may create. *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310. It is equally well settled that, as to some *specific* subject matter, it may delegate a *limited* portion of its legislative power to an administrative agency *if* it prescribes the standards under which the agency is to exercise the delegated powers." *Turnpike Authority v. Pine Island,* 265 N.C. 109, 114, 143 S.E. 2d 319, 323, and cases there cited.

For present purposes, it is sufficient to say that no question is presented in the Attorney General's petition for review of the Commissioner's order of December 18, 1969, as to the power of the General Assembly or of the Commissioner to fix rates. The arguments brought forward assume the existence of such power.

In the absence of a legislative formula or standards, the Commissioner has had no alternative but to look to the rate-making procedures recognized in the industry and in other States. The words, "pure cost" and "expense loading" as used, without explanation, in G.S. 58-248, facilitated this course. Thus,

the Rate Office and the Commissioner adopted the industry view that the reasonableness of a profit to be allowed to a company writing automobile liability insurance was determinable on the basis of a percentage of the gross premium rather than on the basis of a rate of return on invested capital. Underlying this view is the fact that the required capital assets of a casualty insurance company are primarily reserves to guarantee its ability to discharge its liability rather than for use as working capital in the prosecution of its business. Such a company has no significant inventory of assets which are used and useful in the prosecution of its business. The primary function of such a company is to render a service. It is noted that the 5% of premium allowed for underwriting profit and contingencies in computing the rates proposed by the 1969 Filing is the same as that used in preceding filings and is the same as that generally approved in the industry.

SCOPE OF REVIEW

[2] The case is before us upon the ten assignments of error set forth in the Attorney General's petition for review by the Superior Court of the Commissioner's order of December 18, 1969. These assignments challenge all findings of fact in the Commissioner's order on the ground they were based wholly or principally on incompetent testimony and unauthenticated and otherwise incompetent documentary evidence. At the hearing(s), the Attorney General objected to practically all of the evidence offered by the Rate Office and excepted to the overruling of his objections. He contended the provisions of Chapter 930 of the Session Laws of 1967, codified as G.S. 143-317 and G.S. 143-318, were applicable in determining the competency of evidence at the hearing(s) before the Commissioner, and that the bulk of the evidence offered by the Rate Office was incompetent under "(t)he rules of evidence as applied in the superior and district court divisions of the General Court of Justice."

The Attorney General's petition for review of the Commissioner's order of December 18, 1969, brought the matter to the Superior Court for hearing on the assignments of error set forth in that petition. We are concerned only with that portion of Judge Bailey's judgment which overrules these assignments of error and affirms the Commissioner's order.

THE 1967 ACT

The 1967 Act, as codified, is quoted below:

"§ 143-317. Definitions.—As used in this article,

(1) 'Administrative agency' means any State authority board, bureau, commission, committee, department, or officer authorized by law to make administrative decisions, except those agencies in the legislative and judicial departments of government, the North Carolina Utilities Commission, the North Carolina Industrial Commission, the Employment Security Commission of North Carolina, and the institutions and agencies that operate pursuant to chapters 115, 115A, and 116 of the General Statutes.

(2) 'Party' means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.

(3) 'Proceeding' shall mean any proceeding, by whatever name called, before an administrative agency of the State, *wherein the legal rights, duties, or privileges of specific parties are required by law or by constitutional right to be determined after an opportunity for agency hearing.* (Our italics.)

"§ 143-318. Rules of evidence official notice.—In all proceedings:

(1) *Incompetent,* irrelevant, immaterial, unduly repetitious, *and hearsay evidence* shall be excluded. *The rules of evidence as applied in the superior and district court divisions of the General Court of Justice shall be followed.* (Our italics.)

(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(3) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff

memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence."

These facts are noted: In *In re Filing by Fire Ins. Rating Bureau,* 275 N.C. 15, 165 S.E. 2d 207, no question was raised as to the applicability of the 1967 Act to the evidence then offered by the North Carolina Fire Insurance Rating Bureau in support of its proposal for increased rates on fire insurance policies. Nor does it appear that any question was raised as to the applicability of the 1967 Act to the evidence offered by the Rate Office in support of its proposals filed July 1, 1967, and July 1, 1968, on private passenger automobile liability insurance policies. In these proceedings, the Attorney General appeared as counsel for the Commissioner. In the present proceeding, the Attorney General, as authorized by Chapter 535 of the Session Laws of 1969, intervened and appeared "in a representative capacity for and on behalf of the using and consuming public of this State." Understandably, when so intervening and appearing, the Attorney General deemed it his duty to assert the applicability of the 1967 Act to rate-making proceedings before the Commissioner and obtain an authoritative ruling thereon.

G.S. 58-27.1 provides that "(t)here shall be in the Insurance Department an insurance advisory board which shall consist of seven members." It designates the Commissioner "a member of the board and its chairman and executive head." It provides for the appointment by the Governor of the remaining six members. It provides that the Insurance Advisory Board "shall . . . promulgate rules and regulations to provide for the holding of public hearings before the Commissioner . . . on such proposals, to revise an existing rating schedule the effect of which is to increase or decrease the charge for insurance or to set up a new rating schedule, as are subject to the approval of the Commissioner and as, in the judgment of the board, are of such nature and importance as to justify and require a public hearing."

Pursuant to G.S. 58-27.1, the Insurance Advisory Board adopted rules and regulations for such public hearings by the Commissioner, which rules and regulations were filed with the Secretary of State on March 1, 1950. Section 6 thereof is quoted below.

"6. Public hearings shall be conducted in an orderly but informal manner. *The hearing officer shall admit all evidence of any type having reasonable probative value,* and shall include in the evidence any relevant or material evidence which may be made available to him by any records of the Insurance Department or disclosed by any investigation or study of the problem by personnel of the Department. Irrelevant, immaterial or unduly repetitious evidence shall be excluded. *Any evidence of the type upon which responsible persons are accustomed to rely in the conduct of insurance affairs shall be deemed to have reasonable probative value.* A hearing may be continued when such continuation is, in the Commissioner's judgment, warranted." (Our italics.)

It is noted that both G.S. 58-27.1 and the rules and regulations adopted by the Insurance Advisory Board relate specifically and solely to public hearings before the Commissioner on proposals to revise insurance rates.

We are of opinion, and so hold, that the 1967 Act, now codified as G.S. 143-317 and G.S. 143-318, is not applicable to a public hearing before the Commissioner on proposals for a general revision of insurance rates submitted by a statutory rate-making bureau such as the Rate Office. The rates approved or fixed by the Commissioner apply equally to all companies licensed to issue and to all persons who obtain liability insurance on private passenger automobiles. The statutes, G.S. 143-317 and G.S. 143-318, are applicable only to a "proceeding" before an administrative agency *"wherein the legal rights, duties, or privileges of specific parties* are required by law or by constitutional right to be determined after an opportunity for an agency hearing." (Our italics.) G.S. 143-317(3). The quoted portion of G.S. 143-317(3) shows that G.S. 143-318 was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent (G.S. 58-42, G.S. 58-248.3) or of a specified insurance company (G.S. 58-44.4, G.S. 58-248.3) or to the imposition of a fine or penalty (G.S. 58-262) upon an insurance agent or insurance company for violation of the "Insurance Law." Such hearings involve the essential elements of a court trial. In such cases, the Attorney General, as legal adviser to the Commissioner, can provide counsel as to whether proffered evidence complies with "(t)he rules

of evidence as applied in the superior and district court divisions of the General Court of Justice."

[3] G.S. 143-317 and G.S. 143-318 apply only to judicial or quasi-judicial proceedings. The power to fix rates effective from a specified future date, which G.S. 58-248 purports to delegate to the Commissioner, is a legislative power. This is no less true because its exercise is preceded by investigations and hearings. In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 53 L. Ed. 150, 29 S.Ct. 67 (1908), which involved proceedings before a Virginia Commission to establish railway passenger rates for the future, Mr. Justice Holmes said: "But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court . . . . A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind . . . ." As stated in *In re Filing by Fire Ins. Rating Bureau, supra* at 32, 165 S.E. 2d at 219: "In fixing by law the premium rate, it is the legislative power of the State which is being exercised."

There were no specific parties to the public hearing before the Commissioner. In submitting the 1969 Filing, the Rate Office, a statutory bureau, was engaged in the performance of the duty imposed upon it by G.S. 58-248. The proposals embodied in the 1969 Filing were in accordance with the determinations and directions of the Governing Committee. Although each of the two hundred and fifty-one licensed companies had an equal vote in the selection of the Governing Committee, nothing in the record indicates the proposal embodied in the 1969 Filing represent the views or have the approval of any specific insurance company. It would seem that the plaintiffs in *Allstate Insurance Company v. Lanier, supra,* were seeking an opportunity to fix their own rates and be free from the necessity of conforming to the rate proposals and presentation thereof as made by the Rate Office.

SUFFICIENCY OF THE EVIDENCE

[4] We agree with the Attorney General that much of the testimony and documentary evidence produced at the hearing(s) did not meet the tests required for the admissibility of evidence over objection thereto in a trial in a Superior or District Court. However, we think the evidence produced was "of the type upon which responsible persons are accustomed to rely in the conduct of insurance affairs" and was for consideration by the Commissioner in connection with his approval or fixing of rates to be effective from some future date. Too, in making what must be considered in large measure a policy or judgment decision, the Commissioner had the benefit of his own continuous study and knowledge of changing conditions, including the enactment of Chapter 215, Session Laws of 1969, which rewrote G.S. 28-174 relating to the damages recoverable in wrongful death actions. Without elaboration, it is noted that, as shown by his rulings in connection with the 1967 and 1968 Filings by the Rate Office, the Commissioner has held a tight rein with reference to any proposed increase of rates.

The opinion testimony of Mize, Hunter and Holcombe supports the Commissioner's decision and order of December 18, 1969. Each of these men has had extensive experience and is well informed with reference to liability insurance rates on private passenger automobiles in North Carolina and throughout the country, including the percentages allocated to "pure cost" and to each of the various items included in "expense loading."

Mize has been connected with the Rate Office since 1950 and has been General Manager thereof since February, 1968. He has testified "a good many times in prior automobile liability insurance rate cases before the Commissioner of Insurance." His work has kept him in close touch with automobile statistical data, compilations and automobile liability insurance rates.

Hunter's experience includes employment by the Insurance Rating Board and by the Mutual Insurance Rating Bureau. These bureaus are licensed as Statistical Agents in all States and as Rating Organizations in most States, though not in North Carolina, for automobile liability insurance. In his present position as Assistant Actuary of MIRB, Hunter supervises the preparation of rate revisions in all States where MIRB is licensed as a Rating Organization.

Holcombe, for the past thirteen years, has been employed by the North Carolina Department of Insurance as Assistant Fire and Casualty Actuary. His work involves a critical review of filed material. This includes an analysis of the accounting and statistical methods, practices and procedures used by insurance companies as they relate to automobile liability insurance rates in North Carolina. It was stipulated that he was an expert "in rate analysis."

DATA REQUIRED BY G.S. 58-248

[5] The record contains no exhibit or testimony that shows precisely what data each company is required to submit to the Statistical Agent to which it reports. The data required and supplied seems sufficient as to the "pure cost" component of the rate. It falls short of that required to reflect the experience *in North Carolina* as to the "expense loading" component of the rate. Mr. Mize testified: "Countrywide experience is the only experience available. Related to automobile liability insurance specifically, no expense statistics, data, or experience is available for operations solely in the State of North Carolina." As stated above, the data required and supplied does not reflect a reporting company's underwriting profit and loss experience in North Carolina. We are mindful that items such as production costs, administration costs, etc., may consist in part of expenditures elsewhere than in North Carolina, *e.g.*, home office expenses. Even so, G.S. 58-248 contemplates that each company furnish data based on North Carolina experience with reference to the items composing "expense loading" as well as those composing "pure cost." Whether this requirement is reasonable or will prove of substantial value is for legislative determination. The Rate Office and the Commissioner should take notice that, under present statutory provisions, each company should be required to provide all of the data required by G.S. 58-248.

CONCLUSION

[6] As indicated, the data supplied by the companies to the Statistical Agents falls short of that required by G.S. 58-248. Even so, we think the uncontradicted evidence sufficient to support the Commissioner's allowance of the overall increase of 2.8% (instead of the 5.3% increase proposed by the Rate Office) notwithstanding the failure to comply with all requirements of G.S. 58-248.

It is noted that the Rate Office has made its July 1, 1970 Filing and soon will be required to make its July 1, 1971 Filing.

We are of opinion that Judge Bailey's judgment, which affirms the Commissioner's order of December 18, 1969, should be, and it is hereby, affirmed.

Affirmed.

Justice LAKE dissenting.

With reference to the findings of fact which the Commissioner of Insurance must make in a proceeding to fix the premium rates, there is no difference between fire insurance and automobile liability insurance. In reviewing an order by the Commissioner, fixing premiums for fire insurance policies, this Court said:

> "The ultimate question to be determined by the Commissioner is whether an increase in premium rates is necessary in order to yield a 'fair and reasonable profit' in the immediate future (i.e., treating the Bureau as if it were an operating company whose experience in the past is a composite of the experiences of all the operating companies), and, if so, how much increase is required for that purpose. This cannot be determined without specific findings of fact, upon substantial evidence, as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the per cent of Earned Premiums which will constitute a 'fair and reasonable profit' in that period." *In re Filing by Fire Insurance Rating Bureau,* 275 N.C. 15, 39, 165 S.E. 2d 207.

In the present case, the Commissioner has not made any finding as to items (2) and (3). Without such preliminary findings of fact, his declaration "that the present rates for private passenger automobile liability insurance are inadequate" and his declaration "that the record shows and the statistics support the need for some rate relief for private passenger automobile liability insurance in North Carolina" are not findings of fact, but are mere administrative declarations which no court can review intelligibly. To affirm an order fixing premium rates upon a mere administrative declaration that the old rates are "inadequate" and the new ones are "reason-

able" subjects both the public and the insurance carriers to the danger of arbitrary action by the Commissioner. It is to guard against that danger that the duty of judicial review is imposed upon us by G.S. 58-9.3. We may not properly avoid it by merely accepting the Commissioner's declarations because of our confidence in his superior knowledge of the field.

G.S. 58-248.1 provides: "Whenever the Commissioner * * * shall determine, after notice and a hearing, that the rates charged or filed * * * are excessive, inadequate, unreasonable * * * or otherwise not in the public interest * * * he shall issue an order to the bureau directing that such rates * * * be altered or revised * * * to the extent stated in such order to produce rates * * * which are reasonable, adequate * * * and in the public interest."

G.S. 58-248.5 provides: "A review of any order made by the Commissioner * * * shall be by appeal to the Superior Court of Wake County in accordance with the provisions of § 58.9.3." G.S. 58.9.3 provides for judicial review of any order of the Commissioner except one to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets. Consequently, the judicial review which it is our duty to make in the present case is precisely the same as that which we must make of an order fixing premium rates for fire insurance. *In re Filing by Fire Insurance Rating Bureau, supra,* is, therefore, applicable to the present case.

G.S. 58-9.3(a) specifically recognizes the right of any person aggrieved by an order of the Commissioner to obtain a judicial review of its merits. Obviously, it does not contemplate that the reviewing court will make its own findings of fact concerning what per cent of earned premiums will constitute a fair and reasonable profit or what operating expenses are reasonably to be anticipated in the period in which the premium rates are to be in effect. The reviewing court is charged by G.S. 58-9.3(b) with the duty of reviewing findings of fact made by the Commissioner. To enable it to do so, this statute requires the Commissioner to file with the court a complete transcript of the record of the hearing before him. The statute states that the order of the Commissioner "if supported by substantial evidence" shall be presumed to be correct. Obviously, the statute contemplates that the reviewing court is to determine whether there is substantial evidence in the record to

support the Commissioner's findings of fact which are essential to his ultimate finding that the rates are excessive or inadequate, reasonable or unreasonable.

Before this ultimate finding can be made and reviewed there must be findings by someone as to the earned premiums to be anticipated by the company *(i.e.,* all companies operating in North Carolina considered as one), the anticipated payments to be made on account of claims, the anticipated operating expenses and what is a reasonable and fair profit. Clearly, the statute does not contemplate that the reviewing court will make its own findings of fact as to these matters. The judicial review contemplated by the statute cannot be had unless the Commissioner's findings on these preliminary matters are set forth in his order. In the present case, such findings are not set forth in the order of the Commissioner.

In the present case, it is the rate payers, represented by the Attorney General, who appealed. *In re Filing by Fire Insurance Rating Bureau, supra,* was an appeal by the companies, represented by the Rating Bureau. To affirm an order of the Commissioner fixing premium rates when, as here, the Court does not have before it these essential preliminary findings of fact by the Commissioner is to expose both the rate payers and the companies to the danger of arbitrary rate making by the Commissioner. How can this Court review the Commissioner's findings that the former rates are inadequate and the rates now fixed by him are reasonable when we do not know what profit either schedule of rates will produce and do not know what profit the Commissioner deems reasonable? This Court should remand this matter to the Commissioner with instructions comparable to those given in the case of the Fire Insurance Rating Bureau, *supra.*

Furthermore, there is not in the present record evidence sufficient to support findings of fact upon these essential preliminary questions. No exhibit and no testimony in the record before us shows: (1) The total amount of earned premiums anticipated in a 12 month period, either from the present rates or from the proposed rates, when applied to the number of vehicles registered at the time of filing; (2) the total amount of company expenses, other than payment of losses and expenses related to the payment of losses, attributable to North Carolina

business in such period; or (3) the total amount of profit or loss anticipated under either the present rates or the proposed rates.

An exhibit filed by the Rate Office shows in precise figures the bodily injury and property damage losses actually incurred by the companies in North Carolina in the two test years, within the minimum coverage limits; that is, payments on claims and expenses incurred in settling them. By *pro forma* adjustments, apparently proper, the Rate Office computed that such losses and loss adjustment expenses amounted to 68.6 cents of each earned premium dollar under the then present rates. This is a figure which purports to show the actual expenditures by the companies, attributable to their North Carolina business for the payment of losses and expenses relating thereto. Nothing in the record casts doubt upon its substantial accuracy.

Obviously, an insurance company has other expenses. The Rate Office breaks these down into four types: Production Costs; General Administration; Taxes, Licenses, Fees; and Inspection and Bureau. However, instead of showing the amounts actually expended during the test period, in or attributable to North Carolina, for these items, as it did in the matter of losses and expenses related thereto, the evidence of the Rate Office merely allocates to each of these items a specified percentage of the premium dollar, these allocations being: Production Costs 16.8%; General Administration 5.5%; Taxes, Licenses, Fees 3.1%; and Inspection and Bureau 1.0%, making a total for the four items of 26.4 cents out of each earned premium dollar. Adding this to the 68.6 cents of the premium dollar, computed from actual experience as the amount paid for losses and expenses relating thereto, the total was 95 cents out of the earned premium dollar. This, says the Rate Office, leaves 5 cents of each earned premium dollar for "underwriting profit and contingency." Of this, income taxes will consume 2.6 cents, leaving 2.4 cents for addition to surplus or declaration of dividends.

When expressed in terms of 2.4 cents per premium dollar, the net profit after taxes, and, of course, after the payment of all losses and expenses, seems trivial. The actual fact is quite to the contrary. In 1967 the earned premiums just from the then minimum coverages of $5,000 for bodily injury to one person, $10,000 for all injuries in a single accident, and $5,000 for property damage totaled $113,424,348. Since that time, the mini-

mum coverage has been increased by statute and, according to the evidence of the Bureau, there has been an increase of 7% each year in the number of vehicles registered in the State, which means a substantial increase in the earned premiums without any increase in the rate. Even on the 1967 total earned premiums a profit of 2.4 cents per premium dollar would be $2,722,184 annually after taxes. Thus, we are not here concerned with trivial amounts. When the increase in profit of only a fraction of a cent per dollar of earned premiums amounts to so large a sum, by reason of the tremendous volume of business done, the public interest, as well as fair treatment of investors in insurance company securities, requires that the Commissioner abstain from fixing rates on the basis of rough estimates and guess.

The Rate Office in the present case has offered no evidence to show the actual expenses of the companies for production costs, or for general administration expense, attributable to North Carolina business. If each of these items has been overstated by as little as one cent per premium dollar, the amount actually remaining for underwriting profit would, necessarily, be increased by two cents of each earned premium dollar, which would amount to a very large sum, indeed, upon the total business done in this State.

It is essential to proper rate making that the expenses of the company, as well as its payments upon claims, be computed accurately on the basis of North Carolina experience, not just approximated on the basis of a hypothetical or theoretical allocation of the earned premium dollar as was done by the Rate Office and accepted by the Commissioner in this case.

The testimony of the witnesses for the Rate Office shows that they arrived at their computation of the allocation of the earned premium dollar to these expenses not from North Carolina experience, but from "countrywide expense experience" of all members of the Insurance Rating Board, one of the statistical agents. This "countrywide experience" not only relates to experience of insurers outside this State but includes the experience of companies not doing any business in North Carolina at all and excludes the experience of those who do operate here but report to a different statistical agent.

Furthermore, to predicate a rate increase on the premise that the expense of the insurance companies for General Administration varies in direct proportion to the premium receipts, as

the Rate Office and the Commissioner have done, strains credulity beyond the breaking point. Salaries of filing clerks, secretaries and administration officers of the company are not fixed on this basis and neither are office rent and many other expenses of the home office and regional office operations. To conclude from this "countrywide experience" that the General Administration expense of the companies attributable to their North Carolina business has been or will be 5.50% of the earned premium dollar in this State, irrespective of what the premium rate is, is sheer approximation in an area where an error of a fraction of one per cent results in a substantial variation of the amount remaining for profit. A finding on such a basis that the present rates are "inadequate" is not a finding supported by substantial evidence in the record.

The statistical exhibits filed by the Rate Office in this case showing the actual payments on claims and claim adjustment expense, based upon actual North Carolina experience, demonstrates that these companies can compile accurate data with reference to their expense experience attributable to their business in this State alone. It is not unreasonable to require these companies to assume the task of allocating to the respective states they serve the appropriate shares of their general expenses. The statutory plan for insurance rate making adopted by this State contemplates that the Commissioner of Insurance will require such proof before authorizing an increase in the premium rates for liability insurance policies issued to the residents of this State.

There are substantial differences between North Carolina and other states in regard to automobile liability insurance. This is a compulsory insurance state. Few of the other states are. The companies have in North Carolina a captive market. Not only does this greatly increase the volume of business, which usually affects the profit necessary per unit of sale, but it also tends to reduce the sales promotion cost per policy. On the basis of "countrywide experience" the Rate Office allocated, and the Commissioner accepted, 16.8 cents of each premium dollar in North Carolina to Production Expense. If this allocation is only one cent too high, as applied to North Carolina, the result is a concealment in "Expense" of more than $1,000,000 in profit.

It is quite true that in North Carolina the companies must issue assigned risk policies. This, no doubt, tends to increase the hazard, per policy, but on the Rate Office's own evidence,

the total of all payments for losses and loss adjustment expense, including the assigned risks, is only 68.6 cents of each earned premium dollar under the rates in effect prior to the order here in question. How much of the remaining 31.4 cents of each earned premium dollar is actual profit should be determined on the basis of actual North Carolina expenses incurred, not on the basis of "countrywide experience."

Assuming that the actual profit derived by the companies from their North Carolina business has been determined accurately, the question remains, is this a fair and reasonable profit? This can be determined only in the light of the ratio of profits to gross sales in other businesses of comparable risk. A reviewing court is not the proper body to determine that question. That determination should be made by the Commissioner. He has not done so in this case.

There is in the record no substantial evidence to support a finding by the Commissioner upon this question. Assuming that an expert insurance actuary is also an expert in the matter of determining a fair rate of profit, which in my opinion does not follow necessarily, a finding by the Commissioner that a certain rate of profit is reasonable requires for its support more than the mere assertion by an expert witness that it is so. In McCormick on Evidence, § 12, it is said:

> "Undoubtedly there is a kind of statment by the witness which amounts to little more than an expression of his belief as to how the case should be decided or as to the amount of damages which should be given or as to the credibility of certain testimony. Such extreme expressions as these all courts, it is believed, would exclude. There is no necessity for such evidence, and to receive it would tend to suggest that the judge and jury may shift responsibility for a decision to the witnesses."

This statement is equally applicable to an administrative officer, such as the Commissioner of Insurance, when conducting an inquiry into the reasonableness of a rate of profit.

North Carolina, being a compulsory insurance state, is relatively unique among the states of the Union. Consequently, the mere statement that a certain rate of profit is allowed, or accepted, in other states is not substantial evidence that it is a fair and reasonable rate of profit in this State. This is especially so in the total absence of any evidence as to which other states

have so determined and as to how and by whom their determinations were made.

The majority opinion appears to proceed from the position, indicated in its statement of the facts, that the Attorney General raised no point other than the competency of evidence admitted over his objection.

The fourth assignment of error in the petition for review filed by the Attorney General in the Superior Court reads as follows:

> "(4) That the Commissioner erred in overruling the Attorney General's motion to dismiss made at the end of the Rating Bureau's evidence and again at the end of all the evidence on the ground that there was not sufficient competent evidence to support any part of the suggested rate increase."

Since the first three assignments of error in the petition for review were directed specifically at the alleged errors of the Commissioner in overruling the Attorney General's objections to testimony and exhibits offered by the Rate Office, it seems clear that Assignment of Error No. 4 was directed to the sufficiency of the evidence to sustain the burden of proof placed upon the Rate Office in such proceedings as this.

Assignment of Error (10) reads:

> "(10) That the Commissioner erred in ordering * * * that private passenger automobile liability insurance rates be increased by 2.8% in that such order is based upon erroneous findings of fact and erroneous conclusions of law which resulted from incompetent testimony to which the Attorney General consistently made timely objections and motions to strike."

While these assignments of error are not stated with the utmost precision, they are, in my opinion, sufficient to present for the consideration of a reviewing court the sufficiency of the Commissioner's findings of fact and the sufficiency of the evidence to support them.

The learned judge who heard the matter in the Superior Court evidently regarded this question as having been raised for Conclusion No. 9 in his judgment reads: "There is substantial evidence in the record * * * to support the findings and con-

clusions of the Commissioner in finding present rates inadequate and ordering a 2.8% overall private passenger automobile liability insurance rate increase on and after January 28, 1970." The Attorney General assigned this conclusion as error in his appeal to this Court.

G.S. 58-9.3(b) provides that upon judicial review "the order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper." This presumption relates to the correctness of the Commissioner's findings of fact. It does not bar reversal of the order for the failure of the Commissioner to make findings of fact adequate to support his order since, when this omission occurs, it is an error of law, apparent upon the face of the order.

Consequently, it is my view that the sufficiency of the evidence to support the Commissioner's findings of fact as to the adequacy or inadequacy of the former rates and the sufficiency of those findings of fact to support the order allowing the increase in the rates are questions properly before us on this appeal. For the reasons above mentioned, it is my view that the order of the Commissioner should be reversed and this matter remanded to him for the making of findings required by *In Re Filing by Fire Insurance Rating Bureau, supra.*

The statutes of this State impose upon the Commissioner the authority and the responsibility to make the determination of what is the profit actually made in North Carolina. He is not authorized by the statutes to accept determinations "elsewhere in the country" as to what is a reasonable "allocation" to profit, simply because such determinations have been made there. As the majority opinion states, there is nothing whatsoever in this record to show what profits were actually made by the insurance companies operating in North Carolina from their North Carolina business in the test years used in this proceeding. Without such evidence the finding of the Commissioner that a higher premium rate must be paid by the people of this State is unauthorized and should not be affirmed. It is, of course, entirely possible, so far as this record shows, that the Commissioner should have allowed an even larger increase. The difficulty is that the record does not show what, if any, increase is necessary to make the former rates "adequate."

The majority opinion notes the fact that North Carolina premium rates are lower than the average in the 25 Eastern

states, only two of these having rates lower than those paid in North Carolina. Elsewhere the majority opinion notes that "the Commissioner has held a tight rein with reference to any proposed increase of rates." It is not the function of the Commissioner to hold a tight rein or a loose one. He is charged with the duty of fixing rates which are adequate and reasonable.

The majority opinion says that the Legislature has not defined a "reasonable rate" or provided a formula to guide the Commissioner in determining the same. That being true, we must find the guidance in the terms "adequate" and "reasonable," which the Legislature has used, or conclude that the statute is designed to give the Commissioner arbitrary, dictatorial power to fix rates, in which event the statute itself would be unconstitutional. It is my view that the words "adequate" and "reasonable" are, themselves, sufficient as standards and, by analogy to the statutes providing for regulation of public utility rates, mean that the premium rates are to be fixed so as to provide sufficient funds to pay losses, all operating expenses, including taxes, and leave a margin of profit sufficient to attract investors to the insurance business in comparison with other businesses of like risk. See, *Bluefield Waterworks & Improvement Co. v. Public Service Commission,* 262 U.S. 679, 43 S.Ct. 675, 67 L. Ed. 1176. Without adequate findings of fact by the Commissioner no reviewing court can determine whether his order meets this requirement.

The majority opinion says, "It is noteworthy that a casualty insurance company, unlike a public utility, has no monopolistic or exclusive rights." In this State the companies are forbidden by law to vary from the premium rates fixed by the Commissioner. The Commissioner, in the present order, stated correctly that he fixes premium rates as if all the companies operating in this State were a single company, having the composite experience of all of them with reference to losses and operating expenses. Furthermore, the automobile owner and driver in North Carolina is required to purchase liability insurance, subject to an exception which for practical purposes may be disregarded. Technically, it may be correct to say that the automobile liability insurance business in North Carolina is not monopolistic but, so far as rate making is concerned, it is a complete monopoly whose services the public is not even at liberty to reject. The only thing that saves it from condemnation as a monopoly under the rule of *United States v. Southeastern Un-*

derwriters Association, 322 U.S. 533, 64 S.Ct. 1162, 88 L. Ed. 1440, is that the State has provided a statutory procedure for regulating its rates in the public interest. Its rates should, therefore, be regulated at least as carefully as those of a public utility for whose services the public can often find an adequate substitute.

Of course, an insurance company has nothing comparable to the rate base of a public utility. The test of a fair return or profit to the insurance company is not to be measured by a percentage of the value of its properties in this State, but a fair return, measured by a percentage of gross sales in this State, can still be determined by the test of what is necessary to attract investors to this business. It is not sufficient for the Commissioner simply to take "allocations" made "elsewhere in the country."

The majority opinion holds that G.S. 143-317 and G.S. 143-318 are not applicable to a hearing before the Commissioner of Insurance for the purpose of a general revision of insurance rates. With this, and the implication inherent therein, that in such a proceeding the Commissioner of Insurance may act upon evidence not competent for admission in the Superior Court, I cannot agree. This decision, on this point, exposes the insurance companies, as well as the public, to the danger of arbitrary rate making, which danger is not insignificant merely because of justified confidence in the fairness and ability of the present Commissioner.

It is not necessary for this Court in this proceeding to hold G.S. 143-317 and G.S. 143-318 are not applicable to such hearings. The statistical data introduced in evidence over objection by the Attorney General was, in my opinion, clearly admissible in a proceeding in the Superior Court. This evidence falls within the limits of the well known exception to the Hearsay Rule for entries made in the regular course of business. *Sims v. Insurance Co.,* 257 N.C. 32, 125 S.E. 2d 326; *Insurance Co. v. Railroad,* 138 N.C. 42, 50 S.E. 452; Stansbury, North Carolina Evidence, 2d Ed, §§ 144, 155; Wigmore on Evidence, 3d Ed, § 1530. The admission of compilations and summaries of data, themselves prepared in the regular course of business, in lieu of a mass of original entries, is a proper extension of this exception to the Hearsay Rule. See: *Papadakis v. United States,* 208 F. 2d 945; *Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal*

Co., 18 F. 2d 934; *King v. State ex rel Murdock Acceptance Corp.*, 222 So. 2d 393 (Miss.); 1964 pocket supplements to Wigmore on Evidence, 3d Ed, § 1530.

G.S. 143-317 defines "Administrative Agency" to mean any State authority * * * or officer authorized by law to make administrative decisions, except agencies in the legislative and judicial departments of government * * *." It defines "Proceeding" to mean "any proceeding, by whatever name called, before an administrative agency of the State, wherein the legal rights, duties, or privileges of specific parties are required by law * * * to be determined after an opportunity for agency hearing." G.S. 143-318 provides, "In all proceedings * * * [t]he rules of evidence as applied in the superior and district court divisions of the General Court of Justice shall be followed."

The Commissioner of Insurance is a State officer authorized by law to make administrative decisions. He is a member of the executive, not of the legislative or judicial department of the State government. Constitution of North Carolina, Art. III, § 1. Consequently, he is an administrative agency within the meaning of these statutes. Although the fixing of rates by the Commissioner is an exercise of the State's legislative power, *In re Filing by Fire Insurance Rating Bureau, supra,* the Commissioner exercises this power as an administrative officer to whom it has been delegated by the Legislature. The hearing before him is not comparable to a hearing before a committee of the Legislature considering proposed legislative action. The purpose of the proceedings before him is to determine the right of the insurance companies operating in this State to charge the premiums which they propose to charge. That right is required by G.S. 58-248.1 to be determined after a hearing. G.S. 58-248.5 provides that a determination of such right is reviewable by appeal to the Superior Court of Wake County and thence to the Appellate Division, the judicial review being a "review of findings of fact and errors of law only." G.S. 58-9.3.

The plain language of the statutes seems clearly to encompass a hearing before the Commissioner for the fixing of insurance rates. The fact that the ratepayers are not designated by name and the fact that the petitioner in the proceeding represents 251 insurance companies, rather than one alone, are not material. If this were a proceeding by a single insurance company to determine its legal right to charge a higher premium

rate, it would seem quite clearly to fall squarely within the definitions of G.S. 143-317. The statute expressly excepts from its application proceedings before the North Carolina Utilities Commission. This strengthens my conclusion that it was intended to include proceedings before the Commissioner of Insurance to fix premium rates. The exclusion of the Utilities Commission clearly indicates that the Legislature understood a rate making proceeding before the North Carolina Utilities Commission would be within the statute without such exclusion. The obvious reason for the exclusion is that substantially the same provision is made applicable to the Utilities Commission by G.S. 62-65.

If the Commissioner can order a rate increase on the basis of evidence not admissible in the Superior Court, in a proceeding in which the judge sits without a jury, he can also order a decrease in the rates on the basis of such evidence. Thus, the insurance companies, as well as the public, are exposed by this decision to future findings made without support of evidence competent for consideration by the courts of this State. It is a high price to pay for a rate increase.

STATE OF NORTH CAROLINA v. LEONARD H. CUTSHALL

No. 38

(Filed 14 April 1971)

1. **Criminal Law § 26— plea of double jeopardy — order of mistrial in first trial — improper conduct of juror**

Where a defendant's first trial for homicide ended in mistrial, without his consent, on the ground that a member of the jury had met with the defendant during a weekend recess, the defendant could not properly raise the plea of double jeopardy in his second trial for the same offense, the order of mistrial having been entered for the necessity of doing justice.

2. **Criminal Law § 26— double jeopardy — burden of proof**

The burden is upon defendant to sustain his plea of double jeopardy.

3. **Criminal Law § 26; Constitutional Law § 34— double jeopardy — constitutional guarantee**

No person can be twice put in jeopardy of life or limb for the same offense. N. C. Constitution, Art. I, § 17; U. S. Constitution, Amendment V.

4. Criminal Law § 26— when jeopardy attaches

Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn.

5. Criminal Law § 26— double jeopardy — mistrial in first trial

A plea of former jeopardy will not prevail where the defendant's first trial had ended in mistrial for physical necessity or for necessity of doing justice.

6. Criminal Law § 101— order of mistrial — misconduct of juror who met with defendant

Trial court's findings of fact tending to support the inference that a juror had met with defendant during a weekend recess in the trial, *held* sufficient to support an order of mistrial on the ground that a juror had "been tampered with and would be unable to render a fair and impartial verdict."

7. Criminal Law § 158— record on appeal — presumption as to evidence omitted

In the absence of evidence in the record on appeal, it will be presumed that an order of mistrial was supported by sufficient evidence.

8. Criminal Law § 159— record on appeal — order of mistrial not signed in term time — harmless effect

The fact that an order declaring a mistrial was not signed in term time did not constitute prejudicial error, since the order was available in ample time for the defendant to prepare his case on appeal.

9. Criminal Law § 160— additions to signed order of mistrial — harmless effect

Various additions to a signed order of mistrial merely gave a meaning to a sentence which had evidently been clouded by an inadvertent omission and were not prejudicial to the defendant.

10. Criminal Law § 101— mistrial for misconduct of juror — examination of juror

In ordering a mistrial, the trial court was not required to examine the very juror whose alleged misconduct in meeting with defendant created the necessity for the mistrial.

11. Criminal Law § 43; Homicide § 20— admissibility of photographs — illustration of testimony relating to cause of death

Notwithstanding the defendant's admission that the homicide victim had died from a gunshot wound, photographs of the victim were properly introduced to illustrate the testimony of the examining physicians that the fatal bullet had entered the right side of the victim's neck and had exited on the left.

12. **Criminal Law § 42; Homicide § 20— homicide prosecution — admissibility of bloodstained clothing**

The bloodstained skirt worn by a woman who was sitting next to a homicide victim when he was shot, *held* admissible in the trial of defendant for the homicide.

13. **Criminal Law §§ 88, 169; Witnesses § 8— impeachment of testimony given on cross-examination — prejudicial error**

When defendant's son denied on cross-examination that he had ever made the statement that his father was in a certain town establishing an alibi for a homicide, it was reversible error to allow the State to offer testimony contradicting the son's denial, such testimony being incompetent and tending greatly to prejudice the defendant's defense of alibi on his trial for the homicide.

APPEAL by defendant from *Thornburg, S.J.*, at 28 September 1970 Session of MADISON.

Defendant was tried upon a bill of indictment which charged that on 30 January 1970 he "feloniously, wilfully and of his malice aforethought, did kill and murder Richard Jack Reeves."

The case first came on for trial before Judge W. K. McLean at the 25 May 1970 Regular Criminal Session of Madison. Defendant entered a plea of not guilty and a jury was duly chosen and empaneled. The case was submitted to the jury at about 5:00 o'clock p.m. on Friday, 29 May 1970, and after deliberating for about three hours without reaching a verdict, the jurors were permitted to go home until Monday, 1 June 1970. Defendant was at liberty on bond. When the court reconvened on Monday, Judge McLean withdrew Charles Goforth and declared a mistrial. The record shows an unsigned order dated 1 June 1970 in which Judge McLean found facts and ordered a mistrial. We quote pertinent portions of the order:

". . . On Monday morning the Sheriff reported to the Court that one Jack Thomas had advised him that he had made arrangements for Juror Charles Goforth to contact and talk with the defendant over the line in the State of Tennessee.

Upon the foregoing, the Court ordered the Solicitor to bring into court such evidence as he had bearing upon any contact that the defendant might have had with members of the trial jury. Thereupon the following witnesses were called by the State: Andrew Jack Thomas, Sheriff Roy Roberts, Lonnie Treadway, Mrs. Wanda Treadway, Mrs. How-

ard Allen, Mr. Herbert Baker, Mr. Mac Boyd, and Mr. Troy Ramsey. At the conclusion of the State's evidence and prior to the time that Troy Ramsey testified, the defendant testified in his own behalf.

Upon the evidence offered by the witnesses above-named the Court finds the following facts, to-wit: that on Sunday afternoon, May 31, Andrew Jack Thomas, at the request of Lonnie Treadway in Thomas' truck, took Treadway and his wife to the home of Charles Wayne Goforth, a member of the trial jury in this case; that Treadway and his wife had requested Thomas to take them to see a child of the Treadways who lives with one Billy King; that they did not go to see the child but went to the Hipps Mountain along the highway which leads up Little Laurel from the State of North Carolina into the State of Tennessee; that the defendant, L. H. Cutshall, lives in a trailer which is near the North Carolina-Tennessee line, but on the Tennessee side of the State line; that Goforth's wife was driving the truck of Thomas during this trip; that Juror Goforth asked Andrew Jack Thomas to go to the home of L. H. Cutshall which was some 100 yards from where they had parked Thomas' truck and tell the defendant Cutshall that he wanted to see him; that there is a logging road leading from the main highway to the left as you travel north toward Greeneville down into the woods; that after Juror Goforth had requested Thomas to carry the message to the defendant, Goforth then proceeded down the road or path into the woods; that Andrew Thomas did go to the home of the defendant Cutshall and told him that Juror Goforth wanted to see him or words to that effect; that Thomas then left the home of Cutshall and went back where they had originally parked near, as the witnesses described it, the salt bin; that shortly the witness Thomas observed a black automobile pass within some 100 feet of him going down the same trail that Juror Goforth had theretofore gone down; that the defendant L. H. Cutshall is the owner of a black Oldsmobile automobile.

Upon the foregoing facts and circumstances, the court finds as a fact that the defendant L. H. Cutshall contacted the Juror Goforth along the logging road. The Court further finds as a fact that on the Sunday evening of the 31st between the hours of 6:00 o'clock and 7:00 o'clock p.m. that

Troy Ramsey along with Herbert Baker and Mac Boyd ate sandwiches in Henderson Cafe in Hot Springs, North Carolina; that the wife of Herbert Baker is a member of the trial jury; that Mrs. Howard Caldwell is a member of the trial jury and is a first cousin of Mac Boyd; that Ramsey and Baker both knew the defendant Cutshall; that Troy Ramsey and the defendant's sister married brother and sister.

Upon the foregoing, the Court concludes that the defendant wilfully and voluntarily contacted Juror Goforth; that the meeting or association of the witnesses Ramsey, Baker and Boyd with the defendant during the progress of the trial is and was conducive to a fraudulent verdict.

The Court further concludes that the Juror Goforth has been tampered with and would be unable to render a fair and impartial verdict.

It is now, therefore, ORDERED that Juror Goforth be withdrawn from the jury panel and a mistrial ordered.

This first day of June, 1970.

W. K. MCLEAN
Judge Presiding"

Another order finding facts and declaring a mistrial, dated 1 June 1970, was signed by Judge McLean. The unsigned order dated 1 June and the signed order dated 1 June were identical except as follows: The unsigned order on the last page stated: "That on the Sunday evening of the 31st between the hours of 6:00 o'clock and 7:00 o'clock p.m., that Troy Ramsey along with Herbert Baker and Mac Boyd ate sandwiches in Henderson Cafe in Hot Springs, North Carolina." The signed order states that "on the Sunday evening of the 31st between the hours of 6:00 o'clock and 7:00 o'clock p.m. that Troy Ramsey along with Herbert Baker and Mac Boyd . . (illegible) . . L. H. Cutshall 11 (illegible) . . ate sandwiches in Henderson Cafe in Hot Springs, North Carolina"; There was also an obvious correction in the signed order in the misspelling of the name "Ramsey." This record is very confusing as to when the signed order was actually signed and filed. The following notation appears above the signed order: "ADDENDUM A—ORDER OF JUNE 2, 1970 OF JUDGE W. K. MCLEAN, AS SAME APPEARED AS OF RECORD ON JANUARY 28, 1970," but the order itself indicates that Judge McLean signed

the portion of the order relating to the mistrial on 1 June 1970. The statement of case on appeal states that Judge McLean withdrew a juror and declared a mistrial on the 3rd day of June 1970. The order settling the case on appeal refers to an order entered on the 2nd day of June 1970. We can conclude only that the signed order was signed at some time after the adjournment of the 25 May Session of Court, but before 28 January 1971, when the case was settled on appeal.

Defendant excepted to the findings of fact and conclusions of law.

At the 28 September 1970 Session of Madison, defendant was again put on trial for murder in the first degree. The jury, pursuant to order of Judge McLean, was drawn from Buncombe County. Defendant at that time did not enter a plea of double jeopardy.

Before the State put on evidence defendant entered a stipulation that deceased, Jack Reeves, died as a result of gunshot wounds on or about the 30th day of January, 1970, between the hours of 11:00 p.m. and midnight.

The State's evidence pertinent to decision is summarized (except where quoted) as follows:

Blanche Gentry Cutshall testified that she was formerly married to defendant and that they had one child born to their marriage—Dewayne Cutshall, age 18. She was divorced from defendant in June 1969 and lived with her son a short distance from the State Line Service Station and Grocery, which she operated. She had known the deceased, Richard Jack Reeves, for 25 or 30 years, and began seeing him socially after her divorce. On the night of 30 June 1970 she had a "date" with deceased. He picked her up in his Ford automobile and they drove up on Hot Springs Mountain, visited Carlie Gunter, and then went to Greeneville, Tennessee, where they ate at a drive-in. Shortly before 11:00 o'clock they started back towards her home in North Carolina. Near the State line they passed her son, Dewayne Cutshall, driving in the opposite direction, so since her son was not at home, they decided to "ride around some more." She was driving at this time, and as they drove up on the road towards the home of Richard Jack Reeves, she noticed an automobile following them. She told Reeves about the following car and pulled over in front of his house, and slid down in the seat.

The car that had been following stopped and someone started shooting. Richard Jack Reeves fell over on her legs. She heard the other car start off and she raised up to see who it was. She recognized L. H. Cutshall, who was driving his black 1964 Oldsmobile. After the Oldsmobile left, she ran down to the Reeves home and told Jack's mother and niece that "L. H. has shot Jack." She denied, on cross-examination, that she had told police officers and her son that "to the best of my knowledge" the driver of the car was L. H. Cutshall. She stated that she had never expressed any doubt to her son about the identity of the person she saw on the night of the shooting. She also related an incident "sometime in 1969" when defendant had thrown a rock and hit the car of Richard Jack Reeves, and at that time "L. H. run back into the back room and got a shotgun . . . but Richard had gone on down the road when he got to the door with the gun."

Over defendant's objection, the State offered in evidence the skirt worn by Mrs. Cutshall on the night in question.

Dr. Otis Duck testified that he examined the body of deceased at the scene of the crime. Over objection he stated that deceased was killed by a bullet's severing the spinal column. Based on his observation of the wound he stated that the bullet entered from the right side and exited the left side of deceased's neck.

Dr. George R. Pacey, district pathologist under the Medical examination system, testified that he examined the body on 31 January 1970. His conclusions were consistent with those of Dr. Duck. The State offered to introduce several pictures taken of the body while it was being examined by Dr. Lacey. The court permitted only two of these in evidence. One showed deceased's hand, through which a bullet had passed. The other showed deceased's body looking from the top of the head toward the feet. A probe came through the neck following the path of the bullet, but the picture did not show the wound. In both pictures blood was evident. Dr. Lacey described the wound without objection from defendant.

Madgie M. Thompson testified that she was passing defendant's trailer home around 5:00 o'clock in the afternoon on 30 January 1970 and saw L. H. Cutshall putting a gun into the trunk of his black Oldsmobile. Her testimony was corroborated by that of her husband, Jimmy L. Thompson.

SBI Agent Howard Elliott testified that he talked with defendant on 31 January 1970. Defendant told him that he knew nothing of the shooting and that he did not loan his automobile to anyone on the night of 30 January 1970. In response to question as to where he was on that night, defendant replied, "he would prove that when the time came."

The State offered other witnesses whose testimony was cumulative and corroborative.

At the close of the State's evidence, defendant moved for judgment as of nonsuit. The motion was denied. Defendant then offered evidence which, in substance, was as follows:

Ray Ayers testified that he arrived at the Riverside Cafe in Newport, Tennessee, which is located about 50 or 60 miles from the place where the shooting occurred, at about 11:00 o'clock p.m. on 30 January 1970. Ayers stated that he saw defendant at the cafe when he arrived and that defendant was still there when he departed at 12:00 o'clock midnight. On cross-examination he admitted that he was a close friend of defendant, and that he did not testify at defendant's first trial because he was not subpoenaed.

Mrs. Martha Hillard testified that she arrived at the Riverside Cafe around 11:45 p.m. on the night in question and saw defendant at that time; that defendant was still there when she left around 1:00 o'clock a.m. on the morning of 31 January. She also stated that she did not testify in defendant's behalf at the first trial.

Dewayne Cutshall, son of L. H. Cutshall and Blanche Cutshall, testified that he saw his mother at a place about 13 miles from the scene of the crime at about 11:20 on the night of the homicide. She was driving away from Greeneville, Tennessee, and he was driving towards Greeneville. At that time she was not being followed by any automobile. He further stated that he did not see his father's automobile on that night. Dewayne testified that he heard his mother make a statement to investigating officers in which she said it was L. H. Cutshall who shot deceased to the best of her knowledge. He further testified: "I talked to my mother the following day about this matter. I went up to her and I said, mom, are you sure that it was my father. I said, are you sure? And she looked at me and she studied for a while and she said, I'm not sure, but I think it was; . . ."

Defendant presented other witnesses whose testimony is not pertinent to decision in this case.

The State in rebuttal recalled Dewayne Cutshall, who testified that he was with Sheriff Roberts during the preliminary investigation on the night of the shooting. The Solicitor asked the following question: "I'll ask you if you didn't tell him to go over to Newport to this drive-in that he would find your daddy over there getting his alibi?" Dewayne denied that he made this statement.

The State then recalled Sheriff Roy Roberts who, over defendant's objection, testified that he heard Dewayne Cutshall say that defendant would be at Riverside making up alibis.

Blanche Cutshall was recalled, and she testified, over defendant's objection, that she heard Dewayne state in the Sheriff's presence that the defendant was probably at Newport establishing an alibi.

Bobby Stinson was called as a rebuttal witness. He testified that on 30 January 1970 he was a deputy sheriff in Cocke County, Tennessee, and that in connection with his duties he received a call with respect to L. H. Cutshall. Pursuant to the call he went to Riverside Truck Stop near Newport, Tennessee, between the hours of 12:30 and 1:00 o'clock. He stated that he did not see the defendant L. H. Cutshall there and that he had a description of his automobile and was unable to locate the automobile there. On cross-examination, the following occurred:

". . . I didn't check the register and didn't find out that L. H. was registered there that night, or that he could have been in one of the rooms.

Q-17: Well, you don't deny that he was, do you?

Objection. Overruled. I'm going to let you answer that.

A. I'd have to use hearsay.

COURT: All right.

A. The man that was supposed to have registered them in up here, Cod Lock . . .

COURT: I mean just listen to the question.

Q-18: Just answer my question. Do you deny that he was registered there?

A. By hearsay, he was not registered at the time that I was there. That's hearsay. The owner said he wasn't, anyway." Objection overruled; motion to strike denied.

The jury returned a verdict of guilty of murder in the first degree with recommendation that the punishment be life imprisonment. Defendant appealed.

Attorney General Morgan and Assistant Attorney General Millard R. Rich, Jr., for the State.

Bruce A. Elmore and Richard B. Ford for defendant.

BRANCH, Justice.

[1] Defendant contends that he has been placed in double jeopardy by being twice tried for the same capital offense of murder. In this connection he contends that Judge McLean erred in entering an order declaring a mistrial without defendant's consent at the 25 May 1970 Session of Madison Superior Court, and that he erred in altering the order of mistrial of 1 June 1970 and in signing the same on 28 January 1971.

[2] The burden is upon defendant to sustain his plea of double jeopardy. He failed to plead double jeopardy and to offer supporting evidence thereon, and he is therefore deemed to have abandoned the plea of double jeopardy and to have relied solely on his plea of not guilty. *State v. Baldwin,* 226 N.C. 295, 37 S.E. 2d 898; *State v. Davis,* 223 N.C. 54, 25 S.E. 2d 164; *State v. King,* 195 N.C. 621, 143 S.E. 140; *State v. Smith,* 170 N.C. 742, 87 S.E. 98; *State v. Ellsworth,* 131 N.C. 773, 42 S.E. 699.

On 25 February 1971, three months after expiration of the time allowed by the trial judge for submitting the case on appeal and 28 days after Judge Thornburg settled the case on appeal, counsel for defendant filed a motion in which it was stated that counsel was employed only two days before the second trial commenced and therefore was not prepared to enter the plea of double jeopardy. By his motion defendant contends that Judge McLean was in error in declaring a mistrial because there was not sufficient evidence presented to the court upon which the court could base a determination that the ends of justice could not be carried out because the jury had been tampered with, and because the court failed to examine the juror involved. Defendant prayed that Judge McLean's order of 1 June 1970 be declared

in error and that the verdict and judgment of the court at the 28 September 1970 session of Madison be declared null and void as in derogation of defendant's constitutional rights not to be tried twice for the same offense.

Although defendant appears to have abandoned the plea of double jeopardy, we choose to consider the merits of this constitutional question because of the seriousness of the crime here involved.

[3] It is a fundamental principle of the common law, now guaranteed by our federal and state constitutions, that no person can be twice put in jeopardy of life or limb for the same offense. *State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871; *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243; *State v. Prince,* 63 N.C. 529; N.C. Const. Art. I, § 17; U. S. Const. Amend. V.

[4] Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn. *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838.

[5] In an instant case it is clear that the elements of jeopardy are present. Even where, as here, all the elements of jeopardy appear, a plea of former jeopardy will not prevail where the order of mistrial was properly entered for "physical necessity or for necessity of doing justice." We therefore must consider whether Judge McLean, without defendant's consent, lawfully ordered a mistrial and discharged the jury before verdict.

In *State v. Tyson,* 138 N.C. 627, 50 S.E. 456, it is stated:

> "It is well settled, and admits of no controversy, that in all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge, but in capital cases he is required to find the facts fully and place them upon record so that upon a plea of former jeopardy, as in this case, the action of the court may be reviewed."

Accord: *State v. Ellis,* 200 N.C. 77, 156 S.E. 157; *State v. Beal,* 199 N.C. 278, 154 S.E. 604; *State v. Cain,* 175 N.C. 825, 95 S.E.

930; *State v. Upton,* 170 N.C. 769, 87 S.E. 328; *State v. Wiseman,* 68 N.C. 203.

In the case of *State v. Crocker, supra,* Bobbitt, J. (now C. J.) stated:

> "The two kinds of necessity, *i.e.,* 'physical necessity' and the 'necessity of doing justice' were so classified by Boyden, J., in *S. v. Wiseman,* 68 N.C. 203. As to 'physical necessity,' he said: 'One class may not improperly be termed physical and absolute; as where a juror by a sudden attack of illness is wholly disqualified from proceeding with the trial; or where the prisoner becomes insane during the trial, or where a female defendant is taken in labor during the trial.' As to 'necessity of doing justice,' he said that this arises from the duty of the court to 'guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution.'
>
> "It will be observed that 'the necessity of doing justice' is not an expression connoting a vague generality but one that relates to a limited subject, namely, the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. In *S. v. Wiseman, supra,* the basis for mistrial was 'tampering with the jury.' In *S. v. Bell,* 81 N.C. 591, and in *S. v. Washington,* 89 N.C. 535, 45 Am. Rep. 700, a juror had fraudulently procured himself to be put on the jury for the purpose of acquiting the defendant in a trial for murder. In *S. v. Cain,* 175 N.C. 825, 95 S.E. 930, a juror had given a false answer to the solicitor bearing upon his fitness and qualifications to serve as a juror. . . . "

[6] Judge McLean's findings of fact are to the effect that one Andrew Jack Thomas, during a weekend recess of the trial, in his truck carried Charles Wayne Goforth, a member of the jury trying defendant, to within 100 yards of defendant's trailer home, and at that time juror Goforth instructed Thomas to go to defendant's trailer and tell defendant that juror Goforth wanted to see him on a nearby wooded logging road. Juror Goforth then proceeded down the path into the woods. Thomas delivered the message and returned to his parked truck, and he shortly thereafter saw a black automobile proceed down the

same trail taken by juror Goforth. Defendant is the owner of a black Oldsmobile automobile.

We conclude that these findings of the court, without considering the findings as to the incident in Henderson Cafe, are sufficient to support Judge McLean's conclusion that juror Goforth had "been tampered with and would be unable to render a fair and impartial verdict."

[7] Defendant, however, further argues that the evidence presented to the court was not sufficient to support the court's findings of fact. There is no evidence on this question in the record. Admittedly this Court would have been more enlightened had the record contained the testimony of the witnesses heard by the trial judge on the question of mistrial; however, it is well recognized that a silent record supports the presumption that the proceedings in the court below were regular and free from error. *State v. Mullis,* 233 N.C. 542, 64 S.E. 2d 656. Further, it was the duty of the defendant to see that the record was properly made up and transmitted, and when the matter complained of does not appear of record, defendant has failed to show prejudicial error. *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453; *State v. Ellis, supra.*

[8, 9] Neither do we find it prejudicial error that the order declaring a mistrial was not signed in term time. The stated purpose of a written order finding facts when a mistrial is ordered in a capital case is to furnish a basis for appellate review. *State v. Tyson, supra.* In instant case the order finding facts and ordering a mistrial was signed long before defendant had raised the issue of double jeopardy, and the order was in the record in ample time for defendant to prepare his case on appeal. The additions found in the signed order merely gave a meaning to the sentence which had evidently been clouded by an inadvertent omission. It is therefore manifest that no prejudicial error resulted from the addition to the order or because the order was signed after adjournment of the 25 May 1970 session.

[10] We find no merit in defendant's further argument that Judge McLean erred in not examining the witness Goforth before he ordered a mistrial. In many instances a trial judge is warranted in examining jurors to see if some untoward incident has so affected them that they cannot render a fair and impartial

verdict. In this case such an examination of the juror whose misdeeds allegedly created the necessity for a mistrial would be a patently vain exercise.

[1] Judge McLean's findings show such absolute necessity for the entry of an order of mistrial that, in law, there was no trial of defendant at the 25 May 1970 session. We therefore hold that defendant was not put in double jeopardy by virtue of the proceedings held at the 25 May 1970 session of Madison Superior Court.

[11] Defendant next contends that two photographs of Reeves' body were erroneously admitted into evidence because they were inflammatory and were introduced without reason since defendant had admitted the cause of Reeves' death.

Properly authenticated photographs of the body of a homicide victim may be introduced into evidence under instructions limiting their use to the purpose of illustrating the witness' testimony. Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words. The fact that the photograph may be gory, grewsome, revolting or horrible, does not prevent its use by a witness to illustrate his testimony. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824.

Defendant's admission as to the cause of death did not preclude the State from introducing the photographs of Reeves' body. The admission that Reeves' death was caused by a gunshot wound did not relieve the State of the burden of proving its entire case beyond a reasonable doubt as long as defendant stood on his plea of not guilty. It was an essential part of the State's theory that the victim was shot by someone on decedent's right. The photographs in question were properly used to illustrate testimony of Drs. Duck and Lacey that the fatal bullet had, in fact, entered deceased's right side and exited on his left. The State could, therefore, select the method of proving its case subject to the enforcement of the rules of evidence and fair play by the trial judge. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755; *Rivers v. United States,* 270 F. 2d 435, *cert. den.* 362 U.S. 920, 4 L. Ed. 2d 740, 80 S.Ct. 674; *People v. Dunn,* 29 Cal. 2d 654, 177 P. 2d 553; *Commonwealth v. Novak,* 395 Pa. 199, 150 A. 2d 102; *State v. Leland,* 190 Ore. 598, 227 P. 2d 785.

We are aware of the holdings in the cases of *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328, and *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889. Both of these cases turn on the introduction of an excessive number of photographs having no probative value. Here, the trial judge allowed only two properly authenticated photographs to be introduced under instructions to the jury that they were admitted for the sole purpose of illustrating the witnesses' testimony. There was no error in the admission of the two photographs.

[12] Neither do we find prejudicial error in the admission into evidence of the bloodstained skirt worn by the witness Blanche Cutshall on the night of the homicide.

Mrs. Cutshall, in part, testified: "He shot in—shot into the car there . . . Jack fell over on my legs. . . . With reference to the marks or spots on the bottom portion of this skirt, his head would have been right on my legs where this—this is—where the blood is, because he fell over on me there."

It is not error to permit clothing of a victim or other articles to be introduced into evidence which bear stains or appear corroborative of the theory of the State's case, or which "enable the jury to realize more completely the cogency and force of the testimony of the witness." *State v. Atkinson, supra; State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294; *State v. Vann,* 162 N.C. 534, 77 S.E. 295; *State v. Wall,* 205 N.C. 659, 172 S.E. 216. The cases above cited relate to introduction of the bloodstained and torn clothing of deceased victims of the crime. Certainly the bloodstained skirt of a living witness would not create such prejudice as would the torn or bloodstained clothing of a deceased victim.

[13] Defendant next contends that the trial court erred in permitting Sheriff Roy Roberts and Blanche Cutshall to testify that they heard Dewayne Cutshall make a statement to the effect that defendant was at Riverside establishing his alibi, after Dewayne Cutshall had denied making such statement under cross-examination.

The State recalled Sheriff Roberts, who testified over objection: "We was talking about where he possibly could be. Dewayne says, I know where he is. He's down at Riverside making up alibis." The State also recalled Blanche Cutshall, who testified over objection that she heard her son Dewayne

state in Sheriff Roberts' presence that his daddy was "*probably* at Newport establishing an alibi . . . . " (Emphasis ours.)

When a cross-examiner seeks to discredit a witness by showing prior inconsistent statements or other conduct, the answers of the witness to questions concerning collateral matter are generally conclusive and may not be contradicted by extrinsic testimony. *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342; *State v. Broom,* 222 N.C. 324, 22 S.E. 2d 926; *State v. Gardner,* 226 N.C. 310, 37 S.E. 2d 913; *State v. Jordan,* 207 N.C. 460, 177 S.E. 333; Stansbury, North Carolina Evidence § 48. This rule is subject to the following exception: Where a party cross-examines an adverse witness as to collateral matters which tend to show the partiality or bias of the witness toward the cross-examiner's adversary, or which shows the witness' hostility toward the cross-examiner's cause, the cross-examiner is not bound by the witness' answer denying partiality or hostility. The cross-examiner, after putting the witness on notice, is at liberty to contradict the witness by extrinsic evidence. *State v. Hart,* 239 N.C. 709, 80 S.E. 2d 901; *State v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277; *State v. Spaulding,* 216 N.C. 538, 5 S.E. 2d 715; *State v. Rowell,* 244 N.C. 280, 93 S.E. 2d 201; *State v. Patterson,* 24 N.C. 346; 58 Am. Jur., Witnesses, § 715.

In the case of *State v. Taylor,* 250 N.C. 363, 108 S.E. 2d 629, the Court considered the proper test for determining whether contradictory testimony relates to a material or collateral matter, and stated:

> " . . . [D]efendant quotes Stansbury, North Carolina, Evidence, § 48(3): 'The proper test would seem to be whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction; or, in case of prior inconsistent statements, whether evidence of the facts stated would be so admissible.' The 'proper test,' as so defined, is amply supported by cases cited by Professor Stansbury and by defendant."

Assuming, *arguendo,* that Dewayne made the statement attributed to him under the circumstances related, it is obvious that such statement would be, at most, a speculative, conjectural expression of opinion completely lacking in probative value towards establishing a material fact in the case. The statement would not be admissible for any purpose other than contradic-

tion, and is therefore collateral. Thus, when Dewayne Cutshall denied making the collateral statement, the State was bound by his answer and could not offer extrinsic evidence for the purpose of impeaching the witness as to his prior inconsistent statements. Yet, the admission of the incompetent testimony of Blanche Cutshall and Sheriff Roy Roberts contradicting Dewayne's denial gave the State the benefit of evidence which tended to weaken and undermine defendant's sole defense of alibi. The admission of the evidence is rendered highly prejudicial for the reason that its weight would be greatly magnified in the eyes of the jury because the damaging statements allegedly came from defendant's own child who was a witness for the defense.

The State did not contend—and we think properly so—that the contradictory evidence was admissible to show bias, temper or disposition of the witness. Assuming that the statement was made and that its content was such as to show bias or partiality, it could only be interpreted to show bias or partiality in favor of the State and against defendant.

Defendant did not request, nor did the judge on his own motion give, instructions restricting the evidence to impeachment. Had the instructions been given, the incompetent evidence would not have been rendered competent; nor is it probable that its highly prejudicial effect would have been diluted in the eyes of the jury by such instructions.

Error in the admission of this evidence requires a new trial.

Since there must be a new trial, we do not deem it necessary to discuss defendant's assignment of error concerning hearsay testimony of Bobby Stinson. The answer complained of was clearly hearsay, but was "invited" by defendant's counsel. In all probability this occurrence will be avoided at the new trial. *State v. Burton,* 256 N.C. 464, 124 S.E. 2d 108; *State v. Williams,* 255 N.C. 82, 120 S.E. 2d 442; *State v. Sutton,* 225 N.C. 332, 34 S.E. 2d 195.

New trial.

STATE OF NORTH CAROLINA v. EDWARD A. DAWSON

No. 73

(Filed 14 April 1971)

1. **Criminal Law § 71; Homicide § 15— homicide prosecution — evidence of defendant's attitude after the homicide — shorthand statement of fact**

In a prosecution charging defendant with homicide by kicking the victim to death, it was proper to admit testimony that, when defendant was describing to others how hard he had kicked his victim, he "seemed to be joking about it;" the reference to defendant's jocular mode of expression was admissible as a shorthand statement of fact.

2. **Criminal Law § 162— general objection to evidence — review on appeal**

When a general objection to evidence is interposed and overruled, it will not be considered reversible error if the evidence is competent for any purpose. Rule of Practice in the Supreme Court No. 21.

3. **Criminal Law § 43; Homicide § 20— photographs of homicide victim — admissibility**

Photographs of a homicide victim were admissible over the defendant's general objection for the limited purpose of illustrating the testimony of the witnesses, where it was shown that (1) the witnesses were familiar with the victim and (2) the photographs accurately portrayed the victim.

4. **Homicide § 1— prosecution — proof of corpus delicti**

The requirements sufficient to establish the *corpus delicti* in homicide cases are: (1) there must be a corpse, or circumstantial evidence so strong and cogent that there can be no doubt of the death and (2) the criminal agency must be shown.

5. **Homicide § 20; Criminal Law § 43— proof of homicide corpus delicti — use of photographs**

Photographs are admissible to illustrate testimony establishing the *corpus delicti* in a homicide prosecution.

6. **Homicide § 21— proof of corpus delicti — identity of homicide victim**

In establishing the *corpus delicti* in a homicide case, the State offered sufficient and competent evidence, through the examining pathologist and other witnesses, to show that the body on which the autopsy was performed was the body of the homicide victim named in the bill of indictment.

7. **Homicide § 21— proof of corpus delicti — criminal agency**

In establishing the criminal agency element of *corpus delicti*, testimony by the examining pathologist and by eyewitnesses was sufficient to show that the victim's death was caused by the defendant's kicking him in the head.

8. **Homicide § 15; Criminal Law §§ 34, 86— impeachment of defendant — evidence tending to show guilt of other crimes**

In a prosecution charging defendant with homicide by kicking the victim to death, the State's evidence that defendant had been involved in a fracas at a high school gymnasium earlier on the evening of the homicide, *held* admissible to impeach the defendant's testimony that, as a result of disabling injuries from falling off a horse, he was in no physical condition to kick anyone on the night of the homicide. The fact that the State's evidence might have tended to show defendant's guilt of an independent crime did not affect its admissibility.

9. **Witnesses § 6; Criminal Law § 89— impeachment of witnesses — scope of examination**

Questions designed to impeach the witness, if relevant to the controversy, may cover a wide range and are permissible within the discretion of the court.

10. **Criminal Law § 76— statements of minor defendant — admissibility — absence of mother from interrogation room**

The in-custody statements of a minor defendant were not rendered inadmissible by the fact that the mother of the defendant had not been apprised of the son's constitutional rights and was not allowed to be present at the interrogation.

11. **Criminal Law § 75— confessions — test of voluntariness**

The correct test of the admissibility of a confession is whether the confession was, in fact, voluntary under all the circumstances of the case.

12. **Criminal Law § 166— the brief — abandonment of assignments of error**

Assignments of error which are not preserved and properly brought forward in defendant's brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

13. **Criminal Law § 122; Homicide § 23— homicide case — additional instructions**

A trial judge in a homicide case who not only repeated the definitions of voluntary and involuntary manslaughter — as requested by the jury — but who also, "out of an abundance of precaution," repeated the definition of second-degree murder, did not commit prejudicial error.

APPEAL by defendant from *Godwin, S.J.*, July 1970 Criminal Session, WAKE Superior Court.

In a bill of indictment returned by a Nash County Grand Jury at the January-February 1970 Session of Nash Superior Court, defendant was charged with the first degree murder of Jimmie Collie on 22 November 1969 in Nash County. By consent, the case was removed to the Superior Count of Wake County for trial.

Upon the call of the case the solicitor announced in open court that the State would not ask for a verdict of murder in the first degree but would seek defendant's conviction of murder in the second degree, voluntary manslaughter, or involuntary manslaughter, as the evidence might disclose.

The testimony of Donald Brake, Danny Radford, William Ray Connie, Bobby Connie, Dennis Eason and Mike Eason tended to show that between the hours of 11 p.m. and 12 o'clock midnight on 22 November 1969, twenty-five or more teenagers gathered at Aycock Park in the City of Rocky Mount to witness a fight between Jimmie Collie and Michael Melvin. Collie and Melvin met at the appointed time and place and agreed it would be a fair fight—one on one. After an exchange of blows, Jimmie Collie knocked Mike Melvin out. James Adams then struck Collie in the mouth with his fist and knocked him down. Larry Powell and Larry Pittman then jumped on Collie at the same time. Defendant Edward Dawson kicked Jimmie Collie three times at that point following which Jimmie Collie arose and ran to his Mustang automobile with Larry Powell and Larry Pittman chasing him. James Adams and Larry Pittman blocked Collie's passage to the front of the Mustang and Collie attempted to go across the hood, whereupon Larry Pittman grabbed Collie's shoe and tripped him so that he fell across the hood face down. Collie rolled over on his back and Larry Powell struck him across the chest with a chain. Jimmie Collie then came off the hood of his car and landed face down on his hands or chest. As soon as Collie hit the ground defendant Edward Dawson started kicking him again and kicked him four or five times. Collie's head was on the curb and the remainder of his body in the street. When defendant Dawson first kicked him, "Jimmie was face down in the grass right just about an inch off the curb . . . from his top lip up was on the grass and [from] his chin down was on the curb." No one other than Edward Dawson kicked or struck Collie after he left the hood of the Mustang. Edward Dawson was wearing a tie-up, hard shoe, with laces in it—a leather shoe. When defendant Dawson had finished kicking him Jimmie Collie was part way under the car—his legs were on the pavement while his head and shoulders were on the cement curbing. Blood was oozing from Collie's mouth, nose and ears. Defendant Dawson and many others then ran off and Dawson was later seen at the Hamburger Shop. In obedience to a telephone call from the police to his mother, Dawson was taken by his mother to the police station.

William Ray Connie, who had ridden to Aycock Park with Jimmie Collie in his Mustang, knelt beside Collie and began calling his name but got no reaction. Collie had no pulse and was not breathing. William Ray Connie and his cousin Elbert Connie then loaded Jimmie Collie into the Mustang, driving first to the Bobby Connie home and then to Park View Hospital. It was the opinion of Bobby Connie that Jimmie Collie was dead at the time he saw him. It was determined at the hospital that Collie was dead on arrival. The exact time of his death is not revealed by the record.

At the time of his death, Jimmie Collie was eighteen years of age, approximately five feet, eight inches in height, weighed 140 pounds and was in good health.

Dr. Henry Haberyan, an admitted medical expert specializing in pathology, performed an autopsy upon the body of Jimmie Collie at the hospital in Wilson at 10:15 a.m. on 23 November 1969. In Dr. Haberyan's opinion, Jimmie Collie came to his death by reason of trauma or injury to the brain produced by a blunt instrument. After describing superficial lacerations and abrasions about the knees and a relatively minor lesion across the chest, Dr. Haberyan stated that "there were lacerations about the mouth, and of the right ear. These externally, did not appear to be of great severity but upon examination of the brain, a lesion of significance was found beneath the scalp over the right ear and in the bone [at] the base of the brain." The right ear was cut completely through and the margins of the lacerations were too irregular to have been inflicted by a cutting instrument. The autopsy revealed a congestion of blood in and swelling of the brain. The swelling caused compression of the centers in the brain that are concerned with breathing and heart action so that vital functions ceased, causing death due to the accumulation of fluid in the lungs.

Dr. Haberyan further testified that he found nothing which would have caused the death of Jimmie Collie other than the trauma to the head and that in his opinion the head trauma was inflicted by something blunt because there was no laceration of the skin of the scalp. "To external appearances . . . the only thing that could be seen in this area other than the lacerations of the ear, was swelling. So the agent that inflicted the wound would have had to have been something relatively blunt . . . rather than something sharp." He further stated that the head

and brain injury which he described could, in his opinion, have resulted from falling from the hood of a Mustang automobile and striking the head upon the concrete curb or could have been caused by a kick in the head with a shoe. Such a head wound would result in death within five minutes from the time of its infliction.

Edward Dawson, a witness in his own behalf, testified that in November 1969 he was eighteen years of age; that he had heard there was going to be a fight at Aycock Park on the night of November 22, 1969, and "wanted to ride by there to see what was going to happen"; that Jimmie Collie and Mike Melvin fought and Melvin was knocked out; that "Jimmie Collie stood up straddle him and with his legs straddled out and said 'who's next' "; that he helped Mike Melvin to a water fountain sixty to seventy feet away for the purpose of reviving him; that his (Dawson's) left arm was in a cast and his ankle was swollen and painful; that he saw James Adams swing at Jimmie Collie and heard somebody yell "let's get him"; that he saw Larry Powell hit Jimmie Collie with the chain and saw Collie after he was on the ground beside the Mustang but never touched him at any time either with his hands or his feet; that he heard Jimmie Collie say to a person who was bending over him there, "What are you trying to do, kill me?" Defendant stated that Steve Inscoe, who resembles defendant, was the nearest person to Jimmie Collie when he heard Collie make the quoted statement; that Steve Inscoe was wearing a brown corduroy coat, a pair of dungarees, and jungle boots. Defendant said he thereupon left the scene and rode to the Hamburger Shop with a boy named Reddie Hatfield; that in leaving the scene he went up an embankment where he could not see what was in front of him, ran across a pile of bushes or tree limbs that had been piled up for the City, caught his right leg in them and twisted his leg and ankle. He stated that he was having trouble with his ankle that night and it was in such condition he could not have kicked anyone.

Defendant admitted on cross examination that he had not subpoenaed Steve Inscoe, Steve Frye, William Fullford, Ronnie Joyner, Billy Outlaw, Karen Israel, and others, all of whom were present at the fight. He did subpoena and called as defense witnesses Michael Melvin, James Adams, Larry Powell and Larry Pittman, each of whom refused to testify on the ground that it might tend to incriminate him in connection with charges

pending against him in Nash Superior Court arising out of the same incident.

Defendant offered evidence by his parents and others tending to show that he is an Eagle Scout; that he was injured when he fell from a horse in September 1969 and in an automobile accident on 2 November 1969, as a result of which his right ankle was sprained, his left arm was placed in a cast from elbow to wrist, and "his hip was hurt," causing difficulty and swelling in his right ankle.

Steve Inscoe, testifying as a rebuttal witness for the State, stated that he never at any time struck or kicked Jimmie Collie on the night in question.

The testimony of Larry Hataway, a Rocky Mount detective, with respect to a statement made by defendant will be discussed in the opinion.

For the purpose of showing the physical condition of the defendant on the evening of 7 November 1969, two weeks prior to the fight in which Jimmie Collie was killed, the State offered the evidence of Mr. and Mrs. David Hendricks. Their testimony was substantially to the effect that Mr. Hendricks was coach at Benvenue School where he gave a party for the football players at the gymnasium on the night of 7 November 1969. Edward Dawson was neither a student nor a football player at that school, but came uninvited and was asked to leave. Defendant left but returned in a half hour accompanied by about fifteen other boys who marched single file into the gymnasium wearing sunglasses and smoking cigarettes, which they extinguished on the floor. Edward Dawson was wearing a cast on his left arm at the time. He and others in his group assaulted David Hendricks, striking him several times. Defendant Dawson, participating in the assault, pressed the arm cast against David Hendricks' neck, was strong and active and had no apparent disability save the cast on his arm. This evidence was offered and received over objection for the sole purpose of showing the physical condition of the defendant at that time and to impeach defendant's testimony that on the night of November 22 he was so disabled by injuries which he had received in a fall from a horse in September and in an automobile accident on November 2, that he could not have struck or kicked anyone.

Following arguments of counsel and charge of the court, the jury returned a verdict of guilty of voluntary manslaughter. A prison term of ten years was imposed by the court and defendant gave notice of appeal to the Court of Appeals. The case was transferred to the Supreme Court under its general referral order dated 31 July 1970.

Carl E. Gaddy, Jr., Attorney for defendant appellant.

Robert Morgan, Attorney General, by Thomas B. Wood, Assistant Attorney General.

HUSKINS, Justice.

Defendant's first thirty-nine exceptions and assignments of error based thereon are addressed to the admission of evidence. Those which merit discussion will be considered in numerical order.

[1] Defendant initially asserts that the trial court erred in allowing the witness Donald Brake to testify that when defendant, at the Hamburger Shop shortly after the fight, told him he had kicked Jimmie Collie so hard he had sprained his ankle, he "seemed to be joking about it." Defendant claims the witness was thus permitted to state a conclusion which was irrelevant and highly prejudicial in that it indicated an attitude of unconcern on defendant's part. No authority is cited and no reason stated in support of this assignment save the bare assertion that it was irrelevant and prejudicial. For that reason the assignment is deemed abandoned under Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783 at 810. Nevertheless, admission of the evidence was not error. The statement attributed to defendant was highly relevant and material, and defendant's jocular mode of expression was admissible as a shorthand statement of fact. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Gray,* 180 N.C. 697, 104 S.E. 647 (1920); Stansbury, N. C. Evidence (2d Ed., 1963) § 125. This assignment has no merit.

[2, 3] Assignments of Error 2 through 8 relate to the introduction of photographs of the deceased to illustrate the testimony of various witnesses. Viewed in context and in the setting at the trial, it appears that in each instance the familiarity of the testifying witness with deceased was established, and the accuracy of the photograph as a true likeness of Jimmie Collie

was shown. They were offered and admitted over defendant's general objection. When a general objection is interposed and overruled, it will not be considered reversible error if the evidence is competent for any purpose. Rule 21, Rules of Practice in the Supreme Court, 254 N.C. 783 at 803; *State v. Ham,* 224 N.C. 128, 29 S.E. 2d 449 (1944). Even so, the trial judge invariably instructed the jury to consider each photograph for illustrative purposes only and not as substantive evidence. They were competent for the limited purpose stated and their admission was not error. *State v. Casper,* 256 N.C. 99, 122 S.E. 2d 805 (1961), *cert. den.,* 376 U.S. 927, 11 L. Ed. 2d 622, 84 S.Ct. 691 (1964).

Defendant insists, however, that the State sought to use the photographs to establish the *corpus delicti;* that photographs may not be used for that purpose, and therefore the *corpus delicti* was never shown by competent evidence.

[4] "The phrase *'corpus delicti'* means literally the body of the transgression charged, the essence of the crime or offense committed. To establish the *corpus delicti* it is necessary to show the commission of a particular act and its commission by unlawful means." 1 Wharton's Criminal Law and Procedure (Anderson Ed., 1957), § 66. Strong and cogent circumstantial evidence may be sufficient to prove the *corpus delicti* where no direct evidence is available. "The *corpus delicti,* in cases such as we are considering, is made up of two things: first, certain facts forming its basis, and, secondly, the existence of criminal agency as the cause of them." *State v. Williams,* 52 N.C. 446, 78 Am. Dec. 248 (1860). *See also State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513 (1958); *State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773 (1954); *State v. Cuthrell,* 233 N.C. 274, 63 S.E. 2d 549 (1951). In homicide cases the requirements sufficient to establish the *corpus delicti* are more specific: (1) There must be a corpse, or circumstantial evidence so strong and cogent that there can be no doubt of the death, *State v. Williams, supra;* and (2) the criminal agency must be shown. *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844, 31 A.L.R. 2d 682 (1952). "The independent evidence must tend to point to some reason for the loss of life other than natural causes, suicide or accident." Rollin M. Perkins, The Corpus Delicti of Murder, 48 Va. L. Rev. 173 (1962).

[5] Here, defendant argues that the State failed to show by competent evidence that the body upon which the autopsy was performed was the body of Jimmie Collie because the photograph exhibited to the doctor was not competent as substantive evidence and was therefore inadmissible for the purpose of proving *corpus delicti.* This contention is not supported by the decided cases.

Photographs have been held properly admitted, with appropriate limiting instructions, to illustrate testimony establishing the *corpus delicti* in North Carolina and other jurisdictions. *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824 (1948); *State v. Miller,* 219 N.C. 514, 14 S.E. 2d 522 (1941); *Hines v. State,* 260 Ala. 668, 72 So. 2d 296 (1954); *Potts v. People,* 114 Colo. 253, 158 P. 2d 739, 159 A.L.R. 1410 (1945); *State v. Myers,* 7 N.J. 465, 81 A. 2d 710, 25 A.L.R. 2d 1171 (1951); Annotation, Admissibility of Photograph of Corpse in Prosecution for Homicide or Civil Action for Causing Death, 73 A.L.R. 2d 769 (1960) at § 14; 40 Am. Jur. 2d, Homicide, § 418.

This is in accord with the general rule that "photographs are competent to be used by a witness to explain or to illustrate anything it is competent for him to describe in words." *State v. Gardner, supra.* The photographs must, of course, be properly limited and authenticated, and must be relevant. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969).

[6] Applying these principles to the facts in this case, it appears that Dr. Haberyan, although not previously acquainted with Jimmie Collie, testified that the photograph exhibited to him was a fair and accurate representation of the body upon which he performed an autopsy, and expresed his expert opinion that a kick in the head inflicted by a leather shoe could have caused death. The witness Dennis Eason, who saw Jimmie Collie at the fight in Aycock Park, said he recognized the same photograph which had been shown to Dr. Haberyan as a fair likeness of Jimmie Collie on the night he was killed. The father of the deceased identified the same body as that of his son. Thus there was no failure to connect the subject of the autopsy to the deceased named in the bill of indictment. The assignments of error based on such contention are overruled.

[7] Manifestly, there was plenary evidence in proof of the second element of the *corpus delicti.* Several witnesses testified

that Jimmie Collie was kicked in the head by defendant Dawson following which blood was seen running from the victim's mouth, ears and nose. These witnesses observed that the victim had no pulse and was not breathing. Dr. Haberyan testified essentially that death was caused by a skull fracture behind the right ear and near the base of the brain, compressing vital centers controlling the heart and lungs, and that the fracture was caused by a blow inflicted by a blunt instrumentality such as a cement curbing or a leather shoe. There is no evidence in the record that when Jimmie Collie fell from the hood of the car the back of his head struck the curb. To the contrary, the testimony shows that he fell from the hood of the car and landed face down. This points to the conclusion that the blow which caused death was inflicted by Edward Dawson's shoe and greatly weakens the suggestion that Collie's death was attributable to other causes. It was a question for the jury. Defendant's motion for nonsuit was properly denied.

Defendant's Exceptions and Assignments of Error Nos. 9 and 13 through 39 concern the admission of testimony involving a fracas at the gymnasium of Benvenue School on the night of November 7, 1969, at a party given by the coach for his football players. These assignments therefore will be grouped for discussion.

[8] Defendant had testified that due to injuries received when he was thrown from a horse and when he was involved in an automobile accident on November 2, 1969, his physical condition was such that he was unable to kick Jimmie Collie as alleged by the State. On cross-examination the solicitor referred to defendant's professed physical disability and asked: "Didn't keep you from getting into a fight with the coach of the football team at Benvenue School, did it?" Defendant's objection and motion to strike were overruled. Later, over the continued objections of defendant, the State was permitted to elicit rebuttal testimony from Coach Hendricks and his wife to the effect that Edward Dawson was neither a student nor a football player at Benvenue School; that defendant came to the party uninvited and was requested to leave; that he left but returned in a half hour accompanied by fifteen other boys who marched into the gym and assaulted the coach; that defendant pressed the arm cast he was wearing against Coach Hendricks' neck, struck the coach, was strong and active and had no apparent disability save

the cast on his arm. This evidence was offered and received for the sole purpose of showing the physical condition of the defendant at that time and to impeach defendant's testimony that on the night of November 22 when Jimmie Collie was killed defendant was so disabled by injuries that he could not have struck or kicked anyone. The jury was specifically instructed to consider the evidence only for that purpose.

[9] The evidence was competent for the limited purpose for which it was admitted. Under the North Carolina rule of wide-open cross-examination, so called because the scope of inquiry is not confined to matters brought out on direct examination, questions designed to impeach the witness, if relevant to the controversy, may cover a wide range and are permissible within the discretion of the court. *State v. Penley,* 277 N.C. 704, 178 S.E. 2d 490 (1971); *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); *State v. Dickerson,* 189 N.C. 327, 127 S.E. 256 (1925); Stansbury, N. C. Evidence (2d Ed., 1963), §§ 35, 56; 4 Jones on Evidence (5th Ed., 1958), §§ 928-929.

[8] Nor was the testimony of Coach Hendricks and his wife, offered by way of rebuttal to impeach defendant's testimony of his professed physical incapacity, rendered inadmissible by the general rule which prohibits the State from offering evidence of other offenses committed by the defendant on trial. Such evidence, when it "tends to prove any other relevant fact . . . will not be excluded merely because it also shows him to have been guilty of an independent crime." Stansbury, N. C. Evidence (2d Ed., 1963), § 91; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). Assignments of Error Nos. 9 and 13 through 39 are thus without merit and are overruled.

[10] Appellant next contends that the trial court erred in allowing Detective Hataway to testify in rebuttal that defendant stated during an in-custody interrogation that he kicked the deceased two or three times. The record reveals that upon timely objection a *voir dire* was conducted, at the conclusion of which the judge made findings of fact that before defendant made any statement to Officer Hataway he was fully advised of his constitutional rights and understood them. The judge concluded that any statement made by defendant to the officer was made knowingly, freely and voluntarily. Nevertheless, defendant now contends his incriminating statement was involuntary because his

mother, who was present at the police station at the time of the interrogation, was not apprised of her son's constitutional rights and was not allowed to be present at the interrogation. In support of this contention, defendant cites *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602 (1966), and *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S.Ct. 1758 (1964).

We find nothing in *Miranda* or *Escobedo* which even remotely supports defendant's position. A confession is not rendered involuntary merely because the person making it is a minor. *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738 (1970); *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969); Annotation, Voluntariness and Admissibility of Minor's Confession, 87 A.L.R. 2d 624 (1963). The California Supreme Court in *People v. Lara,* 67 Cal. 2d 365, 62 Cal. Rptr. 586, 432 P. 2d 202 (1967), held that the "totality of circumstances" rule for the admission of out-of-court confessions applies to the confessions of minors as well as adults. The Court said: "We cannot accept the suggestion of certain commentators . . . that every minor is incompetent as a matter of law to waive his constitutional rights to remain silent and to an attorney unless the waiver is consented to by an attorney or by a parent or guardian who has himself been advised of the minor's rights." The Court then concluded: "This, then, is the general rule: a minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement." *See also Vaughn v. State,* 456 S.W. 2d 379 (Tenn. Crim. App., 1970); *McLeod v. State,* 229 So. 2d 557 (Miss., 1969); *United States ex rel Walker v. Maroney,* 313 F. Supp. 237 (1970); *Commonwealth v. Darden,* 441 Pa. 41, 271 A. 2d 257 (1970).

[11] So it is with us. The correct test of the admissibility of a confession is whether the confession was, in fact, voluntary under all the circumstances of the case. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). While the testimony on *voir dire* is conflicting, there is ample evidence to support the finding that defendant was apprised of his constitutional rights and knowingly and voluntarily made the statement attributed to him. Under

our procedure such findings by the trial judge are conclusive if supported by competent evidence. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968); *State v. Gray, supra; State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344 (1965); *State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847 (1961).

We are aware of the different procedure used in the federal courts, where an independent examination of the facts is made to determine voluntariness. In earlier federal cases it was held that reviewing federal courts were likewise bound by the facts as found by the trial judge. *See, e.g., Watts v. Indiana,* 338 U.S. 49, 93 L. Ed. 1801, 69 S.Ct. 1347 (1949); *Lyons v. Oklahoma,* 322 U.S. 596, 88 L. Ed. 1481, 64 S.Ct. 1208 (1944); *Lisenba v. California,* 314 U.S. 219, 86 L. Ed. 166, 62 S.Ct. 280 (1941). In *Watts,* Justice Frankfurter wrote: "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court." He noted, however, the amorphous nature of a "constitutional fact." More recently, the United States Supreme Court has greatly enlarged the scope of federal independent determination of facts with respect to constitutional rights. *See Haynes v. Washington,* 373 U.S. 503, 10 L. Ed. 2d 513, 83 S.Ct. 1336 (1963); *Davis v. North Carolina,* 384 U.S. 737, 16 L. Ed. 2d 895, 86 S.Ct. 1761 (1966); *Clewis v. Texas,* 386 U.S. 707, 18 L. Ed. 2d 423, 87 S.Ct. 1338 (1967). In *Davis,* the Court said: "It is our duty in this case, . . . as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness." Professor Strong, who recently chronicled this change of scope, observes: "Clearly, 'independent examination of the whole record' means, where deemed necessary to vindication of the constitutional claim, review of facts disputed as well as undisputed." Frank R. Strong, The Persistent Doctrine of "Constitutional Fact," 46 N.C.L. Rev. 223 (1968). Moreover, United States District Courts have wide fact-finding powers exercisable in the determination of federal constitutional claims on *habeas corpus. Townsend v. Sain,* 372 U.S. 293, 9 L. Ed. 2d 770, 83 S.Ct. 745 (1963); *Fay v. Noia,* 372 U.S. 391, 9 L. Ed. 2d 837, 83 S.Ct. 822 (1963). *See* J. Skelly Wright and Abraham D. Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 75 Yale L. J. 895 (1966).

Our procedure upholding the findings if supported by competent evidence is grounded on the reliability of the trial judge who hears the testimony on *voir dire,* observes the demeanor of the witnesses, and sits in a more strategic position to judge credibility and determine the true facts with respect to voluntariness. Here, the facts are only weakly disputed and the record strongly supports the findings. All assignments of error addressed to the admission of defendant's statement are overruled.

It is worthy of note that under the law as recently declared by the United States Supreme Court defendant Dawson's statement to the officers, even if obtained in violation of *Miranda,* would be competent on rebuttal (so used here) to impeach and attack the credibility of his trial testimony. In *Harris v. New York,* 39 U.S.L.W. 4281, decided February 24, 1971, the prosecution made no effort in its case in chief to use statements allegedly made by Harris, conceding that they were inadmissible under *Miranda* for that the required warnings of constitutional rights had not been given. Harris took the stand in his own defense and his testimony contrasted sharply with what he told the police shortly after his arrest. In rebuttal, the prosecution was permitted to use his inadmissible statements to the police for the limited purpose of impeaching and attacking the credibility of defendant's trial testimony. The Supreme Court of the United States affirmed, saying: "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards."

[12] Finally, defendant assigns as error several portions of the charge. Since only one assignment is preserved and properly brought forward in defendant's brief, all others are deemed abandoned under Rule 28, Rules of Practice in the Supreme Court, *supra.*

[13] After retiring to consider its verdict, the jury returned and requested the court to repeat its definitions of voluntary and involuntary manslaughter. The trial judge, "out of an abundance of precaution," repeated his charge as to second degree murder and then detailed the circumstances which legally reduce that crime to manslaughter, voluntary or involuntary, as the jury might find from the evidence. Defendant assigns this as

error, contending that its effect was to cause the jury to reconsider second degree murder as a possible verdict and perhaps to find defendant guilty of voluntary rather than involuntary manslaughter. This contention has no merit.

It is true that a judge who is requested by the jury to reiterate his instructions on some particular point is not required to repeat his entire charge. *McGaha v. State*, 216 Ark. 165, 224 S.W. 2d 534 (1949); 23A C.J.S., Criminal Law, § 1376(d); 53 Am. Jur., Trial, § 942. Indeed, needless repetition is undesirable and has been held erroneous on occasion. 53 Am. Jur., Trial, § 559. But where a careful trial judge, as here, repeats his definition of second degree murder for the express purpose of delineating the law and clarifying its application to factual situations requiring a verdict of voluntary or involuntary manslaughter, his diligence will be commended rather than condemned. Even had the repetition been erroneous, which is not conceded, no prejudice resulted because the jury returned a verdict of voluntary manslaughter and thus acquitted defendant of second degree murder. The matter complained of was entirely harmless and the assignment of error based thereon is not sustained.

Prejudicial error in the trial below has not been shown. The verdict and judgment must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. PHILLIP MARSHALL HILL and JAMES A. GALLOWAY

No. 68

(Filed 14 April 1971)

1. **Constitutional Law § 32— waiver of right to counsel — police lineup**

   Defendant's statement to police officers, after he had been advised of his rights, that he did not need an attorney during a police identification lineup constituted a valid waiver of the right to counsel.

2. **Criminal Law § 66— police lineup procedures — question of suggestiveness**

   The fact that the participants in a police identification lineup were required three or four times to change their numbers and to shift their positions in the line did not render the lineup suggestive or conducive to mistaken identification.

3. **Criminal Law § 66— police lineup — failure to make immediate identification**

The fact that the defendant was not identified in the first of two police identification lineups goes to the weight of the identification testimony rather than to its competency.

4. **Searches and Seizures § 1— warrantless search of automobile at police station — lawfulness of search**

It was lawful for officers to make a warrantless search of defendant's automobile that had been taken to the police station following the defendant's arrest for armed robbery, where (1) the officers had probable cause to stop the defendant's car and arrest defendant, (2) a search of the car on the highway would have been impractical and perhaps dangerous, and (3) a shotgun barrel and a pistol barrel openly protruded from under the seat of the automobile.

5. **Searches and Seizures § 1— lawfulness of warrantless seizure — case where search is unnecessary**

The constitutional guaranty against unlawful searches and seizures does not prohibit police officers from making a warrantless seizure in cases where a search is unnecessary.

6. **Searches and Seizures § 1— seizure of concealed guns in automobile**

The warrantless seizure of pistols that were wholly concealed under an automobile seat was lawful where the pistols were discovered during the lawful removal of visible weapons from the car.

APPEAL by defendants from *Cooper, J.*, at the 19 October 1970 Criminal Session, CUMBERLAND Superior Court.

Criminal prosecution upon a bill of indictment, proper in form, charging defendants with the armed robbery of Marie Harmon on 28 May 1970.

The State's evidence tends to show that Mrs. Marie Harmon was operator of the Star Stop Grocery in Cumberland County. At 9:45 p.m. on the evening of 28 May 1970, two Negro men entered the grocery. One walked to the counter directly in front of Mrs. Harmon, stood there for two or three minutes, and "handled some bottles that had been taken out of the cooler." The other went to the back of the store where he was not immediately in view. The two men then got together and walked to the counter where Mrs. Harmon was standing. She asked if she could help them. One replied, "Yes, just open up the cash register and give me all the money." He had a small gun with a black barrel pointed at Mrs. Harmon. She opened the cash register and held out the money and some checks. The robbers took the money, threw the checks on the counter, and left by the

front door. Mrs. Harmon followed them outside, saw a man across the street pumping gas, screamed for help, and the robbers started running. She then reentered the store and called the sheriff's department. Deputy Sheriff Frye, in response to a radio call, arrived at the store within three minutes. She told this officer that the robbers were two colored males, one six feet tall and the other shorter, one wearing an orange hat with some sort of writing on it, and both of medium dark complexion. As a result of information received by Deputy Frye and relayed to the sheriff's department, an alert was put out for a blue Ford bearing Maryland License No. CM 8917.

At approximately 10:10 p.m., Officer O'Brian, who had received the radio alert, parked near Vick's Drive-In on Rowan Street in Fayetteville. He saw three Negro men (later identified as Phillip Marshall Hill, James A. Galloway and Vernon Harmon) at the drive-in standing between a 1968 Ford Torino bearing Maryland License No. CM 8917 and a red 1964 Ford Fairlane with a taillight out. In about ten minutes Galloway and Harmon entered the 1964 Fairlane and proceeded west on Rowan Street with Galloway driving. Deputy Willie Brown in Car 38 was alerted by Officer O'Brian to stop this vehicle and check out the two occupants with reference to the armed robbery. Defendant Hill entered the 1968 Ford Torino and, as he turned west on Rowan Street, was stopped by Officer O'Brian and placed under arrest for armed robbery. A big orange hat was lying between the seats. A person who was with Officer O'Brian drove the Torino to the sheriff's department where it was parked and locked. It was later searched with Hill's written permission. Nothing was found save the orange hat which was seized and offered in evidence at the trial.

Deputy Brown in Car 38 was parked on Rowan Street near Vick's Drive-In. After receiving the alert from Officer O'Brian, he saw the 1964 Fairlane leave Vick's Drive-In with James Galloway driving. He followed and stopped it at Bragg Boulevard. When Deputy Brown got out of his vehicle, he saw Galloway pass something to Vernon Harmon, the passenger on his right, who looked back and then bent forward as if to put something under the seat. Galloway was dressed in pants and a blue shirt. When he opened the glove compartment to produce his driver's license and registration card, the officer saw two boxes of Remington ammunition. When Galloway opened the

door to get out of the car, the officer saw about four inches of a shotgun barrel protruding from under the seat. Deputy Harvey Carter arrived on the scene and took Galloway to the courthouse. Deputy Brown drove the 1964 Fairlane to the courthouse with Vernon Harmon as a passenger. There, he removed Harmon from the car and delivered him to other officers. Then Deputy Brown and Officer O'Brian shined a flashlight into this vehicle and saw a pistol protruding from under the front seat on the right side. Officer Brown opened the door, reached to get the pistol they had observed and discovered that there were two more pistols under the seat. The three pistols and shotgun were taken by the officers and later offered in evidence at the trial. The pistols were loaded and the shotgun was loaded with rifle slugs.

Upon Galloway's timely objection prior to the introduction of the weapons and the Remington ammunition, a *voir dire* was conducted in the absence of the jury, during which only evidence for the State was heard—defendants offered none. At the conclusion of the *voir dire* the court found facts substantially as above set out and concluded as a matter of law that Officers Brown and O'Brian had probable cause to search the 1964 Fairlane for weapons and stolen money.

Between midnight and 1 a.m. on the same night of 28 May 1970, in response to a call from the sheriff's department, Mrs. Marie Harmon went to the courthouse to view a lineup. There, she entered a viewing room and looked at a lineup in an adjacent room through a one-way glass window. There were six or seven people in the lineup, including defendants Hill and Galloway, Vernon Harmon, one Eddie Butler and others. She immediately identified Galloway as the man wearing the orange hat when she was robbed three hours earlier. She did not identify Hill that night but returned and viewed a second lineup the following morning at 10 a.m. At that time she identified Hill as the other robber.

Upon timely objection by defendants, interposed before any testimony with respect to the lineups had been elicited, the court conducted a *voir dire* in the absence of the jury. Both the State and the defendants offered evidence on the *voir dire*. Among other things, Mrs. Harmon said that although she identified both defendants in the lineup, "my identification here today has been based on the time of the robbery. I base my

recollection of Galloway on the fact that I observed him for two or three minutes at least at one time. Also, I base the identification on his general appearance, his face, and one thing is that he is extremely thin. An extremely thin person came toward me before he went to the back. I looked at him at that time. He came within two feet of me. I base my recollection of the identification of Hill on the same things. That is, I recall his facial features and his complexion. He just looks like the person. There is no doubt in my mind these were the two men who came into my business on May 28, 1970. It was never suggested by any law enforcement officer prior to the identification of the lineups that these were the men."

Deputy Louis Frye testified for the State on *voir dire* that he first talked to defendant Hill, warned him of his rights and read a regular rights form to him; that he told Hill they were going to have a lineup; that Hill was suspected of armed robbery and entitled to have an attorney present at the lineup and during any questioning and one would be appointed for him if he couldn't afford one; that he did not have to stand in the lineup until he talked to an attorney or until he had one present, and that he offered to call Mr. Cherry, the Public Defender, for Hill, whereupon Hill stated he did not mind standing in the lineup, did not need an attorney, but did not want to sign any papers.

Deputy Frye further stated that he advised defendant Galloway of his constitutional rights, telling him the same thing he had told Hill; that both defendants stated they didn't mind standing in a lineup, that they didn't have anything to be afraid of and did not want the services of an attorney; that they did not want to sign any papers and refused to sign the regular rights form.

The defendant Hill testified on *voir dire* that the first lineup was conducted about 12:30 a.m. on the night of 28 May 1970; that there were seven people in the lineup including himself, James A. Galloway, Vernon Harmon and Eddie Butler; that after he left the lineup he didn't participate in any lineup after that night; that during the lineup the participants would be required to turn around, change numbers, shift positions, and then turn and face the window with the one-way glass; that this shifting of positions and exchange of numbers was carried out three or four times during the lineup in which

he participated; that he signed a paper that night "stating that they could search my car" and said, "you can go and search it"; that he was not advised of his constitutional rights before the lineup was conducted but was advised later when the warrant was served upon him.

James A. Galloway testified on *voir dire* that he was in the same lineup described by defendant Hill; that he heard Mrs. Harmon talking and heard her say that "No. 2 looked like the one. Then, I looked down to my number to make sure what it was and started objecting right then." This defendant further stated that he signed a rights form containing a waiver of those rights after he had read it, and he identified his signature thereon; that Lt. Washburn read the rights form to him after the warrant was served; that he did not know before the lineup that he was being charged with armed robbery; that he signed the rights form after the lineup and had not been advised of his rights before the lineup was conducted.

Vernon Harmon testified on *voir dire* that he was placed in four or five lineups and remembered seeing James Galloway and Phillip Hill in the lineups; that about seven of them were standing against the wall; that it all took place about 11:30 p.m.

Deputy Frye returned to the stand as a State's witness and again, on rebuttal, testified that Galloway and Harmon were brought into the room a few minutes after he sat down to talk to Hill; that all three were advised of their constitutional rights prior to any lineup.

Following the *voir dire* and upon conclusion of arguments, the court made findings of fact that both defendants were advised of their constitutional rights as specified in *Miranda v. Arizona* (384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602) prior to the lineup; that each defendant stated that he did not object to participating in a lineup, did not want the services of an attorney, but did not want to sign any papers; that the lineup was thereafter conducted and Mrs. Harmon identified defendant Galloway that night as one of the robbers and, following the second lineup the next morning, identified the defendant Hill as the other robber; that Mrs. Harmon never at any time identified any other person as having participated in the robbery. Based on those findings the court concluded that the lineup

procedure was not illegal, did not violate the constitutional rights of either defendant, and that defendants willingly, knowingly and understandingly participated in said lineups after having been advised of their rights and of the armed robbery charge under investigation. The court further concluded that Mrs. Harmon's in-court identification of defendants Hill and Galloway was not based upon her observation of them at the lineup but originated independently from her observation of defendants during the robbery. The judge ruled that the identification evidence to which objection had been made was admissible, and Mrs. Harmon was permitted to identify defendants in court before the jury.

Defendants offered evidence before the jury tending to establish an alibi. James A. Galloway testified that on 28 May 1970 he lived in a trailer at 604 Leisure Living Trailer Park with Vernon Harmon and Miss Cadena James, Harmon's "girl friend." The trailer park is one mile from the Star Stop Grocery. At 11 a.m. on that date he left his residence and went to Fayetteville State College where he picked up his girl friend Debora Cunningham. Returning to his residence with her, he picked up Vernon Harmon and Cadena James, and the four of them went shopping in downtown Fayetteville. They returned to his residence about 7 p.m. At 8 p.m. they went to the Laundromat and stayed there until 9:45 p.m. They then returned to his trailer at Leisure Living Trailer Park and stayed there until 11 p.m., at which time he and Vernon Harmon drove to Vick's Drive-In where he saw the defendant Hill for the first time that day. Shortly after leaving Vick's Drive-In he was arrested.

Defendant Galloway further stated that he was not at the Star Stop Grocery that day and did not rob Mrs. Harmon; that he had never worn the orange hat referred to in the State's evidence and first saw it at the hearing; that the car he was driving at the time of his arrest, and the weapons in it, belonged to Vernon Harmon; that the weapons were kept at the trailer where they lived, loaded.

Vernon Harmon testified that defendant Galloway was with him all day on 28 May 1970 as detailed in Galloway's testimony. With reference to the weapons, this witness said: "We had the pistols in the house and were going to take them to a friend's house. We were going to leave them at his house.

I don't recall his name at the moment. . . . I was in my car but it was being driven by James Galloway. . . . I knew that there were three loaded pistols and a loaded shotgun in the car under the seat."

Cadena James corroborated the testimony of defendant Galloway with reference to his whereabouts on 28 May 1970.

Phillip Marshall Hill testified that he lived at Leisure Living Trailer Park on 28 May 1970 and knew James Galloway who was his friend; that between the hours of 6 p.m. and 11 p.m. on 28 May 1970 he was at the home of Bobby Adams playing poker and whist with Adams, Dwight Tyler and others; that when he left at 11 p.m. he drove to Vick's Drive-In, arriving at 11:20 p.m., and was arrested five or ten minutes later; that he was a member of the United States Army and had been paid $326 that morning; that he had never been to the Star Stop Grocery and did not rob the store; that he had not been with James Galloway and saw him for the first time that day at 11:30 p.m. at Vick's Drive-In; that the orange hat was not in his car when the officer stopped him, "but it might have been when I got to the Courthouse. . . . I was in a patrol car. One of the officers drove my car."

Bobby Adams, a staff sergeant in the United States Army, testified that defendant Hill played poker and whist at his house from 6:30 or 7 o'clock p.m. until 10:45 p.m. on 28 May 1970; that Hill and Dwight Tyler came together and Hill left at 10:45 p.m. to get food; that he next saw Hill after he was subpoenaed to appear at the preliminary hearing.

Dwight Tyler testified that he lived at the same house where defendant Hill lived; that he and Hill went to the home of Bobby Adams between 6:30 and 7:00 p.m. on 28 May 1970 to play poker; that Hill did not leave the poker party from the time he arrived until 10:45 p.m. when he left to go to Vick's Drive-In; that they were all paid at Fort Bragg on that date.

David Green testified that he went to the home of Bobby Adams about 6:30 p.m. on 28 May 1970 and borrowed his car with the understanding that he would return it before 11 p.m.; that he returned the car at 10:50 p.m. that night and defendant Hill, who was in the process of getting into his car, drove away at that time.

Deputy N. A. Monroe, a rebuttal witness for the State, testified that the orange hat (State's Exhibit 1) was on the right hand side of the front seat of Hill's car on the night of 28 May 1970; that he removed the hat and gave it to Deputy Frye who tagged it.

Deputy Frye testified that he tagged the hat given him by Deputy Monroe and that it had been in the locker in the sheriff's department since that time.

Following arguments of counsel and charge of the court, the jury returned a verdict of guilty as charged as to each defendant. Judgment was pronounced imposing a prison term of not less than twenty nor more than twenty-five years on each defendant, and defendants gave notice of appeal to the Court of Appeals. The case is before the Supreme Court for initial review under our general referral order dated 31 July 1970.

Sol G. Cherry, Public Defender, Twelfth Judicial District, for Defendant Appellant Phillip Marshall Hill; Mitchel E. Gadsden, Attorney for Defendant Appellant James A. Galloway.

Robert Morgan, Attorney General; William W. Melvin and T. Buie Costen, Assistant Attorneys General, for the State.

HUSKINS, Justice.

Was the lineup procedure employed in this case so unnecessarily suggestive and so conducive to irreparable mistaken identification as to constitute a denial of due process in violation of the Fourteenth Amendment? This is the only question posed by the appeal of Phillip Marshall Hill.

[1] The issue of waiver of counsel is not raised, although no counsel was present at the lineups in question. The court found on conflicting evidence at the *voir dire* that prior to any lineup Hill was fully advised of his constitutional rights, including the right to have counsel present, and stated, in the words of Deputy Frye, that "he didn't mind standing in the lineup and that he didn't need an attorney." This defendant thus exercised an "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 58 S.Ct. 1019, 146 A.L.R. 357 (1938); *Brady v. United States,* 397 U.S. 742, 25 L. Ed. 2d 747, 90 S.Ct. 1463 (1970). In such fashion, Hill waived the right to counsel as an incident of due process accord-

ed him by the Fourteenth Amendment, a right fully discussed in *United States v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S.Ct. 1926 (1967), and *Gilbert v. California,* 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S.Ct. 1951 (1967).

Notwithstanding the waiver of counsel, Hill contends the lineup procedures used to identify him were "so impermissively suggestive as to give rise to a very substantial likelihood" of irreparable mistaken identification—a denial of due process of law. *Simmons v. United States,* 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S.Ct. 967 (1968); *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S.Ct. 1967 (1967); *Foster v. California,* 394 U.S. 440, 22 L. Ed. 2d 402, 89 S.Ct. 1127 (1969); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969); *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968). This requires an examination of the totality of circumstances surrounding the questioned lineups.

The evidence on *voir dire* conflicts as to exactly how many lineups were conducted, and the trial judge refused to find as a fact that any certain number were held. The conflict emerging from the testimony, however, seems more a battle of semantics than the result of faulty memory. It is undisputed that Hill and Galloway stood in a lineup with six or seven other men at approximately 1:00 a.m. in the early morning of May 29. With respect to this lineup, Hill himself testified that the participants would be required to turn around, change numbers, shift positions in the line, and then turn to face the one-way glass window through which the lineup was being observed. Some of the witnesses described each shift and change as an additional lineup, while others treated it as one lineup throughout the proceeding. This accounts in large measure for the conflicting testimony with respect to the number of lineups conducted and, in our view, has no legal significance. After viewing the two defendants in a lineup conducted as described, Mrs. Harmon identified James A. Galloway as one of the men who robbed her approximately three hours earlier that night.

At 10:30 a.m. on May 29, about ten hours later, the second phase of the lineup procedure took place. This phase roughly paralleled the procedure of the first phase. The men were placed in line, viewed by Mrs. Harmon through the one-way window, then asked to change numbers and positions and again face

the viewing window. Deputy Frye testified: "We always have three or four lineups and switch the person around in places beside different people and in different locations." Following this phase, defendant Hill was identified by Mrs. Harmon as one of the robbers.

[2] It appears that the number of lineups conducted depends upon the notion of the various witnesses as to what constitutes a lineup. Nevertheless, the number is unimportant. The significant inquiry is whether the procedure used was suggestive and conducive to mistaken identification. We hold that it was not. The circumstances revealed by this record do not even approach in suggestiveness the procedure employed by police in *Stovall* (bedside identification of a single suspect); or in *Foster* (defendant, six feet tall, required to stand in two successive lineups with two short men while wearing a jacket similar to that worn by the robber); or in *Simmons* (suggestive use of photographs). Indeed, the procedure used here seems calculated to make identification more difficult and to insure the correctness of the identification eventually made. The shifting of the men in line accompanied by an exchange of the number held by each certainly did not make the identification any easier. Furthermore, there is no evidence of any suggestions by the police prior to the lineup or of any effort by the officers to direct the attention of Mrs. Harmon to any particular participant. No apparent physical disparities between the participants rendering the defendants especially obvious appear in the record; and the number of participants in the lineup was sufficient to negate any suggestion that defendants were the robbers merely because of their presence. See *State v. Rogers, supra,* for cases from other jurisdictions which illustrate the suggestive, unfair type of lineup referred to in *Wade, Gilbert* and *Stovall* and condemned by the United States Supreme Court in *Foster v. California, supra.*

[3] The fact that Hill was not identified in the first lineup does not indicate suggestiveness. The purpose of the *Wade, Gilbert* and *Stovall* line of cases is to curtail suggestive lineup *procedures.* If the procedure is fair to the defendant, the fact that the identification itself is not immediate goes to the weight rather than the competency of the testimony and is thus a matter to be considered by the jury. *Lewis v. United States,* 417 F. 2d 755 (1969), *cert. den.,* 397 U.S. 1058, 25 L. Ed. 2d 676, 90 S.Ct. 1404; *Parker v. United States,* 404 F. 2d 1193 (1968).

It is worthy of note that Mrs. Harmon viewed the first lineup within three hours and the second lineup within approximately twelve hours of the robbery. Events were fresh in her mind. She never at any time identified any other person as having robbed her. Her store was well lighted and she had observed the robbers closely when the crime was committed. She described their clothing, their facial features and complexion, and testified both on the *voir dire* and before the jury: "There is no doubt in my mind that the defendants James A. Galloway and Phillip Hill are the ones who came into my store on the evening of May 28, 1970 and robbed me." She further stated that her identification at the trial was based on her recollections at the time of the robbery. The trial judge so found at the conclusion of the *voir dire*. Thus, had the lineup been illegal, as suggested but not shown, there is ample evidence that the in-court identification was of independent origin and therefore competent. *State v. Wright, supra* (274 N.C. 84, 161 S.E. 2d 581). This assignment of error is overruled.

[4] Defendant Galloway contends that the weapons found in a warrantless search of the 1964 Fairlane at the police station after his arrest were the fruits of an illegal search and inadmissible under *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S.Ct. 1684 (1961). He assigns as error the admission of the shotgun and three pistols taken by the officers from the car he was operating. This constitutes Galloway's only assignment of error.

The assignment ignores recent authority to the contrary. In *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970), the United States Supreme Court dealt with a fact situation on all fours with the facts in this case. There, acting on information concerning the clothing worn and the car driven by the robbers, police stopped a car fitting the description given and arrested its occupants for the robbery. Later, after the car had been taken to the police station, it was searched without a search warrant and the incriminating evidence was seized. The Supreme Court held that the Fourth Amendment rights of the accused were not violated by the warrantless search for that there was probable cause to search the vehicle on the spot at the time of the arrest, and such probable cause still obtained at the station house. The rationale of the decision, which arguably marks a digression from the

formerly prevailing view of the Fourth Amendment (see separate opinion of Mr. Justice Harlan), is that there is "a constitutional difference between houses and cars" by reason of the mobility of the latter. The Court explained that even when the car was sitting at the station house, it was highly mobile and its contents in danger of removal "unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured."

We think it clear that *Chambers* controls the instant case. Here, the police, acting on reliable information, had probable cause to stop the 1964 Fairlane driven by Galloway and arrest him. As in *Chambers,* a careful search of the car was reasonable but impractical and perhaps dangerous at the time and place of the arrest. The station house search a short time later was fully justified and constituted a lawful search. *State v. Jordan,* 277 N.C. 341, 177 S.E. 2d 289 (1970); *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753 (1970).

[5, 6] Furthermore, when the circumstances require no search, the constitutional immunity from unlawful searches and seizures never arises. "Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without warrant where there is no need for a search, and where the contraband subject matter is fully disclosed and open to the eye and hand." 47 Am. Jur., Searches and Seizures, § 20; *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). Here, the shotgun barrel and one pistol barrel protruded from under the car seat, and the presence of those two weapons was fully disclosed. When two additional pistols were discovered while the officers were in the act of removing the visible weapons, their subsequent seizure was a mere continuation of a lawful seizure of the visible weapons and in nowise constituted an unlawful search prohibited by the Fourth Amendment. *State v. Dobbins,* 277 N.C. 484, 178 S.E. 2d 449 (1971); *State v. McCloud, supra.* This assignment of error is overruled.

In the trial below, we find

No error.

RAYMOND CLOTT v. GREYHOUND LINES, INC.

No. 18

(Filed 14 April 1971)

1. **Carriers § 16— bus company's liability for baggage**

A bus company was not an insurer of a bag that was carried aboard its bus in the passenger's custody and control and whose existence the company was unaware until it was notified that the passenger had lost the bag.

2. **Carriers § 16; Bailment § 3— liability for baggage — gratuitous bailment — creation of involuntary trust**

A bailment solely for the benefit of the bailee—a gratuitous bailment—may be effected with respect to baggage which comes into the hands of a carrier as an involuntary trust through accident or mistake.

3. **Carriers § 16— carrier's liability for baggage**

Ordinarily, a passenger leaving personal baggage in a carrier upon alighting therefrom cannot hold the carrier responsible for the loss of the baggage; but the carrier may be held liable where a subsequent loss proximately resulted from the failure of the carrier's employees to take care of the baggage after full knowledge of the facts.

4. **Carriers § 16; Bailment § 3— bus passenger's loss of bag and contents — negligence of bus company — sufficiency of evidence**

A bus company could be held liable, as a gratuitous bailee, for the loss of a bag and its contents that was carried aboard the company's bus in the custody of a passenger and that remained on the bus after the passenger was left behind during a stopover, where the passenger's evidence tended to show that (1) the bag recovered from the bus at the next stopover was the passenger's bag, (2) the company's terminal manager received the bag with its locks unbroken, (3) the bag thereafter remained in the control and possession of the company, and (4) the bag was subsequently returned to the passenger with its locks broken and its contents rifled.

5. **Carriers § 16— liability for baggage — damages — federal law**

Federal statutes are applicable to the amount of damages a plaintiff may recover for the loss of a bag in interstate commerce.

ON *certiorari* to North Carolina Court of Appeals to Review its decision (9 N.C. App. 604, 177 S.E. 2d 438) affirming judgment of *Ransdell, District Judge,* entered 31 March 1970 Session of WAKE County District Court.

Civil action to recover damages for the loss or theft of a leather bag and its contents while it was allegedly in custody of defendant.

Plaintiff offered evidence which consisted of his own testimony and the adverse examinations of three of defendant's employees. A. H. Howell, by his adverse examination, testified that in December 1966 he was employed as a driver for Greyhound Bus Lines, and during the month of December he made a regular trip from Columbia, South Carolina, which was scheduled to arrive in Raleigh, North Carolina, at 11:30 a.m. on 2 December 1966. He testified:

"... When I arrived in Raleigh I was notified that there was a fellow left in Columbia, and I was given the information of baggage that was left on the bus by him, and asked if I would go and take it and bring it to the dispatcher's office. I don't remember what type of baggage it was. The bag was in the back of the bus on the rack. I don't remember whether I also removed a hat. The transportation supervisor instructed me to remove the bag. That was the dispatcher on duty, Mr. Rackley .... it was a small — well, one of these small bags and he told me it was at the back of the bus on the rack. I went out there while they were servicing the bus and got it off and brought it to him. I gave the bag directly to Mr. Rackley. I did not notice anything unusual about the bag when I took it off of the bus .... Now if I remember correctly, it was on the right rear.

"... I handed Mr. Rackley the bag in the dispatcher's office.

...

"... I talked to Mr. Lucas (the Greyhound dispatcher) in Columbia later on about the bag. He asked me about leaving the passenger. I told him I didn't know I had left him until I was notified in Raleigh. He asked me if we got it off the bus for him, and I told him that we did. ...

....

"Mr. Rackley did not make any comments to me when I delivered the bag to him. He just thanked me. He made no comment to me about the condition of the bag."

Mr. Roy Wells also by his adverse examination testified that he was Superintendent of the Raleigh Division of Grey-

hound and had been employed in that capacity since June of 1965. He had discussed plaintiff's lost bag and contents with Mr. Rackley, who was working for Greyhound in its Raleigh office on 2 December 1966 as a dispatcher. Mr. Rackley told him that he received a message from Columbia, South Carolina, concerning a lost bag which contained valuable contents, and that in response to the message he contacted the driver of the bus as soon as the bus arrived from Columbia, described the bag to the driver, and asked the driver to deliver the bag to him. The driver, Mr. Howell, did deliver the bag to Rackley, who placed it in the dispatcher's office. Rackley stated that when Mr. Clott (plaintiff) arrived that he, Mr. Rackley, was unable to locate the bag. Mr. Rackley did not have the same bag that Mr. Howell delivered to him. Mr. Wells further stated that he read correspondence which indicated that the bag was found in the Raleigh Bus Station and shipped to their unclaimed articles warehouse in Chamblee, Georgia.

Mr. Walter J. Rackley, Jr., by his deposition stated that during the month of December 1966 he was employed by defendant as a driver and part-time dispatcher. He remembered receiving a message concerning a bag on the bus coming from Columbia, but he did not remember on what date he received such message. The message was received by teletype, but he did not remember having seen the original or the copy of the message since the date it was received. He stated that "if I remember correctly," he went to the bus with the driver and found a hat but no bag. He further stated:

> "I don't remember taking a bag off the bus.
>
> "To the best of my recollection the bus driver did not take a bag off the bus and deliver it to me at the dispatcher's office, not in this particular case. I can't remember him bringing one to me."

Plaintiff, a merchant seaman, testified that he bought a ticket in Bushnell, Florida, to go to New York City, by Greyhound bus. He was unable to check his bag when he changed buses in Jacksonville, Florida, because he had only five minutes between buses, and all baggage had to be checked twenty minutes before departure time. He testified that his bag contained

$2,209 in cash, a camera, two watches, perfume, certain seaman's papers, and other personal effects. He described his bag as "a brown bag, valise type, satchel type bag. I had locks on the bag. I had a padlock on it, on the two handles, and also a key lock on the small latch . . . . " When he got on the bus in Jacksonville he got in the last seat and put the bag between the seat and the motor wall. He did not think anyone saw him deposit the bag. When the bus arrived in Columbia, South Carolina, at about 6:30 a.m., he heard the announcement about a stopover, but paid no attention to it because he was half asleep. It was later announced over the bus loud speaker that the bus would be delayed about twenty minutes because of a dead battery. He then went into the coffee shop to get coffee and doughnuts, and while he was walking out with the doughnuts he saw the bus pulling out. He heard no announcement of the departure after he left the bus. The dispatcher told him that he knew the bus was one passenger short. He asked the dispatcher to get a police car or a taxi so that he might stop the bus, and then told the dispatcher about his bag containing valuables and money and about its location on the bus. The dispatcher told plaintiff that he would wire Raleigh. Plaintiff further testified that about two hours later he took the next scheduled bus to Raleigh, and upon arrival he talked to Mr. Rackley, the Raleigh dispatcher. "I asked for my bag, and I told him and asked him where my bag was, and he said to me, 'Here's a hat here.' He said, 'But the bag,' he said, 'My God, I gave it away.' He said, 'I must have made a mistake.' "

He received his bag from defendant company about six months later. When it was returned, "the lock was gone off and the small lock there was jimmied, which it still is, and the entire lining was torn out of the bag, . . . " Everything was gone except some papers, including his empty pay envelope.

Among other exhibits, plaintiff introduced into evidence the original of a letter which read as follows:

"GREYHOUND

SOUTHERN GREYHOUND LINES
DIVISION OF THE GREYHOUND CORPORATION
1220 Blanding Street, Columbia, South Carolina

January 6, 1967

Mr. Raymond Clott
Route 1, Box 204-A
Noble Avenue
Bushnell, Florida

Dear Mr. Clott:

We did indeed talk with Mr. Lucas on December 14, 1966 as we told you we would do. Mr. Lucas did not give us a written statement concerning the facts in this matter, however, he did make a report of same to our Terminal Manager, Mr. W. E. Stilwell.

Mr. Lucas has confirmed that you were left in Columbia, S. C., on December 2, 1966 as you stated. Also, that you reported to him that your hand bag and hat were left on the bus. He teletyped Raleigh, N. C. to have your property removed from the bus and that you would pick them up when you arrived in Raleigh later that day. Mr. Lucas has checked with the Driver who pulled this schedule and was told by Driver Howell that he did remove the hand bag and the hat as requested and turned them over to the Transportation Supervisor in Raleigh, N. C. That is all that he knows in this matter.

We regret to advise that our efforts to locate your hand bag from the information we got from you for tracing purposes, through our premises. We are today taking the liberty of forwarding our entire file in this matter to our Claims Department for further handling.

Yours very truly,

SOUTHERN GREYHOUND LINES
s/ A. W. McSwain
A. W. McSwain

cc: Mr. J. E. Smith"

At the conclusion of plaintiff's evidence defendant moved for a directed verdict. The court allowed the motion. Plaintiff appealed to the North Carolina Court of Appeals and that court affirmed the judgment of the District Court. We allowed plaintiff's petition for writ of *certiorari* to North Carolina Court of Appeals to review its decision on 5 January, 1971.

Boyce, Mitchell, Burns & Smith for plaintiff.

Teague, Johnson, Patterson, Dilthey & Clay and Paul L. Cranfill for defendant.

BRANCH, Justice.

Plaintiff contends that the trial judge erred when he granted defendant's motion for a directed verdict.

[1] Plaintiff, *inter alia,* contends that defendant became an insurer of his baggage because plaintiff was separated from his baggage by the negligence of defendant's agents.

If defendant were an insurer, plaintiff would be entitled to recover, *without proof of negligence,* upon proof of delivery to defendant and of failure of defendant to deliver, unless defendant could carry the burden of showing that the loss was caused by an act of God, the public enemy, the negligence of the shipper, or by the inherent qualities of the goods. *Merchant v. Lassiter,* 224 N.C. 343, 30 S.E. 2d 217; *Perry v. R. R.,* 171 N.C. 158, 88 S.E. 156. For defendant to be liable as an insurer there must have been a delivery and acceptance of the baggage into the exclusive custody and control of defendant as a carrier for its transportation. *National Fire Ins. Co. v. Yellow Cab Co.,* 205 Ark. 953, 171 S.W. 2d 927; *Blair v. Pennsylvania Greyhound Lines,* 275 Mich. 636, 267 N.W. 2d 578; *Southeastern Greyhound Lines v. Berrie,* 31 Ala. App. 178, 13 So. 2d 696.

Here, plaintiff purchased a ticket but kept complete control and custody of his baggage, and defendant had no custody or control or even knowledge concerning the baggage until plaintiff notified defendant's agent in Columbia, South Carolina, of his loss. We therefore do not think that defendant was liable as an insurer.

We observe, parenthetically, that aside from any breach of contract or strict bailment, if plaintiff had been left in Columbia,

S. C. because of the negligence of defendant, he could proceed under the general law of torts to recover any damages proximately resulting from the negligent act. Schouler, *Law of Bailments,* 2d Ed., Carrier of Passengers, § 684, p. 748; *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104.

We must, however, consider the possibility of liability upon a showing of negligence where other relationships of bailor and bailee exist.

[2] This Court has classified bailments as those (1) for the sole benefit of bailor, or in which relationship the bailee will be liable only for gross negligence, (2) for the bailee's sole benefit, in which relationship the bailee will be liable for slight negligence, and (3) those for the mutual benefit of both parties, in which relationship the bailee will be liable for ordinary negligence. However, "the terms 'slight negligence,' 'gross negligence,' and 'ordinary negligence' are convenient terms to indicate the degree of care required; but, in the last analysis, the care required by the law is that of the man of ordinary prudence. This is the safest and best rule, and rids us of the technical and useless distinctions in regard to the subject. Ordinary care, being that kind of care which should be used in the particular circumstances, is the correct standard in all cases. It may be high or low in degree, according to circumstances, but is, at least, that which is adapted to the situation." *Hanes v. Shapiro,* 168 N.C. 24, 84 S.E. 33. A bailment solely for the benefit of the bailee—a gratuitous bailment—may be effected with respect to baggage when the property comes into the hands of a carrier as an involuntary trust through accident or mistake. 14 Am. Jur. 2d, Carriers, § 1240, p. 636. When a passenger stops or lies over at an intermediate point on his journey, without consent of the carrier, and permits his baggage to go on without him, the carrier is liable as a gratuitous bailee. 4 Elliott on Railroads, 2d. Ed. § 1652A, and *Kindley v. Railroad,* 151 N.C. 207, 65 S.E. 897.

In the case of *Perry v. R. R., supra,* the plaintiff offered evidence which tended to show that on 3 December 1913 he bought a ticket on Southern Railway from Goldsboro to Raleigh and checked his baggage containing wearing apparel of the value of $50.00. The bag remained in the baggage room at Union Station in Raleigh from 7:00 p.m. on 3 December until the morning of 4 December. On the night of 3 December plain-

tiff bought a ticket from Raleigh to Henderson via defendant Seaboard Air Line Railroad and went to Henderson on Seaboard, without checking his bag. On the morning of 4 December he requested defendant's agent to have his bag brought to Henderson from Raleigh. Defendant's agent complied with plaintiff's request, and when the bag was received, plaintiff's clothes were missing. Defendant's evidence tended to show that there were no clothes in the bag when it was delivered to them and that they were not negligent in any respect. The Court, holding that the defendant was a gratuitous bailee, *inter alia,* stated:

> " . . . [T]he baggage which must be carried by the railroad company, without compensation beyond the passenger's fare, is such as is required for the necessity, convenience, or pleasure of the passenger, and consequently must accompany his person.
>
> . . . .
>
> "The weight of modern authority is in favor of the position that proof of delivery to the carrier and of its failure to deliver is evidence of negligence sufficient to carry the case to the jury and to support a verdict, but that the jury ought to be instructed that the carrier is not liable if upon the whole evidence they do not find that it did not exercise the care of a person of ordinary prudence under the circumstances."

This Court considered bailments as related to motor carriers in the case of *Neece v. Richmond Greyhound Lines,* 246 N.C. 547, 99 S.E. 2d 756. There, defendant carrier refused to allow the plaintiff, who was traveling in interstate commerce from New York to Greensboro, to carry on the bus a bag containing wearing apparel which exceeded the dimensions given in the tariff which defendant had filed with the ICC pursuant to 49 USCA §§ 20(11) and 319. However, plaintiff was allowed to check the parcel and was given a baggage check which recited a limitation of liability on the part of the carrier in the amount of $25. Defendant failed to deliver the baggage on demand and plaintiff brought suit to recover $619, the asserted full value of the lost baggage. The court held that the liability of the common carrier, if any, was for the full value of the luggage as a gratuitous bailee, and that the limitation of liability did not apply because the luggage did not come within the specifications

of baggage as contained in the filed tariff. In so holding, the Court stated:

"Before a motor carrier can limit its liability for negligent loss or damage to property entrusted to it, it must show: (1) it received the property as a common carrier; (2) it issued a written receipt which contained the asserted limitation; (3) the Interstate Commerce Commission has expressly authorized the limitation which is based on a rate differential.

"If each of these conditions is not shown to exist, the asserted limitation has no effect. *New York, N.H. & H.R. Co. v. Nothnagle, supra* (346 U.S. 128, 97 L. Ed. 1500); *Caten v. Salt Lake City Movers & Storage Co.*, 149 F. 2d 428; *Union Pacific R. Co. v. Burke, supra* (255 U.S. 317, 65 L. Ed. 657); *Southeastern Exp. Co. v. Pastime A. Co.*, 299 U.S. 28, 81 L. Ed. 20, 57 S.Ct. 73; *Sambur v. Hudson Transit Lines, Inc.*, 112 N.Y.S. 2d 514, 116 N.Y.S. 2d 500.

. . . .

"Plaintiff, under the provisions of her ticket, had a right to carry on the bus with her under her control her baggage. *Santa Fe Trail Transp. Co. v. Newlon*, 159 P. (2d) 713 (Okla.). When so carried, baggage is in the custody of the passenger and no responsibility with respect thereto is imposed on the carrier.

. . . .

"Where a carrier of passengers receives and handles a package for a passenger which does not qualify as baggage which the passenger is entitled to have transported free, the carrier is a gratuitous bailee of the package. As a gratuitous bailee, it is liable only if the loss be occasioned by its gross negligence. *Perry v. R. R.*, 171 N.C. 158, 88 S.E. 156; *Kindley v. R. R.*, 151 N.C. 207, 65 S.E. 897; *Brick v. A.C.L.*, 145 N.C. 203; *Trouser Co. v. R. R.*, 139 N.C. 382; 6 Am. Jur. 358.

" . . . Defendant admits receipt of plaintiff's bag and its failure to return it on demand. This admission is sufficient to take the case to the jury or to require a finding by the court if a jury trial be waived."

[3] Ordinarily, a passenger leaving personal baggage in a carrier upon alighting therefrom cannot hold the carrier responsible, but where it is shown that a subsequent loss was the proximate result of conduct of carrier's employees in failing to exercise ordinary care, either through failure to take care of the baggage after full knowledge of the facts, the carrier may be held liable. 14 Am. Jur. 2d, Carriers, § 1284; *Kinsley v. Lake Shore & M. S. R. R.*, 125 Mass. 54; *Fire Ins. Co. v. Yellow Cab Co., supra; Clark v. Checker Taxi Co.*, 330 Mass. 20, 110 N.E. 2d 849; *Blair v. Pennsylvania Greyhound Lines, supra.*

The baggage which must be carried by a carrier without compensation beyond the passenger's fare is such as is required for the necessity, convenience or pleasure of the passenger on his journey. Ordinarily only the amount of money necessary for the payment of expenses of the journey is considered baggage. 14 Am. Jur. 2d, Carriers, §§ 1469, 1276. However, a carrier may be liable for gross negligence as a gratuitous bailee, even when the property does not properly constitute baggage. *Brick v. R. R.*, 145 N.C. 203, 58 S.E. 1073; 14 Am. Jur. 2d., Carriers, § 1269; *Michigan C.R.R. Co. v. Carrow*, 73 Ill. 348.

[4] Defendant strongly argues that plaintiff's evidence was not sufficient to show that the baggage removed from the bus by defendant's driver belonged to plaintiff, and that plaintiff's property had not been taken from the bag before it was delivered to defendant. The bus driver was "given information of baggage that was left on the bus" belonging to plaintiff. Pursuant to this information he delivered a small bag to the dispatcher. *He noticed nothing unusual about the bag, and the dispatcher received the bag without comment.* There is no evidence that any other passenger on the bus ever reported a missing bag. The dispatcher in Raleigh received the bag with information that it contained money and valuable contents. When plaintiff arrived about two hours later, the dispatcher was unable to deliver the bag which the driver had delivered to him.

Mr. A. W. McSwain wrote to plaintiff on defendant's letterhead and, in part, stated:

> "Mr. Lucas has confirmed that you were left in Columbia, South Carolina on December 2, 1966 as you stated. Also, that you reported to him that your hand bag and hat were left on the bus. He teletyped Raleigh, N. C. to

have *your* property removed from the bus and that you would pick them up when you arrived in Raleigh later that day. Mr. Lucas has checked with the driver who pulled this schedule and was told by Driver Howell that *he did remove the hand bag and the hat as requested and turned them over to the Transportation Supervisor in Raleigh, N. C.*" (Emphasis added.)

One of defendant's theories is that the bag was opened and rifled before it came into the possession of defendant's agents. It is inconceivable that anyone would receive or wrongfully remove the bag from the custody of defendant's agents if the locks had been broken and the bag rifled *before* it came into the possession of defendant's agents.

We think this evidence is sufficient to support a finding that the baggage removed from the bus by defendant's driver was plaintiff's baggage, and was received by defendant's agents before the locks were broken and the bag rifled.

When the above rules of law are applied to plaintiff's evidence, we think defendant is a bailee for the sole benefit of the bailor, *i.e.*, a gratuitous bailee. However, we conclude that classification of bailments is of little import since the degree of care required in all classes of bailments is, in truth, the care of the man of ordinary prudence as adapted to the particular circumstances. The care must be "commensurate care" having regard to the value of the property bailed and the particular circumstances of the case. *Hanes v. Shapiro, supra; Insurance Co. v. Storage Co.*, 267 N.C. 679, 149 S.E. 2d 27. The standard of care is a part of the law of the case which the court must apply and explain. The degree of care required by the circumstances of the particular case to measure up to the standard is for the jury to decide. *Jackson v. Stancil* and *Smith v. Stancil*, 253 N.C. 291, 116 S.E. 2d 817.

Thus, when a bailor, whether classified as gratuitous or otherwise, offers evidence tending to show (1) that the property was delivered to the bailee, (2) that bailee accepted it and therefore had possession and control of the property, and (3) that bailee failed to return the property, or returned it in a damaged condition, a *prima facie* case of actionable negligence is made out and the case must be submitted to the jury. *Perry v. R. R., supra; Hanes v. Shapiro, supra; Pennington v. Styron,*

270 N.C. 80, 153 S.E. 2d 776. When a *prima facie* case is made out, it warrants but does not compel a verdict for plaintiff. The jury is simply authorized to find either way, and either party may lose if he offers no further proof. *Manufacturing Co. v. R. R.*, 222 N.C. 330, 23 S.E. 2d 32; Stansbury, North Carolina Evidence, 2d. Ed., § 203.

Again applying the legal principles set forth and the well recognized rules as to consideration of evidence upon motion for a directed verdict to the facts of the instant case *(Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47), we conclude that plaintiff offered evidence from which a jury could find (1) that there was a delivery of the baggage to defendant, through its agents, (2) that through its agents defendant accepted and thereafter had control and possession of the baggage, and (3) that defendant failed to return a portion of the baggage and returned a portion of the baggage in a damaged condition.

We therefore hold that plaintiff's evidence was sufficient to repel defendant's motion for a directed verdict.

We do not think that plaintiff's evidence established the defense of contributory negligence as the sole reasonable conclusion. *Price v. Miller,* 271 N.C. 690, 157 S.E. 2d 347. There is no evidence of any negligence of any kind on the part of plaintiff *after* defendant assumed possession and control of the bag as bailee. Thus the action of plaintiff could not have contributed to the ultimate loss.

[5] The questions of limitation of liability by the carrier and damages are not before us, since the trial court allowed defendant's motion to dismiss. Further, the loss alleged to have been sustained by plaintiff occurred while his property was being moved in interstate commerce, and therefore appropriate federal statutes are applicable. *Neece v. Greyhound Lines, supra.* 49 USCA § 319 makes 49 USCA § 20(11) and (12) applicable to motor carriers. 49 USCA § 20(11) states that unless provided for by a proviso of that section, no limitation of liability on a carrier will be valid. The proviso relevant to our consideration states that the carrier may limit liability for "baggage carried on passenger trains" (or on motor buses by virtue of 49 USCA § 319) by properly filing a tariff pursuant to lawful authorization of the Interstate Commerce Commission.

"The excepted 'baggage carried on passenger trains' refers solely to free baggage *checked through* on a passenger fare." (Emphasis added.) *New York, N.H. & H.R. Co. v. Nothnagle,* 346 U.S. 128, 97 L. Ed. 1500, 73 S.Ct. 986; *Neece v. Greyhound Lines, supra.*

Neither does the record show that defendant has attempted to comply with the provisions of any federal statute which might limit its liability. *Cray v. Pennsylvania Greyhound Lines,* 177 Pa. Super. 275, 110 A. 2d 892.

We note that defendant's cross-examination exceeded the bounds of relevancy when plaintiff was cross-examined concerning limitation of liability established by the Interstate Commerce Commission as related to a baggage check, since all the evidence showed the bag was not checked. *Motor Co. v. Ins. Co.,* 220 N.C. 168, 16 S.E. 2d 847.

The decision of the Court of Appeals is reversed. The case is remanded to that Court to be certified to the trial court for a new trial in accord with this opinion.

Reversed and remanded.

C. H. CUTTS v. S. WORTH (WIRT) CASEY AND WIFE, MARTHA B. CASEY

No. 40

(Filed 14 April 1971)

1. Boundaries § 2— established line of another tract — fixed monument

A line of another tract which is well known and established on the ground is a fixed monument.

2. Boundaries § 2— discrepancy in distance called for in deed and that shown on map — factor for jury

Discrepancy between the length of ocean frontage called for in a grant and that shown on a surveyor's map of the property is a factor for the jury to consider in determining whether a disputed line of an adjoining tract, called for in the grant, has been correctly located, but once such line has been established, it controls course and distance.

3. Rules of Civil Procedure §§ 41, 50— motion for dismissal — motion for directed verdict — sufficiency of claimant's evidence

In nonjury trials the motion for nonsuit has been replaced by the motion for dismissal, G.S. 1A-1, Rule 41(b), and in jury trials by the motion for a directed verdict, G.S. 1A-1, Rule 50(a); the motion for a directed verdict presents substantially the same question formerly presented by the motion for nonsuit, that is, whether the evidence considered in the light most favorable to the claimant will justify a verdict in his favor.

4. Trespass to Try Title § 2— title claimed by both parties — burden of proof

In an action of trespass when both parties claim title to the land involved, and each seeks an adjudication that he is the owner and entitled to possession of the disputed property, each has the burden of establishing his title by one of the methods recognized by law.

5. Ejectment § 7; Trespass to Try Title § 2— title claimed by both parties through common source — burden of proof

Where both parties claim title to the disputed property through a common source, the burden rests upon each party to connect his title to the common source by an unbroken chain of conveyances and to show (1) that the disputed land is embraced within the bounds of the instruments upon which he relies and (2) that the title thus acquired is superior to that claimed by his adversary.

6. Ejectment § 7; Trespass to Try Title § 2— fitting descriptions in chain of title to land claimed

In an action involving title to land, claimant must show that the land he claims lies within the area described in each conveyance in his chain of title and, whether relying upon his deed as proof of title or color of title, must fit the description in his deed to the land claimed.

7. Trespass to Try Title § 2— title claimed by both parties — failure of one party to carry burden of proof

In an action of trespass wherein both parties claim title to the disputed land, a failure of one of the parties to carry his burden of proof on the issue of title does not, *ipso facto*, entitle the adverse party to an adjudication that title to the disputed land is in him, since he is not relieved of the burden of showing title in himself.

8. Appeal and Error § 68— law of the case

In this action of trespass wherein both parties claim title to the disputed land, decision on prior appeal that plaintiff's evidence was sufficient for the jury remains the law of the case in a subsequent trial upon substantially the same evidence, and defendants' motion for a directed verdict against plaintiff's action was properly denied.

9. Trespass to Try Title § 4— insufficiency of evidence to show record title

In this action of trespass in which plaintiff and defendants claim title to the land in controversy through an 1859 grant, and defendants claim title under an 1879 conveyance of a portion of that grant, the

location of the 1879 conveyance being in dispute, defendants' evidence was insufficient to establish record title to the land described in their answer where it failed to locate the 1879 conveyance on the ground by reference to the description in the deed which conveyed it.

10. **Boundaries § 13; Ejectment § 9; Evidence § 25— surveyor's map — inadmissibility as substantive evidence**

Surveyor's map purportedly showing the division of land conveyed by an 1879 deed was not admissible as substantive evidence of the location of the 1879 conveyance.

11. **Evidence § 25— private maps — admissibility**

Private maps may be used only when a witness testifies to their correctness from first-hand knowledge.

12. **Boundaries § 13; Ejectment § 9— failure to admit map for illustrative purposes — harmless error**

Where witnesses were questioned and gave answers with reference to a map offered by defendants, and defendants' claim would be impossible to visualize without the map, the trial court should have admitted the map for illustrative purposes; however, defendants were not prejudiced by its exclusion since the case was withdrawn from the jury, and the trial judge and appellate court have had the benefit of the map.

13. **Boundaries § 6— establishing line in senior grant — reversing call in junior grant**

A line created by a senior grant cannot be established by reversing the calls in a junior grant.

14. **Boundaries § 3— reversing calls**

Calls in a deed may be reversed only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line.

15. **Adverse Possession § 5— continuity of possession — known and visible boundaries**

While adverse possession is not required to be unceasing, if it is interrupted, claimant must show that he has, from time to time, continuously subjected the land to the use of which it is susceptible for the statutory period—and such use must have been under known and visible lines and boundaries.

16. **Adverse Possession § 25— failure to show known and visible boundary**

Defendants failed to establish title to the land in controversy by twenty years' adverse possession on the part of defendants and their predecessors in title where they offered no evidence that any known or visible line marked the southeastern boundary of the land claimed by their predecessors in title.

17. **Trespass to Try Title § 5— issues submitted**

In this action of trespass to try title in which the location of an 1879 conveyance was in dispute, the trial court did not err when it

refused an issue tendered by defendant as to whether plaintiff owned the land described in the complaint and submitted issues as to whether the land described in the 1879 deed was properly located on a map introduced by plaintiff and, if it was, whether plaintiff was the owner and entitled to immediate possession of the land described in the complaint, since the first issue submitted by the court would determine whether plaintiff had title to the land described in the complaint.

18. Trespass to Try Title § 5— failure to submit issues of trespass and damage — harmless error

In an action of trespass to try title, the court's failure to submit issues of trespass and damage was harmless error where the jury answered the issue of title adversely to plaintiff.

19. Rules of Civil Procedure § 50— directed verdict in favor of party having burden of proof

The trial judge cannot direct a verdict under G.S. 1A-1, Rule 50, in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses, since it is the established policy of this State—declared in both the constitution and statutes—that the credibility of testimony is for the jury, not the court, and that a genuine issue of fact must be tried by a jury unless this right is waived. N. C. Constitution, Art. I § 19 (to become Art. I, § 25 on 1 July 1971); G.S. 1A-1, Rule 51(a).

20. Rules of Civil Procedure § 41— unavailability of voluntary dismissal after plaintiff rests

Under the new rules of civil procedure a plaintiff can no longer take a voluntary nonsuit as a matter of right or secure a voluntary dismissal *after* he has rested his case. G.S. 1A-1, Rule 41(a)(1).

21. Rules of Civil Procedure §§ 41, 50— sufficiency of evidence — motion for directed verdict — motion for dismissal

In a jury trial the motion for a directed verdict under Rule 50(a) is the only device by which the adverse party can challenge the sufficiency of the evidence to go to the jury; the comparable motion in a nonjury case is the defending party's motion for a dismissal under Rule 41(b).

22. Rules of Civil Procedure § 50— directed verdict against plaintiff — judgment on the merits

When a motion for a directed verdict under Rule 50(a) is granted, the defendant is entitled to a judgment on the merits unless the court permits a voluntary dismissal of the action under Rule 41(a)(2).

23. Rules of Civil Procedure § 41— voluntary dismissal

A dismissal under Rule 41(a)(2) is without prejudice unless the judge specifies otherwise.

24. Rules of Civil Procedure § 50— directed verdict — absence of jury function

The jury has no function when a directed verdict is ordered.

25. Trespass to Try Title § 4— directed verdict for plaintiff — error by court

In this action of trespass to try title, the trial court erred in directing a verdict in favor of plaintiff, the party having the burden of proof, and in assuming that plaintiff's evidence as to the location of a disputed line of an adjoining tract was uncontradicted.

Justice HUSKINS concurring in result.

APPEAL by defendants from *Cowper, J.*, February 1970 Civil Session of PENDER, certified for review by the Supreme Court before determination by the Court of Appeals upon the motion of both appellant and appellees. The appeal was docketed and argued at the Fall Term 1970 as Case No. 32.

Blake and Trawick; Rountree & Clark for plaintiff appellee.

Corbett & Fisler for defendant appellants.

SHARP, Justice.

This action of trespass to try title was before us at the Fall Term 1967, *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519. It was here again at the Fall Term 1969, *Cutts v. Casey,* 275 N.C. 599, 170 S.E. 2d 598. Reference is made to these two decisions for the history of the case and a resume of the evidence in the first two trials.

The complaint alleges: Plaintiff is the owner of 2.8 acres in Topsail Township, Pender County, described by metes and bounds and designated as lot No. 3 on the map of the Division of Lands of Jesse W. Batson, recorded in Map Book 5, page 78. Defendants, asserting an invalid and unfounded claim to the land, have trespassed upon the lot and committed waste. Plaintiff prays that he be declared the owner, and entitled to the immediate possession, of the tract described in the complaint; that he recover $2,000.00 in damages; and that defendants be restrained from further trespasses.

Answering the complaint, defendants deny that they have trespassed upon any land belonging to plaintiff. They allege: Defendants are the owners of lot No. 1 of the Nancy Batts

subdivision of lot No. 3 of the Division of the Millie Bishop Estate, described by metes and bounds in paragraph 1 of the further answer and on the map recorded in Map Book 5, page 8. Plaintiff is trespassing upon the described land and, unless restrained, will cause defendants irreparable damage. Defendants and their predecessors in title have held, and adversely possessed, the property in suit under known and visible lines and boundaries for more than twenty years next preceding the institution of the action, and under color of title for more than seven years prior thereto. Defendants pray that they be declared the owners, and entitled to the immediate possession, of the lands described in the answer; that plaintiff be restrained from further trespassing upon the property; and that defendants recover $1,000.00 in damages from plaintiff.

At the third trial of this action the case was heard by Cowper, J., and a jury upon the transcript of the evidence offered by plaintiff and defendants before the referee in October 1965. The parties stipulated that the claim from a common source and specified the instruments through which each claims record title to the land in dispute.

The common source is land grant No. 1696, dated 20 April 1859, from the State to Jesse W. Batson for 51 acres adjoining Frederick Rhue on Topsail Banks: "Beginning at a stake, William B. Sidbury's corner on the sound; running thence with Sidbury's line across the Banks South twenty-five East sixty-six poles to a stake at the edge of the ocean; thence with the edge of the ocean North fifty-three East 107 poles (1765.5 feet) to Frederick Rhue's line; thence with Rhue's line North twenty-five West eighty-eight poles to a crooked creek; thence with the meanders of said creek to the beginning."

[1] The Batson grant describes a quadrangular-shaped tract lying between uncontroverted natural boundaries and between the boundaries of adjoining landowners, Rhue and Sidbury. The location of the Sidbury line is one of the crucial questions in this case. The location of the Rhue line, the northeast boundary of the Batson grant, is not in dispute. The Rhue line, which is the southwestern boundary of a grant of 114 acres on Topsail Banks from the State to Frederick Rhue, made on 18 November 1854, begins "at a stake at Cokle or Crooked Creek landing on the sound side, then South thirty-five East ninety-two poles to the Ocean. . . . " This line is well known and established on the

ground. As such it is a fixed monument. *Batson v. Bell,* 249 N.C. 718, 107 S.E. 2d 562. The parties stipulated that line A-B on the court map is the Rhue line and the third call of the Batson tract. This map, which is incorporated in this opinion, was made in December 1956 by J. W. Blanchard, Surveyor, to show the contentions of the parties.

As the first step in his effort to establish the location of the Sidbury line plaintiff introduced in evidence grant No. 1740, dated 4 January 1845, from the State to William B. Sidbury for 170 acres between Topsail Inlet and Stump Inlet. The description reads: "Beginning on a dead cedar at the east end of a hammock near Cockle Creek Pond; thence South twenty-three East fifty poles to a stake; thence South fifty West two hundred, sixty poles to a stake between the Hammock and the Atlantic; thence North twenty-three West one hundred and sixty poles to a stake in the sound; thence to the beginning."

Here we note that the northeastern line of the Sidbury grant (50 poles in length) does not run to the ocean. The southwestern line of the Batson grant runs the same course to the ocean and calls for 66 poles.

On 1 August 1879 J. W. Batson and wife conveyed to Millie Bishop a tract of land which, it is stipulated, is a portion of the land described in the Batson grant. The lot conveyed is described as "a certain tract of land in (Pender) County lying on Topsail Banks and adjoining the lands of Vashti Atkinson and bounded as follows, *viz.*: "Beginning at a stake, Vashti Atkinson's corner in the Sound; running thence with said Vashti Atkinson's line across the banks South twenty-five East sixty-six poles to a stake at the edge of the ocean; thence with the edge of the ocean North fifty-three East fifty-three poles (874.5 feet) to a stake; thence North twenty-five West eighty-eight poles to the sound; thence with the meanders of the sound back to the Beginning." Defendants claim title to the land in dispute under the deed from Batson to Bishop.

At this point we note that, although the first call in the deed from Batson to Bishop contains the same course and distance as the first call in the Batson grant, the beginning point is designated as Vashti Atkinson's corner, not William B. Sidbury's corner. It is also noted that the second call in the Bishop deed is for the same course, and approximately one half of the

distance, as the second call in the Batson grant. *Prima facie,* by this deed Bishop acquired about one half of the western portion of the Batson grant.

In a special proceeding instituted 21 January 1956 the heirs of Jesse W. Batson sought to partition the lands which he owned at the time of his death. Those lands are described in the petition as the 51 acres which Batson acquired by grant No. 1696, less the tract he conveyed to Millie Bishop on 1 August 1879 by deed recorded in Book D, page 514, Pender County Registry.

The commissioners appointed by the court to partition the Batson lands employed Raymond Price, Surveyor, to make the division. In May 1956 he purported to survey the William B. Sidbury grant. His location of Sidbury's northeast line is shown as the line A-E on the map introduced in evidence as plaintiff's Exhibit F. This map is made a part of this opinion. The southwestern boundary of the Batson grant and of the Millie Bishop tract is shown as that same line A-E extended to B. The Rhue line is shown as the line C-D.

Having located the Sidbury line to his satisfaction, in order to define the Batson grant, Price measured from his Sidbury line along the edge of the ocean to the Rhue line. This distance turned out to be 209 poles (3,448.5 feet) instead of 107 poles (1,765.5 feet) as called for in the grant. On the premise that the Vashti Atkinson line was the northeastern line of the Sidbury grant, Price next defined the Millie Bishop tract by running the calls in the deed from Batson to Bishop. He extended the Sidbury line A-E (53 poles) to point B to make the 66 poles (1,089 feet) specified in the first call. From B he ran 53 poles (874.5 feet) along the edge of the ocean; thence N. 25° W. 88 poles to Topsail Sound. Having located the Bishop tract at the southwestern end of the Batson grant, Price then divided the remaining 2,574 feet of ocean frontage into 12 lots of varying widths extending from the ocean to Topsail Sound as shown on Exhibit F. In that division, lot No. 3 was allotted to the heirs of Levi Batson, who conveyed that lot to plaintiff Cutts on 6 October 1964.

[2] We here note that Price, by his location of the Sidbury line, almost doubled the distance of ocean frontage called for in the Batson grant. Such a discrepancy in distance is a factor for the jury to consider in determining whether a disputed line

of another tract has been correctly located. Once it is established, however, "such line 'controls course and distance, being considered the more certain description and it makes no difference whether it is a marked or unmarked, or mathematical line, . . . *provided it be the line which is called for.*'" *Coffey v. Greer,* 241 N.C. 744, 746, 86 S.E. 2d 441, 443.

Plaintiff claims record title to the land in dispute through the following instruments: The Batson grant; special proceeding partitioning the lands of Jesse W. Batson, deceased; deed from the heirs of Levi Batson to plaintiff.

The deed from Batson to Bishop is the source of defendants' claim, and they contend that it conveyed a tract located at the northeastern end of the Batson grant, and that the northeast boundary of the Bishop tract is the Rhue line.

In December 1946, on the basis of a survey and map made by R. E. Koonce, Engineer, the heirs of Millie Bishop purported to divide the lands conveyed to her by Batson into six lots, each fronting 159.3 feet on the ocean (a total of 955.8 feet, 81.3 feet more than called for in the Bishop deed) and running back to Topsail Sound. The Koonce division was made on the assumption that the Rhue line was the northeastern line of the Bishop tract, and his map shows that he began his survey at the iron pipe which is the Rhue corner on Cockle Creek and from there ran S. 32° E. 1000 feet to the Atlantic Ocean; thence with the ocean S. 57° 30′ W. to a stake; thence N. 70° W. 1871 feet to Topsail Sound; thence with the sound to the beginning.

The map of the Millie Bishop division is recorded in Map Book 3, page 36, Pender County Registry. It was frequently referred to in the testimony, and the parties stipulated that the iron pipe shown on the Koonce map is the Frederick Rhue corner. Defendant S. W. Casey was permitted to testify that the lot described in the answer was included within the boundaries of lot No. 3 as shown on the Koonce map; that he was with Surveyor Blanchard when he sub-divided lot No. 3 of the Koonce division. Without this map any comprehension of defendants' claim is impossible. However, plaintiff's objection to its introduction in evidence was sustained. For illustrative purposes, however, it is incorporated in this opinion.

On 4 March 1947 by a deed, which recites that the grantors and grantees are all of the heirs of Millie Bishop, the following

described lands were purportedly conveyed to Mrs. Nancy I. Batts, Thelma Batts, Norman Batts, and J. P. Batts:

"BEGINNING at the corner of Lot #2 on the Atlantic Ocean at the low water mark, thence with said low water line South 57° 30′ West 159.3 feet to the corner of Lot #4; thence with the line of said Lot North 52° 30′ West 1540 feet crossing Cockle Creek and the Highway to the Sound; thence with the Sound to the corner of Lot #2; thence with the line of said Lot South 46° 15′ East 1550 feet to the Beginning, containing 8.9 acres, being Lot #3 of Millie Bishop Division. . . . "

Thereafter, in June 1954, W. W. Blanchard, Surveyor, basing his work entirely on the Koonce survey, subdivided lot No. 3 described above into three lots. In 1956 Norman Batts, Thelma Batts, the widow of J. P. Batts, and Nancy Batts conveyed lot No. 1 of the subdivision of lot No. 3 to defendant Martha B. Casey. Lot No. 1 fronts 57.23 feet on the ocean and is the southernmost lot in the subdivision of lot No. 3. It is the land described in the answer and shown on the court map within the lines 1-5-2, 2-3, 3-6-4, 4-1.

Defendants claim record title to the land in suit through the following instruments: The Batson grant, deed from Batson to Millie Bishop, deed from the heirs of Millie Bishop to Batts, and deed from Batts to defendant Martha B. Casey.

From the foregoing recital it is apparent that two surveyors have located the Millie Bishop tract at different places and have plotted overlapping subdivisions.

Price testified that he laid the Batson subdivision "right on top" of Koonce's Millie Bishop division, which "looked like a turkey gobbler's tail." The court map shows that the northern portion of the lot described in defendants' answer overlaps a portion of the northern third of the lot described in plaintiff's complaint. This lappage, the land in suit, is shown on the court maps as a quadrangle about 80 X 280 X 180 X 80 between the lines 2-3, 3-6, 6-5, 5-2. Plaintiff contends that all the land which Price subdivided was entirely outside and east of the boundaries of the Millie Bishop tract. Defendant contends that the land which Koonce subdivided was entirely within the boundaries of the Millie Bishop tract, the northeast line of which was the Rhue line. Thus, it is clear that neither party can establish his title to the land in suit without first locating the Bishop tract.

To establish point A on the Price map as the site of the dead cedar and the beginning point in the first call of the Sidbury grant, plaintiff offered the testimony of Bruce King, Homer King, and Amos Howard.

Bruce King, aged 47, the great, great grandson of William B. Sidbury, the great grandson of Vashti Atkinson and the grandson of Mary E. King, testified: About 35 years ago, at a time when there was no dispute about the location of the northeast line of the Sidbury grant, his father (A. W. King) showed that line to him. He pointed out the dead cedar as the beginning point of the William B. Sidbury grant. On that occasion his father was cutting fence posts on the Sidbury grant, and he showed the line to his crew so that they would not cut over it. At that time his father's mother, Mary E. King, the daughter of Vashti Atkinson, owned the land west of that line. However, she sold it before she died. Bruce King last saw the cedar seven or eight years ago. It is now gone and a lightwood knot or stake, which he pointed out to Price, is located at the beginning point. This stake is about 300 feet from the east end of Horse Hammock and 50-75 yards from a partly filled pond. About 300 feet from the stake "eastward toward the ocean," not quite half-way between the stake at point A and the ocean, there is a cedar snag which was once a tree. King's father said that the line ran almost directly by this snag. Bruce King also testified that there was another Amos Atkinson tract "up the beach" north of the Rhue tract which had "nothing to do with the tract we are talking about."

Homer King, aged 51 and the brother of Bruce King, testified that his father, A. W. King, never showed him "the direct corner" of the Sidbury grant. However, over 35 years ago, when Homer was just a young lad and there was no controversy about the line, his father pointed out "this cedar snag that was up near the end of the hammock" and said that the Sidbury line was between it and Cockle Creek Pond, which was at the end of the hammock. This was the occasion when A. W. King was cutting fence posts, and he told the men to stay below that cedar snag because that was right near the William Sidbury corner. A. W. King never owned any land on either side of the Sidbury line.

Amos Howard, aged 79, testified: He had been familiar with Topsail Beach for 65 years or more. Sixty years ago, when

there was no dispute about the William B. Sidbury line and "nobody didn't care much about it," several people had showed him the line which is now in dispute. Two of Sidbury's great grandsons (the King boys' father and uncle), a fisherman named Blake, and others told him that the Sidbury line, the Vashti Atkinson line, and the Mary E. King line were the same. "They would just talk about it and that's all. This dispute came up in later years, long since then." As a boy he fished at the northern end of Cockle Creek, and nothing was said for a long time. After a while when some of the Batsons demanded rent for the beach they just moved off to where a man gave them permission to fish. The Sidbury line began at a stake out in the marsh at the end of Horse Hammock. He showed this line to Price and went with him to this stake. From it the line ran straight to the ocean on a course parallel with the Rhue line which ran from Cockle Creek to the ocean. When he used to land at Cockle Creek Landing and go to parties at Cockle Creek "it wasn't known as the Millie Bishop land, it wasn't even known whose land it was, that was before I was grown, it weren't even considered, people didn't consider where they were at, whose land they were on, anything of the kind at that time."

Price testified: In surveying the Sidbury and Batson grants he began at an old lightwood knot which Bruce King, Amos Howard, and a number of others pointed out to him as the site of the old cedar. There was a "marshy place" east of this point, "a wet place that could be considered a pond." The stake in the marsh was approximately 300 feet from the end of the hammock. He ran the calls from the lightwood knot, and he is certain he found the correct geographical point. On the southeastern line of the Sidbury tract, line F-G on Exhibit F, he found marked trees. On the Batson survey when he reached the ocean at point B he "went the distance between two fixed points on the ground." He increased the distance from 107 to 209 poles because he was thoroughly convinced of the location of the William B. Sidbury and Rhue lines for which the grant called, and he merely showed the distance between the two lines, A-E-B and C-D.

Plaintiff's evidence further tended to show: William B. Sidbury died prior to March 1861. His daughter Vashti had married Amos Atkinson and was the only wife he ever had.

William B. Sidbury had "quite a number of pieces of land," some of which lay north of the Rhue grant. His old homeplace was part of a grant on the mainland. In March 1861 the lands of William B. Sidbury, including the 170 acres described in grant No. 1740, were partitioned by special proceeding. The commissioners allotted "to Amos Atkinson and wife" three tracts totaling 239 acres. One "tract of banks land," containing 55 acres, was described as "Beginning on a dead cedar, running So. 23 E. 125 poles to a stake; thence No. 23 W. 100 poles to a stake in the Sound; thence to the beginning." Obviously this purported description does not close. The first and second calls are the same line in reverse, the second running back on the first for a disance of "100 poles to a stake in the Sound." It seems likely that this second call was, in reality, the third call and that the second call was omitted. But, however that may be, plaintiff contends that the first call is for the northeastern line of the Sidbury grant No. 1740.

Defendants' evidence tended to show: W. H. Utley, an admitted expert in survey and forestry, purported to survey the Sidbury and Batson grants in 1957 after consulting with three elderly residents of the community, Daniel Justice, aged 80, Raleigh Clayton, aged 78, and Roland Batts, aged 60. Clayton and Justice are now dead. A map of his survey was introduced in evidence as defendants' Exhibit 12, and is incorporated in this opinion. Mr. Justice pointed out to Utley the stake at Cockle (Cokel or Crooked Creek) Landing, which marks the beginning point of the Rhue grant. From this point Utley ran the first call in the Rhue grant to the ocean, line D-E on his map, line A-B on the court map, and line C-D on the Price map, Exhibit F. Mr. Justice took Utley to the end of a hammock just west of the pond which terminates at Crooked or Cockle Creek and, as far as these elderly gentlemen could recall, the end of the hammock and pond "existed today as it always had." They did not refer to this hammock as Horse Hammock, and the Sidbury grant does not cite Horse Hammock as the point of beginning.

Opposite the end of the hammock, just above the level of the existing marsh and just west of the pond which terminated at Crooked or Cokel Creek, Utley found an old cedar stump, which was approximately three feet across the collar. In the immediate vicinity were a number of cedar stumps of varying sizes. The location of this cedar stump is shown as point A on

Utley's map, and his line A-B-C crosses the east end of the hammock at a higher elevation than the surrounding area. The cedar stump at point A was not pointed out to Utley as a particular landmark, and neither Justice, Clayton, nor Batts identified it as the beginning point of the Batson or Sidbury grants. However, its location at the east end of a hammock 75 feet from Cockle Creek Pond fits the description in the Sidbury grant and, after exploring the area, Utley was of the opinion that this stump at point A was the only possible beginning point of the Sidbury and Batson grants.

From point A he ran the first call in the Batson grant, shown as line A-B-C on Exhibit 12. He could not run to point C, which is in the Atlantic Ocean; so that point was computed. He found no particular landmarks on line A-B-C. Measuring from that line to the Rhue line, D-E, he found the distance to be 1,912 feet, or approximately 116 poles. After locating the cedar stump, Utley also attempted to lay the Sidbury grant on the ground by beginning at point A, and running to the ocean. However, at point B, "50 poles or 812 feet from the beginning," he established a point from which he turned to run line B-F, the second call in the Sidbury grant. From F he ran line F-G, the third call (taking into consideration the appropriate variation) across the hammock to the edge of the sound. The terminus, point G, was under water. This survey fitted the landmarks and, in Utley's opinion, shows the true location of the Sidbury grant.

On Utley's map, point 1 is the same as point A on the Price map, and Utley's line 1-2 is shown on the Price map as line A-E. At point 1, which is in the salt marsh, he found a large cedar limb. He pulled it up and examined the tip. It bore tool marks which Utley believed to be from six to twelve months old. The marsh grass at the bottom of the hole had not deteriorated and, in his opinion, it was the previous year's growth. He found no trees or stumps within a radius of 30 feet from the cedar limb. In running line 1-2 he found no marked trees, but someone had cut a visible path through there with a bush axe "within a year or so." Immediately to the northeast of line 1-2 the hammock narrows to a waist at a point about 2,000 feet from the southwestern edge of Cokel Creek Pond.

Utley made no attempt to survey the Millie Bishop deed. All he knows about that is what he saw on the Millie Bishop division map. Mr. Justice told him while standing near the Rhue

corner on Cockle Creek that the land to his right had always been known to him as the Millie Bishop land, but he did not know the present owner. Utley concedes that his survey depends on what the three elderly gentlemen told him plus the location of the old cedar stump.

Defendants offered the evidence of Mrs. Edna Bishop Norman, a great granddaughter of Millie Bishop, and Mrs. Norman's two brothers, O. H. Bishop and L. W. Bishop. They testified that their father, who had been dead approximately thirty years, told them that the Millie Bishop land adjoined the Rhue grant, and that the common line was the Rhue boundary which began at an iron stake on Cockle Creek Landing and ran from there to the ocean. Mrs. Norman testified that her father had looked after the entire interest of all the other heirs when she was just a child; that it was an undivided interest; that they used it for cattle and hogs and "there were fishermen over there, but (she) couldn't say where. . . . " L. W. Bishop testified that for the past 45 years they had hogs and cattle on the Bishop lands; that since the division he had borrowed some money on his part; that both Mr. Justice and Roy Batts had told him the Bishop and Rhue lines begin at Cockle Creek. O. H. Bishop testified: During the past forty years they had used the Bishop lands for grazing purposes. When they were kids he would go with his father to tend the hogs at Cockle Creek Landing. His father would point "this way," not exactly toward Topsail but "toward the ocean and down the sound, more to the south," and tell them, "This is our land." His father used the landing "to go call up the hogs," and "everybody put it on the beach that owned land." Prior to the institution of this lawsuit he had never heard of the Batsons having any connection with this land. He had attempted to build a cottage on the lot but "storm Hazel whipped it away."

S. W. Casey, the husband of defendant Martha Casey, testified that on 27 July 1956 (the date of the institution of this action) he had a building started on the lot described in the answer; that during 1947 Nancy I. Batts and others leased lot No. 3 of the Millie Bishop Estate to the U. S. Navy; and that the land described in the answer is a part of that lot. The documentary evidence showed that the lease was executed on 30 June 1946 and terminated on 15 August 1948. There was no evidence as to what use, if any, the Navy made of this land.

Leroy O. Batts, Sr., testified: He was familiar with the Millie Bishop lands. They adjoined the Rhue grant, the common line beginning at an iron stake at Cockle Creek Landing and going to the ocean. His father had pointed out this line to him 55 years ago. Batts did not know what use the Millie Bishop heirs had made of the land since the subdivision; prior thereto they had cattle and hogs on it as well as a fishery. Before this dispute arose he had never heard that Jesse Batson or his heirs owned any land adjoining Rhue's. R. D. Everett, a resident of the vicinity, testified that the Bishop land "is located south with reference to Cockle Creek Landing"; that his deceased uncle, Oswell Bishop, had pointed the land out to him forty years ago.

At the close of plantiff's evidence, and again at the close of all the evidence, defendants moved for a directed verdict. Both motions were denied and defendants excepted. The record does not disclose that defendants stated the specific grounds for either motion. At the conclusion of all the evidence plaintiff, without stating the specific grounds for his motion, moved for a directed verdict against the defendants on their cross action. This motion was allowed and defendants excepted.

Defendants tendered issues whether (1) plaintiff owned the land described in the complaint; (2) whether defendants had trespassed upon those lands; (3) what damages, if any, plaintiff was entitled to recover; (4) whether they owned the lands described in the answer, and (5) what damages, if any, defendants were entitled to recover of plaintiff. The court refused these issues and submitted the following:

"1. Is the Millie Bishop land described in the deed from Jesse W. Batson, the land as indicated on Plaintiff's Exhibit 'F', the Price Map under the legend J. W. Batson and wife, to Millie Bishop, 1879?

"2. If you answer the first issue 'Yes' is the Plaintiff the owner and entitled to the immediate possession of the lands described in the Complaint, Lot #3, on Plaintiff's Exhibit 'F', the Price Map?"

The jury answered the first issue "No" and, in consequence, did not answer the second issue. Thereupon plaintiff moved for a judgment notwithstanding the verdict. This motion was not coupled with a motion for a new trial, nor was a new trial prayed for in the alternative.

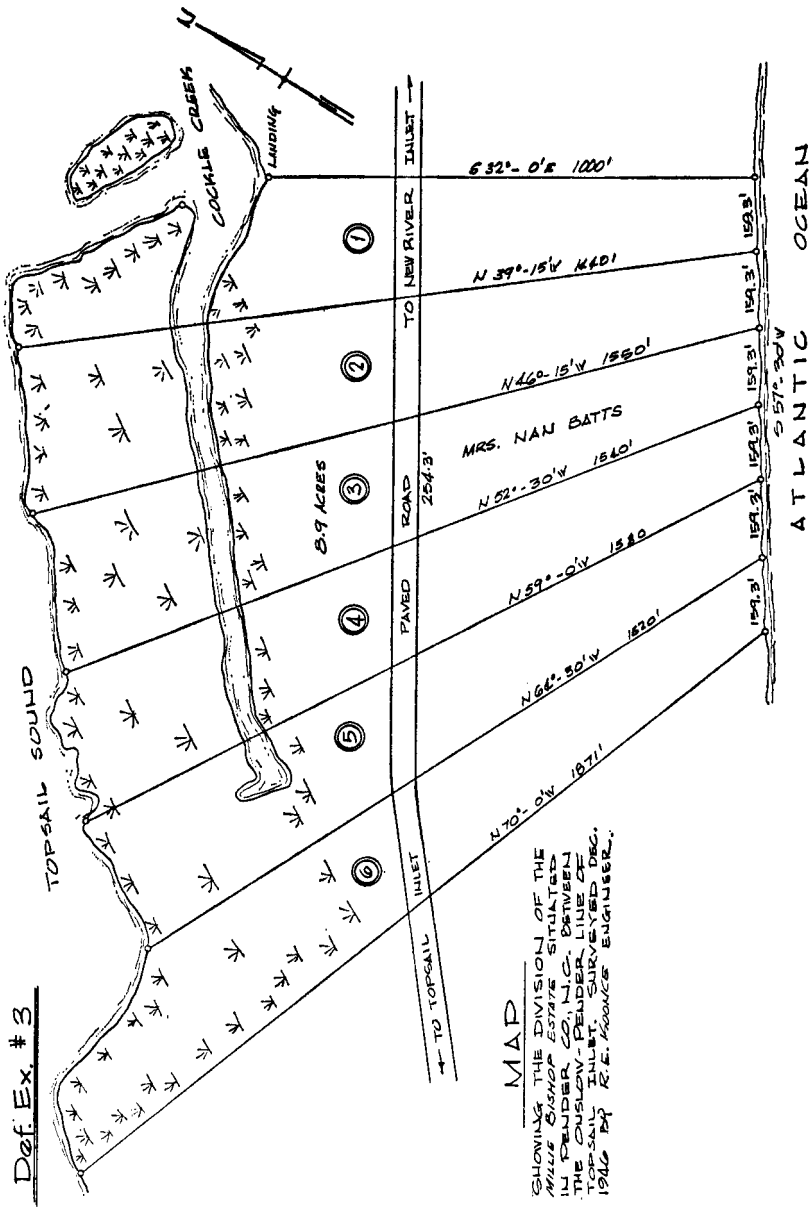
Contending that the court had erred in its ruling upon certain evidence and in its charge, defendants filed motions to set aside the directed verdict which Judge Cowper had entered against them on their cross action and for a new trial. These motions were denied. Defendants then tendered a judgment upon the verdict, which decreed that plaintiff was not the owner of the land described in the complaint and incorporated the court's ruling "nonsuiting" defendants' cross action.

Judge Cowper declined to sign the tendered judgment. Instead he entered judgment which recited (1) that his ruling allowing plaintiff's motion for a directed verdict against defendants' cross action should stand "inasmuch as the defendants have failed to prove title to any land and locate such land within the Jesse W. Batson grant and within the lands conveyed by Jesse W. Batson and wife to Millie Bishop"; (2) that plaintiff's motion for judgment notwithstanding the verdict should be allowed "inasmuch as plaintiff has proved without contradiction that he is the owner of the lands described in the complaint, as shown on the division map of the lands of Jesse W. Batson, deceased, . . . by conveyance from the proper heirs of Jesse W. Batson without any lappage or infringement on such lands by lands owned by the defendants; and (3) that the defendants' motion for a new trial should be overruled."

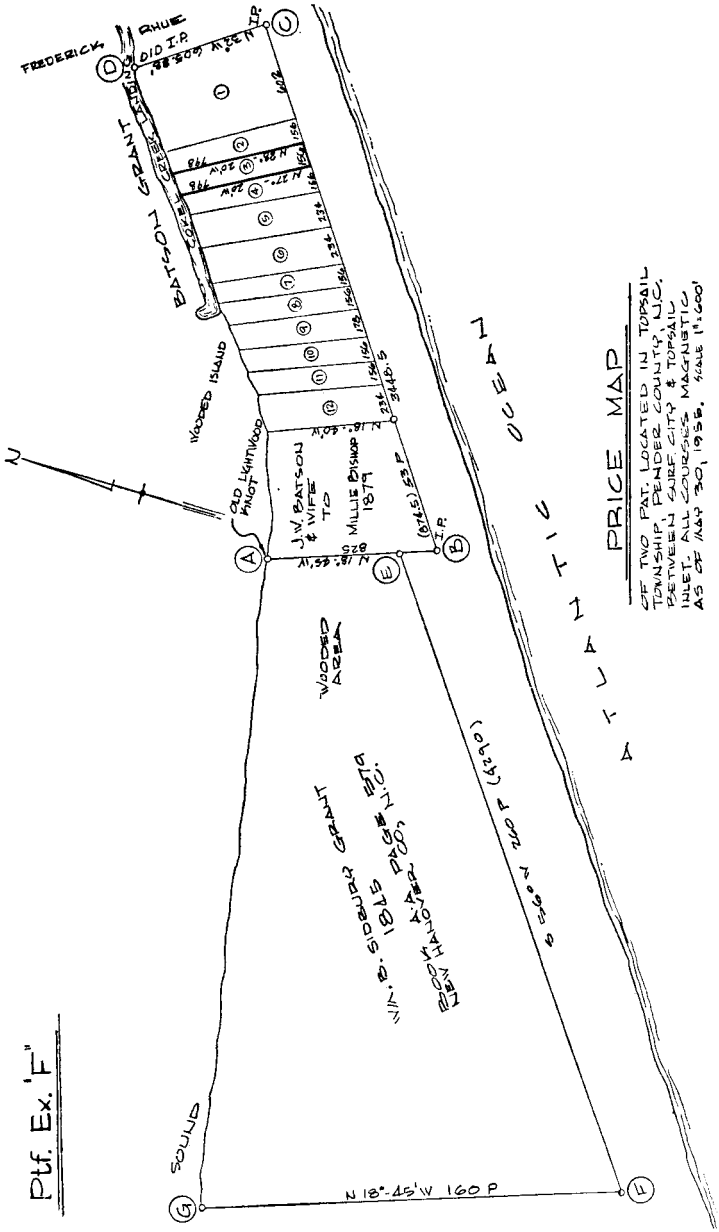
The judgment decreed that defendants are not the owners of the lands described in the answer; that plaintiff is the owner and entitled to the immediate possession of the land described in the complaint; that defendants' claim to the lands described in the answer is a cloud upon plaintiff's title to the lands described in the complaint which should be, and is, hereby removed; and that "plaintiff be and he is hereby allowed to recover against the defendants nominal damages and the costs."

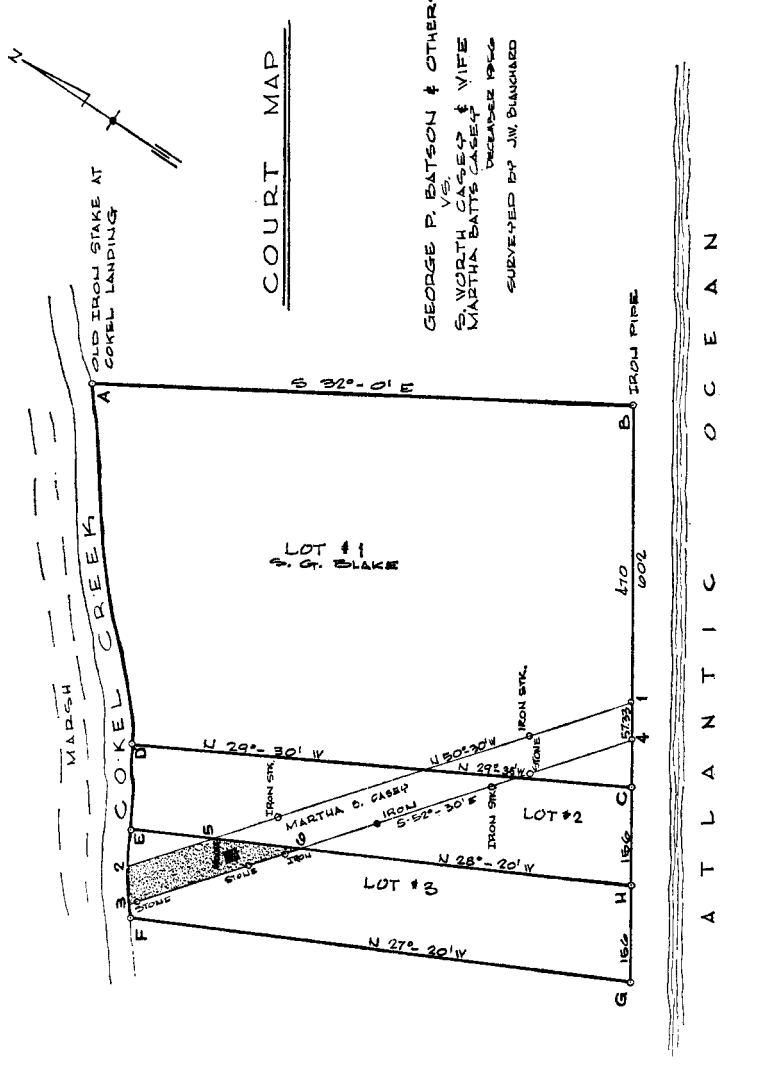
The first assignment of error which defendants bring forward is that the court erred in denying their "motion for a directed verdict of nonsuit" at the conclusion of plaintiff's evidence and at the close of all the evidence. The second is that the court erred in allowing plaintiff's "motion for nonsuit" as to defendants' cross action.

Cutts v. Casey


Def. Ex. #3
MAP
SHOWING THE DIVISION OF THE NELLIE BISHOP ESTATE SITUATED IN PENDER CO., N.C. BETWEEN THE ONSLOW-PENDER LINE OF TOPSAIL INLET. SURVEYED DEC. 1946 BY R.E. HOOKS ENGINEER.
TOPSAIL SOUND
COCKLE CREEK
LANDING
TO TOPSAIL INLET
PAVED ROAD 254.3'
TO NEW RIVER INLET
8.9 ACRES
MRS. NAN BATTS
ATLANTIC OCEAN
S 32°-0'E 1000'
N 39°-15'W 1440'
N 46°-15'W 1560'
N 52°-30'W 1540'
N 59°-0'W 1580
N 64°-30'W 1620'
N 70°-0'W 1871'
S 57°-30'W
159.3'
1
2
3
4
5
6

Cutts v. Casey




COURT MAP
GEORGE P. BATSON & OTHERS
VS.
ED. WORTH CASEY & WIFE
MARTHA BATTS CASEY
DECEASED 1956
SURVEYED BY J.W. BLANCHARD
N
OLD IRON STAKE AT
COKEL LANDING
COKEL CREEK
MARSH
ATLANTIC OCEAN
S 32°-01' E
IRON PIPE
LOT #1
S. G. BLAKE
470
602
N 29°-30' W
N 30°-30' W
N 29°-30' W
IRON STK.
STONE
MARTHA C. CASEY
IRON
S 52°-30' E
LOT #2
N 28°-20' W
LOT #3
N 27°-30' W
A
B
C
D
E
F
G
H
1
2
3
4
5
9

[3] When the new rules of Civil Procedure became effective on 1 January 1970, the word *nonsuit* was banished from our civil practice. In nonjury trials the motion for nonsuit has been replaced by the motion for a dismissal, G.S. 1A-1, Rule 41(b); in jury trials, by the motion for a directed verdict, G.S. 1A-1, Rule 50(a). The motion for a directed verdict presents substantially the same question formerly presented by the motion for nonsuit, that is, whether the evidence considered in the light most favorable to the claimant will justify a verdict in his favor. *Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396.

[4-6] In an action of trespass when both parties claim title to the land involved, and each seeks an adjudication that he is the owner and entitled to the possession of the disputed property, each has the burden of establishing his title by one of the methods specified in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142; *Day v. Godwin* and *Day v. Paper Co.* and *Day v. Blanchard,* 258 N.C. 465, 128 S.E. 2d 814. Where, as here, the parties claim through a common source, the burden on the issue of title rests upon the "party asserting title and right of possession to connect his title to the common source of title by an unbroken chain of conveyances and show that (1) the land in controversy is embraced within the bounds of the deeds or other instruments upon which he relies, and (2) the title thus acquired is superior to that claimed by his adversary." *Jones v. Percy,* 237 N.C. 239, 242, 74 S.E. 2d 700, 702. Claimant must show that the land he claims lies "within the area described in each conveyance in his chain of title and he must fit the description contained in his deed to the land claimed." *Cutts v. Casey,* 271 N.C. 165, 167, 155 S.E. 2d 519, 521. Whether relying upon his deed as proof of title or color of title a claimant is required to fit the description therein to the earth's surface. *Day v. Godwin, supra; Seawell v. Fishing Club,* 249 N.C. 402, 106 S.E. 2d 486; *Skipper v. Yow,* 238 N.C. 659, 78 S.E. 2d 600.

[7] A failure of one of the parties to carry his burden of proof on the issue of title does not, *ipso facto,* entitle the adverse party to an adjudication that title to the disputed land is in him. He is not relieved of the burden of showing title in himself. *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627. "The plaintiff must recover on the strength of his own title, and upon failure of proof by him the jury may well find that he is not the owner of the land, although satisfied that the defendant has no title." *Wicker*

v. Jones, 159 N.C. 103, 116, 74 S.E. 801, 806. This statement is, of course, equally applicable to a defendant who has set up a cross action in which he claims title to the land in dispute. Thus, in this case, if defendants fail to locate the Millie Bishop tract according to their contentions, title cannot be adjudicated in plaintiff merely because of defendants' failure of proof. The burden remains upon plaintiff to prove his title. There are cases involving a disputed title to land in which neither party can carry the burden of proof.

[8] Plaintiff's evidence, when considered in the light most favorable to him, was sufficient to establish the northeastern line of the Sidbury grant as line A-E on the Price map, the southwestern line of the Batson grant as the line A-E-B, the Vashti Atkinson line as line A-E, and the Bishop tract as depicted on the Price map. Thus, plaintiff's evidence would justify a finding that the land he claims lies within the Batson grant and outside the Millie Bishop tract. Each of the three trials which has come to this court for review was had upon the transcript of the evidence taken before the referee. Although certain evidence admitted in the second trial was excluded in the third, plaintiff's evidence has not varied materially from that of the first trial at which the trial judge entered judgment of nonsuit at the close of his evidence. Upon appeal, in an opinion by Chief Justice Parker, we reversed the nonsuit. *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519. That decision remains the law of this case. Defendants' motion for a directed verdict against plaintiff's action was properly denied.

The next question is whether plaintiff's motion for a directed verdict against defendants' cross action was properly allowed. Defendants contend that they not only located the Millie Bishop tract according to their record title at the northeast end of the Batson grant, but also that they showed adverse possession of the lot described in the answer for a period of more than thirty-five years. Neither of these contentions can be sustained.

[9] Defendants assert record title to the land in suit under the deed from Batson to Bishop. They stipulate that Batson acquired the land he conveyed to Bishop by a grant from the State. This grant described a tract at least twice as large as the tract described in his deed to Bishop. Notwithstanding, defendants made no effort to locate the Millie Bishop tract on the ground by reference to the description in her deed. Although

that description begins at "Vashti Atkinson's corner in the Sound," and runs thence with her line "across the banks" S. 25° E. 66 poles to the ocean, defendants offered no evidence tending to locate either her corner or her line. Defendants' contention that they "made out a prima facie case of their counterclaim" by showing that the lot described in the answer was contained within the description of the deed from Batson to Bell and "within the Millie Bishop Estate Division Map" is indeed perplexing. However, it seems that by some thaumaturgy they would substitute for Millie Bishop's 1879 deed the Koonce map made in 1946 at the instance of her great grandchildren, who were then desirous of dividing her beach property among themselves. This, of course, they cannot do.

[10-12] Indubitably the Koonce map was not admissible as substantive evidence to locate the Millie Bishop tract. *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219; *McCormick v. Smith,* 246 N.C. 425, 98 S.E. 2d 448; *Memory v. Wells,* 242 N.C. 277, 87 S.E. 2d 497; *Bullard v. Hollingsworth,* 140 N.C. 634, 53 S.E. 441; *Burwell v. Sneed,* 104 N.C. 118, 10 S.E. 152; *Dobson v. Whisenhant,* 101 N.C. 645, 8 S.E. 126. Further, "private maps may be used only when a witness testifies to their correctness from first-hand knowledge." Stansbury, North Carolina Evidence § 153 (2d Ed. 1963); 32 C. J. S. *Evidence,* § 730(1) (1964). No person attested the accuracy of the Koonce map or attempted to fit it to the description in the Bishop deed. It was, therefore, nothing more than a written declaration by Koonce as to the boundaries of a tract belonging to the "Millie Bishop estate." *Cowles v. Lovin,* 135 N.C. 488, 47 S.E. 610. However, witnesses were questioned and gave answers with reference to the Koonce map. Further, without this map, it would be impossible to visualize defendants' claim. Under these circumstances the court should have admitted the map, carefully limiting its use for illustrative purposes. However, since the case was withdrawn from the jury, and the trial judge and this court have had the benefit of the map, no possible prejudice resulted to defendants from its exclusion. Defendants' assignment of error based upon its exclusion is overruled.

Koonce's assumption that the southwest corner of the Rhue grant was the northeast corner of the Bishop tract gets no support from the Bishop deed. Defendants' evidence tends to show that Mr. Justice told Utley that the land lying southwest of the Rhue line "had always been known to him as Bishop land." R. D.

Everett testified that the Batson lands were located south of Cockle Creek Landing. Several of the Bishop heirs who participated in the Koonce division of her lands testified that their deceased father, at a time when he was a tenant in common of the lands, told them the Rhue land was the Bishop line. However, there is no testimony in the record tending to show that any call in the Bishop deed was a call for the Rhue line. Since the third call in the Bishop deed is the one line identified only by course and distance—the first being the Atkinson line; the second, the Atlantic Ocean; the fourth, the sound—*if* Koonce was attempting to locate the Bishop tract by the deed he was treating the Rhue line as the third call.

[13, 14] From the Rhue line Koonce went southwesterly with the ocean 955.8 feet to a point—not 874.5 feet as specified in the Bishop deed. From that point he ran N. 70° W. 1871 feet to the sound. According to the description in the Millie Bishop deed this line would have been the Vashti Atkinson line, but neither documentary nor oral evidence so identified it. Further, the evidence tended to show that, applying the rules of surveying, in 1946 the call 70° W. could not conform to 25° W. as of 1879. This latter course is the third call in the Bishop deed and the first call in reverse. In any event, Vashti Atkinson's line, having been created by a senior grant, could not be established by reversing the calls in the Bishop deed, a junior grant. "Before the calls of the junior grant can be ascertained, those of the elder must be located and recourse cannot be had to the junior grant for that purpose." *Cornelison v. Hammond,* 224 N.C. 757, 759, 32 S.E. 2d 326, 327; *Day v. Godwin* and *Day v. Paper Co.* and *Day v. Blanchard, supra.* Further, reversing may be had only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line. *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Jarvis v. Swain,* 173 N.C. 9, 91 S.E. 358. Patently this is not a case for reversing.

As earlier pointed out, the first call in the Bishop deed is for the same course and distance as the first call in the Batson grant, its southwest boundary. The only difference is that, instead of calling for the corner of William B. Sidbury (then deceased), it calls for the corner of his daughter Vashti Atkinson. The deed's second call runs northeast with the ocean 53 poles to a *stake.* The third call, which is parallel with the first, runs N. 25° W. 88 poles to the sound, and the fourth runs with the

sound back to the beginning. It is significant that the terminus of the second call in the Bishop deed is a stake—*not the Rhue line*—and that Vashti Atkinson was the only adjoining landowner to whom the description refers. *Prima facie,* the third call, which began at a stake in the edge of the ocean and ran northwesterly to the sound, was a new line going through the Batson grant. As Price—the only surveyor who purported to locate the Bishop tract—testified, wherever the Sidbury line may be located on the ground, the deed from Batson to Millie Bishop locates the Bishop tract at the southwest end of the Batson grant and not the northeast end, as defendants contend.

Utley, the surveyor who testified for defendants, said that he did not survey the Millie Bishop tract and that all he knew about it was what he saw on the Koonce map.

[9, 16] From the foregoing discussion it is quite clear that defendants failed to show that the land described in the answer is covered by the description in the Millie Bishop deed. Furthermore, a reference to the testimony of the Batson heirs and other witnesses for defendants make it equally plain that defendants have failed to establish title by twenty years' adverse possession. The character and requirements for such possession have been stated many times. *State v. Johnson,* 278 N.C. 126, 179 S.E. 2d 371; *Everett v. Sanderson,* 238 N.C. 564, 78 S.E. 408; *Price v. Whisnant,* 236 N.C. 381, 72 S.E. 2d 851; *Locklear v. Oxendine, supra; Smith v. Fite,* 92 N.C. 319. *See* 1 N. C. Index 2nd *Adverse Possession* §§ 1 *et seq.* (1967).

The land which defendants claim as the Bishop tract was unfenced. Cattle and hogs belonging to others also roamed the banks adjacent to Cockle Creek Landing. If there was a "fishery" on the lands its location and duration were not disclosed. This comment is equally applicable to defendants' other evidence of possession. Further, the lease to the Navy and the beginning in 1956 of a house on the lot described in the answer are patently insufficient to establish title by adverse possession to the land in dispute.

[15, 16] While adverse possession is not required to be unceasing, if it is interrupted, claimant must show that he has, from time to time, continuously subjected the land to the use of which it is susceptible for the statutory period—and such use must have been under known and visible lines and boundaries. Assuming the notoriety of the Bishop heirs' claim to the Rhue

line as their northeast boundary, there is not the slightest evidence that any known or visible line marked the southeastern boundary of their claim. To ripen title adverse possession must be under "known and visible boundaries such as to apprise the true owner and the world of the extent of the possession claimed." *McDaris v. "T" Corporation,* 265 N.C. 298, 303, 144 S.E. 2d 59, 63.

Plaintiff's motion for a directed verdict against defendants' cross action was properly allowed.

[17, 18] The third question presented is whether the court erred when it refused the issues tendered by defendants and submitted those framed by the court. The answer is NO.

The theory of plaintiff's case is that Batson conveyed to Bishop the southwestern portion of his grant and that he retained 2,574 feet of ocean frontage between the Bishop and Rhue lines, this being the frontage which Price divided among the Batson heirs. The division is valid, and plaintiff's title to lot No. 3 of the division is established, only if Price correctly located the Sidbury line and the Bishop tract, the deed to which calls for an ocean frontage of merely 53 poles or 874.5 feet. In no other way can plaintiff stretch the distance between the Sidbury and Rhue line from the 107 poles (1,765.4 feet) called for in the Batson grant to the 209 poles (3,448.5 feet) shown on the Price map. Therefore, issue No. 1 which the court submitted to the jury would determine whether plaintiff had title to lot No. 3. Plaintiff tendered no issues and he acquiesced in those framed by the court. After defendants' cross action had been dismissed, plaintiff's title to the land described in the complaint was the first remaining issue. Since the jury answered the issue adversely to plaintiff, the court's failure to submit the issues of trespass and damage was harmless error.

We next consider the question whether the judge erred when he refused to sign the judgment which defendants tendered on the verdict and allowed plaintiff's motion, made under G.S. 1A-1, Rule 50(b)(1), to have the jury's verdict set aside and judgment entered in accordance with his motion for a directed verdict at the close of the evidence.

Judge Cowper's judgment recites that he allowed plaintiff's motion for judgment notwithstanding the verdict because plaintiff had "proved without contradiction that he is the owner of

the lands described in the complaint as shown on the Division Map of the lands of Jesse W. Batson, deceased, recorded in Map Book 5, page 78, Pender Registry, by conveyance from the proper heirs of Jesse W. Batson without any lappage or infringement on such lands owned by the defendants. . . ."

[19] The fundamental question raised by this assignment of error is whether, under G.S. 1A-1, Rule 50, the trial judge can direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. This is a question which has not heretofore been presented to this court, and the answer is NO.

Rule 50, which deals only with jury trials, does not purport to confer upon the judge the power to pass upon the credibility of the evidence and to direct a verdict in favor of the party having the burden of proof—nor could it do so. N. C. Const. art. I, § 19 (recodified as art. I, § 25, effective 1 July 1971) provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." This section has been construed to guarantee trial by jury in all civil actions where the parties have not waived the right. *Icenhour v. Bowman,* 233 N.C. 434, 64 S.E. 2d 428; *Hershey Corp. v. R. R.,* 207 N.C. 122, 176 S.E. 265; *McDowell v. R. R.,* 186 N.C. 571, 120 S.E. 205. *See also Poultry Co. v. Oil Co.,* 272 N.C. 16, 157 S.E. 2d 693; *Mangum v. Yow,* 263 N.C. 525, 139 S.E. 2d 537; *Ingle v. McCurry,* 243 N.C. 65, 89 S.E. 2d 745; *Sparks v. Sparks,* 232 N.C. 492, 61 S.E. 2d 356; *Fox v. Army Store,* 215 N.C. 187, 1 S.E. 2d 550. North Carolina General Statutes 1A-1, Rule 38, specifically refers to this constitutional provision. Furthermore, Rule 51(a) provides, *inter alia,* that "[i]n charging the jury in any action governed by these rules, no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case." This identical provision was formerly contained in G.S. 1-180, which—since 1 January 1970—has applied only to criminal cases.

As a consequence of our constitutional and statutory provisions this Court has consistently held that the judge cannot direct a verdict upon any controverted issue in favor of the party having the burden of proof "even though the evidence is uncon-

tradicted." *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 672, 119 S.E. 2d 614, 615; *Shelby v. Lackey*, 236 N.C. 369, 72 S.E. 2d 757; *McCracken v. Clark*, 235 N.C. 186, 69 S.E. 2d 184; *House v. R. R.*, 131 N.C. 103, 42 S.E. 553; *Mfg. Co. v. R. R.*, 128 N.C. 280, 38 S.E. 894; 4 N. C. Index *Trial* § 31 (1961); 2 McIntosh, N. C. Practice and Procedure § 1516 (2d ed. 1956). Justice Rodman stated the rule succinctly in *Chisholm v. Hall*, 255 N.C. 374, 376-77, 121 S.E. 2d 726, 728: "When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff.

"A peremptory instruction does not deprive the jury of its right to reject the evidence because of lack of faith in its credibility. Such an instruction differs from a directed verdict as that term is used by us. A verdict may never be directed when the facts are in dispute. *The judge may direct a verdict only when the issue submitted* presents a question of law based on admitted facts." (Italics ours; citations omitted.)

In *Pedrick v. Peoria and Eastern Railroad Co.*, 37 Ill. 2d 494, 509, 229 N.E. 2d 504, 513 (1967), this comment was made: "Of all the states in which recent cases were found, North Carolina is the most restrictive, for it allows directed verdicts only when the evidence presents a question of law based on admitted facts. *Chisholm v. Hall*, 255 N.C. 374, 121 S.E. 2d 726; *see also Flintall v. Charlotte Liberty Mutual Ins. Co.*, 259 N.C. 666, 131 S.E. 2d 312."

It has been the rule with us that "[t]he court can always direct a verdict *against* the party on whom rests the burden of proof, if there is no evidence in his favor." (Emphasis added.) *Everett v. Williams*, 152 N.C. 117, 67 S.E. 265. In 1849 Justice Pearson said: "When a plaintiff fails to make out his case, the judge may say to the jury, if all the evidence offered be true, the plaintiff has not made out a case, and direct a verdict to be entered for the defendant, unless the plaintiff chooses to submit to a nonsuit." *State v. Shule*, 32 N.C. 153, 155-156.

As pointed out in *Chisholm v. Hall, supra*, when there is no conflict in the evidence and but one inference is permissible

from it, the court may give a peremptory instruction in favor of the party having the burden of proof. Such an instruction directs the jury to answer the issue in favor of the plaintiff *if* it finds the facts to be as all the evidence tends to show; otherwise not. To so instruct is not to direct a verdict. *In re Will of Roberts,* 251 N.C. 708, 112 S.E. 2d 505; *Stewart v. Jaggers,* 243 N.C. 166, 90 S.E. 2d 308; *Everett v. Williams, supra.* See the comment on directed verdicts by Phillips in the 1969 Supplement to the second edition of McIntosh, N. C. Practice and Procedure § 1516 (hereinafter cited as Phillips).

When granted, the common law motion for a directed verdict resulted in a judgment on the merits in either a criminal or a civil case. For a dicussion of the difference between directed verdicts in criminal and civil cases see *State v. Riley,* 113 N.C. 648, 650, 18 S.E. 168.

Although permissible procedure, the practice of directing a verdict against the party with the burden of proof was little used in this jurisdiction because of the plaintiff's absolute right to take a voluntary nonsuit at any time before verdict. G.S. 1-224 (repealed by N. C. Sess. Laws 1967, Ch. 954, § 4, effective 1 January 1970); *Mitchell v. Jones,* 272 N.C. 499, 158 S.E. 2d 706; *Insurance Co. v. Walton,* 256 N.C. 345, 123 S.E. 2d 780; *Oil Company v. Shore,* 171 N.C. 51, 87 S.E. 938; 4 N. C. Index *Trial* § 29 (1961). Upon the judge's intimation that he would direct a verdict for defendant the plaintiff would take a nonsuit. Whereas a verdict directed against him would have been a disposition of the case on its merits reversible only by appeal, this maneuver left him free either to appeal or to commence a new action. *Pickelsimer v. Pickelsimer,* 257 N.C. 696, 127 S.E. 2d 557; *Hedrick v. Pratt,* 94 N.C. 101; G.S. 1-25 (repealed, N. C. Sess. Laws 1967, Ch. 954, § 4, effective 1 January 1970); Phillips § 1516 (1969 Supp.). In consequence "the directed verdict was abandoned in practice by defendants—though it remained technically available—as had been the demurrer to the evidence. It remained in use under the code only as a means for challenge by plaintiff to the sufficiency of defendants' evidence to support the occasional affirmative defense interposed as the sole defense." Phillips § 1488.5 (1970 Supp.).

[20, 21] Under the new rules of civil procedure a plaintiff can no longer take a voluntary nonsuit as a matter of right or secure a voluntary dismissal without prejudice *after* he has rested his

case. G.S. 1A-1, Rule 41(a)(1), permits one voluntary dismissal, but the right must be exercised before a plaintiff rests his case. 6 Wake Forest L. Rev. 267, 279. Now, in a jury trial, the motion for a directed verdict is the only device by which the adverse party can challenge the sufficiency of the evidence to go to the jury. The rules do not provide for compulsory nonsuit or dismissal in this situation. Rule 50(a); Phillips § 1485.5 (1970 Supp.). The comparable motion in a *nonjury* case is the defending party's motion for a dimissal under Rule 41(b). 2B Barron and Holtzoff, Federal Practice and Procedure § 1075 (Wright ed. 1961, Supp. 1969). *See* Phillips § 1375 (1970 Supp.).

[22, 23] When it is clear that the plaintiff has shown no right to relief, the judge will "direct a verdict for the defendant at the close of plaintiff's evidence just as he could formerly grant a motion for compulsory nonsuit." 5 Wake Forest L. Rev. 1, 37 (1969). When a motion for a directed verdict under Rule 50(a) is granted, the defendant is entitled to a judgment on the merits unless the court permits a voluntary dismissal of the action under Rule 41(a)(2). Under this rule, as Chief Justice Bobbitt pointed out in *Kelly v. Harvester Co., supra* at 158, 179 S.E. 2d at 398, "[T]he court *may* permit *a voluntary* dismissal upon such terms and conditions as justice requires. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 91 L. Ed. 849, 853, 67 S.Ct. 752, 755, (1947); Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Intra. L. Rev. 1, 38 (1969)." A dismissal under Rule 41(a)(2) is without prejudice unless the judge specifies otherwise.

Phillips has noted that whether the motion for a directed verdict is available in favor of the party with the burden of proof "is a problem to which Rule 50 does not speak directly." Phillips § 1488.20 (1970 Supp.). It will have to be resolved by judicial decision within constitutional and statutory limitations.

Under Fed. R. Civ. P. 50(a), which is identical with N. C. R. Civ. P. 50(a) "[i]t is not a usual thing for the trial judge to direct a verdict in favor of the party having the burden of proof though this has sometimes been done under extreme circumstances." *Polhemus v. Water Island,* 252 F. 2d 924, 928 (3rd Cir.). However, in *U. S. v. Grannis,* 172 F. 2d 507, 513 (4th Cir.), the court, in ordering a directed verdict for the government, said: "In the federal courts the judge should direct a verdict for either party, even if the party has the burden of proof,

when the facts are so convincing that reasonable men could not differ as to their significance; and this is especially true when there is no conflict in evidence." Here we note parenthetically that the federal rules have no counterpart for our Rule 51(a), which prohibits the trial judge from expressing to the jury an opinion on the evidence.

An effort was made to state the federal rule in 5 Moore's Federal Practice § 50.02(1) (2d ed. 1969): "The courts are reluctant to direct a verdict in favor of the party carrying the burden of persuasion. On the one hand, it is held that where no evidence is adduced to disprove the *prima facie* case of the proponent and his evidence stands uncontradicted and unimpeached the court should direct a verdict in his favor. On the other hand, it is clear that even when the evidence is uncontradicted, if it is possible to derive conflicting inferences from it, it is error to direct a verdict. And where the proponent's case is totally dependent upon the credibility of his witnesses, the issue is presumably for the jury. But the proponent apparently has no right to go to the jury where the only testimony is against him." *Accord,* 2B Barron and Holtzoff, Federal Practice and Procedure § 1074.1 (Wright ed. 1961). *See Dehydrating Process Co. v. A. O. Smith Corp.,* 292 F. 2d 653, n. 6 at 656 (1st Cir.).

It is quite clear, however, that even in the federal courts evidence is not necessarily conclusive because it is uncontradicted. It is still for the jury if reasonable men may differ as to its truth or if conflicting inferences may reasonably be drawn from it. *Wilkerson v. McCarthy,* 336 U.S. 53, 93 L. Ed. 497. *See Ferdinand v. Agricultural Insurance Company,* 22 N.J. 482, 126 A. 2d 323.

[19] The established policy of this State—declared in both the constitution and statutes—is that the credibility of testimony is for the jury, not the court, and that a genuine issue of fact must be tried by a jury unless this right is waived. *Sparks v. Sparks, supra.* Whether there is a "genuine issue of fact" is, of course, a preliminary question for the judge. There may be, as suggested by Phillips, § 1488.10 (1970 Supp.), "a few situations in which the acceptance of credibility as a matter of law seems compelled." If so, we will endeavor to recognize that situation when it confronts us.

[24] Since a directed verdict has always been a means of taking a case from the jury, Rule 50(a) provides that "the order

granting a motion for a directed verdict shall be effective without any assent of the jury." This simply means that the jury has no function when a directed verdict is ordered. The judge has decided that "the question has become one of law exclusively." Thus, it would be "an idle gesture to require the jury to go through the motions of returning the verdict directed." The quoted provision "eliminates this useless formality." Comment on G.S. 1A-1, Rule 50 at p. 682. *See also* 5 Moore's Federal Practice § 50.02(3) (2d ed. 1969), and 5 Wake Forest L. Rev. 150-151.

[25] In this case the court not only erred in directing a verdict in favor of the party having the burden of proof but also in assuming that plaintiff's evidence was uncontradicted. Plaintiff concedes that the testimony of defendants' witness, W. H. Utley, a registered surveyor, contradicted the testimony as to the location of the beginning point and the northeastern line of the Sidbury grant. Furthermore, conflicting inferences as to its location might reasonably be drawn from the great discrepancy between the length of the ocean frontage called for in the Batson grant and that shown on the Price map. In addition defendants' cross-examination sought to show the unreliability of the information and recollections of the witnesses upon whom plaintiff relied to show that point A on the Price map was the beginning of the Sidbury tract. The location of the Sidbury line at points A-E-B was crucial to plaintiff's case. That plaintiff's evidence was not so clear and uncontradicted as to be conclusive as to its location is demonstrated by the jury's verdict against him. We also note that the referee's findings were against plaintiff and that he has been the appellant in the two preceding appeals.

We hold that the judge erred when he declined to sign the judgment tendered by defendants and entered judgment n. o. v.

Defendants' final contention is that the court erred in failing to award them a new trial for errors of law committed during the trial. We have examined each of the ten exceptions upon which defendants base this assignment of error. In none do we find prejudicial error entitling defendants to a new trial.

The judgment n. o. v. which Judge Cowper entered for plaintiff is reversed. The verdict is reinstated, and this cause is remanded to the Superior Court with directions to enter the judgment tendered by defendants. Phillips, § 1488.45(4) (1970 Supp.).

Error and remanded.

Justice HUSKINS concurring in result.

I am in full agreement with the result reached in the majority opinion. There was plenary conflicting evidence in this case, and direction of the verdict was clearly erroneous. I disagree, however, with that portion of the opinion which holds that the trial judge cannot under Rule 50, under any circumstances, direct a verdict in favor of the party carrying the burden of proof. Such a position is in conflict with the philosophy and purposes of the new Rules of Civil Procedure and in conflict with holdings of the federal courts under the identical Federal Rule 50.

First of all, the direction of a verdict in favor of the party having the burden of proof, or any other party, is not a violation of constitutional provisions guaranteeing a jury trial in all controversies respecting property. N. C. Const., Art. I, § 19 (to become Art. I, § 25 on July 1, 1971). This is so because there is no constitutional right to go to the jury with an argument on facts insufficient as a matter of law to make out a claim. Nor is there a constitutional right to try to persuade a jury, by emotion alone, that plaintiff's case should not prevail when the evidence is uncontradicted or is such that rational men would be unable to differ. The United States Supreme Court faced this problem in construing Federal Rule 50 in *Galloway v. United States,* 319 U.S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077 (1943). The Court held that the Seventh Amendment, which guarantees trial by jury in cases at common law where the value in controversy exceeds $20.00, did not prohibit the direction of a verdict under Federal Rule 50. After pointing out that challenges to the sufficiency of the evidence are nothing new, the Court commented that whatever standard for sufficiency is used, "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *See* Comment, Directed Verdicts and the Right to Trial by Jury in Federal Courts, 42 Texas L. Rev. 1053 (1964).

North Carolina has likewise had such guaranties against jury prejudice in the past. The demurrer to the evidence and the old peremptory instruction, for instance, are procedures heretofore used to decide, *as a matter of law,* whether the jury should have complete freedom to act. 2 McIntosh, North Carolina Prac-

tice and Procedure (2d Ed., 1956), §§ 1482, 1488, 1516, 1596(4). Thus, curbs on the absolute freedom of the jury are nothing new in our practice and have not been construed in the past to offend jury trial provisions of our Constitution. McIntosh, *supra*, §§ 1431, 1488. The crux of the problem seems to be the determination of what is a question of law and what is a question of fact.

This brings us to the second reason for the conclusion of the majority. Rule 51(a) provides in part: "In charging the jury in any action governed by these rules, no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case." The majority notes that there is no counterpart for this rule in the federal practice and, in this manner, apparently distinguishes numerous cases from federal jurisdictions and from other states which hold that in appropriate circumstances a verdict may be directed in favor of the party with the burden of proof. *See, e.g., Stewart v. Gilmore*, 323 F. 2d 389 (1963); *United States v. Grannis*, 172 F. 2d 507 (1949); *Bliss v. DePrang*, 81 Nev. 599, 407 P. 2d 726 (1965). *See also* 5 Moore's Federal Practice, § 50.02(1); 2B Barron and Holtzoff, Federal Practice and Procedure (Wright Ed., 1961), § 1074.1.

We are aware that Rule 51(a) is an almost verbatim application of old G.S. 1-180 (now limited to criminal actions) to civil actions governed by the new rules, and that G.S. 1-180 has in the past been held to apply to comment *at any time* during the trial. *Hyder v. Battery Co.*, 242 N.C. 553, 89 S.E. 2d 124 (1955). This settled law need not be disturbed for this Court to hold that the judge can direct a verdict in favor of the party having the burden of proof. This is so because the determination of a motion for directed verdict is a question of law and not a question of fact. 2 McIntosh, *supra*, §§ 1482, 1516; 2B Barron and Holtzoff, *supra*, §§ 1071-1072.

Dean Dickson Phillips is cited by the majority to support its conclusion. Dean Phillips, on the contrary, states that Rule 51(a) should *not* prevent a direction of a verdict for a party with the burden of proof and suggests that the practice be allowed in North Carolina "in the interest of expeditious administration of justice in the rare cases where appropriate." Phillips, 1970 Pocket Part, McIntosh, *supra*, § 1488.20. Dean Phillips explained

his views in these words: "While the idea that the no-comment rule technically controls here is well imbedded in our decisions, it technically has nothing to do with this problem. The no-comment rule is one designed to prevent a judge's intrusion on the fact finding functions of the jury *after* he has decided the prior question of law: 'Is there a genuine issue of fact requiring jury determination?' It speaks not at all to the basis for deciding this preliminary question. Courts allowing this practice consider that the decision to direct verdict for the party with the burden is equally a matter of law with that to direct verdict against the party with the burden. In this case it is a decision that on all the evidence no jury acting rationally could fail to find for the movant. This does indeed involve accepting (not assuming) credibility, but this is no more and no less a matter of law than deciding that only one inference may be drawn from evidence, or that evidence assumed to be credible does not amount to a 'scintilla,' etc. To deny the right ever to direct a verdict for the party with the burden is to deny that there can be circumstances when credibility is manifest as a matter of law. This would be logically at odds with a parallel attitude firmly accepted in our practice; that evidence can be manifestly incredible as a matter of law." See, as to the question of credibility, Fleming James, Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict, 47 Va. L. Rev. 218 (1961), where the writer says, at 233: "So far as credibility goes, *all* courts consider it on a motion for directed verdict to the minimum degree of determining whether testimony is capable of belief by reasonable men or is incredible as a matter of law."

That this conclusion is correct may be seen by reading Rules 50(a) and 51(a) *in pari materia,* as we are required to do. Rule 50(a) uses the words "a party" instead of "a defendant" to refer to the movant, and the words "an opponent" rather than "a plaintiff" to refer to the resisting party. Surely this language must be read to allow directed verdicts for either party. The language of Rule 51(a) should be read to apply only to the conduct of the judge *before* he takes the case from the jury as a matter of law. Indeed, the language of Rule 50(a) at one point reads: "A motion for a directed verdict which is not granted is not a waiver of trial by jury *even though all parties to the action have moved for directed verdicts.*" (Emphasis added.) The majority view makes these words meaningless.

Moreover, the official comment accompanying Rule 50 reads: "The rule further contemplates that *any party* may move for a directed verdict at the close of all the evidence." (Emphasis added.) One writer assumes without discussion that the plaintiff and the defendant could move for a directed verdict, contrary to "the former North Carolina practice." J. McNeill Smith, Trial Under the New Rules, 5 Wake Forest Intra. L. Rev. 138 at 151 (1969).

It is my view that the intention of the General Assembly was to give North Carolina a directed verdict procedure which tracks the federal rule in all material respects, inasmuch as the wording is identical. *See* James E. Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Intra. L. Rev. 1 (1969), and the numerous references to the federal rules throughout the official comments. This Court has already declared that it would be guided by the federal experience where apposite. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970). Other states, in their interpretation of state adaptations of the federal rules, have done likewise. *See Elliot v. Harris,* 423 S.W. 2d 831 (Mo., 1968); *Schacter v. Albert,* 212 Pa. Super. 58, 239 A. 2d 841 (1968); *Canaday v. Superior Court,* 49 Del. 456, 119 A. 2d 347 (1955); *Rogge v. Weaver,* 368 P. 2d 810 (Alaska, 1962).

Furthermore, the rule propounded in the majority opinion is inharmonious with Rule 56 in some instances. Rule 56 requires that upon motion for summary judgment before trial, the trial judge must decide as a matter of law whether or not there is a "genuine issue as to any material fact," and, if not, enter summary judgment for the movant. Rule 56 specifically provides that the movant may be a "party seeking to recover upon a claim," that is, the plaintiff or any other party having the burden of proof with respect to an asserted claim. The majority reasoning, if applied to Rule 56, would seem to preclude its application to the party with the burden of proof and ignore the explicit language of the rule. If the majority reasoning is inapplicable to Rule 56, we have an anomalous situation where the judge may decide as a matter of law *before* the trial that no genuine issue as to any material fact exists but is forbidden to make such determination upon motion for a directed verdict at the close of the evidence. In my opinion such result was not intended by adoption of the new rules. In fact, some courts

have used the same test for summary judgment as for directed verdict. "A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried. In applying this principle the court should consider both the record actually presented and the record potentially possible at the trial." 3 Barron and Holtzoff, Federal Practice and Procedure (Wright Ed., 1958), § 1234. *See also* Phillips, *supra,* §§ 1660.5, 1660.10.

Research has revealed no recent federal case, including those cited by the majority, which prohibits *under all circumstances* the direction of a verdict in favor of the party with the burden. Likewise, cases decided by state courts during the last fifteen years virtually all support the proposition that in appropriate circumstances, which vary from state to state, a verdict may be directed for the party with the burden of proof. *See Walters v. Bank of America,* 9 Cal. 2d 46, 69 P. 2d 839, 110 A.L.R. 1259 (1937); *Stephens v. Carter,* 215 Ga. 355, 110 S.E. 2d 762 (1959); *Nutwood Drainage and Levee District v. Mamer,* 10 Ill. 2d 101, 139 N.E. 2d 247 (1956); *Burke v. Kaschke,* 80 Ill. App. 2d 359, 224 N.E. 2d 473 (1967); *Seaton v. Tucker,* 325 P. 2d 82 (Okla., 1958); *Fox v. Massey-Ferguson, Inc.,* 206 Kan. 97, 476 P. 2d 646 (1970); *Coulthard v. Keenan,* 256 Iowa 890, 129 N.W. 2d 597 (1964); *Rogers v. Thompson,* 364 Mo. 605, 265 S.W. 2d 282 (1954); *Keeler v. Maricopa Tractor Co.,* 59 Ariz. 94, 123 P. 2d 166 (1942); *Whitly v. Moore,* 5 Ariz. App. 369, 427 P. 2d 350 (1967); *Peroti v. Williams,* 258 Md. 663, 267 A. 2d 114 (1970); *Sommerville v. Pennsylvania R. R. Co.,* 151 W. Va. 709, 155 S.E. 2d 865 (1967); *Bliss v. DePrang,* 81 Nev. 599, 407 P. 2d 726 (1965).

In summary, it is my view that (1) the constitutional provision guaranteeing the right to a jury trial does not prevent the direction of verdicts for the plaintiff or the defendant; (2) Rule 51(a) has no application to the direction of verdicts but applies only to judicial comment before the jury on questions of fact; (3) complete harmony with Rule 56 requires an interpretation that verdicts can be directed for either party; (4) there is little authority, save old cases decided before the enactment of the new rules, for the views expressed in the majority opinion, while many courts have held otherwise; and (5) this Court should follow the federal interpretation in all instances where our rule is a verbatim copy of its federal counterpart.

Finally, it is not necessary for us to decide in this case whether a verdict may be directed in favor of the party with the burden of proof. There will be time enough to decide that question when we are confronted with it in a close case. I am unwilling to foreclose for all time the possibility of the direction of a verdict in favor of the party with the burden.

GEORGE B. COGGINS ON BEHALF OF HIMSELF AND OTHER TAXPAYERS OF THE CITY OF ASHEVILLE v. CITY OF ASHEVILLE AND RANGER CONSTRUCTION COMPANY

No. 14

(Filed 14 April 1971)

1. **Appeal and Error § 58— review of temporary or permanent restraining order — findings of fact**

In cases involving a temporary restraining order, the trial court's findings of fact are not binding on the appellate court, which may make its own findings; when a permanent restraining order is involved, the trial court's findings of fact are binding on appeal if supported by the evidence.

2. **Rules of Civil Procedure § 52; Trial § 58— trial by court without jury — necessity for written findings and conclusions**

In cases in which the trial court passes on the facts, the court must in writing (1) find the facts on all issues joined in the pleadings, (2) declare the conclusions of law arising on the facts found, and (3) enter judgment accordingly. G.S. 1A-1, Rule 52(a).

3. **Municipal Corporations § 39— bond issues approved for auditorium and arts center — use of bond proceeds for combined facility**

Where municipal voters had approved separate bond issues for (1) erecting an auditorium and (2) constructing a civic arts center, and the city council thereafter determined that because of increased construction and land acquisition costs the proceeds from the bond issues would be insufficient to finance both projects separately, a contract entered into by the city council for construction of a new building, renovation of the existing auditorium and physical joinder of the two structures to form a combined facility to meet the basic purposes of both projects approved by the voters, *held* not to constitute an *ultra vires* act by the city council or an unlawful diversion of the bond proceeds in violation of G.S. 160-395 and Art. V, § 7, of the N. C. Constitution, since use of the funds for a combined facility is not a deviation from the general purposes for which the bonds were authorized.

Justice HUSKINS dissents.

Coggins v. City of Asheville

APPEAL by plaintiff from *Ervin, J.*, August 31, 1970 Session, BUNCOMBE Superior Court. The case on appeal was docketed in the Court of Appeals and on petition of both parties, was certified to the Supreme Court for the original appellate review.

The plaintiff instituted this taxpayers' action against the City of Asheville and Ranger Construction Company to restrain the enforcement of a contract between the defendants entered into on May 27, 1970, by the terms of which Ranger Construction Company agreed to construct for the City a complex as authorized by two separate bond issues approved by the voters of the City. The plaintiff alleged the plans for the construction of the complex violated the intent and purpose for which two bond issues were authorized. The plaintiff demands that the execution of the contract be permanently restrained as violative of Article V, Section 7, Constitution of North Carolina and G.S. 160-395. The plaintiff filed a verified complaint to which were attached numerous exhibits and moved for a summary judgment declaring the contract void, restraining both the enforcement of the contract and the sale of any bonds (or the use of bond money) for the construction contemplated in the contract.

Attached to the complaint as exhibits were copies of Ordinances 1 and 3 passed by the City Council on October 19, 1967. The ordinances were approved by the voters at an election held December 5, 1967. Ordinance 1 provided for the issuance of bonds in the sum of $4,000,000 " . . . (F)or the purpose of providing funds, with any other available funds, for erecting an auditorium building, with facilities for public gatherings, exhibitions, amusements and athletic events, and incidental facilities, approaches, plazas, entrances, ways, streets, grounds and parking facilities, including the acquisition of necessary land, apparatus, fixtures and equipment."

Also attached, as Exhibit 3, was an ordinance of the City Council entered into and approved by the voters to contract a debt and issue bonds in the sum of $1,300,000 " . . . (F)or the purpose of providing funds, with any other available funds, for constructing a municipal civic arts center, including the erection of a theatre, amphitheatre, concert halls, art museum, museums of history and natural history, and incidental facilities, approaches, plazas, entrances, ways, streets, grounds and parking facilities, including the acquisition of necessary land, apparatus, fixtures and equipment."

At the time the bond resolutions were passed and the election held, and for thirty years prior thereto, the City of Asheville owned and operated the City Auditorium located on Haywood Street. The City Council employed an architect who drew plans for the proposed construction contemplated by Bond Resolutions 1 and 3. For the purposes contemplated, the City purchased additional lands adjacent to the lot on which the City Auditorium was located. This area was within one-quarter mile of Redevelopment Project NCR-13. On account of the City's contemplated improvements on Haywood Street, the City qualified for and received from the Redevelopment Project a gift of $1,500,000. If the contemplated projects authorized by the bond issues failed, the City would be obligated to refund the amount since it had no other development which could qualify for the gift.

Following the bond election, the City architects drew plans for the structures contemplated in Projects 1 and 3. However, they found that on account of the tremendous increase in construction and land acquisition costs between the election and the time to award contracts, the cost of the projects was far in excess of available funds.

An imposing list of organizations and civic leaders became interested in saving the projects, held meetings and came up with a plan to join the two projects contemplated in the bond resolutions by constructing a single complex using so much of the City Auditorium as fitted into the overall plan in such manner as to provide for the improvements authorized by both bond issues. The City Manager, the representatives of many civic organizations and interested citizens appeared before the City Council and recommended the construction of the complex as a single project.

On November 20, 1969, the Asheville City Council after thorough investigation and consultation with various organizations voted to merge the two projects (1 and 3) into one combined facility to be known as the Asheville Civic Center. Soon thereafter, architects were retained to draft plans for a Civic Arts Complex which would encompass the general purposes as set forth in both bond issues. Instead of constructing a new Civic Arts Center, a portion of the proposed plans called for the complete renovation and remodeling of the existing Asheville

City Auditorium using only such parts of the old structure as fitted into and completed the new facility. Upon completion of the remodeling, plans then called for the physical joinder with the new Auditorium Center.

By providing a single joint facility, instead of two separate ones, the cost of maintenance and supervision would save the City $80,000 annually. The City Council approved the plans to merge the projects into the single complex and entered into the contract which the plaintiff now challenges.

The foregoing is a summary of the evidence before Judge Ervin. Both parties filed written motions for summary judgment. After full hearing, Judge Ervin made detailed findings of fact which cover eleven pages of the record. The findings recite: "Upon oral argument, Plaintiff, through his Counsel of record, admitted that there is no allegation or evidence of any bad faith, fraud, capricious or arbitrary action, or of any abuse of power or abuse of discretion on the part of the members of the City Council of the City of Asheville."

After full consideration of the evidence and the admissions, the court made findings of fact. These findings are supported by the evidence and upon the basis of the findings the court concluded:

"1. The erection and construction of the proposed 'arena' or 'new' building is within the general purposes of the Bond Issues or Questions presented to the voters of the City of Asheville on December 5, 1967, in Questions No. 1 and No. 3, and the contract respecting the same between the defendant City of Asheville and the defendant Ranger Construction Company is valid.

2. The physical connection between the proposed 'arena' or 'new' building and the existing auditorium in the fashion set out in the plans and specifications in the contract between Ranger Construction Company and the City of Asheville does not constitute a material or substantial change from the general purpose set forth in Questions No. 1 and No. 3 in the Bond Issues of December 5, 1967, and such plans and contract are valid.

3. The proposed renovation and remodeling of the existing auditorium, as set forth in the plans and specifications

forming a part of the contract between the City of Asheville and Ranger Construction Company, is not a material variation from the purposes set forth in the bond questions voted upon by the voters of Asheville on December 5, 1967, and, as a matter of law, the language set out in said Questions No. 1 and No. 3 does not, in view of the Facts presented to this Court, limit or confine the City Council of the City of Asheville to the erection and construction of a new structure, but can encompass and include the remodeling and renovation of the existing auditorium for the art related activities.

4. The contract between the City of Asheville and Ranger Construction Company, dated May 27, 1970, does not violate the provisions of G.S. 160-395 and the proposed expenditures by the City of Asheville, pursuant to that contract, do not constitute unlawful or *ultra vires* acts of the Asheville City Council.

5. The decision of the Asheville City Council of November 20, 1969, to merge the Civic Arts Complex and the Convention Center, and to utilize the existing auditorium, was based upon changed conditions which constituted sound and compelling reasons to modify the original plans and such modification, and utilization of the existing auditorium, was included, and remained within the general purposes for which the bonds were authorized.

6. The acts of the Asheville City Council in voting the merger of the two facilities on November 20, 1969, and in entering into the contract of May 27, 1970, did not constitute or amount to bad faith, fraud, capricious or arbitrary action, or abuse of power or abuse of discretion.

7. The City of Asheville has not diverted or misapplied any of the funds from either Bond Question No. 1 or No. 3, nor will the performance of its contract with the Ranger Construction Company constitute any such diversion or misapplication.

8. The combined complex set out in the plans and specifications in the contract between Ranger Construction Company and the City of Asheville will substantially provide the facilities and meet the general purpose of each of the respective Bond Questions.

9. The contract between the City of Asheville and the Ranger Construction Company is not unlawful or *ultra vires* in any respect.

THEREFORE, based upon the Facts presented to this Court and the Conclusions of Law recited above, it is ordered, adjudged and decreed that the Motions for Summary Judgments filed by the City of Asheville and the Ranger Construction Company be and the same are hereby allowed, and the plaintiff's action against said defendants is dismissed.

It is further ordered that the plaintiff's Motion for Summary Judgment be and the same is hereby denied, and the costs of this action are taxed against the plaintiff in this cause.

This the 31st day of August, 1970.

/s/ SAM J. ERVIN, III
JUDGE PRESIDING"

The plaintiff excepted to the judgment entered and demanded appellate review.

Bennett, Kelly & Long by E. Glenn Kelly for plaintiff-appellant.

City of Asheville by James N. Golding, Corporation Counsel.

Van Winkle, Buck, Wall, Starnes & Hyde by Herbert L. Hyde, Attorneys for Ranger Construction Co. for defendant appellees.

HIGGINS, Justice.

In this action the plaintiff asked the court, (1) to restrain the defendants from performing their contract *inter se;* and (2) to restrain the City of Asheville from issuing bonds or using the bond proceeds to finance the contract. The evidentiary facts are not in dispute. However, only the ultimate facts found by the court and its conclusions of law based thereon are challenged.

[1] In cases involving a temporary rather than a permanent restraining order, the court's findings of fact are not binding on the appellate court which may make its own findings. McIntosh North Carolina Practice and Procedure, Vol. 2 § 2219;

Board of Elders v. Jones, 273 N.C. 174, 159 S.E. 2d 545, citing *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116. However, a different rule applies when the purpose of the action is a permanent restraining order. In the latter case, the trial court's findings of fact are binding on appeal, if supported by the evidence. *Whaley v. Taxi Company,* 252 N.C. 586, 114 S.E. 2d 254; *Smith v. Rockingham,* 268 N.C. 697, 151 S.E. 2d 568.

[2] In cases in which the trial court passes on the facts, the court is required " 'to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly.' . . . Where facts are found by the court, if supported by competent evidence, such facts are as conclusive as the verdict of a jury." *Goldsboro v. R. R.,* 246 N.C. 101; 97 S.E. 2d 486. Rule 52(a) Findings: Chapter 1A-1, General Statutes of North Carolina, 1969 Replacement.

[3] The plaintiff does not contravert the evidentiary facts. However, he does contend the contract and plans for the use of the bond proceeds constitute a material diversion from the purposes specified in the ordinances authorizing the bonds and violates G.S. 160-395. Specifically he argues the ordinances provide for new construction; and remodeling and the use of the old municipal auditorium are beyond the scope of the ordinances. G.S. 160-395 provides: "The proceeds of the sale of bonds under this subchapter shall be used only for the purposes specified in the ordinances authorizing said bonds . . . . "

The plaintiff, before Judge Ervin in the Superior Court, and on the review here, has insisted the contract between the defendants should be declared unlawful and its performance permanently restrained on the ground it contemplates the expenditure of bond money for purposes other than those authorized by the bond ordinances.

The plaintiff cites cases from a number of states which follow what is called the Strict Construction Rule. The rule is stated in the case of *Tukey v. City of Omaha,* 74 N.W. 613 (Neb. 1898) : "That, when the governing body of a municipality is authorized by a vote of the people, and only thereby, to incur a debt for a particular purpose, such purpose must be strictly complied with, and the terms of the authority granted be strictly and fully pursued . . . . " Cases following this Strict Construction

Rule are cited from Nebraska, New Mexico, North Dakota, Colorado, Oklahoma, Washington and West Virginia.

North Carolina and many other states follow a more liberal rule in construing statutory limitations upon the use of bond money for public improvements. Emphasis is placed on the final result sought to be accomplished. Bond ordinances are passed authorizing indebtedness for certain stated purposes. When an authorizing vote is required, the bond money is earmarked for the stated purposes. However, in planning large permanent improvements the governing authorities look ahead to the future fulfillment of the construction plans. The authorities will inspect and examine the work as it progresses and minor changes from time to time are expected if conditions change and unforeseen developments occur.

In this case the bond resolutions were passed at the election held in 1967. Thereafter, the City authorities undertook the task of acquiring suitable lands upon which to erect the structures and to negotiate a contract for the completion of the projects. They were successful in acquiring a tract of land on Haywood Street adjoining the lot on which the City's auditorium was located. After the issues were approved, but before the construction plans were completed, land acquired and a contract entered into, the City authorities discovered that due to a period of rapid inflation (estimated to be 1½% per month) the proceeds from the bond issues would fall far short of financing the project.

When the danger of losing the contemplated improvement became manifest, the Council sought the advice of architects, civic organizations and individual citizens as to what course could then be pursued and the purposes contemplated by Bond Issues Nos. 1 and 3 be accomplished. After extensive hearings the City Council concluded that by combining the two projects into one complex and by using the City's lot on Haywood Street and so much of the auditorium as fitted into the plans for the whole, the complex could be built in a manner to take care of and accomplish the objects contemplated in both Bond Resolutions 1 and 3. The plans for the complex contemplated the outlay of nearly $600,000 in rebuilding and reconstructing the old auditorium, using only a part of it which could be fitted into the project. By using the property the City already owned and the

grant of $1,500,000 from Redevelopment, the City was in a position to finance the project and to enter the contract with the co-defendant, the lowest bidder. This action challenges the validity of the contract and the right to sell the bonds on the ground the plans constitute an unlawful diversion from the projects authorized.

"A law authorizing a bond issue for various purposes which does not declare what proportion of the proceeds of the bonds shall be applied to each specific purpose is not void. Such matter may properly rest within the sound discretion of the municipal authorities." McQuillin-Municipal Corporations, Vol. 15, Section 43.68.

"It lies within the sound discretion of the legislative body of the City . . . to decide whether to proceed with one of the projects, even though there would be insufficient funds to proceed with the other project. . . . (T)he legislative body of the City . . . is not subject to the control of the courts in the absence of an abuse of discretion, fraud or collusion." *Krieg v. City of Springfield,* 106 N.E. 2d 652 (Ohio-1952).

"A definition of corporate purpose cannot be static. Changing conditions require that application of the limitations . . . be tempered with due recognition of the existing situation so the purpose for which the public body was organized may be accomplished and enjoyment thereof by the public made possible." *Michigan Boulevard Bldg. Co. v. Chicago Park District,* 412 Ill. 350, 106 N.E. 2d 359.

"Of necessity, the division of the proceeds of the sale of the bonds between sewerage and waterworks must be left to the discretion of the municipal authorities . . . . The exact cost of each could not be well determined by the Legislature." *Hotel Co. v. Red Springs,* 157 N.C. 137, 72 S.E. 837.

"It is true, the act does not declare what proportion of the proceeds of the bonds shall be applied to each specific purpose, but that is wisely left to the sound discretion of the city authorities . . . . " *Gastonia v. Bank,* 165 N.C. 507, 81 S.E. 755.

"While the law will not justify the use of the proceeds of a State or municipal bond issue for purposes other than those specified in the Act authorizing the issue . . . it does

not follow that immaterial or temporary changes consistent with the general purpose of the legislative act should be interpreted as unlawful diversions of public funds. *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484; *Worley v. Johnson County,* 231 N.C. 592, 58 S.E. 2d 99." *Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359.

In *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263, Barnhill, J., later C.J., stated the rules appropriate to the facts in this case: "While the defendants (Board of County Commissioners and School Trustees) have a limited authority, under certain conditions, to transfer or allocate funds from one project to another, *included within the general purpose for which bonds are authorized,* the transfer must be to a project included in the general purpose as stated in the bond resolution . . . . The funds may be diverted to the proposed purposes only in the event the defendant Board of Commissioners finds in good faith that conditions have so changed since the bonds were authorized that proceeds therefrom are no longer needed for the original purpose."

In the case of *Sykes v. Belk,* 278 N.C. 106, 179 S.E. 2d 439, with respect to the use of bond money, this court says: "The court will not interfere with the exercise of discretionary powers of a municipal corporation unless its actions are so unreasonable and arbitrary as to amount to an abuse of discretion. The parties stipulated in this case that the Council did not act arbitrarily or capriciously or in abuse of their discretion. It is worthy of note the cases on the subject emphasize *"deviation from the general purpose for which bonds are authorized"* and do not outlaw such changes as are necessary under existing conditions to accomplish the general purpose. For example, in this case the plaintiff contends the provision in the bond issues authorized the purchase of land but did not authorize the use of lands the City already owns. The use of property already owned by the City would be a saving and not a diversion. The Supreme Court of the United States in *Bain Peanut Co. v. Pinson,* 282 U.S. 499, 75 L. Ed. 482, 51 S.Ct. 228, gave us this admonition: "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."

The record in this case is long, but neither tedious nor cumbersome. Counsel for all parties have ably prepared and presented this case both before Judge Ervin and this court.

Judge Ervin, with care and accuracy, determined the issues before him. We conclude the judgment which he entered in the Superior Court of Buncombe County is correct and should be and is now

Affirmed.

Justice HUSKINS dissents.

HERBERT H. DAWSON, ADMINISTRATOR OF THE ESTATE OF STANLEY PARKS, DECEASED v. CLARENCE B. JENNETTE, ORIGINAL DEFENDANT, AND ARTHUR BRIGHT, ADDITIONAL DEFENDANT

No. 32

(Filed 14 April 1971)

1. **Automobiles § 19— right of way at intersections — T-intersection**

With reference to the right of way as between two vehicles approaching and entering an intersection, the law of this State makes no distinction between a "T" intersection and one at which the two highways cross each other completely. G.S. 20-38; G.S. 20-155; G.S. 20-158.

2. **Automobiles § 19— right of way at intersection — assumption by motorist having right of way**

Nothing else appearing, the driver of a vehicle having the right of way at an intersection is entitled to assume and to act, until the last moment, on the assumption that the driver of another vehicle approaching the intersection will recognize his right of way and will stop or reduce his speed sufficiently to permit him to pass through the intersection with safety.

3. **Automobiles §§ 19, 57— accident at T-intersection — stop sign not in place — right of way of motorist on dominant highway**

In a wrongful death action resulting from a two-car collision at a T-intersection at which the stop sign had fallen down, the driver on the dominant highway, who knew that the intersecting servient street on his right was controlled by the stop sign but who was unaware that the sign had fallen on the ground, was not negligent in failing to yield the right of way to the motorist who entered the intersection from the servient street without stopping.

4. **Rules of Civil Procedure § 50— motion for directed verdict — consideration of evidence**

On a motion by defendant for a directed verdict, the plaintiff's evidence must be taken in the light most favorable to him and he is

entitled to the benefit of all reasonable inferences which may be drawn therefrom.

5. **Automobiles § 57— accident at T-intersection — stop sign not in place — negligence of driver on servient street**

In a wrongful death action resulting from a two-car collision at a T-intersection at which the stop sign had fallen down, the plaintiff administrator, whose deceased was riding in the automobile on the dominant highway, offered sufficient evidence to support jury findings (1) that the defendant's driver approaching the intersection from the servient street could have seen 150 feet away, had she been keeping a proper lookout, that she was approaching the intersection and (2) that such driver was negligent in proceeding to the very verge of the intersection at 30 miles per hour.

6. **Automobiles § 57— accident at T-intersection — stop sign not in place — negligence of owner-passenger**

In a wrongful death action resulting from a two-car collision at a T-intersection at which the stop sign had fallen down, the plaintiff, whose deceased was riding in the automobile on the dominant highway, offered sufficient evidence to support a jury finding that the owner-passenger of the car on the servient street was familiar with the intersection and was negligent in failing to inform his agent-driver, who was unfamiliar with the street, that the intersection was ahead.

APPEAL by plaintiff from the judgment of the Court of Appeals, reported in 10 N.C. App. 252, 178 S.E. 2d 118, affirming the judgment of *Bundy, J.*, at the 18 May 1970 Civil Session of LENOIR, allowing the motion of the original defendant for a directed verdict and dismissing the action as to him.

This is a suit for the wrongful death of Stanley Parks who was killed 4 July 1967 in an automobile collision at the "T" intersection of Rural Paved Road #1578 (Airport Road) and Rural Paved Road #1570 (Heritage Street extended) near the city limits of Kinston. Parks was a passenger in the automobile owned by him and driven, with his permission, by Arthur Bright, the additional defendant, eastwardly on the Airport Road, the top of the "T." Clarence Jennette, the original defendant, was riding as a passenger in the automobile owned by him and driven, with his consent, by his daughter, Sandra Jennette Dolan, northwardly on Heritage Street, the stem of the "T." The collision occurred at approximately 7:45 p.m., at which time it was still daylight, the weather being fair. The speed limit on each road was 55 miles per hour. For many years a stop sign, erected by proper authority, had stood at this intersection facing northbound traffic on Heritage Street. This stop sign was lying

on the ground at the time of the collision. The front of the Jennette car struck the right side of the Parks car at the door. Parks was killed in the collision.

The complaint alleges that Jennette was negligent "in the manner and under the circumstances" in which Sandra Dolan, driver of the Jennette car as agent of Jennette, was operating the automobile; that she drove at a speed unreasonable under the circumstances, she did not maintain a proper lookout and did not keep the Jennette automobile under proper control when she saw or should have seen that the street on which she was traveling ended at the intersection; and that Jennette, a passenger, directed the operation of the automobile or had a right and duty to do so.

The original defendant filed answer denying negligence by his driver, Sandra Dolan, alleging contributory negligence by Parks in that his driver and agent, Arthur Bright, drove the Parks vehicle at a speed greater than was reasonable under the circumstances, without keeping a proper lookout and while under the influence of some intoxicating beverage, Parks, himself, failing to use due care for his own safety in that he failed to remonstrate and admonish Bright concerning the manner of his driving. The further answer also alleged a cross-action against Arthur Bright, driver of the Parks vehicle, for contribution and a counterclaim against the estate of Parks and a counterclaim or cross-action against Bright for personal injuries and property damage sustained by the original defendant, Jennette, in the collision.

Bright, having been made an additional defendant by virtue of the cross-action against him, filed answer denying any negligence by him and asserting a counterclaim against Jennette for Bright's own personal injuries in the collision.

The original defendant filed a reply to the counterclaim of Bright denying all allegations of negligence by Sandra Dolan and Jennette, Bright's allegations in this respect being the same as those of the plaintiff.

At the conclusion of the plaintiff's evidence, Judge Bundy allowed the motion of the original defendant for a directed verdict in his favor and dismissed the action as to the original defendant. Thereupon, by consent of all the parties, the counter-

claims of the original defendant and of the additional defendant against each other and the counterclaim of the original defendant against the plaintiff were all dismissed.

At the trial it was stipulated that: (1) Sandra Dolan was operating the Jennette automobile as Jennette's agent and within the scope of the agency or master-servant relationship at the time of the collision; (2) Parks was the owner of the automobile in which he was riding as a passenger and which, at the time of the collision, was being operated by Arthur Bright with the permission of Parks; and (3) Parks died as the result of injuries sustained in the collision.

The plaintiff's evidence further tended to show:

The paved portion of each road was 20 feet in width, the Heritage Street pavement widening out to 35 feet where it joins the pavement of Airport Road. The stop sign was lying on the ground. (Nothing indicates that it was knocked down in the collision or thereafter.) The sign was standing facing traffic going northward on Heritage Street the day before the collision and there had been a stop sign so located for a period of at least 20 years prior to the collision. Neither driver had been drinking. There was no sign indicating an approach to an intersection erected on Heritage Street. A sign on Airport Road indicated approach to a side road coming in from the south (Heritage Street). The pavement on Airport Road bore a broken white center line. The pavement on Heritage Street also bore a broken white center line with a solid yellow line in the northbound traffic lane for the last 100 feet approaching the intersection, indicating that passing was forbidden.

For a quarter of a mile approaching the intersection Heritage Street is straight and from a point 150 feet south of the intersection one traveling northward on Heritage Street could see Airport Road "completely" *(i.e.,* "the whole intersection"), and from that point could see westwardly along Airport Road for from 50 to 60 feet. Due to growing tobacco in the neighboring fields, one would have to reach a point 20 to 30 feet from the intersection before he could see "down Airport Road." A private dirt road, or field path, extends northward from the intersection and opposite Heritage Street. Being lower than Airport Road, one traveling on Heritage Street could not see it until practically in the intersection.

The investigating patrolman found debris near the center line of Airport Road, 15 feet of tire marks, leading south from the point where the debris was found to a point on Heritage Street six feet south of Airport Road, and an additional 31 feet of tire marks from that point to where the Jennette vehicle came to rest on the north side of Airport Road. The Parks vehicle, also on the north shoulder of Airport Road, lay on its left side 58 feet from the debris.

Both Bright and Jennette were familiar with the roads and the intersection. Sandra Dolan, a resident of New York, was not familiar with it but had driven through it, headed in the opposite direction *(i.e.,* from Airport Road onto Heritage Street) that day. Her parents, both of whom were in the car, were giving her "directions." They were returning from her sister's home to Swan Quarter. Jennette did not tell her she was coming to an intersection as she approached it and she was not aware that an intersection was ahead. She testified that her speed was approximately 30 miles per hour. Jennette told the investigating patrolman he did not realize and did not tell Sandra Dolan they were at the intersection; they were talking and he forgot to tell her.

Arthur Bright told the investigating patrolman that he did not see the Jennette car until it started out into the intersection and he then swerved left to try to avoid it. When called as a witness for the plaintiff, Bright testified that before reaching the intersection he had slowed up, he entered the intersection driving between 40 and 45 miles per hour, he was familiar with Airport Road, on which he was traveling, and he knew there was a stop sign facing traffic coming into the intersection from Heritage Street. When he saw the Jennette car coming up to the intersection and saw it was going too fast to stop, he swerved to the left. The Jennette car struck his car, bending the right front door in on Parks, a passenger in the right front seat. Parks was crippled and Bright drove for him whenever requested to do so.

Beech & Pollock by H. E. Beech, for plaintiff appellant.

Whitaker, Jeffress & Morris by A. H. Jeffress, for defendant appellee.

LAKE, Justice.

[1] With reference to the right of way as between two vehicles approaching and entering an intersection, the law of this State makes no distinction between a "T" intersection and one at which the two highways cross each other completely. G.S. 20-38 defines certain words and phrases as used in the Motor Vehicle Act of 1937, G.S. ch. 20, Art. 3, which article includes G.S. 20-155 and G.S. 20-158. It defines "intersection" as follows: "The area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at any angle, whether or not one such highway crosses the other." The word "intersection" as used in the Public Laws of 1913, ch. 107, which regulated the speed of motor vehicles traversing an intersection was held by this Court to apply to a "T" intersection in *Manly v. Abernathy,* 167 N.C. 220, 83 S.E. 343, which was followed in *Fowler v. Underwood,* 193 N.C. 402, 137 S.E. 155.

In the comparatively recent case of *Brady v. Beverage Co.,* 242 N.C. 32, 86 S.E. 2d 901, there was a collision at a "T" intersection at which no stop sign had been erected. The top of the "T" was a paved highway. The stem of the "T" was a public dirt road which came into the paved road from the plaintiff's right. An embankment blocked the view of each driver along the other road. The defendant's truck came very slowly out of the dirt road onto the paved road without stopping and commenced a left turn. The car in which the plaintiff was a passenger struck the truck before it cleared the right hand lane of the paved road. The Superior Court denied the defendant's motion for a judgment of nonsuit. This Court reversed, saying:

> "[T]he two roads here involved were public roads of equal dignity, neither having been designated by the State Highway and Public Works Commission as 'main traveled or through highway' as defined in G.S. 20-158(a). * * *
>
> "All the evidence further shows the truck of the defendant came to, and entered the intersection before the automobile in which plaintiff was riding reached the intersection, and that the truck approached the intersection from the automobile's right side of the road. Under such factual situation the truck of defendant had the right of way.

* * *

"[T]he driver of defendant's truck had the right of way, that is, the right to proceed uninterruptedly in a lawful manner. He was not required to stop."

The pertinent portion of G.S. 20-158 reads as follows:

"Vehicles must stop and yield right-of-way at certain through highways. — (a) The State Highway Commission, with reference to State highways, * * * are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main traveled or through highway and approaching said intersection. * * * ."

In the light of the above mentioned definition of "intersection" this statute applies to a "T" intersection. Thus, when the stop sign was erected at the intersection here in question, facing traffic moving towards the intersection on Heritage Street, the right of way was vested in vehicles entering the intersections upon Airport Road from either direction. With such sign in position, it was the duty of a vehicle approaching the intersection on Heritage Street to stop and yield the right of way to a vehicle approaching on Airport Road and so close to the intersection that there would be danger of collision if the vehicle on Heritage Street entered the intersection. See: *Bennett v. Stephenson,* 237 N.C. 377, 75 S.E. 2d 147; *State v. Hill,* 233 N.C. 61, 62 S.E. 2d 532.

The pertinent portion of G.S. 20-155 provides:

"Right-of-Way.—(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in § 20-156 and except where the vehicle on the right is required to stop by a sign erected pursuant to the provisions of § 20-158 and except where the vehicle on the right is required to yield the right-of-way by a sign erected pursuant to the provisions of § 20-158.1."

Had there never been a stop sign erected at the intersection here in question, G.S. 20-155(a) would apply, the other exceptions therein referred to not being applicable to this case, and the defendant's vehicle would have had the right of way. *Brady v. Beverage Co., supra.* Two vehicles approach or enter an intersection at approximately the same time, within the meaning of G.S. 20-155(a) when in view of their respective distances from the intersection, their relative speeds and other attendant circumstances, the driver of the vehicle on the left should reasonably apprehend danger of collision unless he delays his progress until the vehicle on the right has passed. *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686; *Bennett v. Stephenson, supra; State v. Hill, supra.*

It is apparent that the two automobiles involved in this collision entered the intersection at "approximately the same time" under this test, the slightly greater distance into the intersection traveled by the Parks vehicle being accounted for by its slightly greater speed. According to the plaintiff's evidence, they were traveling at 40 and 30 miles per hour, respectively. At these speeds, each vehicle would have traveled from its edge of the intersection to the point of impact in less than one second. The right of way as fixed by G.S. 20-155(a) is not determined by a fraction of a second.

[2] Nothing else appearing, the driver of a vehicle having the right of way at an intersection is entitled to assume and to act, until the last moment, on the assumption that the driver of another vehicle, approaching the intersection, will recognize his right of way and will stop or reduce his speed sufficiently to permit him to pass through the intersection in safety. *Moore v. Hales,* 266 N.C. 482, 146 S.E. 2d 385; *Jackson v. McCoury,* 247 N.C. 502, 101 S.E. 2d 377; *Brady v. Beverage Co., supra; Bennett v. Stephenson, supra.*

In *Kelly v. Ashburn,* 256 N.C. 338, 123 S.E. 2d 775, and in *Tucker v. Moorefield,* 250 N.C. 340, 108 S.E. 2d 637, this Court had before it the question of liability for injury in a collision at an intersection at which, prior to the collision, a stop sign, duly erected, had been knocked or taken down, otherwise than by the proper authorities for the purpose of changing the designation of the dominant highway as such. The Kelly case, being the more recent, controls insofar as these decisions are not in harmony. There, as here, the driver of the vehicle on the

highway, which the stop sign had designated as the dominant highway, knew that the stop sign had been so erected but did not know of its disappearance or removal. The driver of the vehicle on the highway, which the stop sign had designated as the servient highway, did not know there had ever been such a stop sign erected at the intersection. He approached the intersection from the right of the other driver.

This Court held in the Kelly case that the removal of the stop sign would not take away the right of the driver of the vehicle on the street, designated by the sign as the dominant highway, to treat it as such and to proceed into the intersection on the assumption that the other vehicle would yield the right of way to him. This Court also said in the Kelly case that the responsibility of the driver of the vehicle on the highway, designated by the sign as the servient highway, but who did not know it had ever been so designated, must be judged in the light of conditions confronting him, namely, an unmarked intersection, at which the other vehicle was approaching from his left. The Court said, "Consequently, a collision at an intersection where a stop sign has been erected and then removed or defaced may result from the negligence of one party, or both, or neither."

[3] The plaintiff's evidence is that the stop sign, erected so as to face traffic moving into the intersection along Heritage Street, had been in place for 20 years and was in place the night before the collision. The driver of the Parks vehicle testified that he was familiar with the intersection and knew of the erection of the stop sign, but not of its being down on the ground, as he approached the intersection on this occasion. Consequently, there being no other evidence of negligence on the part of this driver, the directed verdict in favor of the original defendant cannot be sustained on the ground of contributory negligence by the deceased owner-passenger, derived from the failure of his agent-driver to yield the right of way to the Jennette vehicle. There is nothing in the record to indicate that the deceased, himself, knew the sign was no longer in position on Heritage Street.

Were this suit against the driver of the Jennette vehicle, the second portion of *Kelly v. Ashburn, supra,* would be applicable, for the plaintiff's evidence is that she was not familiar with this intersection and so did not know that a stop sign had been erected there. Thus, had she known she was approaching an intersection, she would have reason to assume that she had the right of way over the Parks vehicle approaching from her

left. *Brady v. Beverage Co., supra.* However, the action is not against the driver of the Jennette vehicle, but against the owner-passenger, who was giving his agent-driver directions but did not realize, or forgot to tell her, that they were approaching the intersection.

[4, 6] The plaintiff's evidence is that the original defendant, the owner-passenger, was familiar with the intersection. While this does not necessarily mean that he knew a stop sign had been erected requiring a vehicle approaching the intersection along Heritage Street to stop and yield the right of way, the jury might reasonably draw that inference from his statement to the investigating patrolman that he was familiar with the intersection. On a motion by a defendant for a directed verdict, as was formerly the rule with reference to a motion for judgment of nonsuit, the plaintiff's evidence must be taken in the light most favorable to him and he is entitled to the benefit of all reasonable inferences which may be drawn therefrom. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47; Strong, N. C. Index 2d, Trial, § 21. Thus, the second rule of *Kelly v. Ashburn, supra,* with which *Tucker v. Moorefield, supra,* is in accord, is not applicable here and does not support the action of the trial court in granting the original defendant's motion for a directed verdict.

[5] Furthermore, the driver of the Jennette vehicle, whose negligence would be attributed to the original defendant on the principle of respondeat superior, in a deposition introduced in evidence by the plaintiff, testified that she did not know she was approaching an intersection. A reasonable inference, which might be drawn from this testimony, is that she did not become aware of the intersection until approximately six feet from it, at which point tire marks appeared on the Heritage Street pavement.

Even though, under the foregoing rules, a driver has the right of way at an intersection, it is incumbent upon him, in approaching and traversing the intersection, to drive at a speed no greater than is reasonable under the conditions than existing, to keep his vehicle under control, to keep a reasonably careful lookout and to take such action as a reasonably prudent person would take to avoid collision when the danger of one is discovered or should have been discovered. *Primm v. King,* 249 N.C.

228, 106 S.E. 2d 223; *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373. It is the duty of a driver to keep a lookout in the direction of travel. *Bowen v. Gardner, supra; Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330. A motorist, who does not keep such a lookout, is nevertheless charged with having seen what he could have seen had he looked. His liability to one injured in a collision with his vehicle is determined as it would have been had he looked, observed the prevailing conditions and continued to drive as he did. *Raper v. Byrum,* 265 N.C. 269, 144 S.E. 2d 38.

The plaintiff's evidence is that the entire intersection was clearly visible to a driver on Heritage Street from a point 150 feet south of the intersection. It is also to the effect that such driver's view of traffic approaching on Airport Road was obstructed by a tobacco crop until within 60 feet of the intersection. It might reasonably be inferred from this evidence that the original defendant's agent-driver, had she been maintaining a lookout, would have seen, when 150 feet from the intersection, that she was approaching a "T" intersection, at which she would necessarily have to turn in one direction or the other. The record does not show in which direction the intended destination of the Jennette vehicle lay. Inferring that she could have so seen, and therefore is to be deemed so to know, and also deemed to know that her view of traffic approaching on the other highway was obstructed, a jury could find it was negligence for such driver to proceed to the very verge of the intersection at a speed of 30 miles per hour and that such negligence was the proximate cause of the collision.

[6] Thus, taking the evidence of the plaintiff to be true, interpreting it in the light most favorable to the plaintiff and giving the plaintiff the benefit of all inferences reasonably to be drawn therefrom, the jury could have found, though, of course, not required to do so, that Sandra Dolan, the agent-driver of the original defendant was negligent in approaching the intersection as she did, which negligence would be attributed to the defendant under the doctrine of respondeat superior, and could have found that the original defendant, himself, was negligent in failing to inform his agent-driver they were approaching an intersection with a highway, which he knew had been designated a dominant highway by the erection of a stop sign so that vehicles traveling on it might not yield to her the right of way. There being no evidence of contributory negligence, either of

these conclusions by the jury would have supported a verdict for the plaintiff, it being stipulated that Parks died as the result of injuries sustained in this collision. It follows that the allowance of the motion by the original defendant for a directed verdict and the entry of a judgment dismissing the plaintiff's action were error.

The matter is remanded to the Court of Appeals for the entry by it of a judgment allowing a new trial.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MITCHELL WAYNE BARBOUR

No. 65

(Filed 14 April 1971)

1. **Kidnapping § 1— elements of the offense**

At common law and as used in G.S. 14-39, the word "kidnap" means the unlawful taking and carrying away of a human being by force and against his will.

2. **Kidnapping § 1— commission of offense by threats and intimidation**

The use of actual physical force or violence is not essential to the commission of the offense of kidnapping, but the offense may be 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, or to overcome the will of the victim and secure control of his person without his consent and against his will.

3. **Kidnapping § 1— unlawful taking — lawful boarding of vehicle — driver forced by hitchhiker to go where commanded**

Although defendant hitchhiker lawfully boarded the victim's truck in response to the victim's invitation, and there was consequently no unlawful taking and carrying away of the victim by force and against his will at the inception of defendant's travel in the truck, there was an unlawful taking and carrying away of the victim by defendant so as to constitute kidnapping from the time defendant held a knife against the victim's throat and chest and, under the threat of killing him, commanded and caused him against his will to abandon his own plans and drive the truck as directed by defendant.

4. **Criminal Law § 169— harmless error in admission of testimony**

In this kidnapping prosecution, admission of testimony by a witness that, upon seeing defendant walk in the direction of her house after the victim escaped from him, she telephoned her husband and told him "to be sure to get the keys out of the truck and make the kids stay in the house," when considered in the contest of the entire evidence, was not of sufficient significance to constitute prejudicial error.

5. **Criminal Law § 16— misdemeanor consolidated with felony — original jurisdiction of superior court**

The superior court has jurisdiction to try a misdemeanor which may be properly consolidated for trial with a felony under G.S. 15-152. G.S. 7A-271(a) (3).

6. **Criminal Law § 92— consolidation of assault and kidnapping charges**

Consolidation of assault and kidnapping charges was permissible under G.S. 15-152 where the charges arose out of the same transaction and elements of the assault charge are essentials of the kidnapping charge.

7. **Criminal Law § 171— assault and kidnapping charges — harmless error in instructions on assault**

Where the jury found defendant guilty of kidnapping and of assault, the assault charged by warrant is the identical assault referred to in the kidnapping indictment, and the cases were consolidated for judgment, defendant was not prejudiced by error, if any, in the judge's instructions with reference to the definition of a deadly weapon when charging the jury in respect of the separate assault charge.

8. **Criminal Law § 116— instructions — failure of defendant to testify**

Court's instruction to the effect that defendant's failure to testify was not to be considered against him, although meager and not commended, met minimum requirements.

9. **Criminal Law § 116— failure of defendant to testify — request for instructions**

Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant.

10. **Kidnapping § 2— punishment**

G.S. 14-39 leaves the term of imprisonment for kidnapping in the discretion of the court, imprisonment for life being the maximum punishment.

APPEAL by defendant from *Bailey, J.*, November 1970 Session, JOHNSTON Superior Court.

Defendant was charged in separate warrants (1) with assaulting J. Alton Wood with a deadly weapon, to wit, a knife, and (2) with kidnapping J. Alton Wood. In each case, defendant waived a preliminary hearing and was bound over to the Superior Court.

In the Superior Court, defendant was tried for kidnapping on the following bill of indictment: "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Mitchell Barbour late of the County of Johnston on the 30 day of July 1970 with force and arms, at and in the county aforesaid, did unlawfully, wilfully

and feloniously and forcibly kidnap one J. Alton Wood to wit: by forcibly causing the said J. Alton Wood to drive him several miles at the point of a knife against the said J. Alton Wood's throat, on a pickup truck owned by J. Alton Wood and against the said J. Alton Wood's wishes, with threat of serious bodily harm to the said J. Alton Wood, against the form of the statute in such case made and provided and against the peace and dignity of the State."

In the Superior Court, defendant was tried for assault with a deadly weapon on the original warrant which charged that defendant on July 30, 1970, in Johnston County, "did unlawfully, wilfully and feloniously assault Alton Wood with a pocketknife approximately six inches long, the blade being very sharp, a deadly weapon, by putting the blade of the knife to the throat of the said Alton Wood with the threat of taking his life with said weapon."

The court consolidated all charges for trial.

Upon finding defendant was an indigent, the court appointed Wallace Ashley, Jr., Esq., to represent him.

The only evidence was that offered by the State. It consists of the testimony of J. Alton Wood, the State's principal witness, of Mrs. Linda Turner, of Sergeant Mitchell of the Clayton Police Department, and of State Highway Patrolman S. M. Bracey.

Summarized, except where quoted, the evidence tends to show the facts narrated below.

J. Alton Wood, age 66, a farmer, lives on Highway 70 about two miles south of Clayton. On Thursday, July 30, 1970, he went to Smithfield; and, about 5:00 p.m., was driving his truck north along Highway 70 on his way home. At a shopping center "about two miles out of Smithfield," Wood observed defendant, who was standing ("thumbing") beside the road. Mistaking defendant for a friend of his son, Wood stopped and offered him a ride. Defendant "opened the door and stepped in." When Wood told defendant he was not the person he thought he was picking up, defendant "didn't answer . . . nor say a word."

After they had traveled in silence for "maybe four miles," Wood felt something stinging him beside his neck. He jerked his head around and "there was a knife to (his) throat." When

Wood asked what he meant by his conduct, defendant said: "I'm an escaped prisoner, I have had seven years in prison, I've pulled five of them, this is my first chance of escaping, and god-dammit, you're going to help me escape."

Defendant ordered Wood to drive (on Highway 70) to Clayton, there "take" Highway 42, go on Highway 42 to Highway 50 (about ten miles), and then "turn left the first dirt road, carry him up that road and (defendant) could be on (his) way." While giving these directions, defendant was holding a knife right next to Wood's chest. When Wood remarked that "(t)hey" would get defendant sooner or later, defendant replied: "Yes, they will but you will not be able to ever tell it, you will be a witness against me and god-dammit I'm killing you." Wood, in fear of his life, spoke of his wife and children and begged defendant not to kill him. Defendant cut Wood three times, "not deep, just nipped (his) throat." Each time Wood begged defendant "to take the knife from (his) throat." Defendant held the knife at Wood's throat or chest while they traveled "approximately 9 or 10 miles." Defendant "tantalized" Wood by telling him he looked "like a right good old scoundrel" and that it was "a pity to kill (him)."

Although fearful of his life, Wood did not panic.

At Woodard's Esso Station, "just this side of Clayton," Wood jerked the steering wheel of his truck but defendant jerked it back and said: "god-damn you, I will kill you right now." Then Wood drove on to Clayton and there, in accordance with defendant's direction, turned west onto Highway 42 and drove towards Highway 50. On his way to Clayton, Wood had passed his own home and was moving farther away from it when the following occurred.

On Highway 42, just before reaching Edward Smith's store-station, Wood saw a Ford station wagon coming up the road. Its "blinkers" indicated it was turning into Smith's station. Then, in Wood's words: "I knew that was my only chance to get shed of him somehow. I jerked my steering wheel right short to the left. The truck went up on the sides, the door flew open, and out of it he went. His left arm caught on the door and he was down there. I reached and got my keys. I run in Mr. Smith's store. I told Mr. Smith, give me your shotgun. 'I want to kill a man.' I told him what he did to me and dashed back

out of the door. . . . Smith and I run into his house and called the law."

When Wood turned into Smith's store "practically all of (his) tools, jack and stuff, went out the door out on the highway." These were found by State Highway Patrolman Bracey "on the eastbound traffic lane of 42 Highway near Mr. Smith's store . . . . "

Mrs. Linda Turner lives on Highway 42 one mile west (towards Highway 50) of Smith's store. On July 30, 1970, she saw Wood turn into the Smith store. In Mrs. Turner's words: "He just whipped on in real fast. The door of the truck came open, and a jack, a small one, and some stuff fell out of the truck." According to Mrs. Turner, defendant "was hanging on to the door when the door came open to keep from falling out." She saw defendant get off the truck and walk away. When she last saw him, defendant was walking down Highway 42 towards her house. She went into Smith's house and from there called the sheriff and also her husband.

Defendant was arrested about 6:45 p.m. in Clayton by Sergeant Mitchell. Sergeant Mitchell informed defendant of the charges involving Wood. Defendant was put in the police car. After Mitchell had driven about two blocks, defendant rolled down the window, had one leg out of the window and was trying to escape. When Sergeant Mitchell stopped the car, defendant came out of the car "fighting." Mitchell subdued him and put handcuffs on him. When arrested, defendant had an "opened" knife in his right front pocket.

The jury returned "a verdict of guilty as charged on both counts." The "two cases" were consolidated for judgment. One judgment was pronounced in which the court "ADJUDGED that the defendant be imprisoned for the term of his natural life in the custody of the State Department of Corrections." Defendant excepted and appealed.

An order was entered in which (1) defendant was permitted to appeal *in forma pauperis,* and (2) defendant's trial counsel was appointed to represent defendant in connection with his appeal, and (3) provision was made for payment by the State of North Carolina for all necessary costs incident to perfecting the appeal.

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

Wallace Ashley, Jr., for defendant appellant.

BOBBITT, Chief Justice.

[1] At common law and as used in G.S. 14-39, the word "kidnap" means the unlawful taking and carrying away of a human being by force and against his will. *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870 (1965), appeal dismissed and *certiorari* denied, 382 U.S. 22, 15 L. Ed. 2d 16, 86 S.Ct. 227 (1965).

[2] "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, or 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).

Although not germane to the present case, it is noteworthy that the unlawful taking and carrying away of a human being fraudulently is kidnapping within the meaning of G.S. 14-39. *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971); *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118 (1962).

[3] Defendant assigns as error the denial of his motion for judgment as in case of nonsuit. He points out that defendant got on the truck lawfully in response to Wood's invitation. Based on these facts, defendant contends there was no "unlawful taking" and therefore the State failed to establish one of the essential elements of the crime of kidnapping. The contention is without merit.

"Where the gravamen of the crime is the carrying away of the person, the place from or to which the person is transported is not material, and an actual asportation of the victim is sufficient to constitute the offense without regard to the extent or degree of such movement; it is the fact, not the distance, of forcible removal which constitutes kidnapping." 51 C.J.S. Kidnapping § 1, pp. 502-503. Accord, *State v. Lowry, supra.*

Standing alone, the fact that the taking and carrying away of Wood was accomplished by means of a truck owned and operated by Wood is of no avail as a defense to the alleged kidnapping. *State v. Bruce, supra; State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969) ; *State v. Woody,* 277 N.C. 646, 178 S.E. 2d 407 (1971). In each of these cases, the defendant unlawfully boarded the car of the victim.

In *State v. Penley,* 277 N.C. 704, 178 S.E. 2d 490 (1971), the defendant, one of a group of prisoners being transported on a prison bus, was convicted of kidnapping the officer-driver thereof. There, the defendant was required rather than invited to enter the bus. Accord, *People v. Valdez,* 3 Cal. App. 2d 700, 40 P. 2d 592 (1935). Valdez is cited in support of this statement: "It is not necessary, however, for the unlawfulness to exist from the beginning of the transaction." 1 Am. Jur. 2d Abduction and Kidnapping § 12, p. 168.

No decision of this Court has come to our attention where a motorist who invited a hitchhiker to ride with him is compelled by the force and intimidation exerted upon him by the hitchhiker to abandon his own desired course of travel and to drive his car as commanded by the hitchhiker.

No case involving this factual situation has come to our attention except the companion cases of *Krummert v. Commonwealth,* 186 Va. 581, 43 S.E. 2d 831 (1947), and *Famular v. Commonwealth,* 186 Va. 586, 43 S.E. 2d 833 (1947). Krummert and Famular were standing on a street corner in Richmond, "waiting to catch a ride," when a motorist offered to take them to a street intersection where they could "best catch a ride" to Washington, D. C. Accepting the motorist's invitation, Krummert and Famular boarded the car. When the motorist stopped at the indicated street intersection, Krummert and Famular, instead of getting out of the car, proceeded to take charge. At gunpoint, they forced other passengers of the motorist to get out and ordered the motorist to drive them on north and out on the Washington highway. About ten miles out of Richmond, the car was stopped by a State Traffic Officer after he had shot one of the rear tires. Under these circumstances, Krummert and Famular were arrested and thereafter tried and convicted of kidnapping.

It may be conceded that there was no unlawful taking and no unlawful carrying away of Wood by force and against his will at the inception and during the first four miles or so of defendant's travel with Wood. But there was an unlawful taking and carrying away of Wood by defendant from the time defendant held a knife against the throat and chest of Wood and, under threat of killing him, commanded and caused him against his will to abandon his own plans and drive the truck as directed by defendant. By acquiring dominance and control over Wood's person and actions in this manner, defendant forfeited his status as an invitee and his conduct is to be judged as if at that time he unlawfully boarded Wood's truck.

[4] Defendant assigns as error the admission of Mrs. Turner's testimony that, when she telephoned to her husband from Smith's house, she told him "to be sure to get the keys out of the truck and make the kids stay in the house." This testimony was included in Mrs. Turner's response to a general question on cross-examination. When Mrs. Turner had completed her answer, defendant entered a general objection "to this." The objection was overruled. There was no motion to strike. Rather than lay stress on any failure of defendant to preserve an objection to this testimony, this assignment of error is overruled on the broad ground that this testimony, when considered in the context of the entire evidence, was not of sufficient significance to constitute prejudicial error. "Where there is abundant evidence to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." 3 Strong, North Carolina Index 2d, Criminal Law § 169, p. 135. Accord, *State v. Barrow,* 276 N.C. 381, 388, 172 S.E. 2d 512, 517 (1970); *State v. Williams,* 275 N.C. 77, 89, 165 S.E. 2d 481, 489 (1969), and cases cited.

Defendant assigns as error the portions of the court's instructions relating to the separate assault charge which define and apply "deadly weapon." We perceive no error in the challenged instructions.

[5, 6] It is noted that the Superior Court has jurisdiction to try a misdemeanor which may be properly consolidated for trial

with a felony under G.S. 15-152. G.S. 7A-271(a)(3). See *State v. Wall,* 271 N.C. 675, 157 S.E. 2d 363 (1967). Since the kidnapping and assault charges arose out of the same transaction and elements of the asault charge are essentials of the kidnapping charge, the consolidation of the assault and kidnapping charges was permissible under G.S. 15-152. There was no objection to the consolidation and we find no prejudice to defendant on account thereof.

[7] In the factual situation presented by the evidence, a finding that defendant was guilty of an assault was prerequisite to a finding that defendant was guilty of kidnapping. Thus, when the jury convicted defendant of kidnapping, their verdict necessarily included a conviction of assault. On the other hand, if the jury had found defendant not guilty of kidnapping, such verdict would not have precluded a verdict of guilty of assault with a deadly weapon or of simple assault. Since the jury found defendant guilty of kidnapping and of assault, and since the assault for which defendant was charged in the warrant is the identical assault referred to in the bill of indictment, and since the cases were consolidated for judgment, no possible harm has come to defendant on account of errors, if any, in the judge's instructions with reference to the definition of a deadly weapon when charging the jury in respect of the separate assault charge.

[8, 9] Defendant assigns as error the court's instructions to the effect that defendant's failure to testify was not to be considered against him. Although the instruction is meager and is not commended, we are constrained to hold that it meets minimum requirements. Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant. See *State v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156 (1919).

[10] Prior to the enactment of Chapter 542, Public Laws of 1933, our statute (C.S. 4221) provided that a person convicted of kidnapping "may be punished in the discretion of the court, not exceeding twenty years in the state's prison." Seemingly as a result of the Lindburgh tragedy, the 1933 Act repealed C.S. 4221. The provisions of the 1933 Act, now codified as G.S. 14-39, include the following: "It shall be unlawful for any person . . . to kidnap . . . any human being, or to demand a ransom of any person . . . to be paid on account of kidnapping, or to hold any human being for ransom. . . . Any person . . .

violating . . . any provisions of this section shall be guilty of a felony, and upon conviction therefor, shall be punishable by imprisonment for life. . . . " Under our decisions, this statute leaves the term of imprisonment in the discretion of the court, imprisonment for life being the maximum punishment. *State v. Lowry, supra* at 541, 139 S.E. 2d at 874; *State v. Bruce, supra* at 184, 150 S.E. 2d at 224; *State v. Kelly,* 206 N.C. 660, 175 S.E. 294.

Since none of defendants's assignments disclose prejudicial error, the verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. JACKIE COLEMAN FRAZIER

No. 1

(Filed 14 April 1971)

1. **Criminal Law § 99— impartiality of the trial court — scope of statute**

The statute imposing the duty of absolute impartiality on the trial judge has been construed to include any opinion or intimation of the judge at any time during the trial which is calculated to prejudice either of the parties in the eyes of the jury. G.S. 1-180.

2. **Criminal Law § 99— examination of witnesses — expression of opinion by court**

In exercising its duty of controlling the examination of a witness the court must not intimate any opinion either of the witness or of his credibility.

3. **Criminal Law § 99— ridicule of witness**

G.S. 1-180 prohibits any ridicule that casts aspersions on the testimony of a witness and thus damages his credibility.

4. **Criminal Law §§ 99, 170— remarks of trial court — prejudicial effect — new trial**

Cumulative effect of trial court's remarks was prejudicial to the defendant and warranted a new trial, where the remarks included the following statements: "It's your case. Try it any way you want to" [to defense counsel]; "Let me inform you, Mr. Frazier, don't come out with any short answers in my court" [to defendant]; "You don't mean he's still there" [to a defense witness, in response to her testimony that her husband did not leave the home on the night of the crime].

Justice LAKE dissenting.

State v. Frazier

APPEAL by defendant from judgment of *Bailey, J.*, 26 June 1967 Special Criminal Session of MECKLENBURG Superior Court.

Jackie Coleman Frazier, Donald Laughter, Andy Gay Laughter, Harold Carr and John R. Dossett were charged in a bill of indictment with unlawfully placing and burning a cross on the property of Genius C. Evans without first obtaining written permission from the owner or occupier of the premises, a violation of G.S. 14-12.12.

The State's evidence tends to show that on the morning of 31 December 1966 Genius C. Evans and his wife discovered a partially burned cross standing in their front yard. They had not given written or oral permission to anyone to place or burn a cross on their premises. The police were notified and the cross was removed from the premises.

Freddy C. Smith and Frederick Davidson Feimster each testified that he was a member of the Ku Klux Klan and attended a Klan meeting on Friday night, 30 December 1966; that the five defendants in this case were present at that meeting; that following the meeting all of them went to Andy Laughter's house about 10:15 p.m. and constructed two crosses; that Andy and Donald Laughter wrapped the crosses in burlap and Jackie Coleman Frazier furnished some type of liquid fuel to put on the crosses so they would burn better; that the crosses were then put in Andy Laughter's car and all five defendants proceeded to the Evans home on Hutchinson-McDonald Road; that one of the crosses was taken from Andy Laughter's car and set up in the Evans front yard. "The cross was set in a stand which we built at the same time we built the cross and it was ignited and then we got back in the automobiles and left. As we pulled away from the house, the cross was burning."

Each of the defendants, as well as other witnesses presented in their behalf, testified that all five defendants were at a surprise birthday party at John R. Dossett's home on the night of 30 December 1966 and until about 2 a.m. on the morning of 31 December 1966; that they were not with Freddy C. Smith or Frederick Davidson Feimster at any time that night and did not participate in the cross burning activities described by those two witneses.

All five defendants were convicted. Defendant Jackie Coleman Frazier was sentenced to eighteen months imprisonment

and gave notice of appeal in apt time. He was allowed thirty days in which to prepare and serve statement of case on appeal. His counsel at that time, Lester V. Chalmers, Jr., failed to perfect the appeal within the allotted time and on 20 September 1967 Judge Snepp, on motion of the solicitor, dismissed the appeal. Thereafter, defendant employed his present counsel and petitioned this Court for permission to perfect a delayed appeal. His petition, treated as a petition for *certiorari* to the Superior Court of Mecklenburg County to send up the record as a delayed appeal, was allowed. The appeal is now before this Court for consideration of the assignments of error noted in the opinion.

Osborne and Griffin by Wallace S. Osborne, Attorneys for defendant appellant.

Robert Morgan, Attorney General; James L. Blackburn, Staff Attorney, for the State of North Carolina.

HUSKINS, Justice.

No constitutional questions are raised on this appeal. Appellant brings forward three assignments of error, but we find it necessary to discuss only one of them, to wit: Did various remarks of the judge in the course of the trial amount to an expression of opinion on the evidence in contravention of G.S. 1-180?

At the outset we are faced with the fact that oftentimes the printed word does not capture the emphasis and the nuances that may be conveyed by tone of voice, inflection, or facial expression. In *Towne v. Eisner,* 245 U.S. 418, 62 L. Ed. 372, 38 S.Ct. 158 (1918), Mr. Justice Holmes said: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances at the time in which it is used." Hence we can only read the record and adjudge by reason and deduction whether the remarks assigned as error were so disparaging in their effect that they could reasonably be said to have prejudiced the defendant. *State v. Owenby,* 146 N.C. 677, 61 S.E. 630 (1908); *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951); *Kanoy v. Hinshaw,* 273 N.C. 418, 160 S.E. 2d 296 (1968).

[1] G.S. 1-180 imposes on the trial judge the duty of absolute impartiality. *Nowell v. Neal,* 249 N.C. 516, 107 S.E. 2d 107

(1959). It forbids the judge to intimate his opinion in any form whatever, "it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury." *State v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378 (1946). It has been construed to include any opinion or intimation of the judge at any time during the trial which is calculated to prejudice either of the parties in the eyes of the jury. *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412 (1966); *Everette v. Lumber Company,* 250 N.C. 688, 110 S.E. 2d 288 (1959). "Both the courts and those engaged in the active trial practice recognize the strong influence a trial judge may wield over the jury. 'The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. G.S. 1-180.'" *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481 (1966).

As stated by Mr. Justice Black in *Illinois v. Allen,* 397 U.S. 337, 25 L. Ed. 2d 353, 90 S.Ct. 1057 (1970): "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country." To that end "[t]he judge should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855 (1907).

It now becomes our duty to apply these principles to the remarks of the trial court which form the basis of defendant's assignment of error. Each dialogue occurred while the defendant was offering evidence. The first remark was made when defendant Frazier was on the stand and was being examined by his attorney, Mr. Chalmers. The attorney said: "I hand you here State's Exhibit No. 3 and ask . . . Your Honor, I am sorry, I referred to these Exhibits as State's Exhibits, they are Defendant's Exhibits." The trial judge replied: "It's your case. Try it any way you want to." While this remark was completely

gratuitous and unnecessary, we cannot say that, standing alone, it was prejudicial. Nevertheless, when remarks from the bench tend to belittle and humiliate counsel, defendant's case can be seriously prejudiced in the eyes of the jury. See Annotation, Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 A.L.R. 2d 166 (1958).

A moment later, during cross-examination of defendant by the State, the defendant was asked: "Mr. Frazier, the cross wasn't burning when you got out of the car and put it in the yard, was it, isn't that right?" The defendant answered: "Suppose you give me a question and I'll answer it." At this point the court interjected: "Wait a minute. Let me inform you, Mr. Frazier, don't come out with any short answers in my court." The defendant now contends that this statement indicated to the jury that the court was antagonistic toward him.

[2] "It is both the right and the duty of the presiding judge to control the examination and cross-examination of witnesses, both for the purpose of conserving the time of the court, and for the purpose of protecting the witness from prolonged and needless examination." *State v. Mansell,* 192 N.C. 20, 133 S.E. 190 (1926). Nevertheless, in doing so the court must not intimate any opinion either of the witness or his credibility. *State v. Belk, supra.* The remark of the court here was undoubtedly calculated to impress upon the witness that he should keep in mind the gravity of the situation and control his attitude accordingly. As such, an appropriate admonition was entirely in order. The language used by the judge, although not the wisest choice, is insufficient standing alone to constitute reversible error.

The third remark of which defendant complains occurred when Donald Laughter was being examined by Attorney Chalmers, who represented all five defendants. Laughter had denied placing or burning a cross on the night in question. Attorney Chalmers then asked: "Mr. Laughter, have you at any time, anywhere . . . " The court interrupted, saying: "Mr. Chalmers, we are only trying him for one place." Defendant contends this remark clearly implied to the jury that defendants had burned other crosses at other times and places and was highly prejudicial. The State contends, on the other hand, that the court was

only trying to keep the examination within the bounds of relevancy. In our view, the defendant's position is more consonant with reason. Its import may well have found its mark in the minds of the jurors. *Upchurch v. Funeral Home,* 263 N.C. 560, 140 S.E. 2d 17 (1965). See Annotation, Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused, 34 A.L.R. 3d 1313 (1970).

The fourth incident occurred during the direct examination of Betty Lou Dossett, wife of defendant John R. Dossett. In response to a question by defense counsel, she testified that her husband was at home at 5:30 p.m. on 30 December 1966 "and he did not depart from the residence either after 5:30 p.m. or 12 o'clock midnight." The court interjected: "You don't mean he's still there?"

[3] While this remark was probably intended as humorous, it tends to ridicule the witness and impair her credibility in the eyes of the jury. G.S. 1-180 prohibits any ridicule that casts aspersions on the testimony of a witness and thus damages his credibility. "It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so. . . . " *State v. Horne,* 171 N.C. 787, 88 S.E. 433 (1916). Even so, the law requires such examinations to be conducted with care and in a manner which avoids prejudice to either party. "If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the 'impression of judicial leaning,' they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error." *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). *Accord State v. Lea,* 259 N.C. 398, 130 S.E. 2d 688 (1963); *State v. Peters,* 253 N.C. 331, 116 S.E. 2d 787 (1960); *Andrews v. Andrews,* 243 N.C. 779, 92 S.E. 2d 180 (1956); *State v. McRae,* 240 N.C. 334, 82 S.E. 2d 67 (1954).

The fifth comment by the court to which exception is taken occurred during the examination of the same witness a few minutes later. Attorney Chalmers elicited the same testimony from the witness, *i.e.,* that her husband was at home all evening. The State objected on grounds of repetition and the objection was sustained. Mr. Chalmers then inquired: "May I get her answer in the record your Honor?" The court replied: "You

may not. It's been answered three times." An examination of the record discloses that the court was correct. The answer of the witness is indeed in the record three times. Since the court must be left free to keep the examination of witnesses under control and within the bounds of lawful, relevant, and non-repetitive inquiry, we hold that this remark was not error.

[4] As already noted, some of the judge's comments run counter to the intent and meaning of G.S. 1-180. Some do not. Any one of them standing alone, even when erroneous, might not be regarded as prejudicial. But when all the incidents are viewed in light of their cumulative effect upon the jury, we are constrained to hold that the cold neutrality of the law was breached to the prejudice of this defendant. The content, tenor, and frequency of the remarks, and the persistence on the part of the trial judge portray an antagonistic attitude toward the defense and convey to the jury the impression of judicial leaning prohibited by G.S. 1-180. This requires a new trial.

We have examined the remaining assignments of error and find nothing of sufficient import to merit discussion.

For the reasons above set out, there must be a

New trial.

Justice LAKE dissenting.

The motion to quash the indictment should have been allowed and, therefore, the judgment below should be reversed for the reason that the indictment does not charge a criminal offense. I, therefore, dissent from the majority opinion directing a new trial.

The statute in effect at the time of the alleged acts of the defendant, G.S. 14-12.12, made the conduct therein proscribed a crime. The difficulty is the bill of indictment does not charge the defendant with the conduct proscribed by the statute.

The acts declared by this statute to be a crime are: "to *place* or cause to be *placed* on the property of another * * * a *burning* or *flaming* cross or any manner of exhibit in which a *burning* or *flaming* cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do." (Emphasis added.)

This statute does not make criminal the placing of a burning circle or triangle on the property of another without his permission, irrespective of the purpose or the effect of such act. Clearly then, had this indictment charged the defendant with placing upon the property of Evans a burning circle, the motion to quash should have been allowed. Why? Simply because the Legislature did not in this statute make that a crime.

The conduct made criminal by this statute is the *placing* of a *burning* or *flaming* cross on the property of another without his permission. A cross, not burning or flaming when placed upon the property, is as truly outside the limits of this statute as is a burning circle. Justice Holmes' well known statement in *Towne v. Eisner,* 245 U.S. 418, 62 L. Ed. 372, 38 S.Ct. 158, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances at the time in which it is used," may not be taken out of context to make criminal that which the Legislature has not declared to be so, and, of course, the majority does not so use his statement here.

It is fundamental in our system of law that the words used in a criminal statute must be strictly construed and may not be enlarged by construction to take in offenses not clearly described. *State v. Gainey,* 273 N.C. 620, 160 S.E. 2d 685; *State v. Garrett,* 263 N.C. 773, 140 S.E. 2d 315; *Milk Producers Co-op v. Melville Dairy, Inc.,* 255 N.C. 1, 120 S.E. 2d 548; *State v. Mitchell,* 217 N.C. 244, 7 S.E. 2d 567; *State v. Ingle,* 214 N.C. 276, 199 S.E. 10; *State v. Railroad,* 168 N.C. 103, 82 S.E. 963. In *State v. Scoggin,* 236 N.C. 1, 10, 72 S.E. 2d 97, Justice Barnhill, later Chief Justice, said, "[I]t is axiomatic that penal statutes are construed strictly against the State and liberally in favor of the private citizen." While it is true that a word in such statute, fairly susceptible of two or more meanings, should be construed so as to avoid giving the statute a ridiculous interpretation, *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596, it is also a fundamental principle of statutory construction that when a word has a single, clear meaning, it should be given that meaning in the application of the statute, in the absence of anything in the statute to show a different meaning was intended. *Duke Power v. Clayton,* 274 N.C. 505, 510, 164 S.E. 2d 289; *State v. Wiggins,* 272 N.C. 147, 153, 158 S.E. 2d 37. The reason is, where the meaning of the words used in the statute is plain, there is

no room for construction and for the court to engage therein, so as to depart from the clear and ordinary meaning of the words used by the Legislature, is to engage in judicial legislation. *School Commissioners v. Aldermen,* 158 N.C. 191, 196, 73 S.E. 905; *Asbury v. Albemarle,* 162 N.C. 247, 250, 78 S.E. 146. If this be true in the construction of a statute involved in civil action, it is even more so with reference to the construction of a criminal statute, so as to make criminal that which the plain meaning of the words used does not include.

In *School Commissioners v. Aldermen, supra,* at page 196, Justice Hoke, speaking for the Court, said:

> "Where the statute is free from ambiguity, explicit in its terms and plain meaning, it is the duty of the courts to give effect to law as it is written, and they may not resort to other means of interpretation. * * * *Even though the Court should be convinced that some other meaning was intended by the lawmaking power, and even though the literal interpretation should defeat the very purposes of the enactment,* still the explicit declaration of the Legislature is the law, and the courts must not depart from it * * * ." (Emphasis added.)

In *Nance v. Railroad,* 149 N.C. 366, 63 S.E. 116, Justice Henry G. Connor, speaking for this Court, said at pages 372-374:

> " 'What the legislative intent was can be derived only from the words they have used. The spirit of the act must be extracted from the words of the act and not from conjecture *aliunde.' Story, J.,* in *Gardner v. Collins,* 27 U.S. 93. '* * * It is not allowable to interpret what has no need of interpretation, or, when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes should be read and understood according to the natural and most obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation.' *McCluskey v. Cornwell,* 11 N.Y. 593. * * * In *Coe v. Lawrence,* 72 E.C.L. (1 Ellis & B.) 516, it was sought to recover a penalty for violating a statute. Defendant claimed that he was not within its terms. It was insisted that the Court could find an intention to

include him. *Lord Campbell, C.J.*, said: 'We are not justified in inserting words for the purpose of extending a penalty clause to cases not expressly comprehended in it. * * *' *Lord Coleridge* said: 'I never heard that it was allowable to insert words for the purpose of extending a penal clause. * * * And even if that were not so, it is quite wrong to alter the language of a statute for the purpose of getting at its meaning,' and of the same opinion were all the judges. * * * If, as is manifest, the Court cannot insert words to enlarge its scope, certainly they may not strike them out to reach a class of persons which they clearly exclude."

We are here dealing with a matter of far more significance to the people of this State than the punishment of this defendant for the conduct alleged in the bill of indictment, senseless, offensive and reprehensible though it be. As Justice Sharp said so aptly in *State v. Cobb*, 262 N.C. 262, 266, 136 S.E. 2d 674:

> "A man's conduct must be judged by the law as it exists at the time his conduct is called into question and not by the law as he and others think it should be rewritten in the interest of social justice. * * * When a court, in effect, constitutes itself a superlegislative body, and attempts to rewrite the law according to its predilections and notions of enlightened legislation, it destroys the separation of powers and thereby upsets the delicate system of checks and balances which has heretofore formed the keystone of our constitutional government."

This sound observation is even more pertinent when the proposal is to enlarge the plain meaining of the words of a criminal statute so as to extend it to conduct not within such meaning.

How can there be any doubt as to what is meant by a "burning or flaming cross?" "Burning," as contrasted with "flaming," would obviously include "smoldering," but an object which is not ignited at all is neither "flaming" nor "burning." To place on the property of another a cross is not a violation of this statute. To ignite a cross on the property of another is not a violation of this statute, irrespective of who put it there or how long it has been there. The offense created by this statute is the *placing* of a *burning* or *flaming* cross on the property of another without his permission. To extend this statute to cover

the placing of an unignited cross, followed by setting it on fire, is as far beyond the power of this Court as it would be to extend it to the placing of a burning triangle, a burning crescent or a burning hammer and sickle. Surely, this statute does not make either of those acts a crime, and it would not cover such an act even if the Ku Klux Klan were to adopt such a burning object as a symbol of its presence.

The bill of indictment very plainly alleges the defendant and his companions placed a cross on the Evans property and "set fire to same." Consequently, it does not allege the conduct which the statute makes criminal—the placing of a burning or flaming cross—and the motion to quash should have been allowed.

Since the indictment charged no crime, we do not reach the matters discussed in the majority opinion. If those questions were before us, I should concur in the views of the majority concerning them.

STATE OF NORTH CAROLINA v. OSSIE SIMMONS

No. 33

(Filed 14 April 1971)

1. **Criminal Law § 84— evidence obtained by unreasonable search — inadmissibility**

Evidence obtained by unreasonable search is inadmissible in both Federal and State courts. U. S. Constitution, Amendments IV and V; N. C. Constitution, Art. I, § 15; G.S. 15-27.

2. **Criminal Law § 84; Searches and Seizures § 1— seizure of evidence without search**

The constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required.

3. **Criminal Law § 84; Searches and Seizures § 1— search of automobile without warrant**

A police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials.

4. Criminal Law § 84; Intoxicating Liquor § 12; Searches and Seizures § 1— non-transparent plastic jugs containing non-taxpaid liquor — warrantless seizure from automobile

Police officers had reasonable cause to believe that plastic jugs which they observed in defendant's car contained non-taxpaid liquor, and the officers lawfully seized the plastic jugs without a warrant, notwithstanding the officers could not see the contents of the jugs, where the officers were looking for defendant's car and knew defendant by name, defendant tried to flee the officers by backing his car into the police car which blocked its path, the officers saw the plastic jugs while removing defendant from his car, and the officers knew that such jugs were commonly used as containers for non-taxpaid liquor; consequently, the trial court did not err in the admission of the non-taxpaid liquor discovered in the jugs and testimony relating to it. G.S. 18-6.

5. Intoxicating Liquor § 12— use of plastic jugs to carry non-taxpaid liquor — relevancy of testimony

In this prosecution for possession and transportation of non-taxpaid liquor wherein defendant contended that officers unlawfully seized plastic jugs containing non-taxpaid liquor from his car without a warrant, testimony by officers that the containers seized from defendant's car were of a type often used to carry non-taxpaid liquor was relevant and admissible.

APPEAL by defendant pursuant to G.S. 7A-30(1) from decision of the North Carolina Court of Appeals, 10 N.C. App. 259, 178 S.E. 2d 90, finding no error in the trial before *Bundy, J.*, at the 26 March 1970 Session of LENOIR.

Defendant was tried in District Court of Lenoir County on a warrant charging that "on or about the 22nd day of December, 1969, defendant named above [Ossie Simmons] (1) did unlawfully and wilfully have in his possession alcoholic beverages in the amount of 6 gallons, upon which the taxes imposed by the laws of the Congress of the United States and by the laws of the State of North Carolina had not been paid, (2) and did transport said whiskey, an intoxicating liquor. The transportation was done on a 1960 model Oldsmobile color blue & white License # BS2803." He was found guilty on both counts, and from sentence imposed defendant appealed to Superior Court.

In Superior Court on trial *de novo* the State offered testimony of Deputy Sheriffs Bob Garris and Leo Harper, which tended to show: On 22 December 1969 Garris received a telephone call at his home. As a result of the phone call he telephoned Harper to meet him at the Sheriff's office in Kinston. They left the office in a county patrol car and proceeded to Davis

Street and parked. After a short time Garris left the county car to see if the car they were looking for had arrived. After Garris left, Harper observed defendant's car, a blue and white Oldsmobile, pull into an alley at the Richard Greene Apartments, and Harper immediately drove the patrol car behind defendant's car so that defendant was blocked. Defendant left his car and walked toward the apartments. Harper called defendant by his given name and asked him to wait so that he could talk to him. Defendant thereupon jumped back into his automobile and, while trying to back out of the alley, bumped into the patrol car several times. Harper went to defendant's car and attempted to get him out of the car, and Garris, who had observed Harper move the patrol car, ran back to the scene. Both officers struggled with defendant and finally handcuffed and removed him from his automobile.

Harper testified that while he was standing on the sidewalk he saw a cardboard carton on the seat of defendant's automobile and two plastic jugs on the floor of the rear seat. He could see the tops of four of the jugs in the cardboard carton. Harper arrested defendant, and Garris brought the carton to the county car, where he opened a jug to determine its contents. Harper stated that in his opinion the plastic jugs contained non-taxpaid whiskey. Over objection, he stated:

> "I have seen plastic jugs like this before. Most of the non-taxpaid whiskey . . . .
>
> OBJECTION. OBJECTION OVERRULED. DEFENDANT'S EXCEPTION NO. 4.
>
> that you get these days is in that type of jug. . . .
>
> . . . .
>
> "The Federal Government got so tight on people seeling *(sic)* half-gallon jars, I think they went to this jug here."

Garris testified in corroboration of Harper and he also testified that he could see the carton and the top of the jugs in defendant's car from the sidewalk. He stated: "Most all the non-taxpaid whiskey I have seen in the last few years has been in this type jug."

Both officers testified on cross-examination that they could not see the contents of the jugs.

At the close of the State's evidence defendant moved that the case be dismissed. His motion was denied, and he excepted. Defendant offered no evidence and renewed his motion for dismissal. His motion was denied, and he excepted. The jury returned verdicts of guilty on both counts. The two counts were consolidated for judgment, and defendant was sentenced to imprisonment for a term of two years.

Attorney General Morgan and Staff Attorney Lloyd for the State.

Turner and Harrison, by Fred W. Harrison, for defendant.

BRANCH, Justice.

Defendant's principal contention is that the trial court erred in admitting evidence, over his objection and motion to suppress, concerning the non-taxpaid whiskey seized from his automobile.

[1-3] Evidence obtained by unreasonable search is inadmissible in both Federal and State courts. U. S. Const., Amend. IV and V; N. C. Const., Art. I, § 15; G.S. 15-27; *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S.Ct. 1684; *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65; *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376. It is equally well settled that the constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28; *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394; *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741. Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. *Carroll v. U. S.,* 267 U.S. 132, 69 L. Ed. 543, 45 S.Ct. 280; *Chambers v. Maroney,* 399 U.S. 42, 26 L. Ed. 2d 419, 90 S.Ct. 1975; *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753; *State v. Jordan,* 277 N.C. 341, 177 S.E. 2d 289; *Ramsey v. United States,* 27 F. 2d 502.

In *State v. McCloud, supra,* this Court, in overruling defendant's motion to suppress contraband material seized from his automobile without a search warrant, stated:

> "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."

Accord: *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25; *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133; *State v. Leach,* 272 N.C. 733, 158 S.E. 2d 782.

In *State v. Harper,* 235 N.C. 67, 69 S.E. 2d 164, defendant Harper drove up in his automobile, and one of the officers "by the use of his flashlight saw in defendant's car two ½ gallon jars containing white non-taxpaid liquor . . . The officer thereupon seized two jars of liquor and looked in the trunk of said car and found five cases of intoxicating liquor upon which the tax due the Federal Government had not been paid." Defendant made a motion to suppress the evidence on the ground of unlawful search. This Court, holding the evidence admissible, stated: "In this case, the officer saw and recognized the liquor in defendant's car. It then became his duty to act either with or without the aid of a search warrant. *S. v. Godette,* 188 N.C. 497, 125 S.E. 24." Accord: *State v. Harper,* 236 N.C. 371, 72 S.E. 2d 871.

In *State v. Ferguson,* 238 N.C. 656, 78 S.E. 2d 911, the State's evidence disclosed that at about 8:15 o'clock p.m. on 22 March 1953, two enforcement officers of the Mecklenburg County ABC Board stopped a Packard sedan near a drive-in theater on the Statesville-Charlotte highway. When the car stopped, the officers walked back to it and, looking in, saw on the floor-board back of the front seat a cardboard box containing twelve half-gallon fruit jars of white whiskey, upon which there were no revenue stamps of the State or Federal Government. Defendant moved to suppress the evidence concerning the non-taxpaid liquor. The Court held that the trial judge properly denied the motion, and stated:

"G.S. 18-6 provides, in so far as is material here, ' . . . that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, *except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage.*' (Italics added.)

"The uncontradicted evidence here is that Officer Moody stopped the car to make a routine check of the operator's driver's license. Following this, the officer saw and had absolute personal knowledge that there was intoxicating liquor in the automobile. This, by virtue of the express language of the statute, G.S. 18-6, dispensed with the necessity of a search warrant."

In connection with the holding in *State v. Ferguson, supra,* we note that Art. IV, Ch. 15, of the General Statutes of North Carolina, as rewritten and effective on 19 June 1969, in part states:

"§ 15-27. Exclusionary rule.—(a) No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial."

The same 1969 Legislature amended G.S. 18-6, but left intact the provisions there contained which state:

" . . . When any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquor, . . . it shall be his duty to seize any and all intoxicating liquor, and any and all equipment or materials designed or intended for use in the manufacture of intoxicating liquor, found therein being transported contrary to law. . . . Provided, that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle, or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor, equipment or materials designed or intended for use in the manufacture of intoxicating liquor, in such vehicle or baggage."

Defendant contends that instant case is distinguishable from *Harper* and *Ferguson* because the *contents* of the plastic contain-

ers were not visible to the officers standing outside the automobile.

The rationale of *Ferguson* and *Harper* must be that when the officers saw the liquid in containers generally used to contain and transport non-taxpaid liquor, under the circumstances then existing, they had sufficient reasonable cause to believe that the jars contained non-taxpaid liquor to justify the seizure of the contraband without a search warrant. Obviously, they could not have known with absolute certainty that the liquid in the jars was non-taxpaid liquor. Both *Harper* and *Ferguson* involved non-taxpaid liquor contained in transparent jars. Here, the illicit liquor was contained and transported in plastic jars of a type which, according to both officers, had been generally used as containers for non-taxpaid liquor for several years because "the Federal Government got so tight on people seeling *(sic)* half-gallon jars . . . . "

Other jurisdictions have held that the observation by officers of certain types of non-transparent containers is one of the circumstances affording such reasonable belief or probable cause that the motor vehicle carried contraband materials as would justify search of the vehicle without a warrant.

In the case of *Rowland v. Commonwealth,* 202 Ky. 92, 259 S.W. 33, the defendant saw police officers stop an automobile in front of him and attempted to turn around in the road. The officers put a spotlight on his car and defendant jumped out and started to run. He left his car door open, exposing one *keg* of "moonshine" whiskey to view. The officers, without a search warrant, searched the car and found 100 gallons of "moonshine" whiskey. Defendant contended that the officers had no right to search his car. The Kentucky Court of Appeals, rejecting this argument, stated:

> " . . . [N]o search warrant was necessary, since it is shown in evidence that the whisky in the keg in the car was exposed to view. We have held in several cases, including *Royce v. Commonwealth,* 194 Ky. 480, 239 S.W. 795, *Helton v. Commonwealth,* 195 Ky. 678, 243 S.W. 918; *Commonwealth v. Warner & Honer,* 198 Ky., 784, 250 S.W. 86, and *Commonwealth v. Riley,* 192 Ky. 153, 232 S.W. 630, that, where the article sought is in plain view, so that it is not necessary for the officers to search the car or other prem-

ises in order to see and know of the existence of the article sought, the arrest may be made and the articles taken as if the officers had in their possession a search warrant directed against the particular car or premises . . . . "

In the case of *Edwards v. State,* 81 Okla. Crim. 296, 164 P. 2d 245, the court upheld a warrantless search where police officers knew defendant's reputation for selling illicit whiskey, and they conducted a search after observing bottles in *paper sacks* on the floor of defendant's automobile while it was parked in a public place.

In *Ramsey v. U. S., supra,* where officers had information as to the location of a load of non-taxpaid liquor, and upon going there saw a car containing a large quantity of materials in *"paper pokes"* used for carrying liquor, the Court held that the circumstances were sufficient to justify a search without warrant.

In *Hawthorne v. U. S.,* 37 F. 2d 316, where the lights of a government car revealed, through slats in the tail gate of a truck, what appeared to be *drums* used to contain alcohol, and officers had some information that the truck was used in transporting illicit liquor, the search and seizure of the contraband materials without a warrant was held legal.

In *People v. Glasgow,* 4 Cal. App. 3d 416, 84 Cal. Rptr. 671, police suspected that defendant was driving a stolen car. Defendant was unable to produce a registration slip, and police in the presence of the defendant were looking around the car for some sign of ownership. One of the investigating officers shone his flashlight into the car's interior and saw two brown paper bags resembling bricks. He recognized the "bricks" as being in the usual package form in which marijuana is brought out of Mexico in commercial shipments. He opened the door, took out the package, widened a small hole in the package, and determined that indeed the package contained marijuana. In holding that the evidence obtained without a warrant was admissible, the court stated: "Reasonable grounds for believing a package contains contraband may be adequately afforded by its shape, its design, and the manner in which it is carried."

[4] In instant case defendant's counsel in his brief to this Court and in his brief to the Court of Appeals admits that the

officers were looking for defendant's blue and white Oldsmobile. Defendant was known to at least one of the officers, who called him by his given name as defendant was walking away from his car which he had just parked in an alley. Defendant thereupon ran back to his car and tried to get out of the alley by backing into the county car which was blocking his car in the alley. While removing defendant from the car, the officers observed several plastic jugs commonly used as containers for non-taxpaid whiskey. The jugs were seized, and it was found that they did contain non-taxpaid whiskey.

We think that the facts and circumstances of this case were sufficient to furnish the officers reasonable ground to believe that defendant illegally possessed and illegally transported non-taxpaid liquor, and that they were justified in seizing from defendant's automobile the containers which were fully disclosed without necessity of search.

[5] Defendant's remaining assignment of error is that the trial court erroneously allowed the witnesses to testify that the containers seized from defendant's car are of the type often used to carry non-taxpaid liquor. He contends that the evidence was not relevant.

We adopt the conclusion and language of the Court of Appeals that "In our opinion the relevance of this evidence is too apparent to require discussion."

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. ROBERT (BOBBY) SMITH

No. 36

(Filed 14 April 1971)

1. **Criminal Law § 66; Constitutional Law § 30— lineup procedures — suggestiveness and mistaken identification — due process**

Lineup and confrontation procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violate due process and are constitutionally unacceptable.

2. **Criminal Law § 66— identification of defendant — confrontation in jail cell — absence of counsel — unnecessary suggestiveness**

The procedure by which the victim of an attempted armed robbery identified the defendant in his jail cell was unnecessarily suggestive and was a violation of due process, where (1) defendant had not been advised of his constitutional rights, including the right to counsel; (2) no counsel was present at the identification; (3) the defendant was wearing clothing similar to that worn by the alleged robber, whereas the two other prisoners in the cell were dressed differently; (4) the defendant was a young man, whereas one of the prisoners was middle-aged and the other was much larger and heavier than defendant.

3. **Criminal Law §§ 66, 169— admission of erroneous identification testimony — harmless error**

The admission of testimony relating to the prosecuting witness' unlawful identification of defendant in his jail cell was harmless error in this attempted armed robbery prosecution, where there was other and overwhelming evidence that the prosecuting witness' in-court identification of defendant was based on the witness' observations prior to and during the crime.

APPEAL by defendant from *McConnell, J.*, 13 April 1970 Criminal Session, ANSON Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging defendant with attempted armed robbery of Fred Cook on 9 October 1969, a violation of G.S. 14-87.

After the jury was impaneled and prior to the introduction of evidence before the jury, defendant moved to suppress the testimony of Fred Cook purporting to identify defendant as the person who attempted to rob him. As grounds for the motion defendant asserts that Cook's identification testimony is based on an illegal confrontation for identification purposes in the Anson County Jail at a time when defendant had not been warned of his constitutional rights and in the absence of defense counsel. Pursuant to the motion a *voir dire* was conducted by the court in the absence of the jury.

Fred Cook testified on *voir dire* that on 9 October 1969 he was operating the Star-Flite Service Station on Highway 52 north of Wadesboro in Anson County. On that date, shortly after 7 p.m., the defendant came to the service station and stayed in the rest room about fifteen minutes. The station was well lighted and defendant passed within fifteen feet of him at that time. After leaving the rest room, defendant went to the edge of the highway forty to fifty feet away and remained there for

approximately an hour as if trying to catch a ride back to town. Meanwhile, about 8 p.m., Cook prepared to close his station, read his gas pumps, looked toward the highway and observed that defendant was gone. Cook had two buildings which he locked and, as he turned to leave, heard someone say: "This is a holdup." An outside night light was mounted over the building and the premises were well lighted by it and by the big lights over the gas pumps. Cook turned to see who had spoken and defendant had a pistol with a shiny barrel pointed right in his face. Defendant's face was not covered. He was within five feet of Cook and plainly visible under the overhead light. As Cook turned to face him defendant pulled the trigger and the pistol snapped but did not fire. Although he had no weapon in his pocket, Cook went toward his pockets with his hands and defendant whirled, ran behind the building, and across a small branch. Cook followed and defendant shot four times but did not hit him. At that time defendant was about seventy-five yards away.

In response to a telephone call, Officers Hieleg and Allen arrived at the service station within forty minutes. Cook told them what had happened, described defendant as a young colored male wearing a white T-shirt and a pair of dark gray pants. He told the officers that his assailant had been around his service station the entire week; that on Monday night, the 6th of October, defendant and two other boys came to the station and defendant complained to Cook that they had put money in one of the vending machines which didn't pay off; that defendant was at the station for an hour on that occasion and Cook had observed him and conversed with him although he did not know his name; that again on Tuesday and Wednesday before the attempted robbery on Thursday, his assailant had returned to the station "and would hang around out there. I had an opportunity to see him each day he was there."

Cook further stated on the *voir dire* that shortly after midnight on the night of the attempted robbery the officers called and informed him the robber had been caught, that his name was Bobby Smith, and that he was in jail. Cook thereupon went to the county jail at Wadesboro, where he was informed by the officers that Judge Mills had been called and that a lawyer would have to be appointed for defendant before they could let Cook see him.

Although the record is silent as to the appointment of counsel, Attorney F. O'Neil Jones was apparently appointed by Judge Mills to represent defendant and went to the jail and courthouse that night. In this connection, Cook testified as follows: "On the night in question I saw Mr. Jones at the jail house. They had called Mr. Jones and appointed him as the lawyer for Bobby Smith. When he arrived there that night he indicated that we were not going to have a lineup. I heard him discuss this with Deputy Sheriff Ralph Allen. Mr. Previtte, the night jailer, was not there at that time. Mr. Jones indicated to the arresting officers that he was not prepared to have a lineup that evening, and that is my best recollection."

Fred Cook further stated that after Attorney Jones left, "they came over in the courthouse to fix up the warrant for him. So while they went over fixing up the warrant, the night man came over there at the jail and asked me did I want to see him. I told him, 'Yes, . . . I want to see who I'm taking out a warrant for, see if he's the right one.' " Cook was thereupon admitted to the jail, saw three colored males in the same cell, and recognized defendant Bobby Smith as the man who had attempted to rob him earlier that night. "I did not go to the cell to identify this person. I simply went to see if the one who had robbed me had been taken into custody. When I saw him, it was my conclusion that that was the one that tried to rob me out at the station. I see the person now who tried to rob me on October 9, 1969 and he is sitting right there. . . . If I had not seen him in jail, I would know that he was the one."

Defendant did not testify on the *voir dire* but called Jailer Eddie Previtte as a witness. The jailer testified that he came on duty at 12 midnight on the night of October 9, 1969; that he saw Attorney Jones that night but did not remember hearing Mr. Jones say anything about "no lineup"; that after he saw Mr. Jones he saw Fred Cook and asked him if he'd like to see Bobby Smith; that Cook replied "yes, he would, after he stayed up there that long"; that it was about 2 a.m., getting late, and he permitted Fred Cook to enter the cell block and view the defendant; "I just took him to the door area where Bobby Smith was, and he looked and left"; that Attorney Jones was not present and did not see what happened at the time he took Cook around to the jail; that he did not point out Bobby Smith to Cook but simply told him if he wanted to see him he could go around to the cell; that T. J. Crowder and Jimmy Preston were the other two prisoners

in the cell with defendant that night; that Crowder is a middle-aged Negro man, obviously over thirty, and Jimmy Preston, while about the same age as defendant, is substantially larger.

James Preston testified that he was in Anson County Jail on the evening of 9 October 1969 and was in the same cell with Bobby Smith and T. J. Crowder; that Bobby Smith was wearing a white T-shirt and dark gray pants while he and Crowder had on no shirt at all; that the jailer brought Fred Cook in there "and told him to go around and see is that the one"; that Cook first pointed at him and the jailer shook his head and Cook then went to Bobby Smith. This witness said he was in jail for burglary and had previously escaped from jail.

Fred Cook was recalled by the State and stated that the jailer couldn't even see him after he entered the cell block; that he "went around the runaway and I couldn't even see the jailer at all. He did not shake his head at me."

Upon the foregoing evidence, the judge found as a fact that Fred Cook had observed Bobby Smith on a number of occasions during the week while Smith was loitering around the Star-Flite Service Station and further observed him for more than an hour on the night of the attempted robbery; that Fred Cook's identification of Bobby Smith was based entirely on his mental picture of defendant at the time of the robbery and was in nowise tainted by the fact that he saw him in the Anson County Jail. Upon those findings, the court concluded that Cook's in-court identification of defendant was competent. Defendant's motion to suppress the evidence was thereupon denied. Fred Cook then took the witness stand and testified before the jury substantially in accord with his *voir dire* testimony. Defendant offered no evidence before the jury.

Following arguments of counsel and charge of the court, the jury returned a verdict of guilty of attempted armed robbery as charged in the bill of indictment. The court pronounced judgment that defendant be confined in the State's Prison for a term of not less than eighteen nor more than twenty-five years, and defendant gave timely notice of appeal to the Court of Appeals. The case is before the Supreme Court for initial appellate review pursuant to our general referral order dated 31 July 1970.

F. O'Neil Jones, Attorney for the defendant appellant.

Robert Morgan, Attorney General, and Ralph Moody, Deputy Attorney General, for the State.

HUSKINS, Justice.

The refusal of the court to suppress the evidence of Fred Cook, identifying defendant as the man who attempted to rob him, constitutes defendant's only assignment of error. Defendant argues that he was identified at the jail in the absence of his counsel and under suggestive circumstances amounting to a denial of due process in violation of the Fourteenth Amendment. We now examine the validity of this contention.

Rules established for in-custody confrontation for identification purposes require that: (1) the accused be warned of his constitutional right to the presence of counsel during the confrontation; (2) when counsel is not knowingly waived and is not present, the testimony of witnesses that they identified the accused at the confrontation be excluded; (3) the in-court identification of the accused by a witness who participated in the pretrial out-of-court confrontation be likewise excluded unless it is first determined on *voir dire* that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. Failure to observe these rules is a denial of due process. *United States v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S.Ct. 1926 (1967); *Gilbert v. California,* 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S.Ct. 1951 (1967); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968). *See generally,* Quinn, In the Wake of Wade: The Dimensions of the Eyewitness Identification Cases, 42 U. Colo. L. Rev. 135 (1970).

[1] In addition, it has become settled law that lineup and confrontation procedures "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" violate due process and are constitutionally unacceptable. *Simmons v. United States,* 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S.Ct. 967 (1968); *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970); *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507 (1970).

[2] Applying the foregoing principles to the facts in this case, we hold that the pretrial identification procedure at the jail

violated the established rules and that the testimony of Fred Cook to the effect that he identified the defendant at the jail was tainted by that illegality and thus inadmissible as a matter of constitutional law. *Foster v. California,* 394 U.S. 440, 22 L. Ed. 2d 402, 89 S.Ct. 1127 (1969); *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S.Ct. 1684 (1961). "Evidence unconstitutionally obtained is excluded in both state and federal courts as an essential to due process—not as a rule of evidence but as a matter of constitutional law." *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). The jailer allowed the prosecuting witness to view the accused in the absence of counsel and under suggestive circumstances. This witness had been informed by the officers that the robber had been caught, that his name was Bobby Smith, and that he was in jail. Cook went to the jail to view the man who had been arrested. The jailer, apparently unaware that a lineup was planned for the next day and unaware that the accused was entitled to the presence of counsel during any confrontation for identification purposes, permitted Fred Cook to enter the cell block where he viewed the defendant. The accused was wearing a white T-shirt and gray pants—clothing similar to that worn by the would-be robber, while the other two prisoners in the cell were dressed differently. The accused is a young man, while one of the other prisoners was middle-aged and the other was much larger and heavier than defendant. Defendant had not been advised of his constitutional rights, had not been informed of his right to counsel, and no counsel was present. The totality of these circumstances reveal a pretrial identification procedure unnecessarily suggestive, in violation of the rule as to counsel, and offensive to fundamental standards of decency, fairness and justice. If defendant's conviction rested on his identification at that illegal confrontation, it could not stand.

[3] On the record before us, however, the evidence is overwhelming that Cook's in-court identification of defendant was not based on the illegal out-of-court confrontation at the jail but on observations made at the time of the crime and during the previous week. The defendant had been "hanging around" Cook's service station for a week prior to the crime. Cook saw him every day from Monday through Thursday night. "He would come hanging around the service station during the day, and it was every day that I saw him . . . I knew him well on sight when I saw him. . . . I see the person now who tried to

rob me on October 9, 1969, and he is sitting right there (witness indicating). He is sitting next to Mr. Jones. That's the same boy I saw the night of October 9, 1969, and the one I saw in jail was the one who tried to rob me out there that night, and he is the same one here now. If I had not seen him in jail, I would know that he was the one."

It is evident that Cook's in-court identification was independent in origin, stemming from his observation of defendant during the week and on the night of the robbery, and was in nowise influenced by the confrontation at the jail. Cook knew the man who attempted to rob him but did not know his name. The officers supplied the name while Cook independently identified the man. There is ample evidence to support the finding of the trial judge that the in-court identification was independent of the illegal out-of-court confrontation. Fred Cook knew the man who attempted the robbery long before he saw him at the jail. At that confrontation Cook only ascertained that the man in jail named "Bobby Smith," for whom he was swearing out a warrant at the instance of the officers, was in fact the would-be robber he already knew.

In all events, the erroneous admission of evidence concerning the confrontation at the jail was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967); *Gilbert v. California, supra.* Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission constitutes harmless error. *Fahy v. Connecticut,* 375 U.S. 85, 11 L. Ed. 2d 171, 84 S.Ct. 229 (1963); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970).

Defendant having failed to show prejudicial error, the verdict and judgment must be upheld.

No error.

STATE OF NORTH CAROLINA v. JAMES EARL LITTLE

No. 60

(Filed 14 April 1971)

1. **Homicide § 21—aiding and abetting homicide — sufficiency of evidence**

Issue of defendant's guilt of aiding and abetting the actual perpetrators of a homicide was properly submitted to the jury, where there was evidence tending to show that (1) on the evening of the homicide the defendant borrowed a shotgun which the perpetrators later used in the homicide, (2) the defendant drove the perpetrators to the scene of the homicide and waited in the car while they carried out the crime, and (3) the defendant drove off with the perpetrators after the homicide had been committed.

2. **Criminal Law § 2— proof of intent**

Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence; it must ordinarily be proven by facts and circumstances from which it may be inferred.

3. **Criminal Law § 89— admission of impeachment testimony — unresponsiveness of testimony**

Part of sheriff's answer which was not responsive to the question but which was competent for the purpose of impeachment, *held* admissible over the defendant's general objection to the answer.

4. **Criminal Law § 162— objection to evidence — evidence previously admitted without objection**

When evidence is admitted over objection but the same evidence was theretofore admitted without objection, the benefit of the objection is ordinarily lost.

Justice LAKE did not participate in the consideration or decision of this case.

APPEAL by defendant from *Thornburg, S.J.*, at the September 21, 1970 Session of STANLY Superior Court.

On the night of 14 March 1970 a dance was being held at the Top Hat Cafe in Norwood, North Carolina, with about 125 people in attendance. Paul George Massey was in the band providing music for the dance. At approximately 11:30 p.m. Norman Watkins, the proprietor of the Top Hat, was standing about a foot to the right of the entrance to the dance hall when he saw Eugene "Snap" Watkins push the door open with the barrel of a shotgun. "Snap" Watkins withdrew the gun, the door closed, and then somebody shot into the door, blowing it open. The door again closed, was reopened, and Norman Watkins saw two shotgun barrels in the doorway. Both guns fired, killing Paul

George Massey. Charlie Barbers and Eugene "Snap" Watkins were tried for Massey's death and were convicted of manslaughter. Defendant Little, tried separately for aiding and abetting Barbers and Watkins, was convicted of manslaughter. From sentence imposed, Little appealed to the Court of Appeals. The case was transferred to the Supreme Court under its general order of 31 July 1970.

Norman Watkins; Donald Watkins, son of Norman Watkins; Alberta Davis; Jack Copley, an agent for the State Bureau of Investigation; and Ralph McSwain, sheriff of Stanly County testified for the State at defendant's trial. Their testimony is summarized as follows:

Norman Watkins testified that the defendant shot him three or four years prior to 14 March 1970, and that since then there had been "trouble or difficulty" between them; that about two months after defendant shot him the defendant returned to the Top Hat and was told to keep out, and about one month prior to the shooting of Massey the defendant entered the Top Hat with a gun but left; that he did not see the defendant on the evening in question, but that he did see Eugene "Snap" Watkins when the barrels of two shotguns were pushed through the door and fired into his establishment.

Donald Watkins testified that he saw the defendant drive an automobile into the Top Hat parking lot about 10 p.m. on 14 March 1970 and park about 50 feet from the door of his father's establishment. Eugene "Snap" Watkins and Charlie Barbers were in the car with defendant. All three got out, stood around for about 45 minutes, and then went to the back of defendant's car, opened the trunk, and Barbers and "Snap" Watkins lifted shotguns out of the trunk. Barbers and "Snap" Watkins then walked toward the Top Hat with the guns while defendant remained by the car. Barbers and "Snap" Watkins stepped inside the hallway, pushed the door open, and fired the shotguns into his father's dance hall. After three shots were fired, Barbers and "Snap" Watkins ran to defendant's car, got in, and defendant who was waiting under the wheel drove away.

Alberta Davis testified that on the night in question defendant came to her home between 11:00 and 11:30 and asked to borrow her brother's shotgun. She gave it to him and he left. This gun was identified as one of the guns used in the homicide.

Defendant testified in his own behalf. His testimony was to the effect that he had not conspired with "Snap" Watkins and Barbers to kill Massey; that although he did borrow a gun from Alberta Davis, he did so because he feared Norman Watkins; that he did go to the Top Hat on 14 March 1970 but did not take Barbers and "Snap" Watkins; that he did not permit and did not encourage anybody to take a loaded 12-gauge shotgun into the dance hall; that he did not open his trunk for Barbers and Watkins to get shotguns; that he did carry Barbers and "Snap" Watkins away from the scene of the crime, but only because they hopped into his car and asked him to drive them away; that before driving them away he asked both if they had shot anyone and they replied they had not.

Eugene "Snap" Watkins testified for the defendant that he did go with defendant to the Top Hat between 7 and 8 p.m. on the night of the murder; that he got out of defendant's car and defendant left; that later in the evening defendant returned to the Top Hat alone; that he and Barbers did shoot Massey, but that he did not get a gun from defendant nor did he and defendant plan any part of the crime; that the reason he got into the car with defendant after the shooting was that he saw him in the road and it looked like a good ride.

Charlie Barbers testified on behalf of the defendant that there were no prior arrangements made by "Snap" Watkins, defendant and himself to go to the dance hall with the shotguns; and that there were no arrangements made with defendant to wait until after the shooting in order to carry them away.

Jack Copley testified in rebuttal for the State that he talked to Barbers after the shooting occurred and that Barbers told him that the defendant had decided to go into the Top Hat Club with "Snap" Watkins, but Watkins told defendant to stay out by the car so he could drive "Snap" Watkins and Barbers away when they were ready to leave. Copley further testified that Barbers told him that defendant gave him the shotgun and told him that there were three shells in it.

Sheriff Ralph McSwain testified in rebuttal that he talked with Barbers and that Barbers told him that just before he and Watkins went into the Top Hat the defendant loaded one of the guns and said, "I won't leave you."

Attorney General Robert Morgan and Assistant Attorney General I. Beverly Lake, Jr., for the State.

Ernest H. Morton, Jr., for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the court's denial of his motion for judgment as of nonsuit. Defendant contends the State failed to offer substantial evidence that defendant shared in the criminal intent of the actual perpetrators, and that this is one of the material elements needed to convict defendant for aiding and abetting.

[2] Intent is an attitude or emotion of the mind, and is seldom, if ever, susceptible of proof by direct evidence. It must ordinarily be proven by facts and circumstances from which it may be inferred. *State v. Arnold,* 264 N.C. 348, 141 S.E. 2d 473; *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649; *State v. Petry,* 226 N.C. 78, 36 S.E. 2d 653; 2 Strong's N. C. Index 2d, Criminal Law § 2.

Justice Ervin, in *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5, states:

> "To constitute one a principal in the second degree, he must not only be actually or constructively present when the crime is committed, but he must aid or abet the actual perpetrator in its commission. *S. v. Epps,* 213 N.C. 709, 197 S.E. 580; *S. v. Davenport,* 156 N.C. 596, 72 S.E. 7; *S. v. Lumber Co.,* 153 N.C. 610, 69 S.E. 58. A person aids or abets in the commission of a crime within the meaning of this rule when he shares in the criminal intent of the actual perpetrator *(S. v. Oxendine,* 187 N.C. 658, 122 S.E. 568), and renders assistance or encouragement to him in the perpetration of the crime. *S. v. Hoffman,* 199 N.C. 328, 154 S.E. 314; *S. v. Baldwin,* 193 N.C. 566, 137 S.E. 590. While mere presence cannot constitute aiding and abetting in legal contemplation, a bystander does become a principal in the second degree by his presence at the time and place of a crime where he is present to the knowledge of the actual perpetrator for the purpose of assisting, if necessary, in the commission of the crime, and his presence and purpose do, in fact, encourage the actual perpetrator to commit the

crime. *S. v. Williams,* 225 N.C. 182, 33 S.E. 2d 880; *S. v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358; *S. v. Hoffman, supra; S. v. Cloninger,* 149 N.C. 567, 63 S.E. 154; *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127, 8 Ann. Cas. 438; *S. v. Chastain,* 104 N.C. 900, 10 S.E. 519."

Accord, State v. Swaney, 277 N.C. 602, 178 S.E. 2d 399; *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655. *See also,* Note, 35 N.C.L. Rev. 285 (1956-57).

"In determining whether a person is guilty as a principal in the second degree, evidence of his relationship to the actual perpetrator, of motive tempting him to assist in the crime, his presence at the scene, and his conduct before and after the crime are circumstances to be considered." 2 Strong's N. C. Index 2d, Criminal Law § 9, p. 493; *State v. Birchfield, supra.*

[2] The State's evidence in the present case tends to show (1) defendant shot the proprietor of the Top Hat some four years before the night Massey was killed, and was later told by the proprietor not to return to the Top Hat; (2) about one month prior to the shooting in question the defendant entered this establishment with a gun but then left; (3) on the evening of the fatal shooting the defendant borrowed a shotgun which was later used in the shooting; (4) on this occasion the defendant, in company with the two principals, backed his automobile into the parking lot of the place where the shooting occurred; (5) the two principals and defendant were near defendant's car by themselves from the time the car was backed into the parking lot until the two principals walked into the building with the shotguns; (6) the defendant opened the trunk of his car and the two principals reached in and procured shotguns; (7) after removing the shotguns from the trunk of defendant's car, the principals entered the premises in question with the shotguns, while the defendant remained in the car; and (8) after the shooting the two principals ran from the building and got into defendant's car, where defendant was waiting under the wheel, and defendant then drove away.

Considering this evidence in the light most favorable to the State, as we must on a motion for judgment as of nonsuit, we hold there was ample evidence to go to the jury on the charge of aiding and abetting Barbers and Watkins in the shooting of Massey, and that the trial court correctly overruled

defendant's motion for judgment as of nonsuit. *State v. Swaney, supra; State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Davis,* 272 N.C. 469, 158 S.E. 2d 630; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241; 2 Strong's N. C. Index 2d, Criminal Law § 104, p. 648.

[3] Defendant next assigns as error the court's failure to sustain his objection to certain testimony of Sheriff McSwain concerning a conversation the sheriff had with Charlie Barbers. Barbers testified for the defendant that he did not see defendant that night until defendant came to the Top Hat by himself, and that he and "Snap" Watkins had no arrangements with the defendant to go to the Top Hat or for the defendant to carry them away after the shooting. Sheriff McSwain on rebuttal was asked, "What, if anything, did you say to him [Barbers] prior to his making any statements, if he did?" Sheriff McSwain answered: "I told him that he had been brought back here for the James Honey Little trial and I wanted to discuss with him any activities that James Little had on the night of March 14. I told him that we only wanted him and Eugene to tell the truth about what happened. And Barbers told me that just before he and Snap went into the Top Hat Cafe that Honey Little loaded one of the guns and that he, Little, says, 'I won't leave you.'" Defendant objected. The objection was overruled. Defendant did not object to the question but objected to the answer. He did not move to strike the answer but now contends that the answer was not responsive to the question, and that the court erred in overruling his objection. This contention is without merit.

"In case of a specific question, objection should be made as soon as the question is asked and before the witness has time to answer. Sometimes, however, inadmissibility is not indicated by the question, but becomes apparent by some feature of the answer. In such cases the objection should be made as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it." Stansbury, N. C. Evidence § 27 (2d Ed., 1963). *Accord, State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599; *Huffman v. Lumber Co.,* 169 N.C. 259, 85 S.E. 148. Although part of Sheriff McSwain's answer was not responsive to the question, that part not responsive was competent for the purpose of impeaching Barbers. *State v. Butler,* 269 N.C. 483, 153 S.E. 2d 70; *State v. McPeak,* 243 N.C. 273, 90 S.E. 2d 505; *State v. Wellmon,* 222

N.C. 215, 22 S.E. 2d 437; Stansbury, N. C. Evidence § 46 (2d Ed., 1963); 2 Strong's N. C. Index 2d, Criminal Law § 89. If competent for the purpose of impeachment, the answer does not become incompetent because unresponsive to the question. "Whether the answers were responsive to the questions is not controlling. The determinative question before the court below is whether the answers were relevant and competent. . . . If the answers furnished relevant facts, they were nonetheless admissible . . . [even though] they were not specifically asked for." *In re Will of Tatum,* 233 N.C. 723, 65 S.E. 2d 351. *Accord, State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225; *In re Will of Taylor,* 260 N.C. 232, 132 S.E. 2d 488.

[4] Before Sheriff McSwain testified concerning Barbers' statement, Jack Copley also testified on rebuttal, without objection, to a conversation which he had with Barbers in which Barbers made substantially the same statements he made to Sheriff McSwain. "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." *State v. Owens,* 277 N.C. 697, 178 S.E. 2d 442. *Accord, Dune's Club v. Insurance Co.,* 259 N.C. 294, 130 S.E. 2d 625.

For the reasons stated, the trial court properly overruled defendant's objection.

In the two assignments brought forward by the defendant, we find no error.

No error.

Justice LAKE did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. BOBBY TYSON
—and—
STATE OF NORTH CAROLINA v. HAROLD DOUGLAS GAINES

No. 61

(Filed 14 April 1971)

1. **Robbery § 5— armed robbery — instruction on lesser included offense**

Trial court in an armed robbery prosecution was not required to instruct the jury on the lesser included offense of common law robbery where there was no evidence to support such an instruction.

2. **Criminal Law § 66— in-court identification testimony — admissibility**

Trial court's findings that the in-court identification of the two defendants charged with armed robbery was based upon the victim's observation of defendants at the time of the robbery and was untainted by any suggestive identification procedures, *held* supported by the uncontradicted evidence on the *voir dire*.

3. **Criminal Law § 66— in-court identification testimony — contention that witness was disqualified**

Defendants' contention that a robbery victim came to the courtroom mentally preconditioned to identify as the robbers whoever might be the defendants on trial and that the victim should have been disqualified from giving identification testimony, *held* without merit.

APPEAL by defendants from *Thornburg, S.J.*, at the 21 September 1970 Session of STANLY, heard prior to determination by the Court of Appeals.

Under four separate indictments, two against each defendant, each proper in form, consolidated for trial, the defendants were tried upon charges of robbery of Marvin Furr and Lloyd Clodfelter with the use of firearms. Each defendant was found guilty as charged in each case. Tyson was sentenced to imprisonment for 20 years in each case. Gaines was sentenced to imprisonment for 25 to 30 years in each case. Since none of the judgments states to the contrary, the sentences imposed on each defendant will run concurrently. Both defendants appealed, their assignments of error being identical.

The evidence of the State, which consisted entirely of the testimony of Furr and Clodfelter, was to the following effect:

On 13 January 1970, at about 4 p.m., Clodfelter stopped at and entered the filling station store operated by Furr. When he arrived, six Negro men were there and Furr was outside pumping gasoline into their car. The two defendants, each positively

identified in court both by Clodfelter and by Furr, were two of those men.

Five of the Negro men and Furr thereafter followed Clodfelter into the store, one of the six remaining in the car as driver. A discussion arose when it developed that the men did not have enough money to pay for the gasoline. Furr refused to accept a check and went outside to make a note of the license number of the car.

While Furr was outside, Tyson "pulled a gun" on Clodfelter, grabbed him around the neck, held the gun at his head and pushed him over behind the door, saying, "If you move, damn you, I'll blow your brains out." Furr then reentered the store and the other Negroes grabbed him. Tyson released his hold upon Clodfelter and, pointing his gun at Furr, demanded that Furr open the cash register after Tyson's own efforts to do so had failed. Furr opened the cash register and Tyson took the money out of it, about $100.

Gaines, who was one of those in the store when Tyson seized Clodfelter and when he forced Furr to open the cash register, went out to the car and returned with a shotgun. The group, at least one other member displaying a pistol, then "started rummaging the store," taking from it shotgun shells and other merchandise. Gaines twice suggested that they kill Furr and Clodfelter, each time lifting his gun as if to shoot, but Tyson said he did not want to do that unless he had to. Tyson and Gaines then took from Furr's person two pocketbooks, containing about $140, which Furr gave them because they had a gun on him.

Tyson and Gaines then marched Furr and Clodfelter out of the store and around to the men's room, which they forced Furr and Clodfelter to enter. They then discovered the door could not be locked from the outside. Furr having locked it from the inside, Gaines threatened to shoot through the door if Furr did not open it, which Furr did. Tyson and Gaines then compelled Furr and Clodfelter to reenter the store and to lie down on the floor, Tyson first taking from Clodfelter's pocket his billfold, from which Tyson removed and put into his own pocket $110. While this was being done, Tyson held a pistol in his hand and Gaines stood by, pointing a shotgun in the faces of Clodfelter and Furr.

Tyson, Gaines and their companions then tore out the telephone and drove away. Their stay in the store lasted fifteen or twenty minutes.

While neither Furr nor Clodfelter had ever seen either defendant prior to this occurrence, each had opportunity, while the robberies were in progress, to observe both defendants. After the robberies, neither witness saw either defendant prior to trial, except that both saw Tyson at his preliminary hearing some weeks prior to trial. At the preliminary hearing both recognized Tyson as he entered the courtroom with a deputy sheriff and took his seat alone in the prisoners' box. No one then told them that Tyson was one of the group which had robbed them. Each witness testified at the trial that his recognition of Tyson at the preliminary hearing was not the basis for his in-court identification of him.

The defendants offered no evidence.

Neither defendant objected, at the time, to the in-court identifications by Furr or by Clodfelter. After Furr had completed his testimony and before Clodfelter took the stand, the court, on its own motion and in the absence of the jury, conducted a *voir dire* to determine the basis of Furr's in-court identifications of the two defendants. On this *voir dire* Furr and Tyson testified, no other evidence being taken. The testimony on *voir dire,* in substance, was as follows:

Tyson's testimony was limited to his hair style at the time of the alleged robberies and to whether or not he then had a mustache.

Furr's testimony on *voir dire* was that the robberies occurred on a fair day; his store was then well lighted; the defendants were in his presence fifteen or twenty mintes; he looked at Tyson's face when Tyson proposed to write a check for the gasoline; Gaines was then within two feet of Furr; at the time of the robberies Furr paid attention to Gaines because Gaines was the one who wanted to shoot him; Furr's in-court identifications were based on the way the defendants looked at the time of the robberies; no police officer or anyone else ever pointed out either Tyson or Gaines to Furr as being members of the group which robbed him; Furr was not asked to testify at Tyson's preliminary hearing and did not do so or then point out Tyson to anyone or make any statment concerning him; no

photograph of Tyson has even been placed before him; no one ever pointed out either defendant to him as one of the group which robbed him; he has never seen either defendant in any line-up of any kind; a mental picture of Tyson has remained in Furr's mind ever since Tyson pointed the automatic pistol at him during the robberies; the only time Furr saw Tyson between the robberies and the trial was at the preliminary hearing; Gaines was not then in custody; and Furr did not see Gaines from the time of the robberies until the trial.

At the conclusion of the *voir dire,* the court entered an order setting forth findings of fact, including a finding that there is nothing in the record to indicate any suggestion by any member of any law enforcement agency "which would color the identity of the two defendants as indicated by the witness Furr," and the finding that there is nothing in the record to indicate any illegal identification procedures or line-ups involving these two defendants while in the custody of law enforcement officers. The court concluded that there was no impermissibly suggestive procedure used to aid Furr in identifying the two defendants and his in-court identifications of them are independent in origin and are admissible in evidence.

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

Ernest H. Morton, Jr., for defendant Bobby Tyson.

W. T. Hudson for defendant Harold Douglas Gaines.

LAKE, Justice.

The defendants have brought forward in their brief only those assignments of error which relate to the admission of the in-court identifications of them by the witness Furr and to the failure of the trial court to instruct the jury concerning the offense of common law robbery. The other assignments of error set forth in their statements of the case on appeal are, therefore, deemed abandoned. *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457; *State v. Spears,* 268 N.C. 303, 150 S.E. 2d 499; Strong, N. C. Index 2d, Criminal Law, § 166. We have, nevertheless, considered all of the assignments of error and we find no merit in those so abandoned by the defendants.

[1] There was no error in the failure of the court to charge the jury as to the offense of common law robbery. Although this is

an offense included in the offense of robbery with the use of firearms so that the indictments would have supported convictions thereof, *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661, there was no evidence whatever of any robbery except with the use of firearms. In such case the law does not require an instruction as to the lesser offense and there was no error in instructing the jury to return, as to each defendant in each case, a verdict of guilty of robbery with the use of firearms or a verdict of not guilty, which the court did. *State v. Williams,* 275 N.C. 77, 88, 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; Strong, N. C. Index 2d, Criminal Law, § 115.

[2] There is, likewise, no merit in the contention that the court erred in finding and concluding that the in-court identification of each defendant by the witness Furr was independent in origin and untainted by any suggestive procedures by law enforcement officers. There is nothing whatever in the record to suggest, even remotely, that there was any line-up, or any display of photographs of either defendant or of the person of either defendant to this witness by any officer or employee of any law enforcement agency. The witness' testimony is clear and positive to the contrary and is sufficient to show ample opportunity for him to observe both defendants at the time of the robberies. The only time he saw the defendant Tyson between the date of the robberies and the commencement of the trial was at Tyson's preliminary hearing on these charges. He never saw the defendant Gaines between the date of the robberies and the commencement of the trial, Gaines having waived a preliminary hearing according to his counsel's brief. The uncontradicted evidence on the *voir dire* is ample to support the trial court's findings of fact. These are, therefore, binding upon us. See: *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744; *State v. Gray,* 268 N.C. 69, 79, 150 S.E. 2d 1; Strong, N. C. Index 2d, Criminal Law, § 76, p. 586. The court's findings of fact support its conclusion that the identifications of both defendants by the witness Furr were admissible in evidence.

Furthermore, neither defendant objected to Furr's in-court identification of him when it was put in evidence and neither objected to the equally positive and unequivocal identifications by the witness Clodfelter. See Stansbury, North Carolina Evidence, 2d Ed., § 27. Nothing in the record indicates that anything transpired after the in-court identification of Tyson by the wit-

ness Furr to cast doubt upon its admissibility. Nevertheless, the trial judge, out of an abundance of caution, made inquiry, in the absence of the jury, into the possibility of impermissibly suggestive police methods leading to some prior identification of the defendant Tyson by this witness. Tyson's testimony on the *voir dire* suggested nothing whatever of this nature. The testimony on *voir dire* by the witness shows clearly there was no effort by anyone to lead him into an identification of either defendant as one of the robbers.

[3] In their brief the defendants argue that when the witness Furr came to the courtroom for the trial, he necessarily knew the defendants were charged with robbing him and so, of course, expected to see in the courtroom men whom the law enforcement officers believed were the robbers. Consequently, they say, the witness came to the courtroom mentally preconditioned to identify as members of the group which robbed him those whom he saw in the courtroom charged with the offense. This, they contend, disqualifies the witness to testify that the persons he saw there were, in fact, the ones who robbed him.

This contention is an amplification of *United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, which has the support of no decision by any court thus far called to our attention. To accept it as a correct application of the Fourteenth Amendment to the United States Constitution would, of course, make it impossible for the victim or any other eye witness to a crime to testify that he recognizes the defendant as its perpetrator, without first having, for each witness, some sort of line-up procedure to test his recollection of the perpetrator's appearance. This is not required. See, *State v. Jacobs, supra.* The decision in the Wade case was designed to promote fairness in the use of line-ups, not to require them. The contention of the defendants is predicated upon the assumption, completely unsupported by anything in the record, that the witness came to court prepared to identify as the one who robbed him whomsoever might be the defendant on trial. It overlooks the obvious truth that when the victim of a crime comes to court to testify, his motivation is his desire to bring the actual wrongdoer to justice, which purpose would be defeated by his identification of someone else as the perpetrator of the crime.

No error.

CITY OF STATESVILLE, A MUNICIPAL CORPORATION, PETITIONER v. LOUIS G. BOWLES AND WIFE, EUGENIA W. BOWLES; HOWARD HOLDERNESS AND THE JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION, RESPONDENTS

No. 35

(Filed 14 April 1971)

1. **Eminent Domain § 6— sewer line easement — harmless error in admission of testimony**

Where (1) it had previously been adjudicated that the city acted in good faith and did not abuse its discretion in selecting a sewer route across respondents' property, and (2) the location of the sewer line was a *fait accompli* and the parties stipulated that the only issue before the judge, who heard the case without a jury, was what damages, if any, resulted to respondents' land from the sewer line as laid, the trial judge erred in allowing respondents to cross-examine the city engineer with reference to another possible location of the sewer line across their property; however, such error will not be held prejudicial where the record contains no suggestion that the judge penalized the city for failing to put the sewer line at another location.

2. **Appeal and Error § 57— nonjury trial — presumption that judge disregarded incompetent evidence**

In a nonjury trial, in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision.

APPEAL by petitioner from *Beal, S.J.*, 8 June 1970 Session of IREDELL, transferred from the Court of Appeals for initial appellate review by the Supreme Court under G.S. 7A-31(b)(4).

This special proceeding was instituted on 8 April 1966 by petitioner, City of Statesville, to condemn an easement twenty feet in width for a sanitary sewer line over certain property of respondents Bowles in Iredell County. The land in a ninety-acre tract, bounded on the north by the old Mocksville Road; on the east by Signal Hill Drive; on the south by East Broad Street and Newtowne Plaza Shopping Center; on the west by the shopping center and Interstate Highway No. 77 (I-77). The land is subject to a deed of trust to which the additional respondents are parties. They filed no answer.

Respondents Bowles (respondents) denied petitioner's right to take the land. The Clerk of the Superior Court, however, ruled that petitioner was entitled to condemn the property and appointed commissioners to appraise respondents' damages. On 5 August 1966 they assessed respondents' damages at $12,000.00

and estimated that special benefits in the amount of $2,000.00 would accrue to their land from the construction of the sewer. Both parties excepted to the commissioners' report. On 29 August 1966 the Clerk entered judgment in accordance with the report, and both parties appealed. The City, however, paid the sum of $10,000.00 into the office of the Clerk of the Superior Court and proceeded to construct the sewer.

At the August 1967 Session, *Gambill, J.*, entered judgment that the City had lawfully condemned the easement described in the petition and that only the issue of damages remained. Respondents gave notice of appeal. On 18 March 1969 the appeal was dismissed because of their failure to perfect it. At the 17 March 1969 Session the jury awarded defendants damages in the amount of $19,000.00. Petitioner appealed to the Court of Appeals, which ordered a new trial for errors in the judge's charge. *See City of Statesville v. Bowles,* 6 N.C. App. 124, 169 S.E. 2d 467.

At the retrial in June 1970 the parties waived a jury and stipulated, *inter alia,* (1) on 29 August 1966 the City condemned a permanent easement for a sanitary sewer system over a 90-acre tract of land belonging to respondents; (2) the easement is 20 feet wide and appropriates 1.26 acres of respondents' land, its location and length being shown by the map, petitioner's Exhibit 1; and (3) the only issue for the court's consideration is the amount of damages, if any, sustained by defendants.

Respondents' evidence tended to show: The fifteen-inch, gravity flow sewer line runs approximately 2,800 feet across respondents' land from the northeast corner to the southwest corner. The fair market value of the 90-acre tract immediately after the taking on 29 August 1966 was from $40,000.00 to $46,650.00 less than its value before the taking.

The boundaries and contours of the property are such that it divides naturally into a 21-acre tract and a 69-acre tract. Because the 21-acre tract fronts on the old Mocksville Road, adjoins the Newtowne Shopping Center, and has "a great deal of sight distance on I-77," its highest and best use prior to the taking was for commercial purposes, particularly a shopping center. Salisbury Branch runs from the Mocksville Road southwesterly through this tract toward I-77. The 21 acres slope westwardly toward Salisbury Branch, and the property is lower than I-77. Extensive grading and filling would be required to level the

property before it could be developed for commercial purposes. The sewer line across the 21-acre tract is all underground, and its manholes are from 5.5 to 6 feet deep. City regulations only permit grading to lower the height of a manhole to a minimum of three feet above the sewer line. Thus, "the free use of the land is restricted because of the location and depth of the sewer line." In the opinion of respondents and some of their expert appraisal witnesses, as a practical matter, "the sewer line problem coupled with the grading" foreclosed any commercial use of the 21-acre tract. It is now best suited for a residential subdivision since that use would require the least grading.

The highest and best use of the greater portion of the 69-acre tract now, as it was before the taking, is for a residential subdivision. Its value for that purpose, however, has been greatly reduced. City regulations do not permit buildings over a sewer line; so three or four building sites on the old Mocksville Road have been completely destroyed by the location of the sewer. Furthermore, the line is laid in a U-shape on the northern portion of this tract, and that portion of the line is exposed in two sections—one, a hundred feet in length; the other, two hundred feet. The exposed sections lie in the center of the Bowles property approximately 375 feet south of the old Mocksville Road. The hundred-foot exposure "is visible to approximately 17 acres of the Bowles property. The 200-foot exposure is visible from 5 acres." An exposed sewer line detracts from the value of the property.

Respondents' witnesses conceded that the portion of the 69-acre tract fronting on East Broad Street has not been affected by the sewer line and that its highest and best use is for commercial purposes. They also concede that prior to the taking the 21-acre tract had no access to a sewer line and that the 69-acre tract now has access to the City's sanitary sewer system.

Petitioner's evidence tended to show: Except for 15 to 18 acres fronting on East Broad Street, which is suitable for commercial development, the highest and best use for all of respondents' property is, and has been, for a residential subdivision. Both before and after the taking of the easement the cost of grading the 21 acres would prohibit its use for commercial purposes. However, in the opinion of the City engineer, the level of the 21-acre tract could be raised without disturbing the sewer. To provide access to this tract from I-77 would require a tre-

mendous expenditure for the construction of a road from East Broad Street into the property. Respondents' land lying north of the shopping center and between I-77 and Salisbury Branch is "a bottom," which "doesn't lend itself to much immediate development." O. J. Clontz, a specialist in real estate appraisals who testified for the City, thought its "most probable use" would be for "light manufacturing." In the opinion of all the expert appraisers who testified for the City, respondents' property has been benefited from the sewer line across their property by at least $10,000.00. One witness assessed the benefit at $11,500.00.

Upon motion of counsel for petitioner, at the close of the evidence, the judge viewed respondents' property and the easement in suit. Thereafter, in substantial compliance with G.S. 1A-1, Rule 52(a), he found facts consistent with the evidence detailed above, assessed respondents' damages at $13,240.00, and entered judgment accordingly. From this judgment petitioner appealed.

Sowers, Avery & Crosswhite for petitioner appellant.

McElwee, Hall & Herring for respondent appellees.

SHARP, Justice.

Judge Beal's findings of fact support his judgment, and the evidence supports his findings of fact. Thus, unless it appears that the findings were influenced by incompetent evidence, the judgment must be affirmed. *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114; *Gasperson v. Rice,* 240 N.C. 660, 83 S.E. 2d 665.

Petitioner, contending that the court acted upon incompetent evidence, assigns as error the admission of certain testimony with reference to another possible location of the sewer line over respondents' property. Respondents elicited this evidence in their cross-examination of E. B. Stafford, the engineer who designed the City sewer system. On direct examination, without objection, Stafford testified that in locating a sewer line professional ethics required an engineer to consider the interest of all property owners affected by its location; that after consultation with Mr. Bowles and the others, he had put the sewer "on what (he) felt would be the most equitable location for all parties concerned."

On cross-examination, counsel for respondents sought to extract from Mr. Stafford an admission that he ran the sewer

line through the middle of the 21-acre tract rather than "through the lower part of Mr. Bowles' property" in order to spare the City the expense of a lift station, which the latter location would have required. Counsel showed Stafford a map (not made a part of the case on appeal) and, over objection, questioned about a dotted line thereon. Stafford said it showed "an approximate possible lower elevation location." However he also testified in substance as follows: He had never discussed with Mr. Bowles any possible lower elevation location of the sewer. Mr. Bowles' concern was that the entire sewer line be put underground. Stafford chose the location in suit because (1) it was good engineering practice to construct a sewer line so that the pull of gravity would deliver the sewage to the treatment plant; (2) the chosen route "was the logical location for all the property that the line was to serve"; and (3) it was the "economical long range plan" considering any future expansion by the City.

[1] Petitioner contends that the court having heard evidence of another possible route "such evidence was taken into consideration by it in arriving at its verdict." Actually the court heard no testimony that the City had ever considered an alternative route. It was error, however, for the court to have permitted the cross-examination with reference to another possible route. In the first place "the choice of a route in a condemnation proceeding is primarily within the political discretion of the grantee of the power and will not be reviewed on the ground that another route may have been more appropriately chosen unless it appears that there has been an abuse of the discretion." *Charlotte v. Heath,* 226 N.C. 750, 754, 40 S.E. 2d 600, 603. That there was no abuse of discretion, and that the City had acted in good faith in selecting the sewer route, had been adjudicated approximately three years earlier. In the second place, the location of the easement was a *fait accompli,* and the parties had stipulated that the only issue before Judge Beal was what damages, if any, had resulted to respondents' land from the sewer line *as laid.*

[2] Petitioner's representation of the virtues of the chosen route and respondents' insinuations that another and better route was rejected at respondents' expense were diversionary tactics which have obviously served no useful purpose for either party. However, petitioner's assumption that prejudice necessarily resulted from the challenged evidence is not borne out by the record. It contains no suggestion that Judge Beal penalized the City for failing to put the sewer at some "possible lower

elevation location." The presumption is to the contrary. In a nonjury trial, in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision. *Anderson v. Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845; *Chappell v. Winslow*, 258 N.C. 617, 129 S.E. 2d 101; *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 128 S.E. 2d 835; *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668; Stansbury, N. C. Evidence 2d § 4a (1963).

Since 29 August 1966, the date the easement was taken, the only real question in this case has been what damages, if any, respondents were entitled to recover. Judge Beal, with the consent of the parties, has answered that question in a trial in which we find no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. ODELL DELANO CLANTON, SR.

No. 29

(Filed 14 April 1971)

1. **Criminal Law § 87— leading questions — teenage daughters of the defendant**

   The solicitor could ask leading questions of two teenage sisters whose father was on trial for the murder of his wife, where the sisters were reluctant to disclose the numerous physical clashes and fights that had taken place between their parents.

2. **Criminal Law § 99— conduct of trial court — objection to court's angry tone of voice**

   Defendant's contention that the trial judge prejudiced the defense by his angry tone of voice in ruling on defendant's objections to leading questions, *held* not supported by the record.

3. **Criminal Law § 158— conclusiveness of case on appeal**

   The Supreme Court could not consider defendant's affidavit that was not certified as a part of the case on appeal.

4. **Homicide § 21— homicide of wife — sufficiency of evidence**

   The State's evidence, which was circumstantial, was sufficient to support a jury finding of defendant's guilt in killing his wife, where there was testimony that (1) the couple had argued and fought over the past two years; (2) the defendant and his wife were arguing on the morning of the crime; (3) later in the day the defendant, in an incoherent state, told his sister that something had happened to his

wife; (4) the wife was found dead in the kitchen of their home, her body lying in a pool of blood; (5) the defendant was the last person known to have been with his wife when she was alive; (6) defendant, when arrested, had human blood stains on his clothes and a fresh scratch on his neck.

APPEAL by defendant from *Johnston, J.*, August 26, 1970 Session, GUILFORD Superior Court.

In this criminal prosecution, Odell Delano Clanton, Sr., was indicted for the murder of his wife, Mary Florence Clanton. The offense is charged to have occurred in Greensboro on Thanksgiving Day, November 27, 1969. Upon arraignment, the State through its prosecuting officer, the solicitor, announced in open court the State would not ask for a verdict of guilty on the capital charge of murder in the first degree, but upon such lesser included offense as the evidence might warrant.

The defendant entered a plea of not guilty. At the close of the State's evidence the defendant lodged a motion to dimiss which the court overruled. The defendant did not offer evidence. The jury returned as its verdict "Guilty of manslaughter." From the judgment of imprisonment imposed, the defendant appealed.

Robert Morgan, Attorney General, by Henry T. Rosser, Assistant Attorney General, for the State.

Herman L. Taylor for defendant appellant.

HIGGINS, Justice.

The defendant contends the trial judge committed prejudicial error (1) by permitting the solicitor to elicit evidence from two teen-age daughters of the defendant and the deceased, by means of leading questions; (2) by the manner and tone of his voice in overruling defense counsel's objections to the leading questions; and (3) by overruling defendant's motion to dismiss at the close of the evidence.

[1] The exception to the solicitor's leading questions cannot be sustained. The witnesses were the teen-age daughters of the defendant who was charged with and was on trial for the killing of his wife, their mother. The record clearly discloses their reluctance to reveal in court the numerous differences, physical clashes and fights that had taken place between their father and mother during the past two years, including his threats to

kill her. Permitting these leading questions under the circumstances disclosed, was a matter within the sound discretion of the trial judge. His ruling will not be reviewed on appeal, absent a showing of abuse of discretion. *State v. Pearson,* 258 N.C. 188, 128 S.E. 2d 251; *State v. Beatty,* 226 N.C. 765, 40 S.E. 2d 357; *State v. Harris,* 222 N.C. 157, 22 S.E. 2d 229. Abuse of discretion is not disclosed.

[2, 3] The defendant contends the trial judge, by his manner and angry tone of voice in ruling on defendant's objections to leading questions, prejudiced the defendant's case before the jury. The words of the judge are in the record. His manner and tone of voice are not disclosed. Defense counsel, however, has filed in this court an affidavit in which he attempts to describe the manner in which the judge ruled on his objections. The affidavit is attached to, but not certified or agreed to, as a part of the case on appeal and cannot be considered by this court in passing on the merits of the appeal. The record does not sustain this assignment.

[4] The defendant's major challenge is to the sufficiency of the evidence to survive the motion to dismiss. The evidence is circumstantial. To survive a motion to dismiss, or for a directed verdict of not guilty, or for judgment as of nonsuit (used interchangeably in criminal prosecutions) the evidence must be sufficient to permit a legitimate inference the defendant committed every essential element of the crime charged. (In this case, manslaughter.) The rule is for the guidance of the trial judge in passing on the motion to dismiss. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431; *State v. Dawson,* 272 N.C. 535, 159 S.E. 2d 1; *State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466. The judge must instruct the jury, however, that in order to permit a verdict of guilty, the jury must find from the evidence beyond a reasonable doubt that the defendant committed every essential element of the offense before the jury may return a verdict of guilty of that offense. In this case we may assume the trial judge gave the required instructions since the defendant did not include the charge in the case on appeal. This court, therefore, is confronted with the question whether the record discloses evidence sufficient to support a legitimate finding the defendant committed all the essential elements of manslaughter.

The State's evidence disclosed that the defendant, Odell Delano Clanton, Sr., and his wife, Mary Florence Clanton, on

and prior to November 27, 1969, lived in the City of Greensboro. They argued frequently; "they fought a lot"; the defendant on numerous occasions had assaulted his wife, once by trying to run over her with an automobile; and he had made threats to kill her. The elder daughter, Sharon, age 16, as a State's witness testified that she had seen her father and mother fight often. On the evening of November 26, her mother, a school teacher, came home from the grocery store about 8:30. A dispute began. ". . . (S)he (the mother) didn't say anything. She just went back out . . . she came home . . . about ten o'clock the next morning (November 27)." The witness and her younger sister soon thereafter went to the home of an aunt, leaving the father and mother at home quarreling.

About 3:45 on the afternoon of the 27th the defendant appeared at the home of Mrs. Haith, his sister, in the City of Winston-Salem. ". . . (H)e asked me where was my mother. . . . (A)nd he started saying that something had happened to Mary. He was very incoherent and kept speaking about my mother. . . . I don't recall word for word of anything he said to me that he had done to his wife." Mrs. Haith in Winston-Salem called a relative in Greensboro and as a result of the call, relatives and officers went to the Clanton home between 4:30 and 5:00 o'clock. The doors were locked. When the relatives and officers entered, they found the dead body of Mary Florence Clanton lying in a pool of blood on the kitchen floor. A chair and a stool were knocked over and a number of soft drink bottles (later estimated to be twenty-three in number) were scattered about the room.

The autopsy, performed by a pathologist on the body of the deceased, revealed numerous bruises about the head, chest, shoulders, arms and hands. ". . . (T)here was extensive recent hemorrhage in all the soft tissues of the scalp. . . . There were small hemorrhages in the membrane covering the brain. I did not find any evidence of fracture." In the opinion of the pathologist, death resulted from the injuries to the brain. There was a considerable amount of blood near the body and blood on one of the bottles.

Defendant was arrested immediately. He had a fresh scratch on his neck, blood on his coat, trousers, socks and shoes. Analysis of stains on the defendant's clothes showed them to be human blood. The quantity was insufficient to identify the group.

Evidence discloses that on the morning of the 27th the defendant and the deceased were in a dispute at home. The two girls left. Later on in the afternoon the defendant was in Winston-Salem mumbling to his sister that something had happened to Mary. Mary's body was found in the home, the doors of which were locked. The record does not reveal the cause of defendant's incoherence. Apparently it was not from injury. He knew and disclosed that something had happened to Mary. He was the last person known to have been with her while she was alive. At that time they were in an argument. She was found dead later in the day in the home in which they were last seen together. The body was in a pool of blood on the kitchen floor; human blood stains were on his clothes; he had a fresh scratch on his neck; and skin and human tissue were discovered under one of Mary's fingernails.

The State's evidence from near relatives was certainly not slanted in favor of the State. The evidence when viewed in the light most favorable to the State, as it must be on the motion to dismiss, was sufficient to go to the jury and to sustain its verdict. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654; *State v. Stephens, supra.*

In the verdict and judgment we find

No error.

STATE OF NORTH CAROLINA v. GARLAND NEAS

No. 67

(Filed 14 April 1971)

1. **Courts § 9; Constitutional Law § 30— order denying motion to dismiss — authority of another judge to set aside**

Judge of the superior court was without authority to overrule an order entered in the case by another superior court judge denying defendant's motion to dismiss the charges against him on the ground that he had not been afforded a speedy trial.

2. **Constitutional Law § 30— speedy trial — delay in serving warrant or securing indictment**

After a complaint has been filed, an inordinate delay in serving the warrant or in securing an indictment will violate the right to a speedy trial.

3. **Constitutional Law § 30— speedy trial — good faith delays**

The constitutional guarantee of a speedy trial does not preclude good faith delays which are reasonably necessary for the State to present its case, the proscription being against purposeful or oppressive delays which the State could have avoided by reasonable effort.

4. **Constitutional Law § 30— speedy trial — delay in service of warrant and trial**

Defendant was not deprived of his right to a speedy trial by a delay of some fifteen months between the time the warrants were issued and the time they were served and defendant was brought to trial, where the cause of the delay was that some of the evidence necessary for trial was held by officers in another county and could not be released until a case against defendant in that county had been terminated by decision of the Court of Appeals.

5. **Criminal Law § 26— when jeopardy attaches**

Jeopardy attaches when a defendant is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case.

6. **Criminal Law § 23— effect of guilty plea**

A plea of guilty, if accepted and entered by the court, is the equivalent of a conviction.

7. **Criminal Law § 26— former jeopardy — guilty pleas accepted by solicitor but rejected by court — subsequent trial**

Jeopardy did not attach when defendant, prior to the selection or empaneling of a jury, tendered pleas of guilty which were accepted by the solicitor but were rejected by the court because defendant refused to answer upon a "Transcript of Plea" that none of his constitutional rights had been violated.

8. **Criminal Law § 91— continuance on court's own motion**

Where defendant's pleas of guilty were accepted by the solicitor but rejected by the court, the court did not abuse its discretion in continuing the cases on its own motion until the next session, notwithstanding the continuance was opposed by defendant.

APPEAL by defendant from *Seay, J.*, January 1970 Session of DAVIE Superior Court.

On 16 June 1968 George Trexler and John O'Neill were guards and R. J. Myrick was a lieutenant employed by the Department of Corrections stationed at a unit located near Mocksville. Defendant Neas, John Engle, and Ronnie McQuaigue were prisoners at this unit. On the afternoon of 16 June 1968 Engle called Trexler into the prison clothes house and when Trexler entered, Engle stuck a knife in his back and demanded Trexler's

money and keys. Trexler refused, and defendant Neas, who was standing on top of a table with a baseball bat in his hand, struck Trexler with the bat and knocked him unconscious. On regaining consciousness Trexler found himself in a small room at the back of the clothes house with O'Neill. Trexler's keys were gone, his money had been taken from his pocket book, and his watch removed from his arm. Engle and defendant, with the threatened use of a knife and baseball bat, had also robbed O'Neill of $4, his keys, a pocket knife, and cigarette lighter, before locking him in the small room with Trexler. The three prisoners then went to the unit's office, where Myrick was threatened with a knife and attacked with mop or broom handles, knocked to the floor, and the keys to his car and his billfold containing $82 taken. The prisoners then forced Myrick to open the office safe and took two pistols and $136.84 from it. They handcuffed Myrick to the gun cabinet and then left in Myrick's car. Later that night defendant and Engle robbed a store in Greensboro and were arrested and placed in jail. They were tried and convicted at the October 1968 Session of Guilford Superior Court. From sentences imposed, they appealed to the Court of Appeals, and that court, in an opinion filed 18 June 1969 and reported in 5 N.C. App. 101, 167 S.E. 2d 864, affirmed their conviction. While their case was on appeal, defendant and Engle were held in the State's prison at Raleigh, where they continued to serve the sentences from which they had escaped on 16 June 1968.

On 17 June 1968 warrants charging Engle and defendant with three counts of armed robbery were issued and on 28 June 1968 another was issued charging each with nonfelonious escape. These warrants were served on 16 September 1969. Indictments were returned, and the cases came on for trial at the 5 November 1969 Session of Davie Superior Court. Engle entered pleas of guilty of common law robbery and was sentenced. Defendant moved that the charge against him be dismissed for the reason he had not been afforded a speedy trial. This motion was denied. Defendant then entered pleas of not guilty. Before a jury was selected, defendant withdrew his pleas of not guilty and tendered to the court pleas of guilty of common law robbery in each of the armed robbery cases and a plea of guilty to the escape charge. These guilty pleas were accepted by the solicitor for the State. For reasons stated in the opinion, the court refused to accept the guilty pleas, ordered that they be stricken out, and continued the cases until the next term.

The three armed robbery charges against defendant were consolidated and tried before Seay, J., and a jury at the January 1970 Session of Davie Superior Court. The jury returned a verdict of "guilty as charged" in one case of armed robbery and verdicts of "guilty of common law robbery" in the other two cases. From sentences imposed, defendant appealed to the Court of Appeals. The cases come here under the transferral order of 31 July 1970.

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

William E. Hall for defendant appellant.

MOORE, Justice.

Defendant first contends he was denied his constitutional right to a speedy trial. When the cases came on for trial at the 5 November 1969 Session of Davie Superior Court before Beal, J., and before a jury was selected or empaneled, defendant moved that the charges be dismissed on the ground that he had not been given a speedy trial. Judge Beal then conducted an extended hearing. Witnesses for the State and for the defendant and the defendant himself testified. At the conclusion of this testimony, Judge Beal made detailed findings of fact, which in pertinent part may be summarized as follows:

Defendant was serving an active sentence in the Davie County prison unit on 16 June 1968, when he and Engle escaped and went to Greensboro in an automobile taken by force from an employee of the prison unit. On that same night defendant and Engle robbed a store in Guilford County, were arrested and placed in jail, and remained in jail until tried for this robbery in October 1968. On conviction defendant and Engle were given active sentences of 20 to 30 years, from which they appealed to the Court of Appeals. The trial court further found as a fact that Guilford County had in its possession certain evidence necessary for the trial in Davie, which was not released by the Guilford County officers until the Guilford County case was terminated by the decision of the Court of Appeals. Based on these findings Judge Beal concluded as a matter of law that none of defendant's constitutional rights had been violated by reason of the failure to serve the warrants against defendant prior to 16 September 1969, that defendant had not been denied a speedy trial, and overruled defendant's motion to dismiss.

To the findings of fact and conclusions of law, the defendant gave notice of appeal to the Court of Appeals. No appeal was perfected. The cases were continued until the January 1970 Session of Davie Superior Court.

When the cases were called for trial at the January 1970 Session, Seay, J., presiding, defendant again moved that the charges be dismissed for the reason that defendant had been deprived of the right to a speedy trial, in violation of his constitutional rights. Defendant then moved "that he be permitted to put on the same evidence and same witnesses that were presented to the Court at the November Session of Davie County Superior Court presided over by Judge Fate Beal and upon which he made certain findings of fact and entered an order." This motion and defendant's motion to dismiss were overruled.

[1-3] Judge Seay correctly held that he was without authority to overrule the order denying defendant's motion to dismiss which had been entered in this case by Judge Beal at the November 1969 Session of Davie Superior Court. "'. . . (O)rdinarily one Superior Court judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action. . . .' 2 Strong's N. C. Index 2d, Courts § 9, p. 446; *Bank v. Hanner,* 268 N.C. 668, 151 S.E. 2d 579; *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332; *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581." *State v. Jones,* 278 N.C. 259, 179 S.E. 2d 433. And Judge Beal correctly overruled defendant's motion to dismiss at the November 1969 Session. The basic rules on a speedy trial are set out by Justice Sharp in *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274. The present case, as did *State v. Johnson, supra,* involves a pre-indictment delay. This Court in *Johnson* held that after a complaint had been filed an inordinate delay in serving the warrant or in securing an indictment will violate the right to a speedy trial, stating: "We can see little, if any, difference in the dilemma which unreasonable delay creates for the suspect who was belatedly charged, the accused named in a warrant promptly issued but belatedly served, and the indicted defendant whose trial has been unduly postponed." The question for decision then in this case is: Did the pre-indictment delay deprive defendant of his constitutional right to a speedy trial? The probability of a delay is inherent in every criminal action, and the constitutional guarantee does not preclude good faith delays which are reasonably necessary for the State to present its case. The proscription is against purposeful or oppressive delays which the State could have avoided by reasonable

effort. *Dickey v. Florida,* 398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 (1970); *Pollard v. United States,* 352 U.S. 354, 1 L. Ed. 2d 393, 77 S. Ct. 481 (1957); *State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377; *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892; *State v. Johnson, supra.*

[4] The facts in this case negate any purposeful or oppressive delay. Rather, they show a delay reasonably necessary for the State to prepare and present its case. The warrants were issued promptly but were not served and defendant was not brought to trial for fifteen months. This delay was due to the conduct of defendant himself. After he committed the acts for which he is charged in these cases, and on the same date, he robbed a store in Greensboro. He was arrested and held for trial in Greensboro for that offense. Judge Beal found that some of the evidence necessary for the trial in Davie Superior Court was held by the officers in Greensboro and could not be released until the case in Greensboro was terminated by the decision of the Court of Appeals. These cases were delayed until that evidence was available for the trial in Davie County. As stated in *State v. Johnson, supra:*

> "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."

[7] Defendant next pleads former jeopardy and contends that for this reason these cases should have been dismissed. When these cases against defendant for armed robbery were called for trial at the November 1969 Session of Davie Superior Court, defendant entered pleas of not guilty. Thereafter, and before a jury was selected or empaneled, defendant withdrew his pleas of not guilty and tendered pleas of guilty of common law robbery in each case. These pleas were accepted by the solicitor for the State, but when a "Transcript of Plea" form was submitted to

the defendant for his signature, defendant refused to answer that none of his constitutional rights had been violated. The trial court then refused to accept the pleas of guilty of common law robbery tendered by defendant, ordered that the tendered pleas be stricken out, and on its own motion continued the cases for the term.

[5] Double jeopardy attaches in North Carolina when a defendant is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case. *State v. Brickhead,* 256 N.C. 494, 124 S.E. 2d 838, 6 A.L.R. 3d 888; *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243; 2 Strong's N. C. Index 2d, Criminal Law § 26, p. 516.

[6, 7] Defendant admits that no jury was selected or empaneled, and that under the usual rule no double jeopardy attached, but contends that when his pleas of guilty were accepted by the solicitor, he was fully exposed to the legal consequences of the charges and that double jeopardy then attached. Defendant further admits that the court did not accept the pleas of guilty of common law robbery tendered by the defendant. A plea of guilty, if accepted and entered by the court, is the equivalent of a conviction. *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638, and cases therein cited; 2 Strong's N. C. Index 2d, Criminal Law § 23. In this case no plea was accepted or entered. Hence, double jeopardy could not attach. Annot., 75 A.L.R. 2d 683; 22 C.J.S., Criminal Law § 248; 21 Am. Jur. 2d, Criminal Law § 165. The trial court correctly overruled defendant's motion to dismiss because of former jeopardy.

[8] Defendant next contends the trial court erred in continuing these cases at the November 1969 Session on its own motion. This continuance was for the protection of defendant. Defendant had tendered pleas of guilty of common law robbery in open court. Had the court proceeded to trial after refusing to accept these pleas, the tendered pleas could well have prejudiced defendant in his trial. A continuance is ordinarily in the discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion. *State v. Crump,* 277 N.C. 573, 178 S.E. 2d 366; *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526; *State v. Cavallaro,* 274 N.C. 480, 164 S.E. 2d 168; *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617; 2 Strong's N. C. Index 2d,

Criminal Law § 91, p. 620; 7 Strong's N. C. Index 2d, Trials § 3. Defendant in this case did not make a motion for continuance and, in fact, opposed the continuance. However, courts have inherent power to grant continuances in criminal cases, *ex mero motu*, subject to the general rules of law governing the exercise of discretion. 22A C.J.S. Criminal Law § 481; 17 Am. Jur. 2d, Continuance § 2. No abuse of discretion is shown, and this assignment is overruled.

In the assignments brought forward we find no error.

No error.

STATE OF NORTH CAROLINA v. SALLIE JO WYNN

No. 37

(Filed 14 April 1971)

1. **Criminal Law § 23— acceptance of guilty plea — determination of defendant's sobriety**

Trial court was warranted in accepting *femme* defendant's plea of guilty to voluntary manslaughter, where defendant's affirmative answer to the trial court's question, "You're sober now?", cleared up any uncertainty stemming from her previous answer that she was under the influence of "little alcohol."

2. **Criminal Law § 23— acceptance of guilty plea — sufficiency of findings**

Trial court's acceptance of a guilty plea will not be disturbed on appeal where there is plenary evidence that the plea was freely, voluntarily, and understandingly made.

3. **Criminal Law § 23— plea of guilty — question presented on appeal**

A voluntary plea of guilty obviates any necessity of proof by the State, and an appeal therefrom presents for review only whether the indictment charges an offense punishable under the Constitution and law.

4. **Criminal Law § 23— acceptance of guilty plea — admission of evidence — punishment — withdrawal of plea**

The trial court may allow a defendant to withdraw his guilty plea if the evidence presented on the question of punishment is insufficient to support a jury conviction of guilt.

5. **Homicide § 6— voluntary manslaughter**

Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation or deliberation.

6. Homicide § 6— manslaughter — heat of blood — adequate provocation

One who kills a human being while under the influence of passion or in the heat of blood produced by adequate provocation is guilty of manslaughter.

7. Homicide § 1— unintentional killing of third party — liability of accused

One who is engaged in an affray with another and unintentionally kills a third person shall be adjudged with reference to his intent and conduct towards his adversary.

8. Homicide § 9— plea of self-defense — applicable circumstances

A person who aggressively and willingly enters into an affray without legal excuse or provocation cannot invoke the plea of self-defense.

9. Criminal Law § 23— guilty plea — homicide case — whether evidence justified withdrawal of the plea

Evidence presented after *femme* defendant's guilty plea to the manslaughter of her father-in-law did not require the trial judge to advise defendant to withdraw her guilty plea, where the evidence allowed a reasonable inference that the homicide occurred when the wife willingly and without provocation entered into a second affray with her husband after he had voluntarily quit the first affray.

APPEAL by defendant from *McConnell, J.*, at the 26 October 1970 Criminal Session of UNION.

Defendant was indicted for murder in the first degree of her father-in-law, Otha Wynn. When the case came on for trial defendant, through her privately employed counsel, Byron E. Williams, tendered a plea of guilty of voluntary manslaughter. The Solicitor indicated willingness to accept the plea. Before approving acceptance of the plea, the trial Judge carefully examined defendant as to her voluntariness and understanding in entering the plea. The Judge's preliminary questions included, *inter alia*, the matter included in the written transcript of plea which was later signed by defendant under oath. In the sworn transcript of plea, defendant, among other things, stated that she was not under the influence of any alcohol, drug, narcotics, or other pills, and that she understood that she had the right to plead not guilty and to be tried by a jury; that she pleaded guilty to the charge of voluntary manslaughter, and that she was, in fact, guilty; that she authorized her attorney to enter the plea of guilty to voluntary manslaughter, and that she had had ample time to confer with her attorney, and that she was satisfied with the services of her attorney; that she had ample time to subpoena witnesses and was ready for trial.

The Court thereupon found that defendant's plea was freely, voluntarily and understandingly made, and ordered that defendant's plea of guilty be entered into the record.

The State offered evidence which tended to show:

On the morning of 30 June 1970 defendant and her husband were fighting in the kitchen of their home. Defendant stabbed her husband in the neck with a butcher knife. Her husband ran out into the yard and she followed. The fighting resumed in the yard, and when Otha Wynn, the deceased, tried to separate them, he was stabbed by defendant with the butcher knife. Otha Wynn died as a result of the wound inflicted by defendant.

Defendant, testifying in her own behalf, stated that on the morning of 30 June 1970 she and her husband were fighting in front of their house. She got away from him and ran into the kitchen of the house. He followed her inside, and while they were fighting in the kitchen she stabbed him in the neck with a butcher knife. He went out of the kitchen and she followed him back into the yard, knife in hand, to see if he was hurt. Her husband then slapped her several times, and when she struck at him with the knife Otha Wynn came between them and was stabbed. She testified: "I was striking at my husband because he was slapping me and was still beating me, . . . I intended to stab my husband instead of him. I had the knife because my husband was beating me."

The State and defendant rested, and the Court imposed sentence confining defendant to the North Carolina Department of Corrections for a term of not less than ten years, nor more than twenty years.

Defendant's counsel thereafter requested permission to present additional witnesses. The Court allowed the request. Henry White and Jacob Otha Wynn testified in corroboration of defendant as to how the killing occurred. The State then offered evidence which tended to show that both Henry White and Jacob Otha Wynn had previously stated that they did not know what had happened on the morning of the killing.

The Court thereupon ordered that the original sentence remain in effect.

After final entry of judgment and notice of appeal, the trial Judge, on 29 October 1970, found defendant to be indigent and appointed Roy H. Patton, Jr., as her attorney for the appeal.

This case is before us pursuant to our general referral order effective 1 August 1970.

Attorney General Morgan, Assistant Attorney General Melvin, and Assistant Attorney General Costen for the State.

Roy H. Patton for defendant.

BRANCH, Justice.

Defendant contends that the trial judge erred in accepting her plea of guilty of manslaughter because it was not freely, voluntarily and understandingly made.

Defendant points to two portions of the record which relate to the trial judge's examination of her prior to his approval of her tendered plea of guilty of manslaughter.

[1] The first exchange between the trial judge and defendant was as follows:

Q. Are you able to understand me now?

A. Yes, sir.

Q. Are your under the influence of any alcohol, drugs, pills or medicines of any sort at this time?

A. Little alcohol.

Q. I'm talking about now?

A. No, sir.

Q. You're sober now?

A. Yes, sir.

Q. You haven't taken any drugs?

A. No, sir.

Defendant argues that the court should have determined exactly what she meant by the words "little alcohol." Her affirmative answer to the question, "You are sober now?" did exactly that. It is clear that she referred to the morning of the killing. At the time the trial judge posed his questions he was interested solely in her sobriety at the time when she tendered the plea of guilty.

The other portion of the record contains this colloquy between the judge and defendant:

Q. You still consent to that plea? It's up to you and Mr. Williams. You still consent to that plea?

A. Yes, sir.

Q. You don't have to.

MR. WILLIAMS: I just told her she didn't have to if she didn't want to.

Q. You have any other questions about your plea?

A. No, sir.

COURT: I think you better go over this with her. If she has any questions, I'd rather she'd bring it up now than later.

NOTE: Conference with defendant by Mr. Williams.

Q. Can you read and write?

A. Yes, sir.

COURT: Does she understand that?

MR. WILLIAMS: Yes, sir.

COURT: Let her stand up before the Clerk and be sworn.

MR. WILLIAMS: I have explained it to her 3 or 4 times.

NOTE: Defendant sworn to Transcript of Plea.

This portion of the record reflects only the concern of a careful and painstaking trial judge that this youthful defendant be given every opportunity to act understandingly and voluntarily in the entry of her plea. The trial judge carefully examined defendant concerning the voluntariness of her plea and, after his personal examination, he required defendant's privately employed attorney to again explain to her the effect of entering the plea of guilty.

[2] Thereupon, the trial judge found that defendant's plea of guilty of voluntary manslaughter was freely, voluntarily and understandingly made. There was plenary evidence to support this finding, and where the evidence supports a finding that

a defendant freely, voluntarily and understandingly enters a plea of guilty, the acceptance of the plea will not be disturbed. *State v. Jones,* 278 N.C. 259, 179 S.E. 2d 433 (filed 10 March 1971); *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34; *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591; *State v. Alston,* 264 N.C. 398, 141 S.E. 2d 793; *Brady v. U. S.,* 397 U.S. 742, 25 L. Ed. 2d 747, 90 S.Ct. 1463. We hold that the trial judge did not err in accepting and approving the entry of defendant's plea.

Defendant next contends that the trial judge erred in not advising defendant to withdraw her plea of guilty of manslaughter because the evidence was not sufficient to support a plea or verdict of guilty of voluntary manslaughter.

[3, 4] Defendant's voluntary plea of guilty obviated any necessity of proof by the State, and when such plea was entered, her appeal presents for review only whether the indictment charges an offense punishable under the Constitution and law. *State v. Caldwell, supra; State v. Perry, supra; State v. Hodge* and *State v. White,* 267 N.C. 238, 147 S.E. 2d 881. The primary function of the court's discretionary decision to hear evidence after a voluntary plea of guilty is entered is to determine the nature and extent of punishment to be imposed; however, if the court determines that the evidence is insufficient to convict the defendant before a jury of the crime to which he has pleaded guilty, the court may in its sound discretion allow the defendant to withdraw his plea. *State v. Branner,* 149 N.C. 559, 63 S.E. 169; *State v. Barbour,* 243 N.C. 265, 90 S.E. 2d 388; *State v. Caldwell, supra; State v. Crandall,* 225 N.C. 148, 33 S.E. 2d 861.

[5, 6] Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation or deliberation. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Street,* 241 N.C. 689, 86 S.E. 2d 277; *State v. Burrage,* 223 N.C. 129, 25 S.E. 2d 393. One who kills a human being while under the influence of passion or in the heat of blood produced by adequate provocation is guilty of manslaughter. *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305; *State v. Watson,* 222 N.C. 672, 24 S.E. 2d 540.

In connection with this contention defendant argues that she was not guilty because she did not intend to harm the deceased, Otha Wynn.

[7] It is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as the fatal act had caused the death of his adversary. It has been aptly stated that "The malice or intent follows the bullet." 40 Am. Jur., 2d Homicide, § 11, p. 302; *State v. Rogers,* 273 N.C. 330, 159 S.E. 2d 900; *State v. Dalton,* 178 N.C. 779, 101 S.E. 548.

Finally, defendant takes the position that the trial court should have advised her to withdraw her plea because the evidence clearly showed that she acted in self-defense.

[8] If a person be without fault in bringing on an affray, he may kill in self-defense if it is necessary, or appears to him to be necessary, in order to save himself from death or great bodily harm. The reasonableness of his apprehension is for the jury to determine from the circumstances as they appeared to him. *State v. Cooper, supra; State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24; *State v. Miller,* 267 N.C. 409, 148 S.E. 2d 279. This defense cannot be invoked when a person aggressively and willingly enters into a fight without legal excuse or provocation. *State v. Church,* 229 N.C. 718, 51 S.E. 2d 345. And in exercising the right of self-defense one can use no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. The use of excessive force in self-defense which results in a killing constitutes at least manslaughter. *State v. Cooper, supra; State v. Mosley,* 213 N.C. 304, 195 S.E. 830; *State v. Glenn,* 198 N.C. 79, 150 S.E. 663.

[9] Defendant's action in following her husband from the house after he had quit the first fight negates any contention that she was without fault. The evidence allows a reasonable inference that she willingly entered into a second affray and at that time used excessive force under the circumstances. Certainly, the evidence as to her claim of self-defense was not so compelling as to demand that the trial judge allow her to withdraw her voluntary plea of guilty.

There was ample evidence from which a jury could have properly returned a verdict of guilty of voluntary manslaugh-

ter. In fact, the evidence in this case might well have justified a jury verdict of a higher degree of homicide.

We have carefully examined the entire record, and in the trial and proceedings below we find

No error.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ADLER v. INSURANCE CO.

No. 45 PC.

Case below: 10 N.C. App. 720.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 12 May 1971.

CABLE v. OIL CO.

No. 49 PC.

Case below: 10 N.C. App. 569.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 12 May 1971.

JERNIGAN v. STATE

No. 43 PC.

Case below: 10 N.C. App. 562.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 12 May 1971.

LEGGETT v. R. R. Co.

No. 51 PC.

Case below: 10 N.C. App. 681.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 12 May 1971.

LONG v. METHODIST HOME

No. 32 PC.

Case below: 10 N.C. App. 534.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 4 May 1971.

MANESS v. CONSTRUCTION CO.

No. 44 PC.

Case below: 10 N.C. App. 592.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 4 May 1971.

ROBBINS v. NICHOLSON

No. 93.

Case below: 10 N.C. App. 421.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 4 May 1971.

STATE v. DAVIS.

No. 42 PC.

Case below: 10 N.C. App. 712.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 4 May 1971.

STATE v. INGRAM

No. 40 PC.

Case below: 10 N.C. App. 709.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 4 May 1971.

STATE v. POWELL

No. 41 PC.

Case below: 10 N.C. App. 726.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 12 May 1971.

STATE v. SHEDD

No. 37 PC.

Case below: 10 N.C. App. 139.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 4 May 1971.

JONAS W. KESSING, INDIVIDUALLY; ALICE H. KESSING; JONAS W. KESSING COMPANY; JONAS W. KESSING AS GENERAL PARTNER OF VILLAGE ASSOCIATES OF CHAPEL HILL LIMITED PARTNERSHIP; JONAS W. KESSING AS LIMITED PARTNER OF VILLAGE ASSOCIATES OF CHAPEL HILL LIMITED PARTNERSHIP v. NATIONAL MORTGAGE CORPORATION, INDIVIDUALLY; NATIONAL MORTGAGE CORPORATION AS LIMITED PARTNER OF VILLAGE ASSOCIATES OF CHAPEL HILL LIMITED PARTNERSHIP

No. 64

(Filed 12 May 1971)

1. **Banks and Banking § 13; Usury § 1— time loan was made — applicability of amended G.S. 24-8**

A loan was made on the date it was closed, 9 July 1969, and not on a prior date when the application for the loan was approved, the negotiations between the parties being, at most, an executory contract to make a loan; consequently, G.S. 24-8 as amended effective 2 July 1969 was applicable to the loan.

2. **Banks and Banking § 13— loan of money**

In order for a loan of money to be made, there must be a delivery of the money and an understanding to repay.

3. **Usury § 1— requisites of proof**

In an action for usury plaintiff must show (1) that there was a loan, (2) that there was an understanding that the money lent would be returned, (3) that for the loan a greater rate of interest than allowed by law was paid, and (4) that there was corrupt intent to take more than the legal rate for the use of the money.

4. **Usury § 1— corrupt intent**

The corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows.

5. **Usury § 1— showing of corrupt intent**

A corrupt intent to violate the usury law is shown where the purpose of the lender intentionally to charge the borrower a greater rate of interest than the law allows is clearly revealed on the face of the instrument.

6. **Usury § 1— undisputed facts — usury as a matter of law**

Where there is no dispute as to the facts, the court may declare a transaction usurious as a matter of law.

7. **Usury § 1— equity participation by lender in limited partnership with borrower**

Loan of $250,000 at 8% interest secured by a deed of trust on realty and in consideration of which the borrower was also required to enter a limited partnership with the lender and to convey to the partnership the properties securing the loan, *held* usurious under G.S. 24-8 either before or after its amendment effective 2 July 1969.

8. Usury §§ 5, 6— penalty for usury

The statutory penalty for charging usurious interest is the forfeiture of all interest on the loan; in the event usurious interest has actually been paid, the person or corporation paying such interest may recover twice the amount of interest paid. G.S. 24-2.

9. Usury §§ 5, 6— usurious partnership agreement — partnership earnings not paid to lender — forfeiture of interest

Where a loan transaction was rendered usurious by a limited partnership agreement which the borrower was required to enter into with the lender, but no earnings from the partnership had been paid to the lender and the only interest actually paid by the lender was the 8% provided for in the note, a legal rate, it was *held:* (1) the borrower is not entitled to recover double the amount of interest paid on the loan since no usurious interest has actually been paid, (2) the charging of usurious interest as provided for in the partnership agreement causes a forfeiture of all interest on the debt and it becomes a loan which bears no interest, and (3) the interest paid on the loan should be credited on the principal amount of the loan.

10. Rules of Civil Procedure § 56— summary judgment — parties and actions

Summary judgment is not limited to any particular types of action and is available to both plaintiff and defendant.

11. Rules of Civil Procedure §§ 12, 56— motions treated as summary judgment motions

Motions under Rules 12(b)(6) and 12(c) can be treated as summary judgment motions, the difference being that under Rules 12(b)(6) and 12(c) the motion is decided on the pleadings alone, while under Rule 56 the court may receive and consider various kinds of evidence.

12. Rules of Civil Procedure § 56— summary judgment — evidence which court may consider

Evidence which may be considered upon motion for summary judgment includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken; oral testimony may also be received by reason of Rule 43(e).

13. Rules of Civil Procedure § 56— purpose of summary judgment

Rule 56 is for the disposition of cases where there is no genuine issue of fact and its purpose is to eliminate formal trials where only questions of law are involved.

14. Usury § 6— action for usury — summary judgment for plaintiff

The trial court properly allowed plaintiffs' motion for summary judgment in an action for usury where the record reveals that the parties were in agreement as to all the factual particulars concerning

the making and the terms of the loan and that plaintiff was entitled to judgment as a matter of law.

15. Bills and Notes § 13; Mortgages and Deeds of Trust § 19— acceleration of maturity — summary judgment for borrower

In this action for usury, summary judgment was properly entered dismissing defendant's counterclaim for recovery of the entire principal balance of the note and accrued interest under a provision of the note which gives defendant the right to accelerate payment on the insolvency of the maker, where plaintiffs presented evidence showing that the maker had assets substantially in excess of liabilities, and defendant offered no countervailing evidence.

16. Bankruptcy § 1— test of solvency

The test of solvency in this State is whether or not the entire assets of the person or entity in question equal or exceed in value the total indebtedness of such person or entity.

17. Partnership § 1— partnership agreement in violation of usury laws

Limited partnership agreement entered into by the borrower and lender as part of a loan transaction which violated G.S. 24-8 as amended in 1969 was void.

Justice HIGGINS dissenting in part.

APPEAL by defendant from *Canaday, J.*, 21 September 1970 Session of ORANGE Superior Court, certified for review by the Supreme Court before determination by the Court of Appeals upon motion of defendant.

Jonas W. Kessing (Kessing), individually and as a general and limited partner of Village Associates of Chapel Hill Limited Partnership (Partnership); Alice H. Kessing (Mrs. Kessing), wife of Jonas W. Kessing; and Jonas W. Kessing Company (Kessing Company), a North Carolina corporation, instituted this action against National Mortgage Corporation (Mortgage Corporation), a Delaware corporation, to recover for alleged usurious interest paid to defendant and to have deeds of conveyance to Partnership and the partnership agreement creating Partnership cancelled and declared null and void on the grounds that the loan made by defendant Mortgage Corporation violated the provisions of amended G.S. 24-8.

Defendant filed answer and counterclaims alleging that the loan in question was valid and not usurious and sought to recover damages for misappropriation of Partnership funds, the amount of the debt due for the funds loaned, and for the

appointment of a receiver for Kessing Company and for the Partnership.

The matter was heard in the Superior Court on motion by plaintiff for summary judgment and motions by defendant for the appointment of receivers.

Admissions in the pleadings and the uncontradicted testimony of the parties establish that prior to 9 July 1969 Kessing Company applied to Mortgage Corporation for a loan in the sum of $250,000; that on 14 May 1969 Mortgage Corporation notified Kessing Company that its application for a loan in the amount of $250,000 had been approved and that "funding will take place, in the increments previously agreed upon, as soon as the formal loan agreement is completed and executed by all parties." No additional loan agreement was entered into by the parties, but all the terms and conditions concerning the loan were agreed upon by the parties prior to 30 June 1969. The loan was closed on 9 July 1969. On that date Kessing Company executed and delivered to Mortgage Corporation a note payable to Mortgage Corporation in the principal sum of $250,000, payable in monthly installments of $500 commencing on 1 May 1970, and with interest at the rate of 8% per annum, payable monthly commencing on 1 August 1969, the monthly payments of principal and interest to continue until 1 June 1974 at which time any unpaid balance of principal or accrued interest became due and payable. The note was endorsed by Kessing and his wife and was secured by a first deed of trust on a leasehold interest in a lot located in Chapel Hill and a second deed of trust on five acres of land in Chapel Hill on which were located 42 garden apartments known as Castillian Apartments. As an additional requirement and condition for making the loan, Mortgage Corporation required that Kessing and Mortgage Corporation enter into a partnership agreement by the terms of which Kessing was the sole general partner and one of the two limited partners, and Mortgage Corporation was the other limited partner. This partnership agreement provided that Mortgage Corporation have a 25% interest in the Partnership for a consideration of $25, that Mortgage Corporation would have 25% of the profits of the Partnership but its liability would be limited to its capital contribution of $25. Kessing Company was required to convey to the Partnership the same properties as described in the deed of trust securing this loan.

The partnership agreement and the deed from Kessing Company to the Partnership were all executed on 9 July 1969, and defendant's check for $250,000 was delivered and disbursed that day. Kessing Company has made all payments on the principal and the interest at 8% in accordance with the note and is not in arrears. No earnings from the Partnership have been paid to defendant. Other evidence pertinent to decision will be set out in the opinion.

After hearing the motions of plaintiffs and defendant and the testimony offered by Kessing and Mortgage Corporation, Judge Canaday made findings of fact and entered judgment in plaintiffs' favor on the motion for summary judgment and adjudged (1) that plaintiff recover $50,000 as twice the amount of usurious interest paid, (2) that all further interest be forfeited, (3) that the partnership agreement between the parties be voided and the deeds of conveyance to the Partnership be cancelled, and (4) the counterclaims of defendant be dismissed.

From this judgment defendant appealed.

Manning, Allen & Hudson by James Allen, Jr., and Bryant, Lipton, Bryant & Battle by F. Gordon Battle for defendant appellant.

Newsom, Graham, Strayhorn, Hedrick & Murray by Josiah S. Murray III, for plaintiff appellees.

MOORE, Justice.

Defendant first contends that the court erred in ruling that G.S. 24-8 as amended was applicable to the loan in question.

Prior to its amendment on 2 July 1969, G.S. 24-8 provided that on loans of $30,000 or more to corporations the legal rate of interest was 8%.

By amendment effective 2 July 1969, G.S. 24-8 was rewritten to read, in pertinent part, as follows:

> "Loans not in excess of $300,000; what interest, fees and charges permitted.—No lender shall charge or receive from any borrower or require in connection with a loan any borrower, directly or indirectly, to pay, deliver, transfer or convey or otherwise confer upon or for the benefit of the lender or any other other person, firm or corporation

any sum of money, thing of value or other consideration other than that which is pledged as security or collateral to secure the repayment of the full principal of the loan, together with fees and interest provided for in chapter 24 or chapter 53 of the North Carolina General Statutes, where the principal amount of a loan is not in excess of three hundred thousand dollars ($300,000.00); . . . "

This amendment further provided that it did not apply to any loan made prior to 2 July 1969.

It is conceded by all the parties that the loan in question was actually closed on 9 July 1969. The question posed by this assignment is: Was the loan made on 9 July 1969, the date closed, or at a prior date when the application for the loan was approved?

The parties agree that for several months prior to 14 May 1969 Kessing Company had been negotiating with defendant for a loan in the amount of $250,000. On 14 May 1969 defendant wrote Kessing as follows:

"Mr. Jonas W. Kessing
201 East Rosemary Street
Chapel Hill, North Carolina 27514

"Dear Mr. Kessing:

"Your request for a loan in the amount of $250,000 was approved by our Executive Committee on May 6, 1969.

"The terms and conditions of said loan will remain as we discussed in our meeting May 13, 1969.

"Funding will take place, in the increments previously agreed upon, *as soon as the formal loan agreement is completed and executed* by all parties. [Emphasis added.]

Very truly yours,
/s/ Richard F. Downham"

[1] All parties also agree that the terms for the loan were agreed upon prior to 30 June 1969 but that no loan agreement was executed prior to 9 July 1969. On 9 July 1969 the note for $250,000, endorsed by Kessing and his wife, and the deed of trust securing the note were executed by Kessing Company

and delivered to defendant. On the same date defendant's check for $250,000, dated 8 July 1969, was delivered and disbursed. Other documents in connection with the loan, including the partnership agreement between Kessing and defendant and a deed from Kessing Company to the Partnership conveying to the Partnership the same lands as described in the deed of trust securing the loan, were executed. On these uncontroverted facts, the trial court held that the loan was made on 9 July 1969. We agree.

[2] The concept and elements of a "loan" are well understood in both the popular and legal usage of the term. "A loan of money has been defined as a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows." 54 C.J.S. Loans, p. 654. Accord, *United States v. Neifert-White Co.*, 247 F. Supp. 878 (D. Mont. 1965), aff'd 372 F. 2d 372 (9th Cir. 1967), revd. on oth. grds. 390 U. S. 228, 19 L. Ed. 2d 1061, 88 S.Ct. 959 (1968); *National Bank of Paulding v. Fidelity & Cas. Co.*, 131 F. Supp. 121 (S.D.Ohio 1954); *Keystone Mortgage Co. v. MacDonald*, 254 C.A. 2d 808, 62 Cal. Rptr. 562; *Wayne Pump Co. v. Department of Treasury*, 232 Ind. 147, 110 N. E. 2d 284. It has been held that a loan has been made upon "the delivery by one party and the receipt by the other party of a given sum of money, on an agreement, express or implied, to repay the sum lent, with or without interest." 54 C.J.S., *supra*. Accord, *National Bank of Paulding v. Fidelity & Cas. Co., supra; Isaacson v. House*, 216 Ga. 698, 119 S.E. 2d 113; *Wayne Pump Co. v. Department of Treasury, supra; Cartney v. Olson*, 154 Neb. 546, 48 N. W. 2d 653. These definitions require that there be a delivery of money on the one hand and an understanding to repay on the other for a loan to have been made. Accord, 54 C.J.S., *supra*, p. 656; 9 C.J.S. Banks and Banking § 383.

[1] At most, the negotiations carried on between the parties in the present case prior to 9 July 1969 constituted an executory contract to make a loan. This Court in considering the contractual commitment of a defendant to make a loan has declared that an action for specific performance of such a commitment would not lie, that the transaction was a contract to lend money upon a certain security, and that upon breach of such an agreement the action is to recover damages. *Norwood v. Crowder*, 177 N.C. 469, 99 S.E. 345; *Elks v. Insurance Co.*, 159 N.C.

619, 75 S.E. 808; *Coles v. Lumber Co.*, 150 N.C. 183, 63 S.E. 736. Implicit in these decisions is the recognition by this Court of the executory contract to lend and the distinction between such a contract and that of a loan made.

Conceding *arguendo* that the court erred in finding that the loan was made 9 July 1969, the error, if any, would be harmless. For the reasons stated later in the opinion, the loan would be usurious under G.S. 24-8 either before or after the amendment of 2 July 1969.

Defendant next contends that the trial court erred in the penalty imposed upon the defendant—that first the court erred in adjudging that the plaintiff Kessing Company recover of defendant the sum of $50,000 as twice the amount of usurious interest paid.

[3-6] In an action for usury plaintiff must show (1) that there was a loan, (2) that there was an understanding that the money lent would be returned, (3) that for the loan a greater rate of interest than allowed by law was paid, and (4) that there was corrupt intent to take more than the legal rate for the use of the money. *Henderson v. Finance Co.*, 273 N.C. 253, 263, 160 S.E. 2d 39, 47; *Bank v. Merrimon*, 260 N.C. 335, 132 S.E. 2d 692; *Preyer v. Parker*, 257 N.C. 440, 125 S.E. 2d 916; *Doster v. English*, 152 N.C. 339, 67 S.E. 754; 7 Strong's N. C. Index 2d, Usury § 1, p. 447; 45 Am. Jur. 2d, Interest and Usury § 111 (1969); Comment, *Usury Law in North Carolina*, 47 N.C. L. Rev. 761 (1969). The corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. *Associated Stores, Inc. v. Industrial Loan & Invest. Co.*, 202 F. Supp. 251 (E.D.N.C. 1962). Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. *Bank v. Wysong & Miles Co.*, 177 N.C. 380, 99 S.E. 199; 12 A.L.R. 1412; *MacRackan v. Bank*, 164 N.C. 24, 80 S.E. 184; *Riley v. Sears*, 154 N.C. 509, 70 S.E. 997. And where there is no dispute as to the facts, the court may declare a transaction usurious as a matter of law. *Doster v. English, supra.*

[7] Under G.S. 24-8 prior to the 1969 amendment, the legal interest allowed on the loan in question was 8%. The president

of defendant corporation testified that the loan of $250,000 was secured by a deed of trust which had full warranty, and the loan was repayable to defendant under any circumstances. Defendant's president further testified that defendant would not have made this loan at the simple rate of 8% but that the added equity participation provided for by the creation of the Partnership and the conveyances to it were considerations for the making of the loan; that from the 25% of the profits to be realized by the Partnership the defendant had an expected or "hoped for" yield of between 16% and 20%—certainly over 8%. Our courts do not hesitate to look beneath the forms of the transactions alleged to be usurious in order to determine whether or not such transactions are in truth and reality usurious. *Pratt v. Mortgage Company,* 196 N.C. 294, 145 S.E. 396; *Bank v. Wysong & Miles Co., supra; MacRackan v. Bank, supra;* See also Annot., 16 A.L.R. 3d 475, 480 (1967); Comment, *Usury Law in North Carolina,* 47 N.C. L. Rev. 761, 776 (1969). Under G.S. 24-8 before the 2 July 1969 amendment, this agreement would have been usurious, for as is said in *Ripple v. Mortgage Corp.,* 193 N.C. 422, 137 S.E. 156:

> " . . . Where a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate, by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form or outward appearance of the transaction in order to determine what it in reality is. If this were not so, the usury laws of the State would easily be evaded by lenders of money who would exact from borrowers with impunity compensation for money loaned in excess of interest at the legal rate."

G.S. 24-8 as amended specifically prohibited the very type equity participation created by the Partnership formed in connection with this loan by providing: "No lender shall . . . require . . . any borrower, directly or indirectly, to . . . transfer or convey . . . for the benefit of the lender . . . any sum of money, thing of value or other consideration other than that which is pledged as security . . . . " A 25% interest in the Partnership (which owned the realty conveyed to it by Kessing Company) was a "thing of value." This made the partnership agreement unlawful. Under the statute, the loan was usurious.

[8, 9] The penalty for charging a greater rate of interest than permitted by law, either before or after the interest accrues, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it. In the event a greater rate of interest has been paid than allowed by law, the person or corporation which has paid such usurious interest may recover twice the amount of interest paid. G.S. 24-2; *Ripple v. Mortgage Corp., supra; Sloan v. Insurance Co.,* 189 N.C. 690, 128 S.E. 2; *Waters v. Garris,* 188 N.C. 305, 124 S.E. 334; 7 Strong's, *supra,* §§ 5 and 6. In the present case a greater rate of interest than allowed by law was charged by means of the partnership agreement required, but no profit has yet inured to the defendant under this agreement. The only interest actually paid by Kessing Company was the 8% provided for in the note. This in itself was a legal rate. No usurious interest has been *paid,* and Kessing Company is not entitled to recover double the amount of the interest. *Clark v. Bank,* 200 N.C. 635, 158 S.E. 96; *Briggs v. Bank,* 197 N.C. 120, 147 S.E. 815; 7 Strong's, *supra,* § 6; 45 Am. Jur. 2d, Interest and Usury § 316 (1969). The statutory penalty for *charging* usury is the forfeiture of *all* interest on the loan. The charging of usurious interest as provided for by the partnership agreement in this case is sufficient to cause a forfeiture of all the interest charged. The charging of such usurious interest strips the debt of all interest. It becomes simply a loan which in law bears no interest. Any payments of interest which have been made at a legal rate are by law applied to the only legal indebtedness—the principal sum. *Williams v. Bank,* 161 N.C. 49, 76 S.E. 531; *Ervin v. Bank,* 161 N.C. 42, 76 S.E. 529; *Smith v. Building and Loan Assn.,* 119 N.C. 249, 26 S.E. 41; *Moore v. Beaman,* 112 N.C. 558, 17 S.E. 676. Accord, *Brown v. Bank,* 169 U.S. 416, 42 L. Ed. 801, 18 S.Ct. 390 (1898). In the instant case Kessing Company has paid $25,000. Since all interest has been forfeited, the payments made should be credited on the principal amount of the loan.

We hold, therefore, that the plaintiffs are not entitled to recover double the amount of the interest paid on this loan and that the trial court erred in so holding. We further hold that all interest on the loan is forfeited and that the payments made should be credited on the principal amount of the loan.

Defendant next contends that the court erred in allowing plaintiffs' motion for summary judgment and dismissing the defendant's counterclaims.

[10-12] The text of Rule 56 of the North Carolina Rules of Civil Procedure providing for summary judgment and that of Rule 56 of the Federal Rules of Civil Procedure are practically the same. Like the Federal rule, our new rule is not limited in its application to any particular type or types of action, and the procedures are available to both plaintiff and defendant. G.S. 1A-1, Rule 56; Gordon, *The New Summary Judgment Rule in North Carolina,* 5 Wake Forest Intra. L. Rev. 87 (1969) [hereinafter cited as Gordon]. The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. Two types of cases are involved: (a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial. 2 McIntosh, N. C. Practice and Procedure § 1660.5 (2d Ed., Phillips' Supp. 1970) [hereinafter cited as Phillips]; 3 Barron and Holtzoff, Federal Practice and Procedure § 1234 (Wright Ed., 1958). The motion for summary judgment legitimized the old "speaking demurrer." Phillips, *supra.* Motions under Rules 12(b)(6) and 12(c) can be treated as summary judgment motions, the difference being that under Rules 12(b)(6) and 12(c) the motion is decided on the pleadings alone, while under Rule 56 the court may receive and consider various kinds of evidence. G.S. 1A-1, Rule 12(b) and (c); Phillips, § 1660.10; 3 Barron and Holtzoff, *supra,* § 1240 (Wright Ed., 1958); 6 Moore's Federal Practice § 56.02[3], 56.15[8] (2d Ed., 1966). Evidence which may be considered under Rule 56 includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken. G.S. 1A-1, Rule 56(c); Phillips § 1660.10; 3 Barron and Holtzoff, *supra,* § 1236 (Wright Ed., 1958); 6 Moore's, *supra,* § 56.11 (2d Ed., 1966). Oral testimony may also be received by reason of Rule 43(e). *Arrington v. City of Fairfield, Ala.,* 414 F. 2d 687 (5th Cir. 1969) (by implication); *Burnham Chemical Co. v. Borax Con-*

solidated, 170 F. 2d 569 (9th Cir. 1948), *cert. den.* 336 U.S. 924, 93 L. Ed. 1086, 69 S.Ct. 655 (1949); Phillips, *supra;* 3 Barron and Holtzoff, *supra,* § 1236, p. 162 (Wright Ed., 1958); 6 Moore's, *supra,* § 56.11[8] (2d Ed., 1966).

[13] The standard for summary judgment is fixed by Rule 56(c). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "The rule does not contemplate that the court will decide an issue of fact, but rather will determine whether a real issue of fact exists." Gordon, p. 88. Accord, *Stevens v. Johnson Co.,* 181 F. 2d 390 (4th Cir. 1950). Rule 56 is for the disposition of cases where there is no genuine issue of fact and its purpose is to eliminate formal trials where only questions of law are involved. Since this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue. However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented. 3 Barron and Holtzoff, *supra,* § 1231 (Wright Ed., 1958). Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment. *Ammons v. Franklin Life Insurance Co.,* 348 F. 2d 414 (5th Cir. 1965); *Palmer v. Chamberlin,* 191 F. 2d 532, 27 A.L.R. 2d 416, *reh. den.* 191 F. 2d 859 (5th Cir. 1951); *Crowder v. United States,* 255 F. Supp. 873 (N.D. Cal. 1964), aff'd 362 F. 2d 1011 (9th Cir. 1966); 3 Barron and Holtzoff, *supra,* § 1234, pp. 126-27 (Wright Ed., 1958); 6 Moore's, *supra,* § 56.16 (2d Ed., 1966).

"The determination of what constitutes a 'genuine issue as to any material fact' is often difficult. It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. A question of fact which is immaterial does not preclude summary judgment. It has been said that a genuine issue is one which can be maintained by substantial evidence. Where the pleadings

or proof of either party disclose that no cause of action or defense exists, a summary judgment may be granted . . . . If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied. . . . " 3 Barron and Holtzoff, *supra,* § 1234 (Wright Ed. 1958).

[14] Procedurally, the question in the instant case is reduced to whether or not the pleadings, together with the affidavit and oral testimony of the parties, show there is any genuine issue as to any material fact, and whether any party is entitled to a judgment as a matter of law. A careful review of the record reveals that the parties were in agreement as to all the factual particulars concerning the making and the terms of the loan. There was no "genuine issue as to any material fact." The effect of the undisputed facts was a question of law for the court to determine. 3 Barron and Holtzoff, *supra,* § 1231 (Wright Ed., 1958) and cases there cited.

[15, 16] The defensive portion of the plaintiffs' motion for summary judgment prays for a dismissal of the counterclaims of the defendant for like reason that there is no genuine issue as to any material fact. In the first counterclaim the defendant prays for recovery of the entire principal balance of the note and accrued interest under a provision in the note which gives defendant the right to accelerate payment of the note on the insolvency of the maker, Kessing Company. The note admittedly was not in default as to any payment of interest or principal. The question raised by this counterclaim was whether there was any genuine issue of fact as to the solvency of Kessing Company. The test of solvency in North Carolina is whether or not the entire assets of the person or entity in question equal or exceed in value the total indebtedness of such person or entity. *Flowers v. Chemical Co.,* 199 N.C. 456, 154 S.E. 736; *Mining Co. v. Smelting Co.,* 119 N.C. 417, 25 S.E. 954. Kessing Company and Kessing individually presented evidence showing assets substantially in excess of liabilities. Defendant, on inquiry by the trial court as to whether any responsive countervailing evidence could be presented, failed to present such. Under these circumstances, defendant's mere allegations were not sufficient and summary judgment was appropriately entered dismissing the first counterclaim. G.S. 1A-1, Rule 56(e); Phillips, § 1660.5; 3 Barron and Holtzoff, *supra,* § 1235.1 (Wright Ed., 1958); 6 Moore's, *supra,* § 56.22[2] (2d., Ed., 1966).

For a general discussion of summary judgment, also see: Wright, Law of Federal Courts § 99 (2d Ed., 1970); 35B C.J.S. Federal Civil Procedure §§ 1135-1218 (1960); 41 Am. Jur., Pleading §§ 340-343 (1942).

[17] Defendant's second, third, and fourth counterclaims relate to the limited Partnership entered into by Kessing and defendant. The trial court correctly adjudged that this loan transaction considered as a whole violated the terms of G.S. 24-8 as amended. It followed, therefore, that the limited partnership agreement and the conveyances made to the Partnership contrary to the statute were void. The courts of this State will not lend their aid to the enforcement of a contract which is unlawful and violates its positive legislation. *Lamm v. Crumpler*, 242 N.C. 438, 88 S.E. 2d 83; *Merrell v. Stuart*, 220 N.C. 326, 17 S.E. 2d 458; *Shoe Co. v. Department Store*, 212 N.C. 75, 193 S.E. 9. The making of this loan in direct violation of G.S. 24-8 as amended made the limited partnership agreement unlawful, and the defendant is not entitled to any relief on its second, third, and fourth counterclaims based on this unlawful agreement.

For the reasons stated, the judgment entered in the Superior Court is modified by striking out that part of the judgment which provides that Kessing Company recover of the defendant $50,000 as twice the amount of usurious interest paid by Kessing Company to the defendant, and it is further modified to provide that all interest, accrued or unaccrued, on the note made and delivered by Kessing Company to the defendant is declared forfeited, and the $25,000 paid by Kessing Company to defendant is ordered credited on the principal amount of the note executed by Kessing Company to defendant. As so modified, the judgment of the Superior Court is in all other respects affirmed.

Modified and affirmed.

Justice HIGGINS dissenting in part.

I am in full accord with the well documented opinion except in one particular. The opinion, I think, correctly states the rule with respect to the penalty which the law permits the debtor to exact as a result of his usurious contract. The penalty

is the forfeiture of all interest. If any interest is actually paid, the debtor is entitled to recover twice the amount so paid.

The court correctly holds: (1) The contract here involved carries a usurious rate of interest; (2) "It becomes simply a loan which in law bears no interest." The trial court by Findings of Fact No. 19 established, "That the plaintiff, Jonas W. Kessing Company, has heretofore paid to National Mortgage Corporation as *interest* (emphasis added) on the subject loan transaction the aggregate sum of Twenty Five Thousand and no/100 Dollars ($25,000.00) . . . ." The court says that the $25,000.00 paid, no interest being due, should be credited on the principal.

I have no trouble whatever following the opinion up to this point, but I do not agree with that part of the opinion which says "We hold, therefore, that the plaintiffs are not entitled to recover double the amount of the interest paid on this loan and that the trial court erred in so holding." In my opinion legal interest cannot accrue on a contract which provides for the payment of usury and such payment when made entitles the payor to the return of the amount paid (or a credit on the principal debt) and an equal amount as a penalty for the illegal exaction.

I vote to affirm the judgment of the superior court.

STATE OF NORTH CAROLINA v. CLIFTON EARL DICKENS

No. 80

(Filed 12 May 1971)

1. **Criminal Law § 42— clothing worn by defendant in custody — admissibility**

Clothing worn by a person while in custody under a valid arrest may be taken from him for examination and, when otherwise competent, may be introduced into evidence at his trial.

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; Criminal Law § 42— arrest without warrant — clothing taken from defendant

Arrest of defendant for burglary without a warrant was valid under G.S. 15-41(2), and clothing taken from defendant after his arrest was properly admitted in evidence, where a person assaulted following a burglarious entry of her home gave officers a description of her assailant and his clothing, including the color and type of his shirt and trousers, officers knew the person they sought had struggled with the victim and had struck her with his hands, officers found defendant at his residence wearing clothing as described by the victim and with unexplained fresh scratches and marks on his hands and arms, and it had been raining that night and defendant's pants were wet from the waist down.

4. Criminal Law § 68— hairs found at crime scene — lapse of five days from crime

In this burglary prosecution, the trial court did not err in the admission of testimony by an officer that some five days after the crime was committed he found hairs inside and outside the burglarized dwelling which matched hairs found on defendant's clothing, the lapse of time which might have given someone else an opportunity to go on the premises and leave such hairs being a circumstance for the jury to consider in determining the credibility of the testimony.

5. Criminal Law § 102 —argument of solicitor — statement that appeals go on forever — harmless error

In this burglary prosecution, statements by the solicitor in his argument to the jury that "If a jury says guilty, the appeals can go on from now until Doom's Day," and that "Appeals can go on forever," while improper, *held* not prejudicial error where the trial court sustained defendant's objection to the remarks and the argument was not directed toward imposition of the death sentence.

6. Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of jurors opposed to capital punishment — jury recommendation of life imprisonment

Decision of *Witherspoon v. Illinois*, 391 U.S. 543, relating to the exclusion of veniremen who voice general objections to the death penalty, does not apply where the jury in a capital case recommends a sentence of life imprisonment.

7. Jury § 7— jurors opposed to capital punishment — challenge for cause

In this prosecution for the capital crime of burglary, the trial court properly allowed the State's challenges for cause of three prospective jurors who stated that they would not under any circumstances vote to return a verdict which would result in the imposition of the death penalty.

8. Jury § 7— valid challenges for cause — solicitor's motives

Where the solicitor challenged three prospective jurors for cause on a valid ground, and the court correctly excused the jurors, the

appellate court will not speculate as to the solicitor's motives in challenging the jurors.

APPEAL by defendant from *May, S.J.*, 26 October 1970 Special Session of MARTIN.

Defendant was tried upon a bill of indictment charging him with the capital crime of burglary.

The State's evidence tends to show: On the evening of 18 August 1970, Mrs. Geraldine Simpson was at her home in Williamston, North Carolina. Her husband was expected home from work at about 3:30 a.m. Mrs. Simpson went to bed shortly after 11:00 o'clock p.m., and she was awakened during the night when someone walked up on the back porch and rattled the screen. The person identified himself as her husband, but she knew it was not her husband's voice. Mrs. Simpson immediately ran to the front door, unlocked it, and called to a neighbor for help, and at that time her assailant came to the front porch. She slammed the front door, which did not shut because it was swollen as a result of damp weather, and retreated into the house to get a pistol. Before she could get the pistol, a man came into the house, caught her by the neck and covered her mouth with his hand. He dragged her to the front porch, where she managed to pull his hand off her mouth, and screamed. He then hit her several times, stated his intention to rape her, and, despite her continued resistance, dragged her into the yard by the hair of her head. A neighbor turned on a light on her front porch, and the man fled. After Mrs. Simpson returned to her house, she remembered someone saying it was ten minutes to one. Mrs. Simpson, without objection, testified:

"At the time I was attacked by the defendant, I noticed the odor of wine on his breath. . . . On the night in question, the defendant was wearing a yellow, gold, or beige, light shirt, and his arms were bare up above his elbows. After he hit me, I was bleeding from the nose and mouth and from the fingers where I cut them on the fence. There is no doubt in my mind whatsoever that the defendant sitting next to Mr. Gurganus is the boy that came into my house on August 19, 1970 in the nighttime. When he lunged at me in the front door, I threw my arms up. I recognized him from just below the eyes down. He was gritting his teeth and he was breathing hard, and I said

that would be one face or profile I would never forget the longest day I lived on this earth."

Police Chief John Swain testified that as the result of a call he arrived at the Simpson residence at about 12:30 a.m. and there talked with Mrs. Simpson. He thereafter talked with defendant at his home about 1:20 a.m. At this point the State offered to introduce into evidence clothing worn by the defendant at the time Officer Swain first saw him. Upon defendant's objection, the jury was excused and a *voir dire* hearing was held concerning the admissibility of the clothing. On *voir dire*, Officer Swain testified that he had known defendant about five years and that he went to defendant's residence as a result of Mrs. Simpson's description of her assailant. When he arrived at defendant's place of residence, he found defendant wearing clothes which also fitted Mrs. Simpson's description of the clothing worn by her assailant. Defendant was carried to the police station and informed of his constitutional rights and informed that he was a suspect in a burglary investigation. He surrendered his clothes to the police officers after they had furnished him other clothing. Defendant offered no evidence on the *voir dire*. The trial judge thereupon found facts consistent with the officer's testimony, and concluded:

"1. That Chief of Police John L. Swain arrested the defendant, Clifton Earl Dickens on the morning of August 19, 1970, after he had been informed that the felony of burglary had been committed at the home of Mrs. Geraldine Simpson, pursuant to the description which had been given to Chief Swain by Mrs. Geraldine Simpson.

"2. That the arrest made by Chief John L. Swain of the defendant was based upon probable cause and upon reasonable grounds upon which he could reasonably rely that the felony of burglary had been committed.

"3. That the defendant's Fourth Amendment rights and Sixth Amendment rights under the Constitution of the United States were not violated by Chief of Police John L. Swain, in placing the defendant under arrest and taking him into custody and placing him in jail and taking his clothing.

"4. That Chief of Police John L. Swain had made sufficient investigation to determine that a felony had been

committed, to wit, burglary, and that he had probable cause to believe that the defendant was the perpetrator of the crime.

"5. That no objection was made to the in court identification or the out of court identification of the defendant, and, therefore the Court has not made any findings of fact with respect to the incourt and out of court identification of the defendant, for the reason that this question has not been raised in the trial of this case.

"6. That the items of clothing which the State offers in evidence were legally obtained by Chief of Police John L. Swain, while the defendant was in custody, under lawful arrest, and, therefore, said State's Exhibits 3, 8 and 9 are admissible in evidence and the defendant's objection thereto is OVERRULED. Exception by the defendant."

The jury returned and defendant's clothing was admitted into evidence. Officer Swain then testified that defendant's trousers were wet from top to bottom when defendant gave him the clothes, and at that time they were matted with hair which consisted of brown and gray hair, one to two inches in length, and light brown or blond hair about four inches in length. In his opinion the short hairs were horse hairs. He described how the clothes were sealed in plastic bags and forward, together with separately packaged hairs cut from Mrs. Simpson's head, to the Federal Bureau of Investigation, Washington, D. C. Swain further testified that when he arrived at Mrs. Simpson's home on the morning of 19 August 1970, she was dressed in a blue nightgown, that her hair was disarranged, her lips were cut, and her face was "puffy." At that time Mrs. Simpson said that her assailant was a Negro male approximately 20 years old, about 5 feet 8 inches tall, weighing about 150 to 160 pounds, that he was not a black skinned person, and that he did not have a goatee. She also stated that her assailant was wearing a short-sleeved yellow or rusty gold colored shirt and black cotton trousers.

Myron Scholberg, an expert in identification of fibers for the Federal Bureau of Investigation, testified that he had examined the human hair samples sent to him for examination and comparison by the Williamston police and that the human hairs taken from defendant's clothes were "microscopically

identical" to the hairs taken from Mrs. Simpson's head. He stated on cross-examination that the science of comparison of human hairs was not so exact as to permit positive identification of hair as originating from a certain individual.

The State offered further testimony that when defendant was arrested he had fresh scratches on his face, hands and arms, that the knuckles of his right hand were skinned, and that he had been drinking.

At the close of the State's evidence defendant moved for a directed verdict and the motion was denied. We note in passing that in a criminal case the proper motion to test the sufficiency of the State's evidence to carry the case to the jury is a motion to dismiss the action or a motion for judgment as in case of nonsuit. G.S. 15-173.

Defendant took the stand in his own behalf. He testified, *inter alia,* that on the night of August 18, 1970 he was with another person drinking wine until about 11:30 p.m., and that he arrived at his home at 11:50 p.m. He testified that he did not again leave home until the officers carried him away. He accounted for the hairs on his trousers by stating he had ridden a pony that afternoon. He said that his britches had become wet when he walked through grass growing on the railroad track.

Defendant's aunt, Lucy May Dickens, in whose home defendant resided, corroborated his testimony as to the time at which he came home. She further testified that his pants were not soaked with water and that he had long whiskers growing on his chin. She did not notice any scratches on his face or arms.

Maletha Hudgins testified that on the night in question defendant called her home and asked to speak to her daughter at 11:55 p.m.

Roland Bland testified for defendant and stated that he was employed as a worker in the Martin County Jail. He saw defendant when he was brought into the jail and did not notice any cuts on his face.

Woodrow Keel, who took photographs of defendant on the night he was arrested, testified that the photographs did not show whether defendant's face was scratched, but they did reveal scratches on defendant's arm. On cross-examination he

stated that he remembered that defendant's face did, in fact, have scratches on it when he took the photographs.

Defendant presented other cumulative and corroborative testimony.

The State offered rebuttal testimony which tended to contradict some of defendant's witnesses.

At the close of all the evidence defendant again moved for a directed verdict, and the motion was again denied.

The jury returned a verdict of guilty of burglary in the first degree with recommendation that punishment be imprisonment for life in the State's prison. Defendant appealed.

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

Edgar J. Gurganus for defendant.

BRANCH, Justice.

Defendant assigns as error the action of the trial judge in admitting into evidence, over objection, clothing worn by defendant when he was taken into custody a short time after the alleged crime.

[1] It is well settled in North Carolina that clothing worn by a person while in custody under a valid arrest may be taken from him for examination, and, when otherwise competent, such clothing may be introduced into evidence at his trial. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345, *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568; *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269. Defendant stressfully argues that he was not in custody under a valid arrest.

[2] An arrest without a warrant except as authorized by statute is illegal. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53; *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100.

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."

The courts have held that a description of an assailant's physical characteristics and his clothing may supply reasonable grounds for believing that he had committed a felony.

In *State v. Tippett, supra,* police officers were informed that a felony had been committed by a barefooted white man wearing coveralls. Police officers arrested the defendant without a warrant upon finding him dressed as described and hiding behind a bush two blocks from the scene of the crime. This Court held that under these circumstances it was lawful to arrest the defendant without a warrant.

In *State v. Grier,* 268 N.C. 296, 150 S.E. 2d 443, police officers knew that a robbery had been committed, and they had information that the robber wore checkered pants and had a cut on the rear of his right leg. When the police apprehended the defendant, dressed in checkered pants, with a cut on the rear of his right leg, they placed him under arrest. Incident to the arrest, the officers searched the defendant and found property on his person similar to that taken in the robbery. This Court held that the police officers had reasonable grounds to arrest the defendant, and that the arrest without a warrant was valid.

In the case of *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741, police officers stopped an automobile which fitted the description of one used in connection with a robbery, and at that time observed a pistol lying on the seat of the car. The Court held that the officers had reasonable ground to believe that the defendant had committed a felony and would evade arrest if not taken into custody. Accord: *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744; *State v. Pearson* and *State v. Belk,* 269 N.C. 725, 153 S.E. 2d 494; *State v. Egerton,* 264 N.C. 328, 141 S.E. 2d 515; *People v. La Bostrie,* 14 Ill. 2d 617, 153 N.E. 2d 570; *People v. Kissane,* 347 Ill. 385, 179 N.E. 850; Holmgren, What Are Reasonable Grounds for Arrest, 42 Chi-Kent L. Rev. 101.

[3] Here, the victim of the assault gave police officers a description of her assailant, including information as to the color and type of his shirt and trousers. As a result of the description furnished, the officers went to defendant's residence and found him there, dressed as described, with unexplained fresh scratches on his hands and arms and skinned places on the knuckles on his right hand. The police were aware that the person whom they sought had struck his victim with his hands and that the person had been engaged in a struggle with his victim. It had

been raining on this night and defendant's pants were wet from the waist down.

There was sufficient competent evidence to support the trial judge's findings of fact, and the findings of fact in turn supported the trial judge's conclusion that the items of clothing were legally obtained while defendant was in custody under lawful arrest.

We have not here discussed defendant's argument as to certain misdemeanor warrants since we hold that the arrest was valid pursuant to G.S. 15-41(2).

The trial judge correctly admitted the items of clothing into evidence.

[4] Defendant next assigns as error the admission of the testimony of Officer Swain to the effect that he had found hairs inside and outside the Simpson dwelling which matched the hairs found on defendant's clothing. He argues that five days had passed since the crime was committed, and although the house was locked, the premises had not been under constant surveillance since the date of the crime, and therefore someone else could have been on the premises and left the hairs.

Every circumstance that is calculated to throw light upon a supposed crime is admissible if otherwise competent. The weight of the evidence is for the jury. *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506; *State v. Ham,* 224 N.C. 128, 29 S.E. 2d 449; Strong's N. C. Index 2d, Criminal Law, § 33, p. 531.

The finding of the hairs similar to those found on defendant's clothing on the living room floor and in the moulding of the front porch of the victim's house is a circumstance tending to show that defendant had been on the premises. The lapse of time which might have given someone else opportunity to go on the premises and leave such hairs is a circumstance to be considered by the jury in determining the weight of the testimony.

[5] Defendant contends that he should be granted a new trial because of a statement made by the solicitor for the State during his argument to the jury. The full argument of the solicitor does not appear in the record. The only excerpt from the argument is shown in the record as follows:

"If a jury says guilty, the appeals can go on from now until Doom's Day. Look at Cassius Clay. Appeals can go on forever. That is the reason we have these appeals. . . .

OBJECTION SUSTAINED EXCEPTION NO. 5."

The principles of law concerning arguments of counsel in contested cases have been recently stated in the case of *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503, where Moore, J., speaking for the Court, stated:

"In this jurisdiction wide latitude is given to counsel in the argument of contested cases. Moreover, what constitutes an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge. *State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466; *State v. Christopher, supra* [258 N.C. 249, 128 S.E. 2d 667]. However, it is the duty of the judge to interfere when the remarks of counsel are not warranted, by the evidence and are calculated to mislead or prejudice the jury, the argument and conduct of counsel being largely in the control and discretion of the presiding judge. *State v. Correll*, 229 N.C. 640, 50 S.E. 2d 717. Ordinarily, exceptions to improper remarks of counsel during argument must be taken before verdict. *State v. Hawley*, 229 N.C. 167, 48 S.E. 2d 35; *State v. Tyson*, 133 N.C. 692, 45 S.E. 838. Such exceptions, like those to the admission of incompetent evidence, must be made in apt time or else be lost. This general rule has been modified in recent years so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that in this Court's opinion it is doubted that the prejudicial effect of such argument could have been removed from the jurors' minds by any instruction the trial judge might have given. *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335; *State v. Dockery*, 238 N.C. 222, 77 S.E. 2d 664."

Defendant cites and relies heavily upon the case of *State v. Little*, 228 N.C. 417, 45 S.E. 2d 542, where the solicitor stated that in the event of conviction there would be an appeal, and if the decision of the lower court were affirmed, there would be an appeal to the Governor and that not more than sixty percent of persons convicted of capital offenses were ever executed. The court granted a new trial, holding this argument to be prejudicial error.

State v. Little, supra, is distinguishable from instant case in that there the death penalty was imposed. In Little the argument went further than in instant case by stating that not more than sixty percent of the persons convicted of capital crimes were ever executed. It is also clear that in the case before us for decision the argument was not directed toward imposing the death sentence.

In *State v. Tucker,* 190 N.C. 708, 130 S.E. 720, the defendant was charged with violating the prohibition laws. The solicitor stated that the defendants looked like professional bootleggers, and that their looks were enough to convict them. The trial judge held the argument to be proper and overruled defendant's objection, which was duly entered before verdict. This Court, granting a new trial, stated:

> ". . . To uphold this ruling would mean, not only to sanction the vituperative language used in the present case, but also to open the door for advocates generally to engage in vilification and abuse—a practice which may be all too frequent, but which the law rightfully holds in reproach."

In this case the language of the solicitor, when considered out of context, appears to have exceeded the bounds of the record evidence and of propriety. However, the record shows that the trial judge sustained defendant's objection, thereby avoiding the evil of approving or sanctioning the language of the solicitor. The record is mute as to whether the trial judge, after sustaining the objection, proceeded to instruct and caution the jury so as to correct the effect of the solicitor's argument. The record is equally silent as to whether the solicitor's statement was made in answer to argument of defendant's counsel. The argument obviously was not directed toward the imposition of the death sentence.

In *State v. Thompson,* 278 N.C. 277, 179 S.E. 2d 315, Higgins, Justice, quoted with approval from *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424, the following:

> "The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge. He sees what is done, and hears what is said. He is cognizant of all the surrounding circumstances, and is a better judge

of the latitude that ought to be allowed to counsel in the argument of any particular case. It is only in extreme cases of the abuse of the privilege of counsel, and when this is not checked by the court, and the jury is not properly cautioned, this Court can intervene and grant a new trial."

Prejudicial error resulting from the solicitor's argument is not disclosed by this record.

Defendant assigns as error the action of the trial judge in excusing for cause three jurors because of their personal convictions concerning the death penalty.

[7] The jurors were excused after the State had exhausted its peremptory challenges and after each of the jurors, in effect, stated that he would not under any circumstances vote to return a verdict which would result in the imposition of the death penalty.

[6] The decision in *Witherspoon v. Illinois,* 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, does not govern the present case since the jury recommended a sentence of life imprisonment. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481; *Bumper v. North Carolina,* 391 U.S. 543, 20 L. Ed. 2d 797, 88 S. Ct. 1788. Even had the decision in *Witherspoon v. Illinois* been applicable, the jurors would have been properly excused under its holding.

[7] The State is entitled to challenge for cause any prospective juror who states under oath that it would be impossible for him to return a verdict which would result in the imposition of the death sentence, even though the State proved the defendant guilty beyond a reasonable doubt. *State v. Peele, supra; State v. Bumper,* 270 N.C. 521, 155 S.E. 2d 173, reversed on other grounds in *Bumper v. North Carolina, supra.*

[8] Defendant advances the argument that there was error in allowing the challenge to each of the jurors because the solicitor wished to excuse the jurors for reasons other than their belief as to capital punishment. The solicitor challenged these jurors on a valid ground, and the trial judge ruled correctly. We cannot depart from the record and speculate as to the solicitor's motives in challenging these jurors.

This assignment of error is overruled.

Defendant assigned as error the trial judge's denial of his motions for directed verdicts. We do not deem it necessary

to discuss this assignment of error since the record reveals plenary evidence to repel defendant's motions.

No error.

WALTER W. HENDRIX, JR. v. JAMES RICHARD ALSOP, CHARLES PFIZER CO., INC., AND J. B. ROERIG AND COMPANY, A DIVISION OF CHARLES PFIZER CO., INC.

No. 85

(Filed 12 May 1971)

1. **Appeal and Error § 1— appeal of right to Supreme Court — dissent in Court of Appeals — purpose of statute**

By enactment of the statute providing for an appeal of right to the Supreme Court from any decision of the Court of Appeals in which there is a dissent, the General Assembly intended to insure a review by the Supreme Court of questions on which there was a division in the intermediate appellate court, but no such review was intended for claims joined or consolidated in the lower appellate court and on which that court rendered unanimous decision. G.S. 7A-30(2).

2. **Appeal and Error § 1— appeal of right to Supreme Court — dissent as to one defendant — unanimous decision as to two defendants**

Where the Court of Appeals unanimously affirmed dismissal of plaintiff's action against two corporate defendants and, by a divided vote, reversed dismissal against an individual defendant, plaintiff is not entitled to appeal to the Supreme Court as a matter of right under G.S. 7A-30(2) the unanimous decision as to the corporate defendants by reason of there having been a dissent as to the individual defendant.

3. **Pleadings § 1— time for filing complaint — certification of appellate court decision**

Where the clerk extended the time for filing plaintiff's complaint until 20 days after filing of a report of adverse examination of defendant, and the Court of Appeals held that plaintiff had failed to show necessity for adverse examination, the period of 20 days in which plaintiff was permitted to file his complaint began to run on the date the opinion of the Court of Appeals was certified to the superior court.

4. **Pleadings § 1— extension of time for filing complaint — discretion of court**

Discretionary power of a superior court judge to extend time for filing complaint is no different than his power to extend time for filing answer.

5. Pleadings § 1— extension of time for filing complaint — motion for dismissal after complaint filed

Where plaintiff failed to file his complaint within the time permitted, fact that defendant waited until after the complaint was filed to move for dismissal is only a matter for the trial judge to consider in ruling on plaintiff's motion for enlargement of the time to file the complaint.

6. Pleadings § 1— denial of motion for extension of time to file complaint

The trial court did not abuse its discretion in the denial of plaintiff's motion for enlargement of the time for filing complaint where plaintiff had filed complaint over one year after the time permitted but before defendant interposed a motion to dismiss.

APPEAL by defendant Alsop pursuant to G.S. 7A-30(2) and appeal by plaintiff pursuant to G.S. 7A-30(1), from decision of the Court of Appeals (10 N.C. App. 338, 178 S.E. 2d 637).

On 5 May 1967 plaintiff caused summons to issue in an action entitled "Walter W. Hendrix, Jr. v. James Richard Alsop" to recover damages for alleged conspiracy, assault, libel, trespass, false arrest, malicious prosecution, and abuse of process.

On the same day, the clerk entered an order for an adverse examination of defendant Alsop and also entered an order extending the time for filing complaint to and including twenty days after filing of the report of adverse examination. Alsop appealed to superior court from the clerk's order for adverse examination, and from an adverse decision he appealed to the North Carolina Court of Appeals. The Court of Appeals (1 N.C. App. 422, 161 S.E. 2d 772) held that plaintiff had failed to show necessity for adverse examination and remanded the cause for entry of an order consistent with its opinion. The opinion was certified to Guilford County Superior Court on 1 July 1968, and on 20 August 1968 Judge Collier entered an order consistent with the opinion of the Court of Appeals.

On 1 August 1969 plaintiff for the first time filed a complaint, entitled "Walter W. Hendrix, Jr. v. James Richard Alsop; Charles Pfizer Co., Inc. (Pfizer); and J. B. Roerig and Company (Roerig), a Division of Charles Pfizer Co., Inc." On the same day the clerk signed an order for service of complaint on Alsop and issued summons for Alsop. Alias summons, copy of order directing service of complaint and a copy of the complaint were served on Alsop on 18 September 1969.

Summonses were also issued for Charles Pfizer Co., Inc., and J. B. Roerig and Company. Summons and copies of the complaint were served on these two defendants on 4 August 1969.

On 27 August 1969 defendants Pfizer and Roerig filed a motion with the clerk to vacate and quash the summons served on them, to strike the complaint, and dismiss the action as to them because no order had been entered making them parties to the action instituted by issuance of summons on 5 May 1967.

On 27 August 1969 Alsop moved before the clerk to strike and set aside the complaint, vacate the order directing service of complaint on him, and moved that the action be dismissed as to him for the reason that plaintiff had failed to file his complaint within twenty days after the entry of the order on the mandate of the Court of Appeals, as required by G.S. 1-121.

The clerk allowed the motions of Alsop, Pfizer and Roerig. Plaintiff appealed to the judge of superior court and at the same time filed motions for extension of time to file his complaint to and including 1 August 1969, and that Judge Collier's order of 20 August 1968 be vacated.

On 6 January 1970 Judge Gambill entered three separate orders, to wit: (1) an order affirming the clerk's order striking the complaint and dismissing the action as to Pfizer and Roerig; (2) an order denying plaintiff's motion to vacate Judge Collier's order dated 20 August 1968; and (3) an order affirming the clerk's order striking the complaint and vacating the service on defendant Alsop, denying, in the court's discretion, enlargement of time within which to file complaint, and dismissing the action as to James R. Alsop. Plaintiff appealed from each of the three orders.

The Court of Appeals reversed the order dismissing the action as to Alsop and remanded the cause to the Superior Court of Guilford County with leave for Alsop to plead, holding that the portion of the order denying plaintiff's motion for enlargement of time to file complaint was of no effect because complaint was already filed. Judge Graham dissented as to this portion of the majority opinion.

The order affirming the clerk's order dismissing the action as to Pfizer and Roerig was affirmed. The order denying plaintiff's motion to vacate Judge Collier's order of 20 August 1968 was affirmed.

Defendant Alsop appealed as a matter of right pursuant to G.S. 7A-30(2).

On 26 February 1971 plaintiff appealed from the decision of the Court of Appeals dismissing the action against Pfizer and Roerig. On 16 March 1971 defendant filed a motion in this Court to dismiss plaintiff's appeal.

On 2 March 1971, plaintiff petitioned this Court for *certiorari* to review the decision of the Court of Appeals. This petition was denied by the Court in Conference on 6 April 1971.

Max D. Ballinger, attorney for plaintiff appellant.

Harry Rockwell and J. B. Winecoff for Defendant Alsop, appellant.

BRANCH, Justice.

We first consider the motion of defendant Pfizer and Roerig to dismiss plaintiff's appeal.

The Court of Appeals unanimously, and we think correctly, affirmed Judge Gambill's order of 6 March 1970, which dismissed the action as to Pfizer and Roerig.

On 6 April 1971 this Court refused to exercise its discretionary power of review pursuant to G.S. 7A-31 and denied plaintiff's petition for *certiorari.*

G.S. 7A-30 provides:

> § 7A-30. Appeals of right from certain decisions of the Court of Appeals.—Except as provided in § 7A-28, [pertaining to post conviction hearings] from any decision of the Court of Appeals rendered in a case
>
> (1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or
>
> (2) In which there is a dissent, or
>
> (3) Which involves review of a decision of the North Carolina Utilities Commission in a general rate-making case, an appeal lies of right to the Supreme Court.

Obviously, the record does not present questions under G.S. 7A-30(1) or G.S. 7A-30(3); however, plaintiff, without cita-

tion of authority, contends that since there was a dissent as to defendant Alsop, he can appeal decision as to Pfizer and Roerig as a matter of right pursuant to G.S. 7A-30(2).

There are no decisions on this point in North Carolina. Our research indicates that the State of New Jersey has appellate procedures very similar to those provided for in G.S. 7A-30(2).

The New Jersey Constitution, Art. VI, Sec. 5, paragraph 1, in part provides:

"1. Appeals may be taken to the Supreme Court: . . .

(b) in causes where there is a dissent in the Appellate Division of the Superior Court."

Complementing this provision of the Constitution is rule 1:2-1 of the New Jersey Supreme Court which, in part, states: "Appeals may be taken to this Court from final judgments: . . . (b) in causes where there is a dissent in the Appellate Division of the Superior Court."

In *Midler v. Heinowitz,* 10 N.J. 123, 89 A 2d 458, the New Jersey Supreme Court, speaking through Justice William Brennan, stated:

> "Our new judicial structure is modeled after the federal court system. Our system too contemplates one appeal as of right to a court of general appellate jurisdiction. This is afforded usually in the Appellate Division of the Superior Court. A further appeal to this court is allowed only in the exercise of our discretional power of certification *unless the case comes within one of the limited number of situations for which an appeal to this court as of right is expressly allowed* by Article VI, Section V, paragraph 1 of the Constitution of 1947. See also Rule 1:2-1." (Emphasis supplied.)

In *Pangborn v. Central Railroad Co. of New Jersey,* 18 N.J. 84, 112 A 2d 705, two plaintiffs, Pangborn and Forner, obtained verdicts in the trial court. The Appellate Division reversed the Pangborn judgment by a divided vote but unanimously affirmed as to Forner. The defendant appealed as to Pangborn and attempted to cross appeal as to Forner under Supreme Court rule 1:2-6, which provided: "Any respondent may appeal

from a judgment, order, or determination by serving and filing a notice of cross appeal which shall be governed by the rules relating to notice of appeal."

Justice Brennan, again speaking for the Court, stated:

"The Pangborn appeal is here as of right under R. R. 1:2-1(b) by reason of the dissent in the Appellate Division. The railroad attempts to bring the Forner case here by cross-appeal. But the two actions are separate and distinct, and *the fact that they were brought under one complaint and tried together does not mean that a dissent in the one case gives the defendant an appeal as of right in the other.* R. R. 1:2-6 governing cross-appeals allows such an appeal only from a judgment properly here at the instance of an appellant therefrom. . . . The Forner case could not be brought here except by certification allowed under R. R. 1:10." (Emphasis supplied.)

[1, 2] *Pangborn v. Central Railroad Co., supra,* differs factually from the case before us for decision. There the defendants sought to appeal by cross-action where there were two separate and distinct actions consolidated for trial. Here, questions presented by plaintiff's attempt to appeal as a matter of right pursuant to G.S. 7A-30(2) are entirely different from questions which defendant Alsop raises in his appeal as a matter of right by virtue of Judge Graham's dissent. It is apparent that both the General Assembly of New Jersey and the General Assembly of North Carolina intended to insure a review by the Supreme Court of questions on which there was a division in the intermediate appellate court; no such review was intended for claims joined or consolidated in the lower appellate court and on which that court rendered unanimous decision.

The plaintiff's appeal is dimissed.

The remaining question for decision is whether the trial judge erred when he entered his order of 6 January 1970, dismissing the action as to James R. Alsop.

At the threshold of this question we must decide when plaintiff should have filed his complaint.

In *Strickland v. Jackson,* 260 N.C. 190, 132 S.E. 2d 338, defendant demurred to the complaint and Judge Mintz sustained

the demurrer, granting plaintiff thirty days in which to file his amended complaint. Plaintiff refused to amend, and appealed to the Supreme Court, where the demurrer was affirmed. On 20 March 1963, the Supreme Court filed its decision affirming the demurrer, and on 3 April 1963 the cause was certified and recorded in the Superior Court of Pitt County. On 19 April 1963, Judge Hubbard, who was then holding courts in Pitt County, entered an order affirming the order of the Supreme Court. Plaintiff attempted to file amendment to the complaint on 13 May 1963, and defendant, on 27 May 1963, moved to strike the complaint upon the ground that it was not filed in time. The judge allowed defendant's motion and plaintiff appealed. Affirming the action of the trial judge, this Court stated:

> "The appeal from the Mintz judgment had the effect of suspending further proceedings pending the appeal. The suspension, however, was lifted when this Court's affirming Certificate was received in the Superior Court of Pitt County on April 3, 1963. As of that date the rights of the parties were fixed by G.S. 1-131, with which the challenged order conformed. The plaintiffs had authority to amend within 30 days. *Dudley v. Dudley,* 250 N.C. 95, 107 S.E. 2d 918; *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345. Judge Hubbard's order of April 19, 1963, neither added to nor took from the rights of the party.
>
> "The plaintiffs' amendment of May 13, 1963, was not filed within 30 days. Consequently, the order of Judge Latham striking the amendment is Affirmed."

[3, 6] In instant case the period of twenty days in which the plaintiff was permitted to file his complaint began to run on 1 July 1968, and complaint was filed on 1 August 1969. Thus, the principal issue narrows to whether, when plaintiff had filed his complaint over one year after the time permitted but before the defendant interposed a motion to dismiss, the trial judge erred in allowing defendant's motion to dismiss and, in his discretion, refusing to enlarge the time to file complaint.

Both the summons and the complaint were served before the effective date of the new Rules of Civil Procedure, and decision will be governed by the Rules as they existed immediately prior to 1 January 1970. G.S. 1-121, in part, provided:

"The first pleading on the part of the plaintiff is the complaint. It must be filed in the clerk's office at or before the time of the issuance of summons and a copy thereof delivered to the defendant, or defendants, at the time of the service of summons; provided, that the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, and a copy of such order shall be delivered to the defendant, or defendants, at the time of the service of summons in lieu of a copy of the complaint; Provided, further, said application and order shall state the nature and purpose of the suit. The clerk shall not extend the time for filing complaint beyond the time specified in such order; except that when application is made to the court, under article forty-six of this chapter, for leave to examine the defendant prior to filing complaint, and it shall be made to appear to the court that such examination of defendant is necessary to enable the plaintiff to file his complaint, and such examination is allowed, the clerk shall extend the time for filing complaint until twenty (20) days after the report of the examination is filed as required by § 1-571. . . ."

The Court of Appeals relies on the case of *Roberts v. Allman,* 106 N.C. 391, 11 S.E. 424, for the proposition that further order of court extending time to file the complaint "was not prerequisite to filing the complaint on that date where no effort has been previously made to dismiss the action.

Roberts v. Allman, supra, was decided under the Code section which provided: "The plaintiff shall file his complaint in the clerk's office on or before the third day of the term to which the action is brought, otherwise the suit may, on motion, be dismissed at the cost of the plaintiff." N. C. Code of 1883 § 206.

Roberts is distinguishable from instant case in that there a *judgment* by default was taken in 1884 and defendants moved on 18 May 1887 to dismiss for the reason that complaint had not been filed in proper time. In *Roberts* defendants made a general appearance which cured any irregularity in process. It is clear that the decision was based, in a large degree, on defendants' lack of diligence.

Other cases decided under the same Code section hold that failure timely to file complaint is ground to dismiss the action

if objection is taken in apt time, but its absence is cured by acquiescence in the judgment. *McLeod v. Graham,* 132 N.C. 473, 43 S.E. 935; *McLean v. Breece,* 113 N.C. 390, 18 S.E. 694; *McNeil v. Hodges,* 105 N.C. 52, 11 S.E. 265; *Robeson v. Hodges,* 105 N.C. 49, 11 S.E. 263; *Peoples v. Norwood,* 94 N.C. 167; *Stancill v. Gay,* 92 N.C. 455.

In instant case complaint was filed on 1 August 1969, and defendant Alsop, on 27 August 1969, before the complaint or order directing service had been served on him, moved to strike the complaint and to dismiss the action as to him. It would seem that the crucial factor is that in instant case defendant moved to dismiss in apt time.

In the case of *Horney v. Mills,* 189 N.C. 724, 128 S.E. 324, we find the following:

> "We cannot, however, sustain defendant's second contention that plaintiff, by delaying to move for judgment by default for want of a verified answer from the date of the filing of the answer to the date of the hearing of the motion, waived his rights. . . . Delay in moving for judgment upon the complaint for want of an answer does not, as a matter of law, waive plaintiff's rights. Such delay may properly be considered by the court in passing upon defendant's motion for leave to file an answer or to verify an answer previously filed, such motion being addressed to the discretion of the court, the exercise of which is not reviewable by this Court; . . ."

[4] The superior court judge's discretionary power to extend time for filing complaint is no different than his power to extend time for filing answer. *Hines v. Lucas,* 195 N.C. 376, 142 S.E. 319; McIntosh, N. C. Practice and Procedure 2d Ed. § 1115.

[5] Here, the fact that defendant waited until after complaint was filed to move for dismissal is only a matter to be considered by the trial judge in exercising his discretion.

In the case of *Deanes v. Clark,* 261 N.C. 467, 135 S.E. 2d 6, the plaintiff obtained an extension of time to file his complaint. The time elapsed, and before complaint was filed defendant moved that the action be dismissed. The plaintiff filed his complaint on the next day, and the clerk held that the action should be dismissed. Plaintiff appealed to superior court, and the

judge of superior court, in affirming the judgment of the clerk, held that the question presented by the appeal from the order of the clerk did not invoke the discretionary authority of the judge of superior court. This Court, finding error and remanding, held that the clerk had no authority to extend the time for filing the complaint, but that the superior court judge was in error in holding the question of his discretion was not invoked when he entered his order. In so holding, this Court stated:

> "This statute now expressly provides that 'the clerk shall not extend the time for filing complaint beyond the time specified in such order,' unless the plaintiff has secured an order to examine the defendant prior to filing complaint. Hence, the power of the clerk to extend the time for filing complaint is clearly limited. McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. I, Sec. 1115. See *O'Briant v. Bennett,* 213 N.C. 400, 196 S.E. 336. The part of G.S. 1-121 quoted above was enacted at the 1927 Session of the General Assembly, Public Laws, Section 1927, Ch. 66.
>
> . . . .
>
> "However, since G.S. 1-121 mentions only the clerk, and the well-established general rule is that the judge has inherent discretionary power to permit plaintiff to file a complaint after expiration of statutory time or to permit untimely pleadings to be filed, G.S. 1-121 does not affect the discretionary power of the judge. *Veasey v. King,* 244 N.C. 216, 92 S.E. 2d 761; *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919; *O'Briant v. Bennett, supra; Hines v. Lucas,* 195 N.C. 376, 142 S.E. 319; *Church v. Church,* 158 N.C. 564, 74 S.E. 14; *Griffin v. Light Co.,* 111 N.C. 434, 16 S.E. 423; *Gilchrist v. Kitchen,* 86 N.C. 20; *Anderson v. Anderson,* 1 N.C. 20. Further, another statute, G.S. 1-152, stemming from our original code provides, 'The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order may enlarge the time.' G.S. 1-152, formerly C.S., 536, has been held applicable to complaints. *Hines v. Lucas, supra.*
>
> "When plaintiff in the instant case appealed from the clerk's order to the judge, the judge was not limited to a review of the action of the clerk, but was vested with jurisdiction 'to hear and determine all matters in contro-

versy in such action,' and render such judgment or order within the limits provided by law as he deemed proper under all the circumstances made to appear to him. G.S. 1-276; *Hudson v. Fox,* 257 N.C. 789, 127 S.E. 2d 556; *Blades v. Spitzer,* 252 N.C. 207, 113 S.E. 2d 315; *Langley v. Langley,* 236 N.C. 184, 72 S.E. 2d 235; *Bailey v. Davis,* 231 N.C. 86, 55 S.E. 2d 919; *Perry v. Bassenger,* 219 N.C. 838, 15 S.E. 2d 365; Strong's N. C. Index, Vol. I, Courts, sec. 6."

. . . .

". . . The whole matter was before the judge below on appeal, and he was vested with the power as to whether or not he should exercise his discretion in furtherance of justice to permit or to refuse plaintiff's motion for an extension of time to file his complaint. The trial judge is presumed to know best what order and what indulgence will promote the ends of justice in each particular case. How the discretion of the trial judge should be exercised in this case we are not authorized to express an opinion."

The case of *Bailey v. Davis,* 231 N.C. 86, 55 S.E. 2d 919, was an appeal from denial by the clerk of a motion to set aside a default judgment on the ground that at the time of its rendition a duly filed answer appeared of record. The answer was filed after the statutory time for filing had elapsed. In holding that the superior court acquired jurisdiction of the entire cause, and had power to permit the answer to remain on record even though it was filed after time for answering expired, the Court stated:

"Thus on the face of the record on 21 January 1949, when the clerk acted upon the motion of plaintiffs for judgment by default final, it appeared that defendant had filed an answer on 19 January 1949. *If it were not filed within the meaning of the law plaintiffs, upon motion so to do, might have had the answer stricken from the record, and, if such motion were allowed, to move then for judgment by default final.* This was not done." (Emphasis added.)

The case of *Campbell v. Asheville,* 184 N.C. 492, 114 S.E. 825, nullifies any contention that the trial judge is precluded from exercising his discretion to allow or deny enlargement of time to file a complaint after the clerk has manually filed a

complaint before defendant moved to dismiss the action. Under the statutory practice then existing (also applicable to *Allman v. Roberts, supra)* the plaintiff was required to file his complaint in the clerk's office "on or before the third day of the term to which the action is brought, otherwise the suit may, on motion, be dismissed at the cost of the plaintiff." N. S. Revisal Statutes § 466. At that time civil actions were commenced by summons which was returnable to the regular term of superior court of the county from which the summons issued, and which commanded the proper officer to summons the defendant to appear at the next ensuing term of superior court. N. C. Revisal Statutes, §§ 429, 430. In *Campbell* the summons was returnable at the July 1919 term of Buncombe Superior Court. The complaint was not filed on time, but was filed on 3 November 1921. On 19 November 1921 defendant moved before the clerk to dismiss the action, and the clerk allowed the motion as a matter of law. On appeal, the judge of superior court reversed, holding that the clerk had discretionary power to extend time to file complaint. Defendant appealed, and this Court reversed the trial judge and held that the clerk had no authority to extend the time for filing under the Code, and stated:

> " . . . [D]efendant was summoned to appear before the judge at the July term of the Superior Court; and whether the time for filing pleadings should be enlarged was a question to be determined by the judge as under the former practice and not by the clerk. We think the clerk had no jurisdiction to dispose of the motion, and that his Honor should have treated the appeal as a motion made originally before him, and should have exercised his discretion in saying whether in the administration of justice the plaintiff should be permitted to file her complaint."

[6] Here, the trial judge had the entire cause before him because of plaintiff's appeal. In the exercise of his discretion he did not permit enlargement of time for filing the complaint, and dismissed the action as to defendant Alsop. The discretionary ruling as to enlargement of time to file complaint, in effect, ended the action. The trial judge had full power to deny the motion to enlarge the time to file complaint and to dismiss the action as to defendant Alsop. No abuse of discretion appears.

The decision of the Court of Appeals as to defendant Alsop is reversed.

Plaintiff's appeal: dismissed.

Defendant Alsop's appeal: reversed.

STATE OF NORTH CAROLINA v. GLOYD A. VESTAL

No. 3

(Filed 12 May 1971)

1. **Criminal Law § 105— motion for nonsuit — question presented**

Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense; if so, the motion is properly denied.

2. **Criminal Law § 104— nonsuit motion — consideration of incompetent evidence**

In determining the nonsuit motion, incompetent evidence which has been admitted must be considered as if it were competent.

3. **Criminal Law § 106— motion for nonsuit — sufficiency of evidence**

The test of the sufficiency of the evidence to withstand the motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct, or both.

4. **Homicide § 21— murder prosecution — sufficiency of evidence**

Issue of defendant's guilt of murder with premeditation and deliberation was properly submitted to the jury, where there was evidence that (1) on 21 June 1969 the dead body of the victim, wrapped in a gold-colored drapery and heavy chains, was found floating in Lake Gaston; (2) the victim's skull had been fractured in five separate places by blows from a heavy instrument; (3) around 7 p.m. on 15 June 1969 the victim had left his home to go on a business trip with the defendant; (4) just prior to 8 p.m. the victim was last seen alive walking up to the defendant's flower shop; (5) the police discovered in defendant's warehouse some gold-colored draperies that were similar to the drapery around the victim's body; (6) the walls and ceiling of the warehouse had numerous spatters of human blood, some of which contained hairs that matched, microscopically, hairs taken from the victim's body; (7) the trunk of defendant's automobile contained splotches of blood, as well as hair that matched hairs taken from the victim's body; (8) the defendant and the victim had

associated in numerous business dealings involving substantial sums of money; (9) at the time of his death the victim held past due notes of the defendant in amounts of $70,000 and $40,000, and a large indebtedness involving the defendant was to fall due on 16 June 1969; (10) the defendant's and the victim's trip of 15 June 1969 was related to their controversy over the indebtedness of 16 June 1969; (11) the victim had communicated to defendant his anger over the defendant's failure to pay the controverted indebtedness and his determination to collect it.

5. **Searches and Seizures § 3— search warrant — requisites of affidavit — incompetent evidence**

A valid search warrant may be issued upon the basis of an affidavit setting forth information which may not be competent as evidence.

6. **Searches and Seizures § 3— search warrant — sufficiency of affidavit**

The affidavit to a search warrant is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated crime will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender.

7. **Searches and Seizures § 3— affidavit of search warrant — reports from FBI labs**

Affidavit in a search warrant which was based in part upon reports from the FBI laboratories concerning the examination of materials taken from a warehouse, *held* sufficient to support a magistrate's finding of probable cause for the issuance of the warrant to search the warehouse. G.S. 15-26.

8. **Searches and Seizures § 3— validity of search warrant — voir dire hearing**

Upon a *voir dire* hearing to determine the validity of a search warrant, the court should receive evidence and make findings of fact.

9. **Searches and Seizures § 2— warrantless search — voluntariness of consent for the search**

In ruling upon the admissibility of evidence obtained by a warrantless search, the determining fact is whether the consent to the search was given voluntarily and without compulsion from the officers.

10. **Searches and Seizures § 2— waiver of search warrant — consent by owner of premises**

The owner of the premises may consent to a search thereof and thus waive the necessity of a valid search warrant so as to render the evidence obtained in the search competent.

11. **Searches and Seizures § 2; Constitutional Law § 37— consent to warrantless search — waiver of constitutional rights — burden of proof**

The consent of an owner to a warrantless search of his premises must be freely and intelligently given, without coercion, duress, or

fraud; and the burden is upon the State to prove that it was so, the presumption being against the waiver of fundamental constitutional rights.

12. **Searches and Seizures § 2— consent to warrantless search —Miranda warnings**

The warnings required by *Miranda v. Arizona* need not be given by officers before obtaining the consent of the owner to a search of his premises.

13. **Searches and Seizures § 2— warrantless search of warehouse — voluntariness of defendant's consent**

Warrantless search of defendant's warehouse which produced draperies similar to a drapery wrapped around the body of a homicide victim *held* lawful where the defendant consented to the search at a time when he was not under arrest or in custody and was not charged with any criminal offense.

14. **Criminal Law § 84— objection to evidence obtained by warrantless search — voir dire hearing**

Although defendant objected to the admission of evidence obtained by a search without a warrant, trial judge was not required, under the facts of this case, to interrupt the progress of the trial in order to hold a *voir dire* hearing into the lawfulness of the search.

15. **Searches and Seizures § 3; Criminal Law § 84— validity of search warrant — affidavit based on prior warrantless search — admission of evidence**

A search warrant whose affidavit was based in part upon an FBI laboratory examination of draperies obtained in a prior and valid search without a warrant, *held* lawful; consequently, evidence obtained by a search under the warrant was admissible.

16. **Homicide § 15— evidence relating to the character of the deceased — inadmissibility of evidence**

Testimony by defense witness relating to the length of time she had been dating the homicide victim and their actions on those occasions, *held* inadmissible on grounds of irrelevancy, the character of the victim not being in issue.

17. **Homicide § 15— exclusion of testimony relating to telephone call from homicide victim**

In a homicide prosecution in which the State attempted to show that the victim was killed on 15 June shortly after 8 p.m., exclusion of testimony that the victim had called a witness on the afternoon of the 15th was not prejudicial to defendant.

18. **Homicide § 15— competency of evidence — exclusion of questions relating to a supposed telephone call from the victim**

In a homicide prosecution in which the State attempted to show that the victim was killed on 15 June 1969, defendant was not prejudiced by the exclusion of questions relating to a supposed telephone

conversation on 17 June between a defense witness and the homicide victim, since the witness would have answered that she could not identify the caller.

19. **Criminal Law § 73; Homicide § 15— exception to hearsay rule — evidence of homicide victim's plans to go on a trip with defendant**

Testimony by the wife of a homicide victim that on the day of the homicide her husband told her of his plans to go on a business trip with the defendant, *held* admissible as an exception to the hearsay rule.

20. **Criminal Law § 169— admission of evidence not objected to**

It was not error to admit that portion of testimony to which no objection was interposed.

21. **Criminal Law § 169— waiver of objection — admission of similar testimony without objection**

The benefit of an objection seasonably made is lost if thereafter substantially the same evidence is admitted without objection.

22. **Criminal Law § 73— exceptions to hearsay rule**

The twofold basis for exceptions to the rule excluding hearsay evidence is necessity and a reasonable probability of truthfulness.

23. **Criminal Law § 73; Evidence §§ 11, 33— exception to hearsay rule — intentions of a decedent**

An exception to the hearsay rule permits the admission of a decedent's declarations to show his intention, when the intention is relevant *per se* and the declaration is not so unreasonably remote in time as to suggest the possibility of a change of mind.

24. **Evidence § 15— purpose of rules of evidence**

The purpose of the rules of evidence is to assist the jury to arrive at the truth.

25. **Homicide § 15; Criminal Law § 80— financial documents — genuineness of defendant's signature — lack of proof**

Various documents purporting to show financial transactions between the defendant and the homicide victim were improperly admitted in evidence when there was no testimony that defendant's signature on the documents was genuine.

26. **Criminal Law § 80— evidence relating to contents of documents that are incompetent**

Where financial documents were incompetent for lack of proof that defendant's signature thereon was genuine, it was error to permit testimony as to the contents of the documents and as to the fact that defendant's name appeared thereon as payee and as endorser.

27. **Homicide § 15— evidence relating to a debt controversy between defendant and homicide victim**

It was proper to admit a witness' testimony relating his business transactions with the defendant and the victim of a homicide—espe-

cially his testimony that he did not owe any indebtedness to the victim—where such testimony was relevant to the State's theory that the defendant and the victim had quarreled over a debt and that the two of them had set out to visit the witness with reference to the debt.

28. **Homicide § 20— photographs of victim's body — admissibility**

Photographs of a homicide victim's body that were taken while the body, wrapped in chains and in a gold drape, was floating in a lake and immediately after the body was pulled ashore, *held* admissible for the sole purpose of illustrating the testimony of witnesses.

29. **Homicide § 15— date of death — medical opinion testimony**

It was proper for the doctor who performed an autopsy on the victim's body to give his opinion as to the probable date of the victim's death and the probable lapse of time between the victim's eating of corn found in his stomach and the date and time of death.

30. **Criminal Law § 51— qualification of hair and fiber expert**

A special agent of the FBI who had conducted thousands of examinations and comparisons of hairs and fibers was properly found to be an expert in field of analyzing and comparing hairs and fibers.

31. **Criminal Law § 51— qualification of expert witness — conclusiveness of court's findings**

The court's finding that a witness is qualified as an expert will not be disturbed on appeal if there is evidence to show that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject on which he testifies.

32. **Criminal Law § 51— testimony of fiber expert — admissibility**

A witness who qualified as an expert in the field of analyzing and comparing hairs and fibers was competent to testify as to his findings and opinions concerning the similarity of drapes found in defendant's warehouse with a drape found on a homicide victim's body.

33. **Criminal Law § 52— cross-examination of metallurgist**

On the cross-examination of an expert in metallurgy who had testified as to the similarity between the hooks and weights on the drapery found around defendant's body and the hooks and weights on the draperies found in defendant's warehouse, the trial court properly prevented defense counsel from asking the witness if he had examined the hooks on the draperies in his own home for such similarities.

34. **Homicide § 17— admission of threatening note written by victim — note undelivered to defendant — prejudicial error**

Defendant in a homicide case was prejudiced by the admission of a handwritten note found in the victim's car and apparently intended for the defendant but never delivered to him, the note expressing the victim's anger over a debt owed him by defendant and ex-

pressing the victim's determination to collect the money. The note is not admissible to show that the victim, in some other manner, communicated his anger to defendant and that defendant thereupon formed an intent to kill the victim.

35. Criminal Law § 169— harmless admission of evidence

It was not prejudicial to admit a witness' general statement that on the date of the homicide the victim had related his business dealings with the defendant, where similar evidence had been previously admitted without objection.

36. Criminal Law § 169— testimony that defendant had moved back with his wife "to make a better show"

The admission of a witness' testimony that it was her personal feeling that the defendant had "moved back" with his wife "because it would make a better show," *held* not substantially prejudicial under the facts of this homicide prosecution.

37. Criminal Law § 112— instructions on reasonable doubt

In the absence of a request by defendant that the court define the term "reasonable doubt," the court's failure so to charge was not error.

38. Criminal Law § 118— instructions on contentions

Errors in the court's statement of contentions must be called to the attention of the court so as to afford it an opportunity for correction.

39. Homicide § 30— instructions on lesser degrees of homicide

The court was not required to instruct on manslaughter where there was no evidence to sustain a verdict of manslaughter.

Chief Justice BOBBITT concurring in result.

Justices HIGGINS and SHARP join in concurring opinion.

APPEAL by defendant from *Johnston, J.*, at the 4 May 1970 Session of GUILFORD.

The defendant was indicted for the murder of Angelo S. Pennisi with premeditation and deliberation. He was found guilty of murder in the second degree and sentenced to imprisonment for a term of 25 years in the State's Prison.

The defendant relies upon 29 assignments of error. The pertinent facts relative to those requiring discussion in the determination of his appeal are set forth in the opinion.

Attorney General Morgan, Assistant Attorney General Smith and Staff Attorney Satisky for the State.

Cahoon & Swisher by Robert S. Cahoon and James L. Swisher for defendant.

LAKE, Justice.

Denial of Motion for Judgment of Nonsuit

[1, 2] Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777; *State v. Goins* and *State v. Martin,* 261 N.C. 707, 136 S.E. 2d 97. In making this determination, the evidence must be considered in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference to be drawn from it. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679. Contradictions and discrepancies in the testimony of the State's witnesses are to be resolved by the jury and, for the purposes of this motion, they are to be deemed by the court as if resolved in favor of the State. *State v. Church,* 265 N.C. 534, 144 S.E. 2d 624; *State v. Simpson,* 244 N.C. 325, 93 S.E. 2d 425. In determining such motion, incompetent evidence which has been admitted must be considered as if it were competent. *State v. Cutler, supra; State v. Virgil, supra.*

[3, 4] The test of the sufficiency of the evidence to withstand the motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct or both. *State v. Cutler, supra; State v. Rowland, supra; State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. There is substantial evidence of each element of the offense charged, or of a lesser offense included therein, and of the identity of the defendant as the perpetrator of it if, but only if, interpreting the evidence in accordance with the foregoing rule, the jury could draw a reasonable inference of each such fact from the evidence. *State v. Rowland, supra.* If, on the other hand, the evidence so considered, together with all reasonable inferences to be drawn therefrom, raises no more than a suspicion or a conjecture, either that the offense charged in the indictment, or a lesser offense included therein, has been committed or that the defendant committed it, the evidence is not sufficient and the motion for judgment of nonsuit should be allowed. *State v. Cutler, supra; State v. Chavis,* 270 N.C. 306, 154 S.E. 2d 340. The evidence in the present record, so con-

sidered, is sufficient to support, though not necessarily to require, findings as follows:

1. On 21 June 1969, the dead body of Angelo Pennisi was found floating in Lake Gaston between the bridges on which Highway 85 and U. S. Highway No. 1 cross the lake, having been submerged in the waters of the lake for a substantial period of time.

2. Wrapped around the body was a length of gold colored window drape and substantial lengths of heavy, metal, log chains, weighing approximately 70 pounds.

3. His pockets were empty except for a folded handkerchief and $32 in bills.

4. On the left side and the back of the head there were several lacerations (i.e., burstings or tearings of the skin as distinguished from cuttings), beneath which there were four or five separate, depressed fractures of the skull. These wounds were caused by blows from an instrument such as a hammer or a length of pipe. There had been four or five such blows upon the head, any one of which would have been sufficient to cause death.

5. The date of death was between four and eight days prior to 21 June.

6. The hour of death was from four to eight hours after Pennisi had a meal consisting in part of kernels of corn.

7. At approximately 1:30 p.m. on 15 June, Pennisi ate a lunch consisting in part of two servings of corn.

8. At 6:55 p.m. on 15 June, he left his home in Greensboro pursuant to his plan to travel by airplane that evening to Wilmington, Delaware, on business in the company of the defendant. He was then wearing the clothing found upon the body in the lake.

9. On 15 June, for approximately ten minutes, ending about 7:20 p.m., Pennisi was seen sitting in his automobile parked at the Summit Shopping Center conversing with a man in another car parked in the adjoining parking space. Between 7 p.m. and 7:30 p.m. he telephoned the defendant and at 7:30 p.m. drove to the defendant's home, parking in front of it. The defendant came out, got in the car, and they talked there until Pennisi

left shortly before 8 p.m. In that conversation Pennisi was "upset" over the title to a Lincoln automobile and "wanted" $6,000 which the defendant owed him. Immediately prior to 8 p.m. Pennisi was observed walking, in a very determined walk, up to the door of the defendant's flower shop, where he stopped abruptly, the flower shop being in the Summit Shopping Center. He was alone. No witness saw him alive thereafter.

10. After the discovery of Pennisi's body in the lake, a belt, similar in size and appearance to the one worn by Pennisi when he left his home on 15 June, broken near the buckle, was found in some tall weeds at a corner of the defendant's warehouse. No belt was found on the body.

11. Inside the warehouse, two blocks from the defendant's flower shop, the investigating officers found, on 26 or 28 June, some gold colored window drapes, which had been left there for storage by a friend of the defendant when she moved to another city. These drapes matched, in color, material, lining, design and stitching the drape found wrapped around Pennisi's body when it was taken from the lake. Among the drapes, so stored by the owner, was one of the size of the drape found wrapped around the body. A drape of that size was not found in the warehouse and none of those stored had been returned to the owner. Those found in the warehouse and the one found upon the body were equipped with the same type of hooks and weights, all the hooks having the same machine markings, indicating that they were all made by the same fabricating machine.

12. On 18 July, the investigating officers also found upon the ceiling and upon the north and west walls of the warehouse numerous spatters of blood, some of these containing hair. The blood was human blood. The several hairs found upon the walls of the warehouse matched, microscopically, hairs taken from Pennisi's body after its removal from the lake. The hairs so taken from the walls of the warehouse were of a Caucasian and, by their condition, showed they had been forcibly removed from the scalp.

13. On 15 June, the defendant owned a Cadillac Eldorado automobile, solid white both interior and exterior. In the trunk of this automobile investigating officers detected on 28 July 1969 a strong odor. From the carpet of the trunk they removed a human hair which, upon expert examination, was found to

match, microscopically, the hairs taken from Pennisi's head after the removal of the body from the lake. The investigating officers also found in the trunk of the white Cadillac a piece of sponge-like material containing a stain and other stains upon the rear trunk panel, which panel, made of cardboard, they removed for examination. They also removed from the trunk of the automobile the jack, several sections of the carpet and of the mat under the carpet. Upon expert examination, the piece of sponge-like material, the cardboard panel, the jack, the sections of carpet and the sections of the mat were each found to have human blood upon it.

14. The defendant's white Cadillac automobile was purchased for him, new on 9 June, the purchase being made by a woman friend in her name at his request. The defendant picked it up from her on 12 June. There was then no peculiar odor about it and she was not aware of any blood or hair in or about it. The mechanic of the dealer who sold it to her observed no unusual odor about it and no blood or hair as he serviced it for delivery. He installed the floor mats which he then removed from the trunk of the car. On 13 June, the defendant took it to a State inspector in order to get a State inspection sticker for it. The inspector did not observe any unusual odor then about the car. On that day the manufacturer's warranty for the car was transferred from the name of the woman, to whom it had been issued, to the defendant's name.

15. On 28 June, a friend of the defendant drove the white Cadillac to Mississippi on a trip which lasted nine days. At that time, the car had a strong odor in the trunk. This user of the car had nothing to do with putting any blood or hair in the trunk. On 18 July, the day the blood and hair were found and removed from the warehouse, the defendant sold the automobile to another friend, who resold it ten days thereafter to a Mr. Shropshire in whose possession the officers found it some two hours later. Shropshire noticed a bad odor about the car, such as cleaning fluid. He had nothing to do with putting any blood or hair in the trunk. He gave the officers permission to take the car into their custody and to search it, including the trunk.

16. On 15 June, the day Pennisi disappeared, another woman friend of the defendant saw the white Cadillac parked in front of the defendant's residence about 7 p.m. When she rode past the house again, as it was getting dark, the Cadillac

was gone. At a time after 8 p.m., a solid white, Cadillac Eldorado automobile, with a white vinyl top and white interior, was observed parked in the Summit Shopping Center near the defendant's florist shop. At 7:15 a.m. the next day, a neighbor observed the defendant driving his white Cadillac Eldorado along the street between their houses.

17. The defendant and Pennisi had had numerous business dealings with each other, including construction, purchases and sales of motels. These involved substantial amounts of money. Not all of their transactions had been reported properly for income tax purposes. At the time of his death, Pennisi held past due notes of the defendant's in the amounts of $70,000 and $40,879.37. A financial statement by Pennisi, dated 30 April 1969, showed Pennisi also held a note of Delaware State Wholesale Florist of Wilmington, Delaware, in the amount of $245,000 due on 15 June 1969, the date Pennisi disappeared after leaving home for the purpose of going on a business trip with the defendant to Wilmington. (The note would, of course, be due the following day, 15 June being Sunday.) This note was not offered in evidence. Its whereabouts were not shown. Pennisi also held at his death checks for $70,000 and $16,000, respectively, signed by the defendant on 15 January 1968, which checks had not been presented to the bank for payment.

18. The proprietor of Delaware State Wholesale Florist is Thomas Hatzis, called Tom. The defendant used the $70,000 loan made to him by Pennisi to pay off an earlier loan in that amount made to the defendant by Hatzis. Hatzis never had any business dealings with Pennisi except the sale to him of an automobile, for which Hatzis was paid by the defendant. The Delaware State Wholesale Florist (i.e., Hatzis) never owed Pennisi anything and Pennisi never owed Delaware State Wholesale Florist or Hatzis anything. Hatzis knew nothing about the above mentioned note of $245,000 held by Pennisi and supposedly due on 15 June 1969. Hatzis (i.e., Delaware State Wholesale Florist) never owed Pennisi a penny.

19. On 18 June, prior to the finding of Pennisi's body in the lake, an envelope bearing Pennisi's insurance agency's return address, with the defendant's name typed thereon and the word "IMPORTANT" hand printed thereon and also bearing on its face a handwritten notation, "Call me 27 26167 Now," was found on the front seat of the Ford automobile owned by Pennisi

and used by his son. The telephone number so shown was that of Pennisi's office. The envelope contained a sheet torn from Pennisi's appointment book for 1969. Upon this sheet was printed and written in Pennisi's handwriting and hand printing the following note:

> "I called Tom on June 12 at 11 a.m. He told me you've *already* collected my money. I want it this *morning*. Not tomorrow. I haven't slept all nite. So you better not come out with another lie on your mouth. You better call me right away."

Assuming, as the court must do upon the motion for judgment of nonsuit, that the jury were to find the above facts from the evidence, the jury could reasonably infer therefrom that Pennisi was murdered in the defendant's warehouse on 15 June 1969 at approximately 8 p.m. and that his body was carried from there to Lake Gaston in the trunk of the defendant's Cadillac. It could further reasonably infer that Pennisi, a few minutes earlier, in his conversation with the defendant in front of the defendant's residence, had demanded that the defendant go with Pennisi to Wilmington to see Hatzis with reference to Hatzis' denial that he had made the note for $245,000, held by Pennisi and supposed to be due the next day, and was also demanding payment of a large sum of money due Pennisi from Vestal. The jury could reasonably infer from the foregoing facts, if it found them to be established by the evidence, that in this conversation there were bad feelings and charges of bad faith directed by Pennisi to the defendant. It could reasonably infer that they parted to meet immediately at the defendant's warehouse for some further action in relation to these matters and that the defendant there struck and killed Pennisi. Whether these findings should be made from the evidence and these inferences drawn from such findings was a question for the jury and not for the trial court. Therefore, the motion for judgment of nonsuit was properly denied and this assignment of error is overruled.

Admissibility of Evidence Obtained by Search of Warehouse

Captain Jackson of the Greensboro Police Department testified that on 26 or 28 June, approximately one week after the discovery of Pennisi's body in Lake Gaston, the defendant came to the Police Office, being fearful for the safety of his children, the cause of this uneasiness being undisclosed in the record.

Captain Jackson and Lieutenant Gibson talked with him and the defendant consented for them to look through his warehouse and his flower shop. They did so, the defendant accompanying them. They searched the warehouse in the presence of the defendant. Over objection to testimony as to the fruits of the search, without conducting a *voir dire* examination, the court permitted Captain Jackson to testify that, in the course of such search, the officers found, stored in the warehouse, three gold drapes used to cover articles of furniture stored there, which they took with the defendant's permission. These drapes were admitted in evidence over objection.

On 18 July, Captain Jackson again searched the warehouse, then having in his possession a search warrant, issued by a magistrate 18 July 1969. In the course of this search the officers discovered an additional drape similar to the ones previously taken and, upon the ceiling and walls of one corner of one room of the warehouse, numerous spatters of blood, some of which contained hair. These were removed from the warehouse. The drapes, the blood stains and hair were sent to the FBI laboratory in Washington for examination. Expert witnesses, who there made such examination, testified that in their opinion the drapes and linings were similar in composition, construction, design and stitching to the drape found upon Pennisi's body when it was taken from Lake Gaston and that the blood stains were human blood and the hair was human hair, microscopically like hair taken from the head of Pennisi's body after its removal from the lake.

After the selection of the jury, but in its absence and before any evidence was offered, the defendant moved to suppress the evidence so taken from the warehouse pursuant to the search warrant. This motion to suppress did not include the drapes taken on the officers' first visit to the warehouse. The court heard argument of counsel upon this motion but conducted no examination of witnesses with reference to the circumstances of either search, none being offered. It had before it the search warrant and the affidavit of Captain Jackson upon the strength of which the warrant was issued by the magistrate. The defendant's contention at the hearing of the motion was that the affidavit was, upon its face, insufficient to show probable cause for issuing the warrant.

The affidavit of Captain Jackson stated that he had "reliable information and reasonable cause to believe" that the defendant had "fibers, bloodstains, hairs, body fluids, drapes, personal effects of Angelo S. Pennisi, which constitute evidence of a felony, to-wit: murder in the first degree, and blunt instruments which were used in the commission of a felony, to-wit: murder in the first degree" in his warehouse, the location of which warehouse was specified. The affidavit further stated the following facts (summarized) "which establish reasonable grounds for issuance of a search warrant"; Pennisi disappeared from Greensboro at some time after 7:05 p.m. on 15 June 1969, at which time he was last seen alive by his family; his body was recovered from Lake Gaston on 21 June wrapped in a gold colored drape, bound with chains, with severe head wounds and bearing evidence of obvious murder; prior thereto the defendant had informed Detective Jenkins of the Greensboro Police Department that he had been with Pennisi at approximately 8 p.m. on 15 June at the defendant's home; Pennisi was last seen by any known witness at approximately 8 p.m. in the immediate vicinity of the defendant's flower shop, two blocks from the warehouse proposed to be searched; on 28 June, the defendant invited police to accompany him to the warehouse and there voluntarily turned over to the affiant three gold colored drapes, which were then located in the warehouse; these, together with the drape found upon Pennisi's body, were submitted to the FBI laboratory in Washington and were found to be similar in construction, composition and design to the drape in which Pennisi's body was wrapped when found; after being advised of his constitutional rights, the defendant told the affiant that Pennisi had a key to the warehouse.

The affidavit is attached to the warrant issued by the magistrate and is referred to therein as being so attached. The warrant states that the magistrate examined the affiant under oath and was "satisfied that there is probable cause to believe that the named person has such property on his premises described in the attached affidavit." The warrant was served and duly returned to the magistrate's office with a list of items taken from the warehouse in the course of the search made pursuant to the warrant.

In the argument of the motion to suppress, counsel for the defendant directed the court's attention to the fact that the

affidavit, upon which the search warrant was issued, recited that the defendant voluntarily turned over to Captain Jackson the three gold colored drapes upon Captain Jackson's first visit to the warehouse. Counsel contended that the affidavit was insufficient as to this obtaining of the drapes in that it did not show by clear and convincing evidence that the defendant's "consent was voluntarily and specifically given and was not the result of actual or implied coercion." In this argument defendant's counsel did not deny that the officers' first visit to the warehouse was with the consent of the defendant. No evidence on that point was offered by the defendant either upon the hearing of the motion to suppress or when the drapes were offered in evidence.

Article 4 of Ch. 15 of the General Statutes, which relates to search warrants, was rewritten by Ch. 869, § 8, of the Session Laws of 1969, which became effective 19 June 1969, approximately one month prior to the issuance of the search warrant in question. As so rewritten, G.S. 15-25 authorizes any magistrate to issue a warrant to search for "evidence, or instrumentality of crime upon finding probable cause for the search." G.S. 15-26, as so rewritten provides:

> "*Contents of Search Warrant.*—(a) The search warrant must describe with reasonable certainty the person, premises, or other place to be searched and the contraband, instrumentality, or evidence for which the search is to be made.
>
> "(b) An affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant.
>
> "(c) The warrant must be signed by the issuing official and bear the date and hour of its issuance above his signature."

[5-7] It is not contended that there is any failure of the warrant here in question to comply with the requirements of paragraph (a) and (c) of the statute. The affidavit complies with the requirements of paragraph (b). A valid search warrant may be issued upon the basis of an affidavit setting forth information which may not be competent as evidence. *State v. Bullard*, 267 N.C. 599, 148 S.E. 2d 565, *cert. den.*, 386 U.S. 917. The affi-

davit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782; *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495; *State v. Bullard, supra.* The police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. *State v. Banks,* 250 N.C. 728, 110 S.E. 2d 322. Similarly, he may state in his affidavit reports made to him by competent experts, such as the personnel of the FBI laboratories, concerning their examinations of materials forwarded by him to them for such examination and report. In *Brinegar v. United States,* 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879, the Supreme Court of the United States said: "In dealing with probable cause * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

In *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, it was established that the Fourth Amendment to the Constitution of the United States forbids the admission in a criminal action, in a state court, of evidence obtained by an unreasonable search and seizure; i.e., a search made without a valid search warrant under circumstances requiring a warrant. That amendment provides that no search warrant shall issue "but upon probable cause, supported by oath or affirmation." As we said in *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376, *cert. den.,* 393 U.S. 1087, this was the law in North Carolina long before the Mapp decision. G.S. 15-27(a), as rewritten in 1969, provides: "No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial."

In *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, the Supreme Court of the United States dealt with questions concerning the Fourth Amendment requirements for obtaining a valid state search warrant. It said:

> "[W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing court will accept evidence of a less 'judicially competent or persuasive character than would have justi-

fied an officer in acting on his own without a warrant,' * * * and will sustain the judicial determination so long as 'there was substantial basis for [the magistrate] to conclude that [the articles searched for] were probably present.' * * *

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725, 78 ALR 2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [articles to be searched for] were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * * was 'credible' or his information 'reliable.' "

[7] Thus, there is no variance between the law of this State as declared by the decisions of this Court, above cited, and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States. The contention of the defendant that the search warrant in the present case was invalid upon its face due to the insufficiency of the affidavit of Captain Jackson is without merit.

At the hearing of the motion to suppress the evidence seized by the search pursuant to the search warrant, the defendant offered no evidence nor did his counsel deny, in his argument in support of his motion, Captain Jackson's sworn statement in his affidavit that the draperies, taken by him on his first visit to the warehouse, were "voluntarily turned over to" him by the defendant, the defendant "having invited police to accompany him to his warehouse" on that occasion. The defendant's sole contention in his argument of the motion to suppress the evidence was that the affidavit was insufficient upon its face, in that it did not set out any other facts showing that the defendant acted voluntarily on that occasion. Having before it this statement under oath by this police captain, not contradicted or denied, the court properly overruled the motion to suppress the evidence.

When the trial got under way, Captain Jackson was called by the State as its witness. He testified that the defendant, of

his own initiative, came to the police headquarters. He talked with Captain Jackson and Lieutenant Gibson "and while there he consented for [them] to go and look through his warehouse." He accompanied them as they searched the warehouse. At that point the defendant interposed his first objection to evidence as to what the officers found in the course of that search without a warrant.

[8, 9] Had there been no prior consideration of the validity of the searches of the warehouse, this objection would have necessitated an inquiry by the court, in the absence of the jury, to determine the validity of the search of the warehouse without a search warrant. Upon such *voir dire* hearing, the court should receive evidence and make findings of fact. The objection raised a preliminary question of fact for the determination of the trial judge, which it is his duty to resolve. *State v. Moore,* 240 N.C. 749, 83 S.E. 2d 912. See also *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, *cert. den.,* 386 U.S. 911. In this respect there is no distinction between the admissibility of a confession and the admissibility of evidence obtained by a search without a warrant. The determining fact in each of these instances is whether the confession or the consent to the search was given voluntarily and without compulsion by the officers.

If the first search without a warrant was a violation of the defendant's constitutional right to be free from an unreasonable search and seizure, the second search was also unlawful because the affidavit upon which the warrant was issued recited and was largely based upon the fruits of the first search. It is the defendant's contention that the search warrant and the evidence produced by the second search, which it purports to authorize, were unlawful and inadmissible because they were fruit of a poisonous tree. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L. Ed. 2d 441; *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L. Ed. 319. We, therefore, must consider the validity of the first search of the warehouse.

[10-12] The owner of the premises may consent to a search thereof and thus waive the necessity of a valid search warrant so as to render the evidence obtained in the search competent. *State v. Colson, supra; State v. Moore, supra.* To have such effect, the consent of the owner must be freely and intelligently

given, without coercion, duress or fraud, and the burden is upon the state to prove that it was so, the presumption being against the waiver of fundamental constitutional rights. *State v. Little,* 270 N.C. 234, 154 S.E. 2d 61. However, the warnings required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694, in order to make competent a confession made in custody, need not be given by officers before obtaining the consent of the owner to a search of his premises. *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25.

[13] When the defendant consented to the first search of his warehouse by Captain Jackson and Lieutenant Gibson, he was not under arrest or otherwise in custody. He was charged with no criminal offense. He, not the officers, sought the interview. There is no suggestion that his concern for the safety of his family stemmed from any action by or fear of the police. At the hearing of his motion to suppress the evidence seized in the second search of the warehouse, the defendant did not move for suppression of the evidence seized in the first search and offered no evidence to contradict the sworn affidavit of Captain Jackson that it was with his consent and that he voluntarily surrendered to the officers the three drapes then taken. Had there been such evidence he could then have offered it with no prejudice whatever to the presentation of his case. When, at the trial, he objected to the introduction in evidence of the fruits of the first search, he made no request for the examination of the witness on *voir dire* and gave no intimation of a desire to offer thereon evidence that his consent was other than voluntary.

[13-15] While, ordinarily, as above noted, an objection to the admission in evidence of the fruits of a search without a warrant is sufficient to require an inquiry by the court, in the absence of the jury, into the validity of the search, under the circumstances of this case, the law does not require the trial judge to interrupt the progress of the trial for such purpose. As Justice Branch said in *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753, "[O]rderly administration of justice demands that this rule [requiring a *voir dire* examination upon the interposing of an objection] be carefully applied so that planned, piecemeal defenses do not destroy certainty of punishment by causing the criminal courts to deteriorate into an endless series of *voir dire* hearings and mistrials." We, therefore, hold there was no error in the admission of the drapes obtained in the first search

of the warehouse and, consequently, the search warrant, valid upon its face, and the fruits of the search thereunder were not rendered invalid and incompetent by reason of the inclusion in the affidavit, upon which the search warrant was issued, of the statements concerning the finding of these drapes and their similarity to the one wrapped around the body of Pennisi.

Examination of Annette West

A material element of the State's case is its effort to establish that Pennisi was killed on Sunday, 15 June, shortly after 8 p.m. The State's evidence included testimony by Captain Jackson of a statement made to him by the defendant that the defendant talked to Pennisi between 7:30 and 8 p.m. on 15 June and that Pennisi then told the defendant he had a date with some woman that evening.

The defendant called as his witness Mrs. Annette West. She testified: She had known Pennisi since 1961; she saw him at her place of employment and "would see him after work on dates occasionally"; she saw him on dates on Tuesday and Friday nights of the week prior to 15 June; she talked with him on Sunday, 15 June.

[16] The defendant assigns as error the sustaining of numerous objections by the State to questions propounded to this witness by the defendant. Many of these related to the length of time during which she had been seeing Pennisi and to their actions on those occasions. These objections were properly sustained, the proposed testimony having no relevancy to the matter on trial, the character of Pennisi not being in issue. Evidence as to the general moral character of the deceased is not admissible in a prosecution for homicide. *State v. Hodgin,* 210 N.C. 371, 186 S.E. 495.

Pertinent questions related to the hour of the conversation on Sunday, 15 June, and to whether she talked with Pennisi by telephone on 17 June, two days after the date on which the State contends he was killed. Nothing else appearing, these questions were proper since the date and hour of Pennisi's death are material factors in the State's case. However, prior to these questions, the defendant was permitted to examine this witness in the absence of the jury upon these matters, and others. She then stated that the conversation on Sunday, 15 June, occurred in the afternoon and related to the making of

a date for Pennisi to pick her up at about 8 p.m., but he never came. On this *voir dire* examination, she also testified that she received a telephone call from a man on Tuesday, 17 June, but she "didn't catch the voice because [Pennisi] don't usually say anything like that" and, consequently, she terminated the telephone conversation. She acknowledged that she had previously told Captain Jackson that she "took" the person making the call on Tuesday to be Pennisi. The caller addressed her "Hi, Kid," Pennisi usually calling her "Kid."

[17, 18] The sustaining of the objections to the questions relating to the conversation on Sunday, 15 June, was not prejudicial to the defendant, since it occurred in the afternoon. On the contrary, had the witness been permitted to testify that Pennisi did not show up for the appointment at 8 p.m., this circumstance would have tended to strengthen the case for the State. The sustaining of the objections to the questions relating to the supposed telephone conversation on 17 June was not prejudicial to the defendant since the record shows the witness would have answered that she could not identify the caller on this date as Pennisi. On the contrary, her testimony would have been that while the caller addressed her as "Kid," the content of the conversation was so different from the customary conversation of Pennisi that she hung up the telephone. Far from being beneficial to the defendant, the jury might well have concluded from this testimony that someone was impersonating Pennisi so as to give the impression that he was still alive. There is no merit in this assignment of error.

Testimony Concerning Pennisi's Travel Plans

[19] Mrs. Pennisi testified, without objection, that Pennisi left their home at 6:55 p.m. on Sunday, 15 June, that he took no suitcase but carried a shaving kit only, that prior to his departure she had some discussion with him in which he referred to a business trip, and that he was planning to go on a business trip to Wilmington, Delaware. Thereafter, over objection, she was permitted to testify that she expected him to return on Monday and that he was going on this trip with the defendant to see about an investment that he had made in that area. Subsequently, without objection, she testified that she became worried when her husband did not return Monday night.

[20, 21] The defendant assigns the admission of all of this testimony as error. It was not error to admit that portion of it

to which no objection was interposed. *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839; Stansbury, North Carolina Evidence, 2d Ed., § 27. As to testimony that Mrs. Pennisi expected her husband to return on Monday, it is sufficient to note that, subsequently, she testified, without objection, that she was worried when he did not return Monday night and on the following day advised her neighbor that he had not returned. It is the rule in this jurisdiction that the benefit of an objection, seasonably made, is lost if thereafter substantially the same evidence is admitted without objection. *State v. Williams,* 274 N.C. 328, 336, 163 S.E. 2d 353; *Shelton v. Railroad,* 193 N.C. 670, 139 S.E. 232; *Smith v. Railroad,* 163 N.C. 143, 79 S.E. 433; Stansbury, North Carolina Evidence, 2d Ed., § 30.

[22] Having testified that her husband left the house at 6:55 p.m. on Sunday, 15 June, prior to which he had made reference to a business trip, the solicitor asked, "Who did he say he would take this trip with?" Over objection, she replied, "He was going with Mr. Gloyd Vestal." The solicitor then asked, "Where did he indicate that he and Mr. Vestal were going?" Over objection, she was permitted to testify, "That afternoon he said that he was going to Wilmington, Delaware, with Mr. Gloyd Vestal to see about an investment that he had made in that area." Of course, this testimony by Mrs. Pennisi as to her husband's travel plans was hearsay. The twofold basis for exceptions to the rule excluding hearsay evidence is necessity and a reasonable probability of truthfulness. As Professor Morgan has said in 31 Yale Law Journal 229, 231, "If it is to be admitted, it must be because there are some good reasons for not requiring the appearance of the utterer and some circumstance of the utterance which performs the functions of the oath and the cross-examination." See also, Wigmore on Evidence, 3rd Ed., §§ 1420-1423; Stansbury, North Carolina Evidence, 2d Ed., § 144.

The subsequent death of Pennisi does not, of itself, make these statements by him admissible. 29 AM. JUR. 2d, Evidence, § 674. It does, however, establish the first basis of an exception to the hearsay rule—necessity; *i.e.,* the unavailability of the declarant as a witness. The circumstances under which the statements were made supply the reasonable probability of trustworthiness. It is a matter of everyday experience that a man leaving his home, or his business establishment, for an out-of-town trip will, for domestic and business purposes, inform his

family or business associates as to his destination, traveling companion, purpose and anticipated time of return. Such statements customarily have no purpose other than the orderly arrangement of his domestic and business affairs and their proper handling in his absence. It is this circumstance which supplies the required probability of truthfulness.

These statements by Pennisi to his wife as he was preparing to leave the house are relevant to the prosecution of the defendant for his murder, since they, if true, show that Pennisi left the house to join the defendant on a trip to Wilmington, Delaware, concerning a business matter in which they were interested. The State had previously introduced evidence of a statement by the defendant to Police Officer Jenkins prior to the time Pennisi's body was discovered. According to this testimony, the defendant acknowledged that Pennisi had come to his home at approximately 7:30 p.m. on 15 June and had requested the defendant to go with him to New York in connection with some problems involving Pennisi's parents. The testimony of Mrs. Pennisi, as to the destination and purpose of the trip contemplated by the deceased, was relevant to the questions of motive and of whether the defendant had truthfully narrated the substance of his conversation with Pennisi when talking to the investigating police officer. It would, of course, be for the jury to determine which, if either, was the correct statement as to the destination and purpose of the trip.

In *Mutual Life Insurance Company v. Hillmon,* 145 U.S. 285, 12 S.Ct. 909, 36 L. Ed. 706, suit was brought on a policy of life insurance and was defended on the ground that the insured, Hillmon, was not dead but, pursuant to a conspiracy to defraud the insurer, had killed his traveling companion, Walters, and left his body to be found at their camp site. The United States Supreme Court, on appeal from a judgment for the plaintiff-beneficiary, granted a new trial for error in excluding, as evidence, letters written by Walters to his sister and his fiancee, in which he wrote, "I expect to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheep trader, for Colorado or parts unknown to me." The Court said: "[W]henever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party."

In the Hillmon case, *supra,* the Court quoted with approval from the opinion of Chief Justice Beasley, speaking for the New Jersey Court of Errors and Appeals, in *Hunter v. State,* 40 N.J. Law 495. In that case, Hunter was indicted for the murder of Armstrong. The Court held there was no error in this admission of an oral statement by Armstrong to his son, in Philadelphia on the afternoon preceding the night of his murder, and a letter, written at the same time to his wife, each stating that Armstrong was going with Hunter to Camden on business, Chief Justice Beasley said:

> "In the ordinary course of things, it was the usual information that a man about leaving home would communicate, for the convenience of his family, the information of his friends, or the regulation of his business. * * * If it be said that such notice of an intention of leaving home could have been given without introducing in it the name of Mr. Hunter, the obvious answer to the suggestion, I think, is that a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company?"

In *State v. Journey,* 115 Conn. 344, 161 A. 515, the defendant was on trial for the murder of one Buda, whose wife was permitted, over objection, to testify that when her husband left the house on the morning of the day of his death, he said he was going to work for Journey. In holding this was not error the Court said:

> "A declaration indicating a present intention to do a particular act in the immediate future, made in apparent good faith and not for self-serving purposes, is admissible to prove that the act was in fact performed. It is admissible, not as a part of the *res gestae,* but as a fact relevant to a fact in issue."

To the same effect are: *People v. Alcalde,* 24 Cal. 2d 177, 148 P. 2d 627 (murder victim's statement that she was going out with the defendant on the evening of her murder); *Smith*

v. State, 148 Ga. 467, 96 S.E. 1042 (homicide victim's statement to his wife, a short time before leaving home, that he and the defendant were "going over to the hollow to hide a still"); *People v. Fritch,* 170 Mich. 258, 136 N.W. 493 (statement by victim of murder by abortion of her intent to submit to such operation); *Commonwealth v. Trefethen,* 157 Mass. 180, 31 N.E. 961 (statement by deceased of her intention to commit suicide held admissible though not part of the *res gestae).*

In an exhaustive annotation in 113 A.L.R. 268, it is said at pages 273, 275 and 288, with numerous supporting citations:

> "Evidence of the statements of a person since deceased with reference to the purpose or destination of a trip or journey, no matter how short, that he was about to make, has been admitted as competent in a considerable number of actions, both civil and criminal in character. * * *
>
> "In 3 Jones on Evidence, § 1220, it is said that the declarations of a person when starting out on a journey, as to the destination or purpose of such journey, have sometimes been held admissible as characterizing the journey and as part of the *res gestae.* And this theory of *res gestae* is by far the most popular theory of admission, though possibly not as well reasoned as the theory that the declarations are admissible as original evidence, as an exception to the hearsay rule. * * *
>
> "The theory of admission which has the approval of eminent text-writers is that statements made by a person since deceased, with reference to the purpose or destination of a journey or trip that he was about to take, are admissible as original evidence under an exception to the hearsay rule allowing proof of intention or motive."

Treatises and other writings supporting the admission of such statements by deceased persons as an exception to the hearsay rule, independent of the *res gestae* theory, include: Wigmore on Evidence, 3rd Ed., § 1725; McCormick on Evidence, § 270; Wharton on Criminal Evidence, § 289; Stansbury, North Carolina Evidence, 2d Ed., § 162; Professor Morgan's article in 31 Yale Law Journal 229, 233; Barrington, Note, 40 N. C. Law Review 812.

In *Gassaway v. Gassaway & Owen, Inc.*, 220 N.C. 694, 18 S.E. 2d 120, and in *Little v. Brake Co.*, 255 N.C. 451, 121 S.E. 2d 889, this Court held that statements by a deceased person as to the purpose and destination of the trip, upon which he was killed in an automobile accident, were not admissible in evidence in a proceeding under the Workmen's Compensation Act because not part of the *res gestae*.

In the Gassaway case, *supra*, the statement was made the night before the start of the trip and was heard by the wife and daughter of the deceased. Justice Barnhill, later Chief Justice, said the statement was not part of the *res gestae* because not connected with the immediate departure. The question in the Gassaway case, however, was whether the declarant was traveling to attend to his company's business as an employee within the protection of the Act or as an executive officer not within the protection of the Act. The statement in question threw no light whatever on that matter. In the Little case, Justice Parker, later Chief Justice, said the statement of the deceased in a telephone call to his wife, approximately half an hour before he left his motel to start on the journey which ended in the fatal accident, was not "so interwoven into his departure that it is vested with the significance of a fact, so as to constitute a part of the *res gestae*," and was properly excluded. However, as shown in the opinion, the statement in question did not disclose where the customer, on whom the declarant intended to call, resided, and there was other evidence to indicate that he may already have been visited before the accident and that, at the time he was killed, the deceased was driving further to visit relatives.

In *Coley v. Phillips*, 224 N.C. 618, 31 S.E. 2d 757, this Court said:

> "For a declaration to be competent as part of the *res gestae*, at least three qualifying conditions must concur: (a) The declaration must be of such *spontaneous* character as to be a sufficient safeguard of its trustworthiness; that is, preclude the likelihood of reflection and fabrication; * * * (b) it must be *contemporaneous* with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom * * * ; and (c) must have some *relevancy* to the fact sought to be proved. * * *

"No rule of universal application can be devised as to the time element; but the principle of relevancy to the fact sought to be proved by it admits of no relaxation." (Emphasis added.)

More specifically with reference to statements as to travel plans, it is said in an annotation in 163 A.L.R. 15, at page 21:

"A class of declarations which are often remote from the accident, yet so linked with it in continuity of action and proof as to be termed a part of the *res gestae,* are those which fall under the principle that if one, *when about to depart on a journey,* declares his intention as to his course of travel, his purpose, or his destination, the declaration is admissible as evidence that he followed that intention or purpose. Strictly speaking, the statement may be said to be part of the *res gestae of the departure,* but it is usually spoken of as part of the *res gestae* of the accident in general. * * *

"Under this general principle, the declaration, to be admissible, must have been made *at the time of departure* or *in preparation* therefor." (Emphasis added.)

[19, 23] In the present case, the statement by Pennisi was part of his preparation for departure. The nature of the statement supplies the probability of truth, which is the only function of the element of spontaniety mentioned in *Coley v. Phillips, supra.* We see no plausible basis for holding such a statement admissible if shouted back to the wife as the car leaves the driveway, but inadmissible if told to her at the dinner table or while packing the traveler's suitcase. The sound basis for its admission is not the *res gestae* doctrine, but the exception to the hearsay rule permitting the admission of declarations of a decedent to show his intention, when the intention is relevant per se and the declaration is not so unreasonably remote in time as to suggest the possibility of a change of mind.

In *State v. Dula,* 61 N.C. 211, the appeal was from a conviction of murder. The body of the deceased was found, several weeks after her disappearance, near "the Bates place." A witness was permitted to testify that, as the deceased rode by on the day she disappeared, she told the witness "she was on her

way to the Bates place; that the prisoner had returned just before day, was going another way and she expected to meet him at the Bates place." Chief Justice Pearson said: "The conversation between Mrs. Scott and the deceased ought not to have been admitted as evidence. At all events, no part of it except that the deceased said she was going to the Bates place." The reason given was that her statement as to where the defendant was and that she expected to meet him could not be "considered a part of the acts of the deceased;" *i.e.*, not a part of her act of riding along the road. On retrial, the statement, as to the destination of the deceased only, was admitted but, thereafter, the State withdrew it and the jury was instructed to disregard it. On the second appeal, 61 N.C. 440, it was said, "The evidence was admissible as part of the act;" *i.e.*, the act of the deceased in riding along the road.

The Dula case is distinguishable from the one now before us. *First,* the declaration of the deceased in that case as to the time of Dula's return and as to the route by which Dula was traveling to the Bates place has no counterpart in the statement by Pennisi in the case before us. *Second,* as to the declaration that the deceased expected to meet Dula at the Bates place—the portion of the statement relevant to the matter before us—the statement was made to an acquaintance casually passed en route. There was no showing of any reason for making it which would supply a reasonable probability of truthfulness. The statement by Pennisi, on the contrary, was made to the witness, his wife, under circumstances, which in and of themselves, supply a reasonable probability of truth.

It is the normal, natural, customary routine for a man leaving his home, or office, upon an out-of-town trip to inform some member of his family, or an employee or business associate, of where he is going, with whom and when he will return. Of course, the particular declarant on the particular occasion may falsely state these matters to his wife or to his business associate. The credibility of his statement on the particular occasion is always open to question, but that is a question for the jury. The fact that in the overwhelming preponderence of such instances the statement is true, because it has no purpose or significance except to promote the orderly conduct of the declarant's domestic or business affairs, supplies that reasonable probability of truth in the particular instance which justifies

the Court in permitting the jury to hear the statement and determine its truth or falsity.

The Dula decision was handed down by this Court more than a century ago. None of the authorities cited above was then in existence. The only exception to the hearsay rule discussed by our distinguished predecessors in their consideration of the Dula case was *res gestae*. We do not now reject the precedent of Dula insofar as the *res gestae* exception is concerned. We hold the testimony as to the statement by Pennisi, now under discussion, admissible under an exception to the hearsay rule developed and accepted, by other courts and by the eminent scholars in the field of Evidence cited above, since the Dula case was decided.

[24] No branch of the law should be less firmly bound to a past century than the rules of Evidence. The purpose of the rules of Evidence is to assist the jury to arrive at the truth. Exceptions to the hearsay rule, evolved by the experience and wisdom of our predecessors for that purpose, should not be transformed by us into rigid molds precluding all testimony not capable of being squeezed neatly into one of them. The Dula case can no longer be deemed authoritative in the factual situation before us.

The admissibility of Mrs. Pennisi's testimony as to her husband's statement concerning *his* travel plans is not predicated upon Vestal's contrary statement to the investigating police officer, though it is relevant to that matter also. Her testimony would have been admissible had Vestal made no statement whatever. Pennisi's statement, so recounted by her, was admissible to show that *Pennisi* had the intent to go to Wilmington to see about an investment he had made in that area, that *Pennisi* had the intent to go on that trip with Vestal, that *Pennisi* left home on that mission. It is competent evidence indicating that for such purpose Pennisi reached and entered into the company of Vestal on the night the State's evidence tends to show he was killed in Vestal's warehouse. It does not show, presumably was not offered to show and certainly would not be competent to show, that *Vestal* intended to go to Wilmington or set out upon such a trip.

It is immaterial that Pennisi never reached Wilmington. In this case his arrival there is not the fact at issue. What is at

issue is his association with Vestal that evening in Greensboro. The statement is relevant upon that matter and the circumstances under which it was made clothe it with a sufficient probability of truthfulness to permit the jury to hear it and to determine its truth or falsity. Consequently, there was no error in permitting Mrs. Pennisi to testify as to Pennisi's travel plans.

Consequently, there was no error in permitting Mrs. Pennisi to testify as to her husband's statement concerning his plan to travel with the defendant to Wilmington, Delaware, to see about an investment.

Admission of Financial Documents and Testimony Relating Thereto

[25] Over objection in each instance, the State was permitted to introduce in evidence the following exhibits:

No. 23, purporting to be a note made by the defendant to Pennisi for $70,000, due 15 January 1968;

No. 24, a "Financing Statement," purporting to be signed by the defendant to secure an undesignated obligation from him to Pennisi;

No. 25, a chattel mortgage, purporting to be given by the defendant to Pennisi to secure Exhibit 23;

No. 26, a document purporting to be signed by the defendant and to be an assignment by him to Pennisi of his rights under a contract with S. S. Kresge Company for the security of Exhibit 23;

No. 27, a note for $40,879.37, payable to Pennisi, dated 12 August 1968, due "October 1968," purporting to be signed by the defendant;

No. 28, a check signed by Pennisi, payable to the defendant, in the amount of $70,000, stating it is "for LOAN, due and payable Jan. 15, 1968" (see Exhibit 23), bearing the bank stamp "PAID" and purporting to be endorsed by the defendant and by T. Hatzis;

No. 29, a check signed by Pennisi, dated 22 January 1968, payable to the defendant, in the sum of $15,000, bearing the bank stamp "PAID" and purporting to be endorsed by the defendant;

No. 30, a check signed by Pennisi, dated 16 July 1968, payable to the defendant, in the amount of $50,000, bearing the bank stamp "PAID" and purporting to be endorsed by the defendant.

Attorney Julius Dees, Jr., testified for the State that he represented Pennisi and, at his request, drafted Exhibits 23 through 26 and, after Pennisi's disappearance, recorded No. 24 and No. 25 at the request of Mrs. Pennisi. He testified that they were not executed in his presence. Mr. Walter Faison, trust officer of North Carolina National Bank, which bank is co-executor of the Pennisi estate, testified that all of these exhibits, 23 through 30, were in the possession of the bank as such executor. After the exhibits were admitted in evidence, Mrs. Pennisi testified that Nos. 28, 29 and 30 were signed by Pennisi. No witness testified as to the genuineness of any purported signature of the defendant on any of these exhibits.

Police Officer Jenkins testified to an interview which he had with the defendant between Pennisi's disappearance and the discovery of his body. He testified that in this interview the defendant told him of various transactions in which he and Pennisi had participated, that he had "borrowed $50,000 at a time from Mr. Pennisi, but that at the present he was settled up with Mr. Pennisi except for" $6,000 which he owed Pennisi for a Lincoln Continental automobile. Officer Jenkins further testified that in this interview the defendant told him of his conversation with Pennisi between 7:30 p.m. and 8 p.m. on Sunday, 15 June, the date of Pennisi's disappearance, and that "Mr. Pennisi was upset over the title of a Lincoln automobile, and that he wanted $6,000 that Vestal owed him," and that he would pay Pennisi "even if he had to borrow the money from Mr. Tom Hatzis of Wilmington, Delaware," a mutual friend of the defendant and Pennisi.

These several documents were relevant to the State's contention that Pennisi and the defendant had been engaged in business transactions involving large sums of money and that the motive for Pennisi's murder grew out of those transactions. There is, however, no evidence in the record identifying the purported signature of the defendant upon any of these documents. The mere fact that his name appears on each document and the fact that the checks naming him as payee were paid by the drawee bank do not constitute proof of the genuineness

of his several signatures or proof that any of these documents actually passed through the defendant's hands. In the absence of such identification of these exhibits as having been signed or possessed by the defendant, their admission in evidence was error. *State v. Breece,* 206 N.C. 92, 173 S.E. 9; Strong, N. C. Index 2d, Criminal Law, § 80. Their admission in evidence was substantially prejudicial to the defendant. The fact that Pennisi's signatures upon Exhibits 28, 29 and 30 were not properly identified until after the exhibits were introduced in evidence would not have made their admission reversible error. *State v. Franks,* 262 N.C. 94, 136 S.E. 2d 623.

[26] The documents being incompetent, it was error to permit the witness Faison to testify as to the contents thereof and as to the fact that the defendant's name (not his genuine signature) appeared upon the checks as payee and as endorser.

[27] There was no error in the admission of the testimony of the witness Hatzis concerning his own business transactions with the defendant and Pennisi, this evidence being relevant to the State's contention as to the motive for the murder. The State had introduced, without objection, two financial statements given by Pennisi, each of which purported to show Pennisi held a note made by Delaware State Wholesale Florist (Hatzis' trade name) of Wilmington, Delaware, due 15 June 1969 (actually due the following day, 15 June being Sunday). This is the date on which the State contends Pennisi left his home with intent to go with the defendant to Wilmington, Delaware, to see about an investment. It was not error to permit Hatzis to testify that he did not owe Pennisi any sum whatever. This evidence was relevant to the State's contention that there was a controversy about the existence of the alleged indebtedness, and the purpose of Pennisi's trip to Wilmington in the company of the defendant was with reference to this controversy. Such evidence was clearly relevant to the question of motive for Pennisi's murder. Furthermore, the defendant recalled Hatzis as his own witness and, as such, had him testify that there was never any money due from Hatzis to either Pennisi or the defendant. Had there been any error in the testimony to this effect by Hatzis, when under interrogation by the State, the defendant lost the benefit of such error through introducing evidence to the same effect. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353; Stansbury, North Carolina Evidence, 2d Ed., § 30.

Admission of Photographs in Evidence

[28] Over objection, the State introduced in evidence five photographs of Pennisi's body while floating in Lake Gaston and immediately after it was pulled ashore, still wrapped in chains and in the gold drape. The defendant contends that these are inflammatory and were needlessly placed in evidence, since the defendant had offered to stipulate that the body was that of Pennisi and that the cause of his death was head injuries as contended by the State. The photographs were properly authenticated and were introduced for the sole purpose of illustrating the testimony of the authenticating witnesses. There was no error in admitting them for this purpose. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10. These exhibits were not excessive in number.

Admission of Expert Opinion Testimony

[29] The State introduced the testimony of Dr. Chapman, Assistant Chief Medical Examiner for the State of Virginia, who performed an autopsy on the body of Pennisi and who, over objection, testified as to his opinion concerning the probable date of death and the probable lapse of time between the eating by the deceased of corn, found in his stomach, and the death. There is no merit in the defendant's objection to the opinion testimony of this witness. The record shows that the defendant stipulated that he was an expert "doctor, physician and pathologist and forensic pathologist." The doctor's testimony as to his qualifications would have been sufficient to support such finding had there been no stipulation. His examination of the body of Pennisi was sufficient to serve as a basis for his opinion as to the date and time of death. *State v. Bright,* 237 N.C. 475, 75 S.E. 2d 407.

[30] The State also called as its witness Frederick J. Wallace, who testified that he has been a Special Agent for the Federal Bureau of Investigation since October, 1963, and, as such, conducts microscopic examinations and comparisons of hairs and fibers at the FBI Laboratory, that he has conducted thousands upon thousands of such examinations, has testified as an expert in this field numerous times and that he received over a year of intensive training in the FBI Laboratory, under qualified examiners of the Hairs and Fibers Unit, until such time as it was recognized that he was competent to conduct examina-

tions on his own. The court found Mr. Wallace to be an expert in the field of analyzing and comparing hairs and fibers. The defendant assigns this finding as error. There is no merit in this contention.

[31, 32] The court's finding that a witness is qualified as an expert will not be disturbed on appeal if there is evidence to show that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject as to which he testifies. *Paris v. Aggregates, Inc.*, 271 N.C. 471, 157 S.E. 2d 131; *State v. Moore*, 245 N.C. 158, 95 S.E. 2d 548; Stansbury, North Carolina Evidence, 2d Ed., § 133. There is in this record substantially more evidence of the expertness of Mr. Wallace than was present in the case of *State v. Mobley*, 273 N.C. 471, 160 S.E. 2d 334, cited by the defendant. Consequently, there was no error in permitting this witness to testify as to his findings and opinions concerning the similarity of the drapes found in the defendant's warehouse with that found upon the body of Pennisi, or as to the similarity of the hairs found in the warehouse and in the trunk of the defendant's automobile with hairs taken from the head of Pennisi's body.

[33] The State also called as its witness Frank DeRonja, a Special Agent for the Federal Bureau of Investigation, assigned to the Physics and Chemistry Section of the FBI Laboratory, his duties being the making of examinations of metals and metal products. He was found to be an expert in metallurgy and as to this finding the defendant interposed no objection. Mr. DeRonja testified that he examined the hooks and weights, found attached to or in the drape wrapped around Pennisi's body when it was taken from the lake, and the hooks and weights, attached to or found in the drapes taken from the defendant's warehouse. He testified that machine markings on these showed the hooks on all of the drapes were made by the same machines and that the weights on all of them were of the same size, type and construction. Upon cross-examination, he acknowledged that he has drapery hooks in his own home. The court sustained objections to questions by defendant's counsel as to whether he had examined the hooks on the draperies in his own home to see whether they bore the same characteristics and marks as those upon the drapes here in question. The defendant assigns this as error, contending that the court there-

by unreasonably curtailed his right of cross-examination. There is no merit in this assignment.

Admission in Evidence of Note from Pennisi Found in Automobile

[34] Over objection, the State was permitted to introduce in evidence a note found between Pennisi's disappearance and the discovery of his body in Lake Gaston. It was found by a neighbor on the front seat of a Ford automobile owned by Pennisi. Pennisi's son had driven this automobile in the past but there was no evidence that anyone had driven it subsequent to Pennisi's disappearance or that Pennisi himself had ever driven it. Pennisi left home on 15 June in another automobile owned by him. At the time the note was discovered, Mrs. Pennisi, the finder and two other neighbors, were riding in the automobile. The driver picked up the envelope from the front seat. It contained another envelope, in which was the note.

There was no evidence as to who placed the envelope and note in the car or as to how long it had been there. The outer envelope bore the printed return address of Pennisi's insurance agency. On its face, in the space customarily used for the name and address of the intended recipient of a letter, appeared the typed name, "GLOYD VESTAL," the hand printed word, "IMPORTANT," and the message, handwritten and hand printed, "Call me 27 26167 NOW," this being Pennisi's telephone number. The inner envelope bore the single word, "Vestal," and the names "Penny & Rosie," which latter names had been marked through. The note, contained in the inner envelope, was written upon a leaf torn from Pennisi's year book for 1969. The note was a mixture of handwriting and hand printing. Both the handwriting and the hand printing were identified as that of Pennisi. It read:

> "I called Tom on June 12 at 11 a.m. He told me you've already collected my money. I want it this morning. Not tomorrow. I haven't slept all nite. So you better not come out with another lie on your mouth. You better call me right away before I get real mad. I had this put under your door at 3:30 a.m. on June 13th."

In the note the word "morning" is underlined four times and the word "mad" is underlined three times.

It is apparent that the statement in the note that the writer had it placed under the defendant's door was written in anticipation that this would be done and the messenger, instead, left it on the seat of the car. There is nothing in the record to indicate that the defendant received, saw or knew of the existence of the note. In his interview with Captain Jackson, above mentioned, he stated that he had talked to Pennisi on Saturday, 14 June, and had driven down to Myrtle Beach, South Carolina, that afternoon, returning to Greensboro on Sunday, 15 June, about 7 p.m., shortly before his conference with Pennisi in the latter's automobile, parked in front of the defendant's residence.

The relevance of this note to the State's contention as to the motive for the murder of Pennisi is apparent. From it an inference could be drawn that Pennisi had talked to Thomas Hatzis by telephone on 12 June with reference to the $245,000 note above mentioned and that Hatzis had told him the defendant had already collected Pennisi's money, that Pennisi had concluded the defendant had told him some falsehood about the matter and was demanding his money immediately from the defendant. It could be inferred further that Pennisi was angry with and suspicious of the defendant and was insisting that the defendant go with him to Wilmington, Delaware, to confer with Hatzis about this transaction, which trip the defendant did not desire to take. The record shows that the solicitor argued substantially this in his speech to the jury. Unquestionably, the introduction of this note into evidence was prejudicial to the defendant.

Obviously, the note is hearsay, being the extra-judicial statement by Pennisi, offered to prove the truth of its contents; that is, to prove the existence of facts which would justify resentment on the part of Pennisi toward the defendant and a state of mind on the part of Pennisi which, in their conversation on Sunday evening, 15 June, could have caused him to threaten the defendant in such manner as to cause him to desire the death of Pennisi. Indeed, it is double hearsay, being Pennisi's extra-judicial statement as to what "Tom" had told him. *Timber Co. v. Yarborough,* 179 N.C. 335, 339, 102 S.E. 630.

The admission of this note into evidence cannot be justified on the theory that it was a threat communicated to the defendant, for there is no indication in the record that the defendant ever saw it or knew about it. It can be regarded only

as an indication of Pennisi's state of mind, which is not shown to have been communicated to the defendant. Prior to the discovery of Pennisi's body in Lake Gaston, the defendant had stated to Police Officer Jenkins that at the time of his conversation with Pennisi on Sunday, 15 June, Pennisi "was upset over the title of a Lincoln automobile, and that he wanted $6,000 that Vestal owed him." This does not, however, indicate that the defendant knew of the note found in the Pennisi automobile, or of Pennisi's claim against Hatzis.

What the State is here undertaking to do is to use a statement by Pennisi to show Pennisi's state of mind and, from that, to draw an inference that Pennisi, in some other manner, communicated to the defendant this state of Pennisi's mind and, upon that supposition, to infer the formation by the defendant of a determination to kill Pennisi. The use of a written statement by the deceased, uncommunicated to anyone, as the basis upon which to build first a supposition of another, unproved communication with the defendant and then to erect, upon that supposition, an inference as to the defendant's state of mind carries the superstructure beyond limits supported by that degree of credibility which is required for an exception to the hearsay rule. See: *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670; 29 AM. JUR. 2d, Evidence, § 161. We, therefore, hold that it was prejudicial error to admit this note in evidence.

Miscellaneous Objections to Evidence

[35] The defendant assigns as error that the court permitted Maurice Miller to testify, over objection, that when he visited Pennisi in the latter's home about 6 p.m. on Sunday, 15 June, Pennisi discussed, with Miller, Pennisi's business relations with the defendant. The witness did not state the nature of that discussion. He had previously testified, without objection, that Pennisi had discussed with the witness his business relations with the defendant on several occasions. In view of this testimony and the testimony of Captain Jackson and Police Officer Jenkins as to their interviews with the defendant, in which the defendant related in detail many business transactions with Pennisi, the admission of Miller's general statement that on Sunday, 15 June, Pennisi discussed, with Miller, his business relations with the defendant was not prejudicial.

[36] The defendant assigns as error the admission, over objection, of Ethel Emerson's testimony that her own personal feel-

ing was that the defendant had "moved back" with his wife "because it would make a better show." The conclusion of the witness as to the defendant's reason for returning to his home was not competent. *Wood v. Insurance Co.*, 243 N.C. 158, 90 S.E. 2d 310; *State v. Cuthrell*, 233 N.C. 274, 63 S.E. 2d 549; Stansbury, North Carolina Evidence, 2d Ed., § 124. Nevertheless, in view of Captain Jackson's testimony concerning the defendant's own statements to him, in the presence of Mrs. Vestal, as to his associations with "Ethel" and Gail Hoyle, plus others unnamed, the statement in question by this witness cannot be deemed substantially prejudicial to the defendant's general character in the eyes of the jury.

The defendant assigns as error the admission, over objection, of the testimony of Lieutenant Gibson to the effect that Mrs. Stanley and her daughter, Miss Cox, were shown a number of pictures, from which they identified one of the defendant's white Cadillac as a picture of the car they had seen in the vicinity of the defendant's flower shop at approximately 8 p.m. on Sunday, 15 June, and that, thereafter, while riding with him, they identified the defendant's car, then meeting them in a line of traffic. Mrs. Stanley and Miss Cox had previously testified that they saw a white Cadillac in the vicinity of the defendant's flower shop on Sunday, 15 June, at a time identified as approximately 8 p.m. Mrs. Stanley had testified also that, subsequently, while riding with Lieutenant Gibson and her daughter, she saw and identified this car, and pointed it out to Lieutenant Gibson, as they met it on the highway. The testimony of Lieutenant Gibson, to which the defendant objected, was sufficiently corroborative of the testimony of Mrs. Stanley to justify its admission. See *State v. Brown*, 249 N.C. 271, 106 S.E. 2d 232.

There is no merit in any of these assignments of error.

Exceptions to the Charge to the Jury

[37-39] Since there must be a new trial for the errors above noted in the admission of evidence, it is not necessary to discuss in detail the assignments of error relating to the charge to the jury. We have examined these and find no error therein. The court gave, in substance, all instructions requested by the defendant. There was no request that the term "reasonable doubt" be defined and, in the absence of such request, the failure to include a definition of the term in the charge was not error.

State v. Potts, 266 N.C. 117, 145 S.E. 2d 307; *State v. Browder,* 252 N.C. 35, 112 S.E. 2d 728. None of the alleged errors in the court's statement of the contentions of the State and of the defendant were called to the attention of the court so as to afford it an opportunity for correction. *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477. There being no evidence in the record to sustain a verdict of manslaughter, it was not error for the court to omit manslaughter from the possible verdicts which the jury might return. *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194; *State v. Summers,* 263 N.C. 517, 139 S.E. 2d 627; Strong, N. C. Index 2d, Criminal Law, § 115.

Other Assignments of Error

The remaining assignments of error brought forward in the defendant's brief are either formal or relate to matters which are unlikely to arise upon the retrial of the case and, therefore, need not be discussed.

For the errors above noted in the admission of the State's Exhibits 23 to 30, inclusive, and the note found in the Pennisi automobile, the State's Exhibits 93, 94 and 95, there must be a new trial.

New trial.

Chief Justice BOBBITT concurring in result.

I agree that the admitted circumstantial evidence, when considered in the light most favorable to the State, was sufficient to withstand defendant's motion for judgment as in case of nonsuit and to warrant submission of the first degree murder charge as well as the lesser included offenses of second degree murder and manslaughter.

I agree also that the admission in evidence of the note and envelopes found in a Pennisi car between the date of Pennisi's disappearance (June 15th) and the date his body was found in Lake Gaston (June 21st) was prejudicial error and, standing alone, is sufficient to require a new trial. The facts with reference thereto are set forth in the majority opinion. Suffice to say, the contents of Pennisi's uncommunicated written statements concerning his relationship with defendant were properly rejected as hearsay. The effect of the erroneous admission thereof was to allow Pennisi to testify at trial through the medium of his identified writings.

I disagree with that portion of the majority opinion which holds competent all of the testimony of Mrs. Pennisi as to what Pennisi told her on Sunday, June 15th, and in doing so undertakes to approve generally an exception to the hearsay rule heretofore unrecognized in this jurisdiction and which, in my opinion, is wholly inapplicable to the present factual situation and portends dangerous consequences.

The question here is whether Pennisi should have been permitted to testify through the medium of his wife's testimony concerning his plans for Sunday, June 15th. Admittedly, this is hearsay testimony. In my view, such testimony should be admitted only under the most compelling circumstances and then only under strict limitations.

The general rule the majority opinion seeks to establish is stated and approved in *State v. Journey,* 115 Conn. 344, 161 A. 515 (1932), where Journey appealed from his conviction for murder in the first degree. The widow of Buda, the deceased, when asked on direct examination what her husband said when he left home the morning he died, was permitted to testify over the defendant's objection "that he said he was going to work for Journey." Later that day, Buda's body was found in the ruins of an old barn on abandoned property. The evidence was that his death had been caused by gunshot wounds, not by burning. There was circumstantial evidence tending to show that Buda and the defendant had been together that morning. *In addition,* the evidence included testimony that defendant admitted to officers "that he had killed Buda, but had no good reason for doing so." A new trial was awarded on the ground there was no evidence of premeditated murder.

With reference to the admission of the widow's testimony as to Buda's declarations, the court said: "The existence of a plan or intention to do a thing is relevant to show that the act was probably done as planned. The plan or intention, being a condition of mind, may be evidenced, under an exception to the hearsay rule, by the person's own statement as to its existence. *A declaration indicating a present intention to do a particular act in the immediate future, made in apparent good faith and not for self-serving purposes, is admissible to prove that the act was in fact performed.* It is admissible, not as a part of the *res gestae* but as a fact relevant to a fact in issue. (Citations omitted.) A fact in issue in the case was whether Buda was in the company of the accused on the morning in question. His

plan or intention to go to his house was a fact relevant to a fact in issue, and his own declaration that such was his intention was admissible in proof of such relevant fact." (My italics.)

In accord with Journey, other cases cited in the majority opinion hold that such declarations of a present intention to do a particular act in the immediate future are admissible *to prove that the act was in fact performed.*

An evaluation of the rule stated in the quoted excerpt from *State v. Journey, supra,* will be set forth below. Whatever its merits, the rule does not apply in the present factual situation.

When first examined, Mrs. Pennisi testified that on Sunday, June 15th, Pennisi was planning to leave that evening at six o'clock to go to Wilmington, Delaware, on a business trip; that, "around 5 o'clock," he received a phone call and, as a result thereof, "(t)he time he was to leave changed"; that at 6:55 he left the house, "went out one door and came back in another and got his raincoat . . . and then he left again"; and that he took with him a shaving kit but no suitcase.

Later, Mrs. Pennisi, upon recall for further testimony, was permitted to testify, over defendant's objections, that Pennisi, before leaving the house on Sunday, June 15th, said that he was going on a business trip "with Mr. Gloyd Vestal"; that during the previous week she and Pennisi had discussed this trip "(s)everal times"; and that during the afternoon of that day he said he was going to Wilmington, Delaware, with "Mr. Gloyd Vestal to see about an investment that he had made in that area."

Immediately after Mrs. Pennisi's testimony upon recall, the State offered the testimony of Captain W. H. Jackson, an investigating officer, who testified to his conversation with defendant in Jackson's office on *July* 14, 1969. Jackson testified, *inter alia,* that defendant told him that on Saturday, June 14th, Pennisi had come by and talked with him, saying "that he was having trouble with his brothers and his father in New York and wished (Vestal) to go there with him"; that Vestal then agreed to make the trip to New York with Pennisi; that Vestal telephoned Pennisi later and told him he could not make the trip; that on Sunday, June 15th, about 8:00 p.m., Pennisi drove up in front of defendant's home; and that defendant got in the car with Pennisi and they talked "about various things," Pen-

nisi stating, *inter alia,* that he would not be going to New York until the following day.

The *fact* that Pennisi told his wife he was going to Wilmington, Delaware, on a business trip with no luggage other than a shaving kit would be competent to explain (1) why she was not disturbed by Pennisi's absence until after he failed to come home when expected, that is, on the night of Monday, June 16th, and (2) why she waited until Wednesday, June 18th, before she reported Pennisi's absence to the Greensboro Police Department.

The State contends, and its evidence tends to show, that Pennisi was killed in Greensboro on the night of Sunday, June 15th. Whether Pennisi went to Wilmington, Delaware, on Sunday, June 15th, for any purpose, with or without defendant, *was not a fact in issue.* The testimony as to what Pennisi told his wife was not offered to prove that Pennisi *went* to Wilmington, Delaware, on Sunday, June 15th. The impact of this testimony was to show that defendant's statements to Captain Jackson as to a proposed trip with Pennisi *to New York* and *the purpose thereof* was in conflict with Pennisi's statements to his wife as to a proposed trip with Vestal to Wilmington, Delaware, and *the purpose thereof.* In my opinion, the statements attributed to Pennisi by his wife were not competent to show the falsity of the conflicting statements attributed to defendant by Captain Jackson and the admission thereof under the circumstances was prejudicial error.

Whatever is said in this case concerning the rule stated in the quoted excerpt from *State v. Journey, supra,* must be considered *dicta* in later cases involving factual situations in which that rule might be pertinent. However, the approval of that rule in the majority opinion impels me to consider it on its merits and in the light of its conflict with our decisions.

Decisions cited in the majority opinion, in addition to *State v. Journey, supra,* include *Mutual Life Ins. Co. v. Hillmon,* 145 U.S. 285, 36 L. Ed. 706, 12 S. Ct. 909 (1892); *Hunter v. State,* 40 N.J.L. 495 (1878); *Commonwealth v. Trefethen,* 157 Mass. 180, 31 N.E. 961 (1892); *People v. Alcalde,* 24 Cal. 2d 177, 148 P. 2d 627 (1944).

In Hillmon, a much discussed decision (see Maguire, The Hillmon Case—Thirty-Three Years After, 38 Harvard Law Re-

view 709 *et seq.),* the insurance companies, as a defense to actions on the policies to recover death benefits, asserted that Hillmon, the insured, was not dead but was alive and in hiding. Decision turned upon whether the body found at Crooked Creek on the night of March 18, 1879, was the body of Hillmon, as asserted by plaintiff, or the body of Walters, as asserted by the defendants. Much conflicting evidence was offered as to the identity of the body. The plaintiff also proffered evidence that Hillmon and Brown had been traveling together through southern Kansas in search of a site for a cattle ranch and that on March 18th, while they were in camp at Crooked Creek, Hillmon was killed by the accidental discharge of a gun. The defendants offered evidence that Walters had left his home and his betrothed in Iowa in March, 1878, and was afterwards in Kansas until March, 1879; that during that time he corresponded regularly with his family and his betrothed; that the letters received from him included one received by his betrothed on March 3rd, and postmarked at Wichita on March 2nd, and one received by his sister about March 4th or 5th, and dated at Wichita a day or two before; and that he had not been heard from since. The last letter of Walters to his sister included a statement that he expected "to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to (him)." The last letter from Walters to his betrothed included a statement that he was "going with a man by the name of Hillmon, who intends to start a sheep ranch"; that Hillmon had promised him more wages than he could make at anything else; and that he would be able to get "to see the best portion of Kansas, Indian Territory, Colorado, and Mexico."

Upon objection by the plaintiff, the trial judge excluded these letters from Walters to his sister and betrothed. The Supreme Court of the United States held these letters should have been admitted in evidence; and, on account of the exclusion of these letters and on account of another (unrelated) error, the defendants were awarded a new trial. The following excerpts from the opinion of Mr. Justice Gray are noted.

"The evidence that Walters was at Wichita on or before March 5, and had not been heard from since, together with the evidence to identify as his the body found at Crooked Creek on March 18, tended to show that he went from Wichita to Crooked Creek between those dates. Evidence that just before March 5

he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked Creek with Hillmon. Letters from him to his family and his betrothed were the natural, if not the only obtainable evidence of his intention. . . .

"The letters in question were competent, not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention. In view of the mass of conflicting testimony introduced upon the question whether it was the body of Walters that was found in Hillmon's camp, this evidence might properly influence the jury in determining that question."

In Hillmon, Mr. Justice Gray quotes a portion of the opinion of Chief Justice Beasley in *Hunter v. State, supra* at 538. The New Jersey Court of Errors and Appeals affirmed the judgment of the Court of Oyer and Terminer where Hunter had been convicted of the first degree murder of John M. Armstrong. On appeal, Hunter assigned as error, *inter alia,* the admission of evidence of statements made by Armstrong in Philadelphia to his son during the afternoon of January 23rd and of evidence as to statements in a letter written by Armstrong to his wife that afternoon, both to the effect that Armstrong was going to Camden, New Jersey, that night with Hunter. The State's evidence tended to show that Armstrong was killed that night in or near Camden.

The two sentences of the opinion of Chief Justice Beasley which precede the portion quoted by Mr. Justice Gray (and brought forward in the majority opinion herein) are as follows: "The present point of inquiry therefore is, whether these declarations of Mr. Armstrong to his son, and the similar declaration contained in the note to his wife, can reasonably be said to be component parts, or the natural incidents of the act of the deceased in going to Camden, which act was incontestably a part of the *res gestae.* After mature reflection and a careful examination of the authorities, my conclusion is, that these communications of the deceased should be regarded as constituents of that transaction, for I think they were preparations for it,

and thus were naturally connected with it." In concluding this portion of the opinion, Chief Justice Beasley observed: "It is principally from the foregoing considerations that I find myself constrained to think that the declarations under discussion, even if they stood in the case unsupported or unaffected by other circumstances, were admissible, on general principles, on the single ground that they were the natural and inartificial concomitants of a probable act, which itself was a part of the *res gestae*. In such a *status* of the evidence, I should think that the exception to the principle that rules out hearsay, *had been carried to its extreme limit, but without transcending such limit.* But, in point of fact, the question thus discussed is not, on this record, presented in this narrow point of view, for it is, in the proofs, connected with facts that appear to put the admissibility of these declarations on a stable foundation." (My italics.) There was evidence tending to show that Hunter had proposed to Armstrong that they go together to Camden on the night of the murder. Declarations of Armstrong were held competent and were admitted to show a mutual understanding to that effect.

In *People v. Alcalde, supra,* Florencio "Frank" Alcalde was convicted of murdering Bernice Curtis, whose dead body was found on the morning of November 23, 1942. The defendant contended that prejudicial error was committed by admitting in evidence over objection the declarations of the deceased made on November 22nd that she was going out with "Frank" that evening. The majority opinion disposes of this contention in these words: "In overruling the objection the court took the precaution to state in the presence of the jury that the evidence was admitted for the limited purpose of showing the decedent's intention. It is argued by the defendant that declarations not under oath, made when the declarant is not confronted by the adverse party, are admissible to prove physical or mental condition and only when either condition is a matter in issue. The admission of such utterances, due caution having been taken by the court as here, is not so limited." There was independent circumstantial evidence that the defendant was at the scene where the body was found.

I am impressed by the force of the dissenting opinion of Justice (later Chief Justice) Traynor in *People v. Alcalde, supra,* which includes the following: "A declaration of intention is admissible to show that the *declarant* did the intended act,

if there are corroborating circumstances and if the declarant is dead or unavailable and hence cannot be put on the witness stand. . . . A declaration as to what one person intended to do, however, cannot safely be accepted as evidence of what another probably did. . . . The declaration of the deceased in this case that she was going out with Frank is also a declaration that he was going out with her, and it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went with her. In the words of Mr. Justice Cardozo, 'Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.' *Shepard v. United States,* 290 U.S. 96, 104, 54 S. Ct. 22, 25, 78 L. Ed. 196. Such a declaration could not be admitted without the risk that the jury would conclude that it tended to prove the acts of the defendant as well as of the declarant, and it is clear that the prosecution used the declaration to that end. There is no dispute as to the identity of the deceased or as to where she was at the time of her death. Since the evidence is overwhelming as to who the deceased was and where she was when she met her death, no legitimate purpose could be served by admitting her declarations of what she intended to do on the evening of November 22d. The only purpose that could be served by admitting such declarations would be to induce the belief that the defendant went out with the deceased, took her to the scene of the crime and there murdered her. Her declarations cannot be admitted for that purpose without setting aside the rule against hearsay."

It is noted that the views expressed by Justice Traynor are those applied by Chief Justice Pearson in *State v. Dula,* 61 N.C. 211 (1867), and *State v. Dula,* 61 N.C. 437 (1868), discussed below.

Although not cited in the majority opinion, *State v. Farnam,* 82 Or. 211, 161 P. 417 (1916), involves questions similar to those heretofore considered. Upon appeal, the plaintiff's conviction of manslaughter was affirmed. The majority held competent the declarations of the deceased that she could not go home with Mabel that night "because she thought Roy (Farnam) was coming down." The body of the deceased was found the next morning in the ruins of a barn which had burned dur-

ing the night. Decisions cited in the concurring opinion of Justice Harris to support the majority view include *Hillmon* and Hunter. Decisions to the contrary are cited in the dissenting opinion of Justice Burnett. Justice Harris, speaking for the majority, stated: "Even though it be assumed that the testimony moved against was incompetent, nevertheless the defendant is in no position to claim that he was materially prejudiced by it." There was independent evidence that the defendant had been to the scene where the body was found.

Justice Harris added: "If evidence is competent for one purpose, it cannot be rejected merely because it is not competent for another purpose. Being competent to show what Edna Morgan intended to do, the testimony of Mabel Barton was not rendered incompetent for all purposes merely because it was incompetent for the purpose of connecting Roy Farnam with the alleged crime, *although it would have been proper to instruct the jury to limit the evidence to the sole purpose for which it was competent, and a failure to give a requested instruction to limit the application of the evidence to the single purpose for which it is admissible would be error; but here the contention is that the testimony was not competent for any purpose.*" (My italics.)

An additional statement from the opinion of Justice Harris is noted: "Declarations, like the one considered here, are, by many, and perhaps, by most, of the authorities, admitted as part of the *res gestae;* they are spoken of by some as verbal acts; they are characterized by others as original evidence admissible as an exception to the hearsay rule." Thus, the admission of the declarations in *State v. Journey, supra,* was on the ground that they constituted original evidence admissible as an exception to the hearsay rule. On the other hand, in *Hunter v. State, supra,* which is cited and relied on in Journey, the admissions were held properly admitted as part of the *res gestae.*

The question presented in *Commonwealth v. Trefethen, supra,* is sufficiently different to warrant full consideration of that case. Trefethen was convicted of the first degree murder of Deltena J. Davis (Deltena). Circumstantial evidence offered by the Commonwealth tended to show that Deltena, who was unmarried, left her home on December 23, 1891; that she was then "about five months advanced in the state of pregnancy"; that her body was found in the Mystic River on January 10,

1892, about three miles from her home; that the cause of her death was drowning; and that "(t)here were no marks of violence on the body when found, nor was there any evidence that poison had been administered, nor did her clothing show any signs of violence." 157 Mass. at 182, 31 N.E. at 962. The defendant offered a witness who testified to a conversation she had with Deltena on December 22nd. When objection was made to the testimony of this witness, counsel for the defendant stated to the court, in the absence of the jury, that they offered to prove by this witness that, at the interview on December 22nd, Deltena "stated to the witness that she was five months pregnant with child, and had come to consult as to what to do, and added later in the interview that she was going to drown herself." The verdict was set aside for error in excluding the testimony of this witness.

The defendant's counsel did not contend, nor did the court hold, that the statements attributed to Deltena were admissible as part of the *res gestae*. They contended "that the declaration is some evidence of the state of mind or intention of the deceased at the time she made it; that the intention which it tends to prove is a material fact, which, in connection with other facts proved, tends to support the theory of suicide; and that the state of mind or intention in the mind of a person, when material, can be proved by evidence of his declarations, as well as of his acts, particularly when that person has deceased and cannot be called as a witness, and the declarations were made before the controversy arose which is the subject of the trial." Accepting this contention, the court held: "The fundamental proposition is, that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these for the sole purpose of showing state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred."

In my opinion, the admissibility of evidence of statements attributed to a deceased person where *the statements themselves* indicate the declarant's state of mind, *e.g.*, that he was confused, distraught, hysterical, mad, etc., when he made them, and his state of mind at that time was an evidential fact material to the fact in issue, is a different question from that presented where the testimony as to the deceased's declarations is offered

solely for the purpose of showing that the deceased in fact later did what he declared he intended or planned to do. In Trefethen, it was conceded the declarations of Deltena were not competent as evidence that she had killed herself. It was held they were competent as indicating her state of mind when she made the statements; and that her state of mind at that time was an evidential circumstance which, when considered with other evidence in the case, was competent as bearing upon whether Deltena committed suicide. It is noted that the statements attributed to Deltena did not involve any other person.

In my opinion, Journey, Hillmon, Hunter, Alcalde and Farnam may be considered authority for this statement from McCormick, Law of Evidence, Hornbook Series, § 270 at 575-576 (1954), to wit: "Whenever declarations of intention are offered *as evidence of the declarant's subsequent conduct* the question of admissibility of the evidence should be clearly discriminated from its sufficiency to support a finding that such conduct occurred. Standing alone such declarations would in the usual situation manifestly be insufficient to warrant such a finding, and accordingly it is frequently said that declarations of intention are admitted in corroboration of other evidence to show such acts. Insufficient as they frequently are, separately considered, they nevertheless may be significant contributions to an aggregation of evidence sufficient to establish the act and the identity of the actor, and as such they will generally be admitted." (My italics.)

If there had been independent evidence that Pennisi was killed in Wilmington, Delaware, then, assuming the rules stated in the decisions discussed above were adopted by this Court, deceased's declarations on Sunday, June 15th, of his intention to leave that day for Wilmington, Delaware, with defendant would have been admissible *as tending to show he acted in accordance with his declared intention.* The evidence as to Pennisi's declarations was not offered for this purpose. The State's evidence is to the effect he did not go to Wilmington, Delaware, but was murdered in Greensboro, N. C. Whatever its merits, the proposed additional exception to the hearsay rule should not be approved until a factual situation to which its application would be pertinent is before us.

Attention is directed now to North Carolina decisions which involve factual situations similar in certain respects to those

involved in the decisions discussed above. In each, the admissibility of the declarations was considered in terms of the *res gestae* exception to the hearsay rule. Even so, *the authority* of these decisions consists in the holding that the evidence was incompetent in the factual situation presented.

In *State v. Dula,* 61 N.C. 211 (1867), the defendant, having been convicted and sentenced for first degree murder, was awarded a new trial because the court admitted, over the defendant's objection, the testimony of one Betsey Scott that she saw Laura Foster, the deceased, on the morning of the day she was missing; that "she was riding her father's mare, bareback, with a bundle of clothes in her lap"; and that Laura said (1) that she was on her way to the Bates place, and (2) that Dula (defendant) had returned just before day, and (3) that she "expected to meet him at the Bates place." Chief Justice Pearson, for this Court, said: "The conversation between Mrs. Scott and the deceased ought not to have been admitted as evidence. At all events, no part of it except that the deceased said she was going to the Bates place. How what the deceased said in regard to the prisoner's having come just before day, and where he was, and that she expected to meet him, can in any sense be considered a part of the acts of deceased—being on her father's mare, bareback, with a bundle of clothes in her lap, and coming from her father's past A. Scott's house, when the witness met her in the road—we are unable to perceive. The law requires all testimony, which is given to the jury, to be subjected to *two tests of its truth:* 1. It must have the sanction of an oath. 2. There must be an opportunity of cross-examination. *Dying declarations* form an exception, and another exception is allowed when declarations constitute a part of the act, or *res gestae.*" Accord: *Mullins v. Commonwealth,* 113 Va. 787, 75 S.E. 193 (1912).

This Court found no error in the trial and conviction of Dula at his second trial. *State v. Dula,* 61 N.C. 437 (1868). It was there held that testimony as to the statement of Laura Foster, while riding in the direction of the Bates place, that *she* was going to that place, was properly admitted. Her declaration as to where she was going when headed in that direction was considered a part of the *res gestae.* At the second trial, no attempt was made to offer in evidence any declaration of Laura as to Dula's plans and conduct.

In *Gassaway v. Gassaway & Owen, Inc.*, 220 N.C. 694, 18 S.E. 2d 120, the question was whether the dependents of Harry C. Gassaway (Gassaway) were entitled to compensation on account of his death on Saturday, June 29, 1940, about 1:00 p.m., as the result of an automobile wreck on the road from Winston-Salem to High Point. Gassaway was the president and one of the principal stockholders of defendant. Defendant appealed from a judgment affirming an award made to the claimants by the North Carolina Industrial Commission. This Court reversed on two grounds, *viz.:* (1) Statements made by Gassaway the preceding Thursday and Friday night to the effect he was trying to get a certain highway job in High Point and planned to go there on Saturday for that purpose were held incompetent because "no part of the *res gestae*"; and (2) these statements tended to show Gassaway's intended Saturday trip was not to perform any service of an ordinary employee or workman but to negotiate a contract as an executive officer of defendant.

In *Little v. Brake Co.*, 255 N.C. 451, 121 S.E. 2d 889 (1961), the question was whether the dependents of Arthur Herman Little were entitled to compensation on account of his death as a result of an automobile accident that occurred on January 8, 1957, about 8:25 p.m., at or near the intersection of N. C. Highway 41 and a rural paved road, about four miles south of the city limits of Lumberton. The Industrial Commission denied compensation, the superior court affirmed and the claimants appealed. This Court affirmed on the ground the claimants failed to offer competent evidence sufficient to support a finding that the death was by accident arising out of and in the course of the deceased's employment by defendant.

The claimants assigned as error the exclusion by the court of declarations attributed to the deceased, offered to show the purpose of the deceased's trip and that he was engaged in work for his employer at the time of his death. The substance of these statements and of the rulings of this Court is set forth in the following excerpt from the opinion of Justice (later Chief Justice) Parker, to wit:

"The deceased employee left the motel in Laurinburg on his fatal trip about 7:30 p.m. o'clock. His statement to H. F. Hoffman about 10:45 a.m. o'clock, 'I've got to be going along, I've got to be down at Whiteville to see a customer sometime

today,' was not connected with his act of departure at 7:30 p.m. o'clock, constitutes no part of the *res gestae,* and was inadmissible.

"The deceased employee after buying gas and talking with Z. R. Jackson at a service station went back to the motel, from there talked to his wife in Charlotte by telephone, went to the motel's office, and there T. T. McNair, manager of the motel, pointed out to him on a North Carolina highway map a route from Laurinburg to Lumberton, to Elizabethtown to White Lake to Burgaw, a distance of about 115 miles. His parents-in-law lived six miles north of Burgaw. He then ate supper in the motel dining room, and left on his fatal trip at 7:30 p.m. o'clock. In his statement to Jackson he said he was going to Lumberton and had a little business to attend to there, but he did not say it was his employer's business, or where he was going to in Lumberton. In our opinion, his statement to Jackson was not connected with his act of departure at 7:30 p.m. o'clock, and constitutes no part of the *res gestae,* and we are fortified in our opinion by the fact that he was killed by accident about four miles south of the city limits of Lumberton. In addition, claimants offered this evidence for the purpose of showing the purpose of his trip, and that he was engaged in work for his employer at the time of his death, but his statement to Jackson does not say what his business was in Lumberton, and has no relevancy to the fact sought to be proved. It was properly excluded.

"We now come to his statement by telephone to his wife around 7:00 o'clock p.m., 'that he was going to call on some more customers, so that he wouldn't have to spend another night, etc.' He did not state who these customers were, or where they lived. After his conversation he went to the motel's office, and its manager pointed out to him on a North Carolina highway map a route from Laurinburg to Burgaw, near which place his parents-in-law lived. He then ate supper, and left. He was killed outside his regular selling territory by accident about an hour and a half later."

The following excerpt from the opinion discloses that this Court was well aware of the divergent views as to whether the competency of such declarations should be tested by application of the *res gestae* exception to the hearsay rule or on the basis of a different specific exception to the hearsay rule. The

opinion states: "The rule that statements made by a person since deceased, as to the purpose or destination of a trip or journey he is about to make, may be proved as part of the *res gestae* when connected with the act of departure, has been recognized and given effect in the admission of such testimony in a considerable number of cases, and the evidence has been excluded in a number of other cases because not part of the *res gestae,* though recognizing the rule. *Gassaway v. Gassaway & Owen, Inc.,* 220 N.C. 694, 18 S.E. 2d 120; Anno. 113 A.L.R. 268-310, an elaborate annotation where a very large number of cases are cited and analyzed; Anno. 163 A.L.R. 21-25; Jones on Evidence, 2nd Ed., Vol. III, § 1220. Other theories for the admission of such statements have been propounded, but the 'theory of *res gestae* is by far the most popular theory of admission, though possibly not as well reasoned as the theory that the declarations are admissible as original evidence, as an exception to the hearsay rule.' Anno. 113 A.L.R. 275. An extraordinary development in the literature of *res gestae* was Dean Wigmore's Wholesale denunciation of the term itself. Evidence, 2nd Ed., § 1767. However, it is said in annotation 163 A.L.R. 20, 'The bench and bar in general have not agreed with Dean Wigmore.' "

In *Little v. Brake Co., supra,* there was no independent evidence that the deceased had visited any customer on the night of his fatal accident or that the accident occurred when he was en route to a customer's place of business.

The general rule the majority opinion seeks to approve recognizes that the death of a declarant, standing alone, is not sufficient ground for the admission of his declarations. Justification therefor is said to be found in what is called *a reasonable probability of truthfulness.* If admissibility is to be determined on this broad ground, the rule against hearsay evidence would be greatly impaired and presumably probability of truthfulness in a particular case would be determined by the presiding judge after a *voir dire* hearing. Whether a particular person is more inclined to tell the truth to his wife, his friend, or a stranger, when he is about to depart on a journey rather than on occasions unrelated to such departure, is subject to question. Certainly, the reasonable probability of the truthfulness of such declarations cannot be compared to the reasonable probability of the truthfulness of a dying declaration.

A dying declaration is admissible only if made when the declarant is in actual danger of death, in full apprehension of his danger and death ensues. *State v. Brown,* 263 N.C. 327, 332, 139 S.E. 2d 609, 612 (1965). When admitted, the credibility of the declarant and the weight to be given his dying declaration is for determination by the jury. It is subject to impeachment or corroboration in the same manner as the testimony of a witness who testified in person at trial. *State v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562 (1942), and cases cited; Stansbury, North Carolina Evidence § 146, at 363 (2d ed. 1963); Note, 14 N.C.L.Rev. 380, 382-383 (1936); 40 Am. Jur. 2d Homicide § 390 (1968); 40 C.J.S. Homicide § 305 (1944); 1 Wharton's Criminal Evidence § 328 (12th ed. Anderson 1955); 5 Wigmore, Evidence § 1446 (3d ed. 1940); 2 Underhill's Criminal Evidence § 299 (5th ed. Herrick 1956).

If declarations of a deceased person are offered as evidence of the truthfulness of the statements contained therein, and such statements are admitted because of what is considered *the reasonable probability of their truthfulness,* it would seem that such declarations would be subject to impeachment or corroboration in the same manner as the testimony of a witness who testifies in person at trial.

As stated in the outset, I think *the fact* that Pennisi told his wife he was going to Wilmington, Delaware, on a business trip with no luggage other than a shaving kit, would be competent to explain (1) why *she* was not disturbed by Pennisi's absence until after he failed to come home when expected, that is, on the night of Monday, June 16th, and (2) why *she* waited until Wednesday, June 18th, before she reported Pennisi's absence to the Greensboro Police Department, *and for no other purpose.* Whatever its merits, it is both unnecessary and unwise to approve in general terms an additional exception to the hearsay rule when the case before us does not call for its application or consideration and when approval thereof tends to impair the authority of prior decisions of this Court.

Justices HIGGINS and SHARP join in this concurring opinion.

THOMAS E. BLACKWELL v. HENRY T. BUTTS, GUARDIAN AD LITEM OF LARRY WAYNE BUTTS

No. 71

(Filed 12 May 1971)

1. **Rules of Civil Procedure § 41— nonjury trial — motion to dismiss**

Contention by defendant in a nonjury trial that plaintiff upon the facts and the law has shown no right to relief should be presented by a motion to dismiss on that ground. G.S. 1A-1, Rule 41(b).

2. **Rules of Civil Procedure § 52— nonjury trial — judgment — conclusions of law — answering of issues**

Trial judge in a nonjury trial should have stated separately his conclusions of law instead of merely answering issues of negligence and contributory negligence after making findings of fact. G.S. 1A-1, Rule 52(a)(1).

3. **Rules of Civil Procedure § 52; Trial § 58— nonjury trial — appellate review**

When a jury trial is waived, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.

4. **Rules of Civil Procedure § 41— motion to dismiss — contributory negligence**

A motion to dismiss on the ground the evidence discloses contributory negligence as a matter of law should be granted when, and only when, the undisputed evidence, taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom.

5. **Automobiles § 59— vehicle struck after entering highway from private driveway — negligence and contributory negligence**

In this action to recover for damages to plaintiff's automobile when struck by defendant's vehicle after entering the highway from a private driveway, heard by the court without a jury, the evidence was insufficient to establish that plaintiff's driver was contributorily negligent as a matter of law and was sufficient to support the court's finding that the sole proximate cause of the collision was the negligence of defendant in failing to keep a proper lookout and in failing to keep his vehicle under proper control.

APPEAL by plaintiff from the Court of Appeals.

The Court of Appeals, by a two to one decision of the hearing panel, reversed the judgment entered in favor of plaintiff by *Long, J.*, at April 1970 Civil Session of ROCKINGHAM Superior

Court. One member of the panel having dissented, plaintiff's appeal is of right under G.S. 7A-30(2).

Plaintiff instituted this action December 14, 1967, in the Reidsville Recorder's Court, to recover $1,360.00 for the damage to his 1965 Ford Mustang when struck by the 1959 Chevrolet owned by Henry T. Butts.

The collision occurred in Caswell County, North Carolina, on North Carolina Highway No. 150, on June 23, 1967, at approximately 2:50 p.m. The paved portion of this two-lane highway was approximately twenty-two feet wide. The weather was clear and the highway was dry. When the collision occurred, the Ford was being operated, with plaintiff's knowledge and consent, by his wife, Betty Mimms Blackwell, and the Chevrolet was being operated by Larry Wayne Butts, defendant herein, the nineteen-year-old son of the owner.

Plaintiff alleged the collision and resulting damage to his car were caused by the negligence of defendant. Defendant denied negligence; pleaded Mrs. Blackwell's negligence was the sole or a contributing cause of the collision; alleged Mrs. Blackwell was operating the Ford as plaintiff's agent; and, notwithstanding the admission in the answer that Henry T. Butts was the owner, defendant alleged he was entitled to recover from plaintiff by way of counterclaim the sum of $550.00 on account of damage to the Chevrolet.

The action was first tried in the Reidsville Recorder's Court and upon appeal was tried *de novo* in the superior court. In the superior court, the parties waived a jury trial and stipulated, *inter alia,* "(t)hat if the Court awards a verdict to the plaintiff for damages to the automobile, the amount to be awarded will be for $1,360.00."

In addition to the undisputed facts stated above, the court made the factual findings quoted below. (Note: The court's findings in respect of directions are based on the erroneous assumption that N. C. Highway No. 150 in the vicinity of the collision runs north-south rather than east-west as disclosed by the evidence and by the agreed statement of case on appeal. The correct directions, substituted for those in the court's findings, are shown in parentheses.)

"3. That, immediately preceding the accident complained of, the plaintiff's Mustang automobile was parked in a private drive on the (south) side of N.C. Highway 150 preparing to enter N.C. Highway #150; that approximately 200 feet (east) of the drive, N.C. Highway 150 curved sharply in a (southeasterly) direction;

"4. That while the plaintiff's wife was stopped preparing to enter N.C. Highway #150, she looked both to the (west) and then to the (east) and, ascertaining that there were no approaching vehicles to be seen, she started off in first gear, then made a left turn onto the highway, proceeding in the (westbound) lane, and thereafter shifted into second gear and obtained a speed of approximately 20 miles per hour in a (westerly) direction down N.C. Highway 150;

"5. That, at or about the same time that the plaintiff's motor vehicle entered N.C. Highway #150 from a private drive, the . . . motor vehicle operated by the defendant Larry Wayne Butts rounded the sharp curve in N.C. Highway #150 and thereafter proceeded (west) in the (west) lane of travel and crashed into the rear of the plaintiff's vehicle and knocked the plaintiff's vehicle down the roadway and into a ditch along the (north) side of said highway causing the plaintiff's motor vehicle to overturn and the damages as alleged in the Complaint;

"6. That the sole proximate cause of the collision complained of and the damages to the plaintiff's automobile was the negligence of the defendant in failing to keep a proper lookout and in failing to keep his Chevrolet automobile under proper control; and, further, the Court finds that the plaintiff is entitled to a Judgment for the damages to the plaintiff's automobile."

The court then stated the issues for determination, namely, negligence, contributory negligence and damages, and answered the negligence issue, "Yes," the contributory negligence issue, "No," and the issue as to damages "$1,360.00." Thereupon, the court entered judgment in plaintiff's favor for $1,360.00 and costs.

Defendant excepted to the judgment (Exception #2) and appealed. At the end of Paragraph 6 of the court's findings of fact, which is also at the end of all of the court's findings of fact, there appears without further explanation the following:

"Exception #1." Based on "Exception #1," defendant's appeal entries assert "there was not sufficient evidence from which the Court could find as a fact that the defendant was guilty of any negligence and that the evidence overwhelmingly showed that the plaintiff was guilty of negligence as a matter of law."

In the Court of Appeals, the majority opinion, in accordance with defendant's brief, considered that "Exception #1" was directed solely to Finding of Fact #6 and held that the evidence did not support a finding "(t)hat the sole proximate cause of the collision complained of and the damages to the plaintiff's automobile was the negligence of the defendant in failing to keep a proper lookout and in failing to keep his Chevrolet automobile under proper control."

McMichael, Griffin & Post, by Albert J. Post and W. Edward Deaton, for plaintiff appellant.

Bethea, Robinson & Moore, by Norwood E. Robinson, for defendant appellee.

BOBBITT, Chief Justice.

[1] The trial was by the court without a jury. A contention by defendant that plaintiff upon the facts and the law had shown no right to relief should have been presented by a motion to dismiss on that ground. Rule 41(b) of the Rules of Civil Procedure (G.S. 1A-1). The record does not show defendant made a motion to dismiss.

In reversing on the ground there was insufficient evidence to support the factual elements in Finding of Fact #6, the Court of Appeals held in effect that upon the facts and the law plaintiff had shown no right to relief and that plaintiff's action should have been dismissed on that ground. This was comparable to the ground for entering a judgment of involuntary nonsuit under the former procedure.

Rule 52(a)(1) provides: "In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

[2] Instead of *stating* separately his conclusions of law, the trial judge answered issues of negligence and contributory neg-

ligence. Although we do not approve this variation from the procedure prescribed by Rule 52(a)(1), we treat the court's answers to these issues as the equivalent of stated conclusions of law (1) that plaintiff's Ford was damaged by the negligence of defendant, and (2) that plaintiff did not by his own negligence contribute to his own damage.

[3] When a jury trial is waived, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. *Knutton v. Cofield,* 273 N.C. 355, 359, 160 S.E. 2d 29, 33, and cases cited. There is no difference in this respect in the trial of an action upon the facts without a jury under Rule 52(a)(1) and a trial upon waiver of jury trial under former G.S. 1-185. Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts.

The greater portion of the evidence has been quoted in the majority opinion of the Court of Appeals. Repetition in detail is unnecessary.

According to Mrs. Blackwell: She had stopped at the edge of Highway No. 150. Immediately before driving onto the highway, she looked to her right and saw no approaching vehicle. Although unsure as to the exact distance, she "guessed" she could see "about 200 feet." Before the Blackwell Ford was struck by the Chevrolet operated by defendant, Mrs. Blackwell had entered upon the highway, turned obliquely to her left, shifted into second gear, got fully in the lane for westbound traffic and was proceeding in that (her right) lane at a speed of "about 15 to 20 miles per hour." The Blackwell car had traveled "about 50 feet" from the time Mrs. Blackwell started out until struck by the Chevrolet. Mrs. Blackwell "did not hear a horn blow, nor did (she) hear tires squeal."

According to defendant: When he first saw the Blackwell car, it was stopped at the end of the driveway, the bumper being "about even with the pavement." It was then "about 300 feet" from him. His speed was from fifty to fifty-five miles per hour. About the time he saw the Blackwell car, Mrs. Blackwell started to pull out. At that time he blew his horn and applied his brakes enough to break the speed but not enough to slide the wheels. The Blackwell car "kept coming out in the highway"

and defendant "kept on blowing (his) horn." The right front of his car struck the left rear of the Blackwell car. When this occurred, the Blackwell car "was in the middle of the road in an angle."

If the actual impact between the Chevrolet operated by defendant and the Blackwell car occurred "on the left side of the center of the road," as defendant testified, it may be there was insufficient time for defendant to stop between the first observable movement of the Blackwell car into Highway No. 150 and the collision. On the other hand, if the actual impact occurred when the Blackwell car was fully in the right lane for westbound traffic and was proceeding therein, as Mrs. Blackwell testified, there was evidence which, when considered in the light most favorable to plaintiff, was sufficient to support findings that defendant, if he had exercised due care to keep a proper lookout and to keep the Chevrolet under proper control, saw or by the exercise of due care should have seen the Blackwell car as it entered and crossed Highway No. 150 and that, by the exercise of due care, defendant could have brought the Chevrolet under control by applying the brakes with greater vigor or by swerving the Chevrolet to his left or both.

The record contains a stipulation that "(t)he accident report prepared by the investigating Highway Patrolman . . . is admitted into evidence for the purpose of tending to show what the officer would testify to if he were in Court with the exception that the entry as to the speed would not be competent." It appears from the diagram on this accident report that the Blackwell car was entirely on its right side of the road when struck by the Chevrolet operated by defendant.

The court resolved the conflict in the evidence as to where the impact occurred in plaintiff's favor in Finding of Fact #4.

It appears from the accident report that no tire impressions were made by the Blackwell car or by the Chevrolet prior to the impact; that the Chevrolet traveled a distance of 108 feet and the Ford a distance of 71 feet; and that the Ford had been knocked across a ditch to its right and had overturned. Mrs. Blackwell testified the Ford, after turning over twice, landed on its top in a yard on its right side of the road.

No eastbound traffic was involved in any way.

[4] Comparable to the well established and oft-stated rule under the former practice, a motion to dismiss on the ground the evidence discloses contributory negligence *as a matter of law* should be granted when, and only when, the undisputed evidence, taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom.

[5] Admittedly, there was evidence which would have supported a finding that negligence on the part of Mrs. Blackwell was a contributing proximate cause of the collision and the damage to plaintiff's car. However, the evidence was insufficient to establish that Mrs. Blackwell was contributorily negligent *as a matter of law*. This is not the only reasonable inference or conclusion that may be drawn from the evidence. Having started across the highway when she could see no traffic approaching from her right, due care may have required that she proceed forthwith into the lane for westbound traffic rather than hesitate and create uncertainty as to her intention. A portion of the Blackwell car entered the lane for westbound traffic when Mrs. Blackwell had traveled approximately eleven feet.

In weighing defendant's testimony, the court may have considered that defendant's credibility was somewhat impaired by the admission that, although only nineteen years of age, he had "been involved in three or four accidents," had traffic violations consisting of one for reckless driving, three for speeding, and one for driving on the wrong side of the road, and had "lost (his) license one time." Whether the court accepted as credible the testimony that defendant "kept on blowing (his) horn" as he approached the scene of collision does not appear. If so, the court might well have considered that defendant, if he saw what he should have seen, chose to rely more heavily upon his horn than upon his brakes.

The Court of Appeals relied largely on our decisions in *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111 (1953), and *Warren v. Lewis,* 273 N.C. 457, 160 S.E. 2d 305 (1968). On account of substantial factual differences, these cases do not control decision in the present case.

In Garner, the plaintiff was a passenger in the car owned and operated by defendant Pittman. The Pittman car entered

Market Street in Smithfield from the north over a private driveway at a warehouse, intending to cross to the south portion of the street and drive thereon in the lane for eastbound traffic. The Pittman car was struck by the car of the defendant Sipe which had traveled from the bridge over Neuse River in the lane for eastbound traffic. In holding the evidence disclosed the negligence of Pittman was the sole proximate cause (Note: The uncontradicted evidence is that Pittman admitted "it was all (his) fault"), Justice (later Chief Justice) Winborne, for the Court, said: "All the evidence shows that the view from the entrance to the private road or drive to the river bridge, the direction from which the automobile of defendant Sipe was approaching, was unobstructed for a distance of 200 to 300 feet. Yet defendant Pittman stated to defendant Sipe at the time, and testified on the witness stand that he did not see the Sipe automobile until the moment of impact. Plaintiff saw it when it was 100 feet away." 237 N.C. at 335, 75 S.E. 2d at 117. The width of Market Street in front of the warehouse was variously estimated as from forty to sixty feet. The Pittman car was only partially in the lane for eastbound traffic when the collision occurred. The Sipe car struck the right side of the Pittman car.

In Warren, the plaintiff attempted to enter the main highway (Shattalon Drive) from the north over a private road, intending to turn east on Shattalon. A white line separated the lanes for eastbound and westbound traffic. The defendant, driving his Dodge eastward, crashed into the rear of the plaintiff's Chevrolet before the plaintiff completed his intended movement. Judgment of involuntary nonsuit was affirmed on the ground that the plaintiff's evidence disclosed contributory negligence as a matter of law. The opinion of Justice Higgins for this Court states: "His (plaintiff's) view from the intersection to his right was unobstructed to the top of a hill 400 to 600 feet west of the intersection. An automobile could be seen an additional 50 feet beyond the crest. In clear weather, and in broad daylight, he entered the main highway, without discovering the vehicle approaching from the west. The physical evidence indicated the plaintiff had moved only a distance of approximately 16 feet—6 to and 10 across the north lane before the collision. The plaintiff testified he never saw the defendant's Dodge before this ' . . . his third wreck.' " 273 N.C. at 460, 160 S.E. 2d at 307.

[5] We think the evidence was sufficient to support Finding of Fact #6 and the judgment entered by the trial judge. Hence, the decision of the Court of Appeals is reversed and the cause is remanded to that Court for entry of a judgment affirming the judgment entered in the superior court.

Error and remanded.

EDWARD LEON UNDERWOOD, T/A THE CASTAWAY NIGHT CLUB, PETITIONER v. STATE BOARD OF ALCOHOLIC CONTROL, RESPONDENT

No. 74

(Filed 12 May 1971)

1. **Constitutional Law § 14; Intoxicating Liquor § 1— sale of alcoholic beverages — regulation — police power**

   The regulation of the sale and use of alcoholic beverages is within the police power of the State.

2. **Intoxicating Liquor § 2; Administrative Law § 5— suspension of alcoholic beverage license — judicial review**

   On judicial review of the suspension and revocation of licenses by the State Board of Alcoholic Control, the "whole record" test is applicable. G.S. 143-315(5).

3. **Intoxicating Liquor § 2— suspension of beer license — customers engaging in affray on premises — insufficiency of ABC Board findings**

   The ABC Board erroneously suspended a tavern owner's retail beer license on the ground that he permitted his customers to engage in an affray on his premises, where all the evidence was to the effect that upon the occurrence of the affray the owner's employees forcibly ejected the troublemakers from the premises.

4. **Intoxicating Liquor § 2— suspension of license for permitting affray on premises — requirement of knowing acquiescence**

   ABC Regulation No. 30(5) which authorizes suspension or revocation of retail beer license for "permitting any person engaging in an affray or disorderly conduct" means a knowing acquiescence in such conduct; the mere fact that an affray took place on the premises does not violate the regulations.

5. **Intoxicating Liquor § 2— suspension of beer license — consumption of liquor on premises — insufficiency of ABC Board's findings**

   The ABC Board erroneously held that a tavern owner permitted the consumption of alcoholic liquors on his licensed premises in violation of G.S. 18-78.1(5), where the evidence relating to the violation

consisted solely of an officer's testimony that two boys drank whiskey and rum in the owner's parking lot within a period of thirty-five minutes, and where the owner's uncontradicted evidence was to the effect that his personnel patrols the parking lot at night but there is difficulty in watching all the cars when two or three hundred patrons are on the premises.

6. Intoxicating Liquor § 2— suspension of beer license — improper supervision of premises

The mere fact that two boys were caught consuming alcoholic liquors in a tavern owner's parking lot within a thirty-five minute period does not warrant the suspension of the owner's retail beer license on the ground that the owner failed to properly supervise his premises on the night in question, where there was uncontradicted evidence that the owner's employees were patrolling the parking lot on the night in question.

APPEAL by Respondent from *Clark, J.*, 14 November 1970 Session of WAKE Superior Court.

On 3 April 1970 the State Board of Alcoholic Control (Board) notified Edward Leon Underwood (petitioner) to appear before the Hearing Officer of the Board on 7 May 1970 to show cause why his retail beer and/or wine permit should not be revoked or suspended for:

(1) Permitting and allowing persons to become engaged in an affray and disorderly conduct on your retail licensed premise on or about March 7, 1970, in violation of Board of Alcoholic Control Regulation No. 30(5).

(2) Permitting and allowing persons to possess and consume alcoholic beverages on your retail licensed premise on or about March 28, 1970, 10:00 p.m. to 10:35 p.m. in violation of G.S. 18-51(6)d. and G.S. 18-78.1(5).

(3) Failing to give your retail licensed premise proper supervision on or about March 7, 1970, and March 28, 1970, 10:00 p.m. to 10:35 p.m. G.S. 18-78.

(4) No longer considered to be a suitable person to hold a State retail beer permit. G.S. 18-136.

The Petitioner appeared in obedience to the notice and the hearing was conducted before D. L. Pickard, Assistant Director-Hearing Officer, at the appointed time and place.

Petitioner was accompanied by his father but was not represented by counsel.

W. C. Ludwick, State ABC Officer assigned to Orange County, testified that petitioner, trading as the Castaway Night Club, had been given several warnings; that he obtained copies of warrants against petitioner, Joseph Grasty and Harold Haymie arising out of an affray at the Castaway Night Club on 7 March 1970; that Edward Underwood was fined $25.00 for assault on Joseph Grasty, Leon Underwood was fined $15.00 for assault on Joseph Grasty, and Joseph Grasty was fined $40.00 for trespassing; that Harold Haymie was found not guilty; that Joseph Grasty is the brother-in-law of Edward Leon Underwood.

Officer Ludwick further testified that on Saturday night, 28 March 1970, at 10:00 p.m., he was sitting in his parked car at the Castaway Night Club, saw two boys come out of the club and enter a car parked twenty feet away; that he then saw the driver of the car tilt a bottle as if pouring into a cup; that he went to the car, identified himself as an ABC officer and demanded the bottle; that the driver handed him a bottle of Bacardi Rum approximately one tenth full; that the driver's name was Johnny Eugene Moore of Carrboro, North Carolina, who stated he was sorry and did not know it was a violation of the law; that he impounded the whiskey and returned to his car; that at 10:35 p.m. several boys went to a car parked on the parking lot of the Castaway Night Club with cups in their hands and a bottle of whiskey; that he approached the car the boys had entered and they were drinking out of paper cups; that he obtained the bottle and found it to be a fifth of Ancient Age Whiskey; that the driver of that car was James Davis Knott of Oxford, North Carolina; that he impounded the whiskey since the club did not have a brown bagging permit.

Officer Ludwick further testified that he then went inside, confronted the owner Edward Leon Underwood, and told him he had picked up two bottles of whiskey on the parking lot; that he talked to him about the fight that had occurred on the premises on 7 March 1970 and told him both the whiskey and the fight were in violation of the law and pertinent regulations and would be reported to the Raleigh office.

Officer Ludwick offered into evidence photostatic copies of the warrants mentioned in his testimony.

Edward Leon Underwood testified as a witness in his own behalf. He stated that he is the owner of the Castaway Night Club and held an on-premise beer permit during the month of March 1970; that Joseph Grasty, his wife's brother, and Harold Haymie got into an argument with another couple and began fighting at the club on 7 March 1970 and some of the employees of the club put them out; that this caused the disturbance that resulted in the issuance of the warrants; that his father and mother and three brothers work at the club; that Joseph Grasty struck his father and his father slapped Grasty twice, put him in a car and made him leave; that he never touched any of them but did plead guilty in the District Court on advice of counsel and paid a fine of $15.00 and the costs; that he did so on his wife's account because her brother Joseph Grasty was already on probation.

Petitioner then offered into evidence a letter signed by C. D. Knight, Sheriff of Orange County, which reads as follows:

TO WHOM IT MAY CONCERN May 6, 1970

I have been acquainted with Mr. T. L. Underwood for the past twenty years, and have known him to be a person of good standing in the community.

Mr. Underwood has never been in any trouble and has always cooperated to the highest possible degree with our department.

The trouble that took [place] at Mr. Underwood's establishment, (The Castaway Club), was between Mr. Edward Underwood and his brother-in-law; and was a family matter.

Any consideration given Mr. T. L. Underwood on this recommendation will be greatly appreciated.

C. D. KNIGHT
Sheriff, Orange County

Petitioner further testified that all patrons who come to his club with whiskey in cups are required to pour it out and are not permitted to enter the club with it; that he has no authority to go outside and seize whiskey people may have in

their cars; that he had signs inside the building which said "No Alcoholic Privileges Allowed Inside the Building"; that once or twice he erected signs on the parking lot to the effect that alcohol was not allowed but they were torn down by people backing over them and by the weather and had not been erected again; that he has personnel to patrol the parking area at night and the grounds were being patrolled on the nights of March 7 and 28, 1970; that he ordinarily has two or three hundred people in his club on Saturday nights where he provides live music and dancing for entertainment, and it is difficult to watch everybody in their cars at the same time.

Upon the foregoing evidence the Hearing Officer found as a fact that Edward Leon Underwood, trading as Castaway Night Club, permitted and allowed persons to become engaged in an affray and disorderly conduct on club premises on 7 March 1970 in violation of the Board's Regulation No. 30(5); that he permitted and allowed persons to possess and consume alcoholic beverages on his retail licensed premises on 28 March 1970 at 10:00 p.m. and 10:35 p.m. in violation of G.S. 18-51(6)d and G.S. 18-78.1(5); that he failed to give his retail licensed premises proper supervision on 7 March 1970 by allowing persons to engage in an affray on the premises; and that he failed to give his licensed premises proper supervision on 28 March 1970 at 10:00 p.m. to 10:35 p.m. by allowing persons to have and consume alcoholic beverages on said premises.

The Hearing Officer further recited that Edward Leon Underwood received a letter of warning from the ABC Board on 2 August 1966 calling his attention to the following violations: (1) Allowing Bobby Peeler, a minor, on petitioner's licensed premises on 15 July 1966 at 9:30 p.m. and permitting said minor to work in and about the premises where malt beverages were sold and dispensed under an on-premise permit in violation of G.S. 110-7 and Malt Beverage Regulation No. 17; and (2) failing to give proper supervision to the licensed premises on 15 July 1966 in violation of G.S. 18-78.

The Hearing Officer included in the history of petitioner's case the fact that petitioner's permit was suspended for sixty days beginning 10 December 1965 for failing to keep the licensed premises clean and orderly, failing to give the licensed premises proper supervision, and for permitting violations of G.S. 18-78.1(4).

Upon the facts found and in light of the history above recited, the Hearing Officer recommended that petitioner's permit be suspended for a period of ninety days. The Board approved the findings and notified petitioner that his retail beer permit was suspended for a period of ninety days effective 29 June 1970 by reason of the violations set out in the findings of fact.

On 24 June 1970 petitioner filed this proceeding in the Superior Court of Wake County pursuant to G.S. 143-306 *et seq.* and obtained an order staying the action of the Board pending the outcome of the review in superior court. The matter was heard on the record by Judge Clark who entered the following judgment:

> THIS CAUSE coming on regularly to be heard before the undersigned Judge presiding at a session of Superior Court of Wake County; and the Court having fully reviewed, examined and considered the administrative decision of the respondents in this cause with respect to the petitioner's permits or licenses and the record upon which said administrative decision rests and the matter being heard in compliance with the requirements of the General Statutes of North Carolina, the Court finds:
>
> 1. That the findings of fact and decision of the respondents herein are not supported by competent, material and substantial evidence in view of the entire record as submitted, and the substantial rights of the petitioner have been prejudiced.
>
> 2. That the findings of facts and decision of the respondent are arbitrary and capricious and should be reversed.
>
> NOW, THEREFORE, it is CONSIDERED, ORDERED, ADJUDGED and DECREED that the decision of the respondent shall be and the same is hereby reversed in all respects and further that the respondents shall pay the cost to be taxed by the Clerk;
>
> IT IS FURTHER ORDERED that the judgment of this Court is that any preliminary stay order heretofore made and entered herein shall become permanent.
>
> Given under my hand and seal at the Courthouse in Raleigh, North Carolina, this the 2nd day of December, 1970.
>
> EDWARD B. CLARK
> Judge Presiding

To the ruling of the court and the signing of the foregoing judgment, the Board appealed to the Court of Appeals assigning errors noted in the opinion. The matter was transferred to this Court for initial appellate review under our general referral order dated 30 July 1970.

Robert Morgan, Attorney General, by Christine Y. Denson, Assistant Attorney General, and James L. Blackburn, Staff Attorney, for the respondent appellant.

Charles B. Hodson and Robert L. Satterfield, attorneys for petitioner appellee.

HUSKINS, Justice.

[1, 2] It is well established that regulation of the sale and use of alcoholic beverages is within the police power of the State. *Boyd v. Allen,* 246 N.C. 150, 97 S.E. 2d 864 (1957). The State Board of Alcoholic Control is empowered to enforce laws relating to the sale and control of alcoholic beverages. G.S. 18-39. The suspension and revocation of licenses by the Board are administrative decisions affecting the rights of specific parties and are subject to judicial review under the provisions of Article 33 of Chapter 143 of the General Statutes. Upon such review, the "whole record" test is applicable, and the decision of the Board may be reversed if substantial rights of the licensee are prejudiced by administrative findings, inferences, conclusions or decisions which are not supported "by competent, material, and substantial evidence in view of the entire record as submitted." G.S. 143-315(5); *Freeman v. Board of Alcoholic Control,* 264 N.C. 320, 141 S.E. 2d 499 (1965); *Keg, Inc. v. Board of Alcoholic Control,* 277 N.C. 450, 177 S.E. 2d 861 (1970). The "whole record" test must be distinguished from the "any competent evidence" standard. *See* Hanft, North Carolina Case Law—Administrative Law, 45 N. C. L. Rev. 816 (1967).

[3] The State Board of Alcoholic Control has adopted regulations to administer the laws governing the sale of wine and malt beverages, and the Board may revoke or suspend the State permit of any licensee for a violation of the law or of any regulation adopted by it. G.S. 18-78(d). Regulation No. 30 reads as follows: "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 permises consumption may be suspended or revoked upon violation of . . . the following pro-

visions upon the licensed premises: . . . 5. Permitting any person engaging in an affray or disorderly conduct." Petitioner is charged with a violation of this regulation.

All the evidence adduced at the hearing and considered by the Board tends to show that the licensee was making a reasonable effort in good faith to enforce the provisions of G.S. 18-78.1(4) which provides that a licensee shall not permit on the licensed premises any disorderly conduct, breach of the peace, etc. Accordingly, Underwood's employees were ejecting troublemakers from his premises, thus indicating petitioner's disapproval of the disorderly conduct in which the participants were engaged. Notwithstanding such evidence, petitioner was found by the Board to be in violation of Regulation No. 30(5)—permitting others to engage in an affray.

That there was an affray or breach of the peace on petitioner's premises is not disputed. The question is whether forcible removal from the premises of persons engaged in an affray constitutes "permitting or allowing persons to become engaged in an affray"? The answer is no.

To permit means to acquiese with knowledge, to knowingly consent. *Hinkle v. Siltamaki,* 361 P. 2d 37 (Wyo., 1961). The words "permit" and "allow" are synonymous. *Collins v. Johnson,* 242 S.C. 112, 130 S.E. 2d 185 (1963); *City of Eastlake v. Ruggiero,* 7 Ohio App. 2d 212, 220 N.E. 2d 126 (1966). "Permit" has been construed to mean in effect "knowingly permit," as the following cases illustrate. To permit sale of alcoholic beverages to a minor connotes some opportunity for knowledge and prevention of the sale. *People v. Teetsel,* 177 N.Y.S. 2d 612, 12 Misc. 2d 835 (1958). To permit livestock to run at large means to allow it to be done with knowledge. *Hinkle v. Siltamaki, supra.* To permit the unlawful sale of liquor in his building, an owner must have knowledge of the violation and consent to it. *Gray v. Stienes,* 69 Iowa 124, 28 N.W. 475 (1886). To permit persons "to resort for the purpose of drinking intoxicating liquors" means to consent to same. *State v. Wheeler,* 38 N.D. 456, 165 N.W. 574 (1917). To permit gaming in one's house means to consent to it with knowledge. *Stuart v. State,* 60 S.W. 554 (Tex. Crim. App., 1901).

[3, 4] We therefore hold that Regulation No. 30(5), authorizing suspension or revocation of license for "permitting any person engaging in an affray or disorderly conduct," means

knowing acquiescence in such conduct. The mere fact that an affray took place on the premises is no violation of the regulation and affords no basis for suspension or revocation of license. The record in this case does not support by competent, material and substantial evidence the charge that Edward Leon Underwood *knowingly permitted* the affray. Instead, it points to the conclusion that he was making a reasonable effort in good faith to prevent such conduct by ejecting the wrongdoers from the premises.

It is unlawful for any person "to permit any alcoholic beverages to be possessed or consumed upon any premises not authorized pursuant to chapter 18, North Carolina General Statutes." G.S. 18-51(6)d. Furthermore, under a license for the sale of malt beverages and wines for consumption on or off premises, no holder of such license shall "*knowingly permit* the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized by law." (Emphasis added.) G.S. 18-78.1(5).

[5] The Board charges Edward Leon Underwood with a violation of the foregoing statutes in that he allegedly permitted the consumption of alcoholic liquors on his licensed premises. We now examine the validity of this charge.

Officer Ludwick testified that at 10:00 p.m. on the night in question he saw two boys come out of the club, enter a parked car, and tilt a bottle as if pouring into a cup; that he demanded and received from the boy named Bobby Eugene Moore a bottle of Bacardi Rum approximately one tenth full; that at 10:35 p.m. several boys went to a parked car on the club's parking lot with cups in their hands and a bottle of whiskey; that he demanded and received from a boy named James Davis Knott a bottle of Ancient Age Whiskey.

Petitioner testified that all patrons with whiskey are required to surrender it or pour it out before entering the club; that signs had been erected on the parking lot to the effect that alcohol was not allowed but had been torn down by people backing over them; that he has personnel who patrol the parking area at night and the grounds were being patrolled on the night the episodes described by Officer Ludwick occurred; that he ordinarily has two or three hundred patrons on Saturday night, and it is difficult to watch everybody in their cars at the same

time. Petitioner's evidence is not refuted. The Board relies on the evidence of Officer Ludwick.

Knowledge may be implied from the circumstances. *State v. Stathos,* 208 N.C. 456, 181 S.E. 273 (1935). Knowledge means "an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said that a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as to give him actual information concerning it." *State v. Hightower,* 187 N.C. 300, 121 S.E. 616 (1924). Thus the holder of a license for the sale of wine and beer who is aware of violations on his premises but who arranges never to see them cannot be said to be ignorant of their existence. He must take steps to avoid violations or suffer the penalties prescribed. *Campbell v. Board of Alcoholic Control,* 263 N.C. 224, 139 S.E. 2d 197 (1964).

When the foregoing principles are applied to the record as a whole in the case before us, there is a lack of substantial evidence that petitioner knowingly permitted the two violations observed by Officer Ludwick. The mere fact that two boys violated the law on petitioner's premises on a single night within a period of thirty-five minutes does not constitute substantial evidence that petitioner *knowingly permitted* the consumption of alcoholic liquors on his premises.

[6] The charge of failing to properly supervise the premises is likewise unsupported by substantial evidence. There was evidence that petitioner's employees were patrolling the parking lot on the night in question and no evidence to the contrary. In *Food Stores v. Board of Alcoholic Control,* 268 N.C. 624, 151 S.E. 2d 582 (1966), the proprietor was charged, *inter alia,* with failure to give proper supervision to his premises by allowing the sale of beer to a minor. Chief Justice Parker, writing for the Court, said: "Surely, the sale of beer on one occasion to a minor under the circumstances here is not a failure to give the licensed premises proper supervision." By like token, under the circumstances here, we hold that the failure to observe all activities on a busy parking lot for a period of thirty-five minutes is not a failure, within the meaning of the law, to give the licensed premises proper supervision.

For lack of competent, material and substantial evidence to support the findings and order of the Board, in view of the entire record as submitted, the judgment of the superior court is

Affirmed.

N. C. MONROE CONSTRUCTION COMPANY v. GUILFORD COUNTY BOARD OF EDUCATION

No. 27

(Filed 12 May 1971)

1. **Declaratory Judgment Act § 1; Rules of Civil Procedure § 57— declaratory judgment — existence of another remedy**

Declaratory relief was not precluded by the fact that plaintiff had another adequate remedy, namely, injunction, in a proceeding which was pending on the effective date of the new Rules of Civil Procedure. G.S. 1A-1, Rule 57.

2. **Declaratory Judgment Act § 2; Parties § 1; Rules of Civil Procedure § 19— validity of contract — necessary parties**

The bidder to whom a school construction contract was awarded by a county board of education was a necessary party in a proceeding instituted by an unsuccessful bidder against the board of education to obtain a declaration that the contract award was invalid. G.S. 1-260; G.S. 1A-1, Rule 19(a) and (b).

APPEAL by defendant from *Robert Martin, S.J.*, at the 10 July 1970 Session of GUILFORD, heard prior to determination by the Court of Appeals.

The plaintiff, a general contractor and a taxpayer of Guilford County, submitted a bid for the general construction contract (i.e., exclusive of the plumbing, heating, ventilating, air conditioning and electrical work) for the construction of Southern High School in Guilford County. The contract was awarded by the defendant to Barker-Cochran Construction Company, hereinafter called Barker-Cochran. The plaintiff instituted this action for a declaratory judgment praying that the Court: (a) Adjudge the purported award of the contract to Barker-Cochran invalid, (b) adjudge that the contract should be awarded to the plaintiff or readvertised for bids and (c) issue

its writ of *mandamus* requiring the defendant to award the contract to the plaintiff or to readvertise it for bids.

In substance, the complaint (renumbered) alleges:

(1) The plaintiff, a taxpayer of Guilford County, is engaged in the general contracting and construction business and is a responsible bidder. In December 1968 the defendant advertised for bids for construction of Southern High School and the plaintiff, along with other general contractors, submitted a bid on the general construction contract.

(2) The bid form prepared by the defendant provided for a base bid and for separate bids on ten additional items under the caption "Equipment." The plaintiff's total bid (base bid plus the ten bids on the equipment items) was the lowest bid, Barker-Cochran being the next lowest bidder.

(3) After the bids were opened, the defendant's supervisor of construction informed the plaintiff that all of the bids were in excess of the funds available for the construction of the building and negotiated with the plaintiff for the purpose of reducing the construction cost. In these negotiations the plaintiff submitted new figures reducing its total bid.

(4) At the same time, without the knowledge of the plaintiff, the defendant's supervisor of construction was also negotiating with Barker-Cochran, in the course of which negotiations it conveyed to Barker-Cochran, for its consideration and use, certain suggestions made by the plaintiff for changes in the construction plans as a means of reducing the cost of the building.

(5) Following these negotiations, the defendant considered the bids of the plaintiff and of Barker-Cochran and eliminated five of the "equipment" items from consideration in determining the lowest bidder. After so eliminating these five "equipment" items, the defendant determined that Barker-Cochran was the lowest bidder and awarded the contract to Barker-Cochran, "subject to the approval and transfer by the County Board of Commissioners to this project * * * of $82,940.80 from unencumbered funds previously appropriated to the Southeast Junior High School project," this condition being necessary due to the fact that both plaintiff's and Barker-Cochran's bids, when added to the bids for the plumbing, heating, air conditioning and electrical work and the architect's fees, would still sub-

stantially exceed the appropriation for the construction of Southern High School.

(6) All ten of the "equipment" items are necessary to the completion and normal operation of the proposed building. The installation of all ten requires coordination with the rest of the plans and work on the general construction contract. The defendant's choice of the five "equipment" items for elimination in determining the low bid was subjective and arbitrary. A different selection of "equipment" items for elimination would have resulted in a total bid by the plaintiff of less than the total bid of Barker-Cochran.

(7) The County Commissioners made the requested additional appropriation by transferring to the Southern High School project funds which had been appropriated for the construction of Southeast Junior High School.

The plaintiff contends that the action of the defendant in awarding the general construction contract to Barker-Cochran, rather than to the plaintiff, was contrary to the competitive bid system prescribed in G.S. 143-129; the elimination of the five "equipment" items as a step in the determination of which contractor had submitted the lowest bid was arbitrary and contrary to law; that the plaintiff was actually the lowest responsible bidder for the contract; and that the negotiations by the defendant with it and with Barker-Cochran between the opening of the sealed bids and the award of the contract were unfairly conducted. For all of these reasons, it contends that the award of the contract to Barker-Cochran was invalid under G.S. 143-129.

The defendant demurred to the complaint on the following grounds: (1) The complaint does not state facts sufficient to constitute a cause of action for relief under the Uniform Declaratory Judgment Act; (2) there is a defect of parties defendant in that Barker-Cochran should have been made a party, and also in that the plumbing, heating, air conditioning and the electrical contractors should also have been made parties; and (3) *mandamus* does not issue to require the performance of an act involving discretion of the defendant such as the construction of a school building.

The demurrer was heard at the 3 March 1969 Session by Judge Exum and was overruled. The defendant thereupon filed its answer.

The matter then came on to be heard before Judge Robert Martin, a jury trial having been waived. Judge Martin made detailed findings of fact, substantially in accord with the allegations of the complaint. Upon these findings of fact, he concluded, among other things, that the action of the defendant was contrary to the competitive bid system embodied in G.S. 143-129, its elimination of the five "equipment" items was arbitrary and contrary to law, the plaintiff was the lowest responsible bidder for the contract and the award of the contract to Barker-Cochran was unauthorized and invalid. Upon these findings and conclusions, Judge Martin entered judgment declaring the contract between the defendant and Barker-Cochran *ultra vires* and void.

The defendant assigns as error: (1) The overruling of its demurrer to the complaint, and (2) the conclusion of the Superior Court that, as a matter of law, upon the findings of fact made by the court, the contract is *ultra vires* and void. The defendant does not assign as error any finding of fact by the trial judge.

McLendon, Brim, Brooks, Pierce & Daniels, by Hubert Humphrey, for plaintiff-appellee.

Douglas, Ravenel, Hardy & Crihfield, by John Hardy, for defendant-appellant.

LAKE, Justice.

This action was instituted and the pleadings were filed prior to the taking effect of the present Rules of Civil Procedure. Consequently, a demurrer, now abolished by Rule 7, was then the proper vehicle by which to assert the absence of a necessary party and the failure of the complaint to state a claim upon which relief can be granted, these being now asserted in the answer or by motion. See Rule 12(b).

Rule 57 of the Rules of Civil Procedure, relating to declaratory judgment, provides:

> "The procedure for obtaining a declaratory judgment pursuant to article 26, chapter 1, General Statutes of North Carolina, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39.

The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a prompt hearing of an action for a declaratory judgment and may advance it on the calendar." (Emphasis added.)

[1] The present Rules of Civil Procedure apply to all actions and proceedings pending on January 1, 1970 as well as to actions and proceedings commenced on and after that date. Session Laws 1969, c. 803, § 10. Thus, the present rules apply to this action. Consequently, by the express provision of Rule 57, *supra,* the defendant's contention that its demurrer to the complaint, for failure to state facts constituting a cause of action for declaratory relief, should have been granted because the plaintiff has a proper remedy other than declaratory relief, namely, injunction, has no merit now, assuming that originally it did have merit.

Rule 19(a) and (b) of the Rules of Civil Procedure provides:

"(a) *Necessary joinder.*—Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; * * *

"(b) *Joinder of parties not united in interest.*—The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action."

The Declaratory Judgment Act provides that courts of record, within their respective jurisdictions, shall have power to declare rights whether or not further relief is or could be claimed and such declarations have the effect of a final judgment or decree. G.S. 1-253. It further provides that any person interested under a written contract or whose rights are affected by a statute or contract may have determined any question of construction or validity arising under the statute or contract and may obtain a declaration of rights thereunder. G.S. 1-254. With reference to the parties to an action for declaratory judgment, the Act provides: "When declaratory relief is sought, all persons shall be made parties who have or claim any inter-

est which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." G.S. 1-260.

In *Morganton v. Hutton & Bourbonnais Company,* 247 N.C. 666, 101 S.E. 2d 679, Justice Johnson, speaking for the Court with reference to an action for declaratory judgment, said: "Whenever, as here, a fatal defect of parties is disclosed, the Court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the Court." See also: *Edmondson v. Henderson,* 246 N.C. 634, 99 S.E. 2d 869; *Peel v. Moore,* 244 N.C. 512, 94 S.E. 2d 491. In the Morganton case the plaintiff contended that a deed from the defendant's former cotenants, properly interpreted, divested those persons of all title to and interest in the property involved in the action. The Court said that the heirs or successors in interest of those grantors were entitled to be heard on the question of the interpretation or construction of their predecessors' deed and, therefore, should have been made parties to the action, notwithstanding the provision in G.S. 1-260 that "No declaration shall prejudice the rights of persons not parties to the proceeding." As to such parties the Court said: "When, as here, decision requires the construction of formal legal documents, vitally affecting the rights of several persons, some parties to the action and some not, can it be said with assurance of verity that the lower court may proceed to adverse judgment and the appellate court to affirmation without prejudice to the rights of those not made parties?"

In *Edmondson v. Henderson, supra,* Justice Johnson, again speaking for this Court in an action for a declaratory judgment, said:

> "In *Gaither Corp. v. Skinner,* 238 N.C. 254, 256, 77 S.E. 2d 659, the Court said, quoting from McIntosh, North Carolina Practice and Procedure, Sec. 209, p. 184: 'Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting

them, and whether they shall be brought in or not is within the discretion of the Court.'

"In *Assurance Society v. Basnight,* 234 N.C. 347, 352, 67 S.E. 2d 390, it is said: 'The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. * * * A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined.'

"In *Garrett v. Rose,* 236 N.C. 299, 307, 72 S.E. 2d 843, it is said: 'A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party.'

* * *

"[C]onceding without deciding that the practice as to parties may be somewhat liberalized under the Declaratory Judgment Act, nevertheless where it appears, as here, in a case involving the construction of a will that the absence of a necessary party prevents the entry of a judgment finally settling and determining the question of interpretation, we think the court should refuse to deal with the merits of the case until the absent person is brought in as a party to the action. * * * "

In *Hine v. Blumenthal,* 239 N.C. 537, 80 S.E. 2d 458, the action was for a declaratory judgment to determine whether a portion of an alley might be closed. Speaking through Justice Denny, later Chief Justice, this Court held that while the plaintiffs could release their own easement rights in the alley, their release would not affect the obligation of the owner of the servient estate with respect to such owner's responsibility to the defendants, if any, in connection with such alley, and, therefore, the owners of the fee in the alley, subject to the easement, were necessary parties to the proceeding.

In 22 AM. JUR. 2d, Declaratory Judgments, § 80, it is said:

"While persons not parties to a proceeding for a declaratory judgment would not be bound by the judgment, it has been held that judgment should not be entered in their absence if they have such an interest in the controversy that their rights would be prejudicially affected by the judgment."

To the same effect, see: 3 Strong, N. C. Index 2d, Declaratory Judgments, § 2, and Annot., 71 A.L.R. 2d 723, § 10.

In *City of Louisville v. Louisville Auto Club,* 290 Ky. 241, 160 S.W. 2d 663, the plaintiff brought declaratory judgment proceedings to obtain a declaration that a parking meter ordinance of the city was invalid and, consequently, a contract for the installation of meters was also invalid. The court held that it could not pass upon the validity of the contract, since the person contracting with the city for the installation of the meters had not been made a party. In *Weissbard v. Potter Drug & Chemical Corp.,* 6 N.J. Super. 451, 69 A. 2d 559, aff'd 4 N.J. 115, 71 A. 2d 629, the court refused to declare a "fair trade" contract abandoned and so void in a proceeding to which the retailer with whom the defendant had made the contract was not a party. In *Brewer v. Brasted,* 11 Pa. D & C 103, a contract for the erection of a school building was alleged to be invalid because the school board was not legally constituted. The court declined to enter a declaratory judgment because the other party to the contract was not a party to the action and so had not been given an opportunity to be heard.

[2] The purpose of the present action is to obtain a declaration that the contract between the defendant and Barker-Cochran is invalid. While Barker-Cochran, not being a party to this action, would not be legally bound by a judgment rendered herein, as a practical matter, its rights, if any, under the contract with the defendant would be adversely affected by a declaration such as the plaintiff seeks in this action. Furthermore, if the plaintiff should prevail in this action, the defendant, though forbidden by the judgment of the court to perform its contract, might well be sued for nonperformance by Barker-Cochran. Clearly, Barker-Cochran is a necessary party in a proceeding to declare its contract with the defendant invalid and the court below could not properly determine the validity of that contract without making Barker-Cochran a party to the proceeding.

Without expressing any opinion as to the merits of the contentions of the plaintiff, the judgment of the Superior Court is, therefore, vacated and the matter is remanded to the Superior Court in order that Barker-Cochran may be made a party and, thereupon, further proceedings in accordance with law may be had.

In oral argument before this Court, in response to a question by the Court, we were advised that the Southern High School building has been completed and paid for and is now occupied for school purposes by the defendant. This does not appear in the record before us. We express no opinion as to whether, if these things be true, the present proceeding is moot, the merits of the case not being before us by reason of the absence of Barker-Cochran, a necessary party, from the proceeding.

Reversed and remanded.

IN RE: ANNEXATION ORDINANCE ADOPTED BY THE CITY OF NEW BERN, NORTH CAROLINA, DECEMBER 19, 1969

No. 51

(Filed 12 May 1971)

1. **Municipal Corporations § 2— annexation proceedings — scope of superior court review**

The superior court's review of annexation proceedings is limited to these inquiries: (1) did the municipality comply with the statutory procedures; (2) if not, will petitioner suffer material injury by reason of the municipality's failure to comply; (3) does the character of the area specified for annexation meet the requirements of G.S. 160-453.16 as applied to petitioners' property. G.S. 160-453.18(a) and (f).

2. **Municipal Corporations § 2— review of annexation proceeding — exclusion of irrelevant evidence**

In the superior court's review of a municipal annexation proceeding, the court properly excluded, as irrelevant, petitioner's evidence that a majority of the city police force had complained about overtime pay and other matters and that the city fire department was asking for new equipment.

3. **Municipal Corporations § 2— challenge to annexation proceedings — burden of proof**

Where the record of annexation proceedings shows on its face substantial compliance with every essential provision of the applicable statutes, the burden is upon the petitioners who appealed from the annexation ordinance to show by competent evidence that the city failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights.

4. **Municipal Corporations § 2— attack on annexation proceeding — slight irregularity in the proceeding — harmless effect**

Petitioners who opposed a city's annexation plans were not materially prejudiced by the city's failure to have a representative present at the annexation hearing to explain its report on proposed services for the annexed area, where (1) the report, which was clear, concise, and couched in terms a layman could understand, had been available for public inspection prior to the hearing; (2) petitioners' attorneys had examined the report but did not request an explanation of the city's plans; and (3) the petitioners' real grievance was the city's Sunday observance ordinance.

5. **Municipal Corporations § 2— slight irregularities in annexation proceedings**

Slight irregularities will not invalidate annexation proceedings if there has been substantial compliance with all essential provisions of the law.

6. **Municipal Corporations § 2— attack on annexation proceedings — grounds for attack**

A property owner can attack annexation proceedings only upon the grounds specified in the statutes; he cannot successfully resist annexation because a city ordinance will adversely affect his financial interest.

APPEAL by petitioners from *Parker, J.*, 4 May 1970 Session of CRAVEN, transferred from the Court of Appeals for initial appellate review by the Supreme Court under G.S. 7A-31(b)(4). The appeal was docketed and argued at the Fall Term as Case No. 79.

In this proceeding, brought under G.S. 160-453.18, petitioners, Irvin Eisenbaum, Tram Realty of New Bern, Inc., Mart of New Bern, Inc., and Mammoth Mart, Inc., seeks to invalidate the annexation ordinance adopted by the City of New Bern (City) on 19 December 1969. The area annexed includes property owned by petitioner Eisenbaum, on which the other petitioners—as lessees or contractors—operate a retail store known as Mammoth Mart Department Store.

In re Annexation Ordinance

On 7 October 1969, City's Board of Aldermen (Board) adopted a resolution announcing that City proposed to annex approximately 403.73 acres, described by metes and bounds and lying generally west of its corporate limits. A public hearing on the proposed annexation was set for 18 November 1969 and duly advertised as required by G.S. 160-453.17(b).

On 3 November 1969, more than fourteen days prior to the date of the public hearing, as required by G.S. 160-453.15, Board approved and filed a report setting forth its plans to provide services to the area proposed for annexation. The plat included in the report divided the area to be annexed into two sections. Section 1, which embraces petitioners' property, contained about 147.79 acres; Section 2, approximately 255.94 acres.

The hearing on 18 November 1969 was opened with prayer by the tax collector. Petitioners were represented by J. Troy Smith, Jr., of the firm of Ward, Tucker, Ward, and Smith, attorneys of New Bern, and Osborne Lee, Jr., of the firm of Lee and Lee, attorneys of Lumberton. A large audience was present, and a number of people spoke against the annexation of Section 2. Except for one gentleman, who thought "the City already had its hands full and should concentrate on improving services rather than annexing *any* additional territory," no one protested the incorporation of that portion of Section 1 which was actually annexed. No representative of the municipality made any explanation of the report setting forth City's plan for extending municipal services to the territory proposed for annexation. However, neither petitioners' counsel nor anyone else requested an explanation of the report or inquired about these plans, and it is stipulated that counsel for petitioners had examined the report which had been filed in the office of the City Clerk fourteen days prior to the public hearing.

At a special meeting on 19 December 1969, Board adopted an ordinance by which City annexed, as of 31 December 1969, only a portion of the total area originally proposed. G.S. 160-453.17(e). The annexed area, described in metes and bounds, included the major part of Section 1. It embraced the property owned by petitioner Eisenbaum on which the Mammoth Mart Department Store is located. *Inter alia,* the ordinance contained specific findings that the area to be annexed met the requirements of G.S. 160-453.16. It reaffirmed City's purpose and

intent to provide municipal services as specified in the report filed 3 November 1969 and noted that these services could "obviously" be more easily provided for the smaller area actually annexed than for the larger one originally contemplated.

As allowed by G.S. 160-453.18, within thirty days following the passage of the annexation ordinance, petitioners appealed to the Superior Court for a review of Board's action. In brief summary they alleged City had failed to meet statutory requirements for annexation in that: (a) the annexation ordinance does not set forth "a specific plan" for extending police protection, fire protection, trash and garbage collection, street maintenance, water and sewer lines to the annexed area; (b) City has not provided for the financing of these municipal services; (c) the annexation ordinance makes a division of territory not described in the report or explained at the public hearing; (d) the area annexed is not "an area developed for urban purposes" as defined by G.S. 160-453.16(c); (e) at the public hearing there was no explanation of the annexation report by a City representative; (f) City has a "Sunday Observance Ordinance or Blue Law" which will prevent the corporate petitioners from operating the Mammoth Mart Department Store on Sunday; and (g) in consequence of City's disregard of the statutory requirements, petitioners will suffer material and irreparable injury unless the court declares the annexation ordinance null and void and stays its effective date pending the outcome of this proceeding.

Annexed to the petition was an affidavit by Eisenbaum that he had purchased the land on which the building now occupied by the Mammoth Mart Department Store is located because there were no legal restrictions against "retail business activity on Sunday" in Craven County; that since the Mammoth Mart opened for business on 8 October 1969 it has operated between the hours of 1:00 p.m. and 6:00 p.m. on Sunday; "that the motive prompting the City of New Bern to annex (his) shopping center is not of any sound municipal purpose." Also attached was an affidavit by Frank H. Brenton, an officer of Mammoth Mart, Inc., in which he averred that if the Mammoth Mart were closed on Sunday under City's "Blue Law," the store would be reduced to "a break-even operation"; that it would not have come to Craven County had there been any "reasonable expectancy of not being able to operate on Sunday"; that the

proposed annexation of the shopping center is arbitrary and illegal.

On 2 January 1970 Bundy, J., restrained City from putting the annexation ordinance into effect and from taking "any action whatsoever to prevent the Sunday operation of the business of the petitioners until further order by this court."

On 12 May 1970 Judge Parker reviewed the annexation proceedings without a jury as provided by G.S. 160-453.18(f). Before offering any evidence, petitioners moved the court to remand the proceedings to Board with directions to hold another public hearing after readvertisement because, at the hearing on 18 November 1969, no representative of City had explained the report on the proposed annexation as required by G.S. 160-453.17(d). This failure, they said, was "to the material prejudice of the substantial rights of the petitioners." The motion was denied.

Petitioners called as witnesses the Clerk-Treasurer of City and the City Manager. Their testimony tended to establish the facts detailed above. They also called the Chief of Police and Captain of the Fire Department and, by cross-examination, sought to establish that City's personnel and equipment were inadequate to furnish police and fire protection, as well as other municipal services, to the newly annexed area. Their testimony, however, tended to show that since 31 December 1969 all municipal services had been adequately supplied; that City had plans for increased fire protection and other services which were ready to be implemented; and that since 5 August 1969 City had been providing fire protection to petitioners under a contract to do so. The court declined to admit evidence that prior to 31 December 1969 a majority of the uniformed policemen had complained to the Board about their overtime pay, the lack of a vice squad, and recapped tires on police cars, and that the fire department was "going to ask for more equipment because we prepare for war in time of peace." Petitioners offered no other evidence. City offered no testimony.

After the hearing, Judge Parker found facts in accordance with City's minutes setting forth the annexation procedures followed and the testimony of the witnesses and entered judgment affirming the annexation. In brief summary (except as quoted) he concluded: (1) The area annexed meets the re-

quirement of G.S. 160-453.16 and qualified for annexation; (2) City substantially complied with the procedures required by Part 3 of N. C. Gen. Stats., Ch. 160; (3) "(S)uch procedural irregularities as may have occurred by reason of the lack of a full explanation of the report of services at the public hearing by a representative of the municipality, did not materially prejudice any substantive right of any of the petitioners," counsel for petitioners having examined said report of services in the office of the City Clerk prior to the public hearing; and (4) adequate municipal services were being furnished the area in question and additional services awaited the outcome of this litigation. From this judgment petitioners appealed.

Lee & Lee; Ward, Tucker, Ward & Smith for petitioner appellants.

Ward & Ward for respondent appellee.

SHARP, Justice.

Petitioners undertake to raise three questions upon this appeal: (1) Did the court err in refusing to remand the annexation ordinance to Board with instructions to readvertise and hold another public hearing at which a representative of City would explain the report setting forth its plan to provide services to the area proposed for annexation? (2) Did the court err in excluding evidence concerning complaints made by representatives of the police department to Board and "concerning the condition and capability" of the fire department to serve the area covered by the annexation ordinance? (3) Is the trial court's judgment supported by the evidence and applicable law? The scope of judicial review of annexation proceedings, however, is limited by statute.

[1] The jurisdiction of the Superior Court on appeal from an annexation ordinance is defined by G.S. 160-453.18. Within thirty days after the passage of an annexation ordinance the statute authorizes any person owning property in the annexed territory who believes "that he will suffer material injury by reason of the failure of the municipal governing body to comply with the procedure set forth in this part (Part 3 of N. C. Gen. Stats., Ch. 160) or to meet the requirements set forth in § 160-453.16 as they apply to his property" to petition the Superior Court to review the action of the governing board. Thus, the

court's review is limited to these inquiries: (1) Did the municipality comply with the statutory procedures? (2) If not, will petitioners "suffer material injury" by reason of the municipality's failure to comply? (3) Does the character of the area specified for annexation meet the requirements of G.S. 160-453.16 as applied to petitioners' property? G.S. 160-453.18(a) and (f).

[2] In reviewing the procedure followed by a municipal governing board in an annexation proceeding the question whether the municipality is then providing services pursuant to the plan of annexation is not before the court. Obviously, extension of services into an annexed area in accordance with the promulgated plan is not a condition precedent to annexation. *Dale v. Morganton,* 270 N.C. 567, 155 S.E. 2d 136. If, one year after annexation, "the municipality has not followed through on its service plans" adopted under the annexation procedures, the remedy of an aggrieved property owner within the annexed territory is by application for a writ of *mandamus.* G.S. 160-453.17(h).

Thus, the list of complaints made by certain policemen and the testimony of the Captain of the Fire Department that he intended to request additional equipment were totally irrelevant to the inquiry. The rejection of this evidence was not error.

[3] On its face the record of the annexation proceedings shows substantial compliance with every essential provision of the applicable statutes, N. C. Gen. Stats., Ch. 160, Part 3. Therefore, the burden is upon petitioners, who appealed from the annexation ordinance, to show by competent evidence that City in fact failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights. *Huntley v. Potter,* 255 N.C. 619, 122 S.E. 2d 681.

[4] The only irregularity which the evidence tends to establish was City's failure, at the public hearing on 18 November 1969, to have a representative explain the report of its plans to provide services to the area proposed for annexation. Thus, the single question presented is whether this failure caused petitioners to suffer material injury. Obviously it did not.

The report, which is clear, concise, and couched in terms laymen can understand, had been on file in the office of the City Clerk for fourteen days prior to the public hearing. It was available for public inspection, and petitioners' attorneys had examined it. At the hearing petitioners were represented by two legal firms. Their lawyers, as well as all other persons who attended the hearing, apparently understood the report, for no one requested any explanation of City's plan to provide services. It would be vain, even farcical, for the court now to require City to readvertise and hold another public hearing so that one of its representatives could make a ritualistic explanation of plans, which had largely been carried out at the time the annexation proceedings were reviewed in the Superior Court.

[5] It is generally held that slight irregularities will not invalidate annexation proceedings if there has been substantial compliance with all essential provisions of the law. *Huntley v. Potter, supra;* 2 McQuillin, Municipal Corporations § 7.29 (3d ed. 1966). "Absolute and literal compliance with a statute enacted describing the conditions of annexation is unnecessary; substantial compliance only is required. . . . The reason is clear. Absolute and literal compliance with the statute would result in defeating the purpose of the statute in situations where no one has been or could be misled." *State v. Town of Benson, Cochise County,* 95 Ariz. 107, 108, 387 P. 2d 807, 808. *Accord, City of Ames v. Olson,* 253 Iowa 983, 114 N.W. 2d 904.

[6] Petitioners' pleadings and affidavits make it quite clear that their only grievance is City's Sunday Observance Ordinance —not the failure of a City representative to explain plans which they fully understood. A property owner, however, can attack annexation proceedings only upon the grounds specified in the statutes. He cannot successfully resist annexation because a city ordinance will adversely affect his financial interest.

The judgment of the Superior Court approving the annexation procedures of the Board of Aldermen of the City of New Bern and the annexation ordinance enacted by it on 19 December 1969 is affirmed. The injunction staying the annexation of petitioners' property and the application of City's ordinances to it is hereby dissolved. *See D & W, Inc. v. Charlotte,* 268 N.C. 720, 152 S.E. 2d 199.

Affirmed.

STATE OF NORTH CAROLINA v. THOMAS HARRAL GREENE, JR.

No. 82

(Filed 12 May 1971)

1. **Criminal Law § 161— assertion of errors on appeal**

An error asserted on appeal must be based upon an appropriate exception duly taken and shown in the record. Rules of Practice in the Supreme Court Nos. 19 and 21.

2. **Criminal Law § 166— the brief — abandonment of assignments of error**

Even though based upon exceptions duly noted in the record and preserved in the statement of the case on appeal, assignment of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, is deemed abandoned. Rule 28.

3. **Criminal Law § 164— denial of nonsuit motion at close of State's evidence — waiver by defendant**

The denial of defendant's motions for nonsuit at the conclusion of the State's evidence in chief was waived by the defendant's introduction of evidence and is not available to him on appeal. G.S. 15-173.

4. **Criminal Law § 164— exceptions to denial of motions for nonsuit — form of assignments of error**

The denial of defendant's two separate motions for judgment of nonsuit as to the charge of first degree murder and as to the charge of the indictment generally should have been the subjects of separate assignments of error.

5. **Criminal Law § 104— motion for nonsuit — conflicts in the evidence**

Conflicts in the evidence present questions for the jury and do not supply a basis for a judgment of nonsuit.

6. **Criminal Law § 104— motion for nonsuit — consideration of evidence**

Upon motion for judgment of nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom in its favor.

7. **Homicide § 21— homicide case — sufficiency of evidence**

Eyewitness' testimony that she saw the defendant point a pistol at the deceased and fire when the deceased was standing five feet away with his hands outstretched and empty and his palms turned upward, *held* sufficient to support a jury finding of defendant's guilt of first degree murder.

8. **Criminal Law § 113— instructions on the evidence — plea of self-defense**

There is no merit to defendant's contention that the trial judge should have reviewed defendant's evidence relating to his plea of self-defense, where (1) the court's summary of the State's and the defendant's evidence was fair and impartial and (2) defendant did not request any addition or correction to the charge.

9. Criminal Law § 114; Homicide § 27— homicide case — instructions — expression of opinion by trial court

Trial court's statement, in his further instructions on manslaughter, that "I am referring, of course, to such cases as the one that we are now concerned with," was not an expression of opinion but was merely an attempt to eliminate involuntary manslaughter from his definition. G.S. 1-180.

APPEAL by defendant from *Godwin, S.J.*, at the 9 October 1970 Session of DURHAM, heard prior to determination by the Court of Appeals.

The defendant was indicted for the murder of David Core. He was found guilty of manslaughter and sentenced to a term of 20 years in the State's prison. He does not deny that he shot and killed Core at about midnight on the night of 30 April-1 May 1970 in a parking lot on the campus of North Carolina Central University. His contention is that he shot in self defense. The undisputed evidence is that Core died almost instantly as the result of a pistol bullet wound in the upper chest, the shot being fired at a sufficiently close range to leave powder burns about the entrance of the wound, the bullet passing through the body and puncturing the aorta.

At the time of the shooting, the defendant was a student at the university, residing with his parents in Durham. The deceased, also a resident of Durham, was not a student, but was in the company of his date for the evening and another couple, the two girls being students.

Core's date, Artie McKesson, a witness for the State, testified: She was an eyewitness of the shooting, being six or seven feet away and approaching the two men when the shot was fired. She spent the afternoon with Core, he brought her back to the dormitory at 7 p.m. and at approximately 9:30 p.m. returned, took her out in his car to get something to eat, after which they went back to the dormitory, where the other couple joined them, and were sitting in the car in the parking lot discussing where they would go next, Core being in the driver's seat. At that time the defendant and his companions drove up and parked parallel to the Core automobile. Immediately, the defendant, addressing Core, asked, "Are you the man I had an argument with?" The defendant's companions identified Core as the other participant in the earlier argument. After some

words, Core said to the defendant: "Man, forget about that. It has been over an hour ago." The witness, not knowing anything about the earlier encounter, became alarmed by the conversation. She ran into the dormitory to request that the campus police be called, which was done, and then ran back to the parking lot. As she approached the two men, they were standing outside of their respective vehicles, facing each other and approximately five feet apart. She saw the defendant raise his hand, point his pistol at Core's chest and fire. Core immediately fell backward. Just prior to the shot, Core's hands were out in front of him, palms upward and empty. He did not have on a jacket, had no weapon in his belt and no bulge in his trouser pockets indicating the presence of a weapon. At no time, while in Core's presence, did she observe a weapon of any kind in his possession or in his automobile. Prior to this occurrence, she had never seen the defendant.

All of the evidence is to the effect that neither the defendant nor Core had been drinking and that they were not acquainted with each other.

When the investigating police officers arrived, a crowd had assembled, Core's body was lying where he had fallen, and the defendant, whose car was parked some six feet from the automobile of Core, approached the officers who took him into custody and carried him to the police station. There they searched him and a .38 caliber revolver, holding six bullets, one of which had been fired, was found stuck in the defendant's belt under his jacket. The officers observed no wounds upon the person of the defendant and saw no weapon on the body of Core, in his automobile or in the area where his body lay. Greene was cooperative with the officers and apparently made no effort either to depart from the scene or to hide his weapon.

The defendant's father testified that he was out of the city when this shooting occurred, that the car and the pistol used by the defendant belonged to the father, the car was used as a family vehicle and the pistol, fully loaded, had been left in the glove compartment according to custom.

The testimony of the defendant and his witnesses was in virtual diametric conflict with that of Artie McKesson. It was to this effect:

At approximately 9 p.m. (the campus security officer, who testified for the State, placed this incident at approximately 8 p.m.) the defendant and a group of friends were in another parking lot on the university campus. Core and some male companions drove up and parked near the defendant's automobile. The groups in the two vehicles were not acquainted. Core accosted the girls in the defendant's group, they making no reply. An argument between Core and the defendant ensued. Core struck the defendant and knocked him down. The campus security officer arrived thereupon and, ascertaining that Core was not a student of the university, requested him to leave the campus, which Core did. In the course of this encounter no weapon was observed in the possession of either participant.

The defendant and his friends did not know of any reason or justification for this assault by Core. Thereafter, the defendant was driven to his home by his friends in their automobile. He obtained the key to his father's car from his mother and, after remaining at home for a while with his friends, drove his father's car to a hotel where he and his date picked up another couple. After driving about, they returned to the parking lot on the campus where the shooting occurred. There he noticed the Core automobile. He drove up near it and stopped.

Addressing Core, the defendant said: "What happened? Aren't you the same guy that hit me earlier tonight?" Core acknowledged that he was and announced that he would do it again. Thereupon, Core got out of his car but the defendant remained seated in his own. With much vulgarity, Core stated that since the defendant had brought the matter up again, if he would get out of his car the two would "settle it right now once and for all." The defendant stated he would not get out of the car or fight and just wanted to know what was wrong. After Artie McKesson ran to her dormitory to summon police assistance, the girls in the defendant's car went into their dormitory at the suggestion of his male companion.

Upon the defendant's refusal to get out and fight, Core returned to his car, started it, turned around in the parking lot and stopped again beside the defendant's car. Core got out, announcing that he was going to finish the matter "right now," reaching under the seat of his vehicle out of the view of the defendant. Core then went over to the defendant's car, grabbed

the door handle with one hand and lunged toward the defendant, who leaned over away from Core. While trying to fight Core off, he managed to open the glove compartment, took the gun and fired without aiming, Core's head being then inside the defendant's car. The defendant did not get out of his car until after he had shot Core. He did not know the pistol was in the glove compartment until he opened it, though he had seen the pistol there before.

No statement made by the defendant to any investigating officer was offered in evidence. The defendant testified that he had not been looking for Core prior to the second altercation. He further testified that as Core stood outside the defendant's car, immediately prior to the shooting, he attempted to open the door with his left hand, his right hand being below the level of the door and not in the range of the defendant's vision.

Attorney General Morgan, Assistant Attorney General Eagles, and Staff Attorney Walker for the State.

Pearson, Malone, Johnson & DeJarmon by W. G. Pearson II and C. C. Malone, Jr., for defendant appellant.

LAKE, Justice.

[1] This Court has stated repeatedly that the Rules of Practice in the Supreme Court are mandatory and that Rules 19 and 21 require that an error asserted on appeal must be based upon an appropriate exception duly taken and shown in the record. See also, Rules 19 and 21 of the Rules of Practice of the Court of Appeals, to which court this appeal was taken. *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793; *State v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666; *State v. Hudler,* 265 N.C. 382, 144 S.E. 2d 50; *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781; *State v. Garner,* 249 N.C. 127, 105 S.E. 2d 281; *State v. Wiley,* 242 N.C. 114, 86 S.E. 2d 913; *State v. Moore,* 222 N.C. 356, 23 S.E. 2d 31. "The assignments of error must be based upon exceptions duly noted, and may not present a question not embraced in an exception. Exceptions which appear nowhere in the record except under the purported assignments of error will not be considered." 1 Strong, N. C. Index 2d, Appeal and Error, § 24.

[2] Even though based upon exceptions duly noted in the record and preserved in the statement of the case on appeal, assign-

ments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court; Rule 28, Rules of Practice in the Court of Appeals; *State v. Baldwin,* 276 N.C. 690, 701, 174 S.E. 2d 526; 1 Strong, N. C. Index 2d, Appeal and Error, § 45. For this reason, had the defendant's Assignments of Error Nos. 5, 6, 7, 8 and 9 been based upon exceptions duly noted and preserved in the record, they would be deemed abandoned.

[3, 4] In his Assignments of Error Nos. 1 and 2, the defendant contends that the Superior Court erred in denying his motions for judgment of nonsuit, both as to the charge of first degree murder and as to all charges embraced in the bill of indictment, the defendant having made such motions both at the conclusion of the State's evidence in chief and at the conclusion of all the evidence. The denial of such motions made at the conclusion of the State's evidence in chief was waived by the defendant's introduction of evidence and is not available to him on appeal. G.S. 15-173; *State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897. Thus, only Assignment of Error No. 2, relating to the denial of the motions for judgment of nonsuit made at the close of all the evidence (erroneously stated in the assignment of error as made at the close of the defendant's evidence), could be considered on appeal had an exception appeared in the record. The defendant discusses in his brief only the denial of the motion for judgment of nonsuit as to the charge of first degree murder. Thus, under the rule above mentioned, so much of the assignment as relates to the denial of his motion for judgment of nonsuit as to the charge in the bill of indictment generally is deemed abandoned. Furthermore, the rulings of the trial court upon these two separate motions for judgment of nonsuit as to the charge of first degree murder and as to the charge of the indictment generally should have been the subjects of separate assignments of error. *State v. Blackwell,* 276 N.C. 714, 721, 174 S.E. 2d 534.

[5, 6] In any event, neither branch of this assignment of error has merit. Conflicts in the evidence present questions for the jury and do not supply a basis for a judgment of nonsuit. *State v. O'Neal,* 273 N.C. 514, 160 S.E. 2d 473; *State v. Walker,* 269 N.C. 135, 152 S.E. 2d 133; *State v. Goins* and *State v. Martin,* 261 N.C. 707, 136 S.E. 2d 97. Upon such motion, it is

elementary that the evidence must be considered in the light most favorable to the State and that the State is entitled to every reasonable inference to be drawn therefrom in its favor. 2 Strong, N. C. Index 2d, Criminal Law, § 104. So considered, the evidence in the present case is ample to warrant the denial of the motion concerning the charge of first degree murder and to warrant the submission of that question to the jury.

[7] The testimony of Artie McKesson was that she, an eyewitness, only six feet distant from the defendant and Core at the time of the shot, saw the defendant point his pistol at Core and fire when Core was standing before him with his hands outstretched and empty, the palms turned upward. A reasonable inference could be drawn from the defendant's own testimony that he, having been knocked down by Core, went to his home, armed himself, returned to the campus in search of Core with intent to renew the quarrel and obtain revenge and did renew the quarrel for that purpose some two hours or more after the first altercation had ended. Upon motion for judgment of nonsuit made at the conclusion of all the evidence, so much of the defendant's evidence as is favorable to the State is taken into consideration. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Prince, supra; State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112; *State v. Bryant,* 235 N.C. 420, 70 S.E. 2d 186.

[8] In his Assignment of Error No. 3, the defendant asserts that the trial court erred in its charge to the jury by failing to include in its review of the evidence some of the defendant's evidence relating to his contention that he killed Core in self defense. The defendant does not except to the court's instructions as to the rules of law applicable to self defense.

In summarizing the evidence, the judge told the jury that he would not attempt to recapitulate or summarize all of it, it being the duty of the jury to remember and consider all of the evidence introduced during the trial. The court's summary of the evidence, both that of the State and that of the defendant, was fair and impartial. We find no material omission and no inaccuracy. The defendant did not direct the attention of the trial judge to any omission or inaccuracy or request any addition or correction. As Justice Moore said in *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487: "The recapitulation of all the evidence is not required under G.S. 1-180, and nothing more is

required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. *State v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58. If defendant desired fuller instructions as to the evidence or contentions, he should have so requested. His failure to do so now precludes him from assigning this as error." See also, *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14; Strong, N. C. Index 2d, Criminal Law, § 113. There is no merit in this assignment of error.

[9] The defendant's Assignment of Error No. 4 relates to the trial court's response to a request by the jury for further instruction as to the "essential differences" between first degree murder, second degree murder and manslaughter. In the original charge, the court instructed the jury correctly as to the elements of each of these offenses. When the jury returned with the request for further instructions, the court again defined murder in the first degree, murder in the second degree and manslaughter. The defendant does not contend that there was any error in these instructions as to the applicable rules of law. Concerning manslaughter the court, in response to this request for further instructions, said: "Manslaughter, *and I am referring, of course, to such cases as the one that we are now concerned with,* is the unlawful killing of a human being without malice, express or implied, and without premeditation or deliberation." (Emphasis added.) The defendant contends that the portion of this instruction which we have italicized constituted an expression of opinion by the judge that the defendant should be found guilty of manslaughter. There is no merit in this contention.

It is, of course, error for the judge, in his charge to the jury or otherwise, to express to or in the presence of the jury any opinion as to the verdict which the jury should render. G.S. 1-180. The above quoted instruction did not violate this well settled rule. We think it clear that the court was simply eliminating from his definition involuntary manslaughter to which he had referred in the original charge, there telling the jury, correctly, that there is no evidence in this case to support a verdict of involuntary manslaughter. We do not deem it reasonably conceivable that the jury could have construed this final definition of manslaughter as an expression of opinion by the court concerning the verdict which the jury should return.

No error.

Bland v. City of Wilmington

JACK T. BLAND, E. R. BROWN, F. R. RAY, HAYWOOD BROWN AND C. C. JORDAN, JR., ON BEHALF OF THEMSELVES AND OTHER MEMBERS OF THE FIRE DEPARTMENT OF THE CITY OF WILMINGTON, AND WILMINGTON FIREFIGHTERS' ASS'N, LOCAL NO. 1284 v. CITY OF WILMINGTON, NORTH CAROLINA, MAYOR L. M. CROMARTIE, COUNCILMEN JOHN SYMMES, W. ALEX FONVIELLE, JR., HERBERT BRAND AND B. D. SCHWARTZ

No. 63

(Filed 12 May 1971)

1. **Declaratory Judgment Act § 1; Municipal Corporations § 9— right of municipal firemen to live outside city — justiciable controversy**

Controversy justiciable under Declaratory Judgment Act was presented where plaintiff municipal firemen alleged that they have a statutory right to live outside the city limits and that defendant city has denied them permission to do so and has declared that it would terminate the employment of any fireman who moved outside the city, and the city alleged that the statute on which the firemen rely has been repealed by enactment of another statute, the firemen not being required to risk their employment by moving outside the city in order to have the applicable statutes construed and their rights declared.

2. **Appeal and Error § 3— constitutional questions — appellate review**

The Supreme Court will not decide a constitutional question which was not raised or considered in the court below.

3. **Statutes § 11— conflicting statutes**

If there is a conflict between two statutes, the last statute enacted will prevail to the extent of the conflict.

4. **Evidence § 1— private or local act — judicial notice**

While the courts, as a general rule, will not take judicial notice of a private or local act unless it is pled by reference to its title or the day of its ratification, even though the act is published among the public laws, this rule should not prevail when a statute which effectually settles the controversy has been formally brought to the attention of the court and all the parties. G.S. 1A-1, Rule 9(h).

5. **Statutes § 11— local statute — exception to subsequent general law**

A local statute enacted for a particular municipality is intended to be exceptional and for the benefit of such municipality and is not repealed by the enactment of a subsequent general law.

6. **Municipal Corporations § 9— requirement that municipal firemen live in city**

Firemen of the City of Wilmington are required to live within the city by provision of the city charter requiring that the city's firemen possess the right of suffrage.

ON *certiorari* to review the decision of the Court of Appeals, reported in 10 N.C. App. 163, 178 S.E. 2d 25, which affirmed the judgment entered by *Cowper, J.*, at the 20 April 1970 Session of NEW HANOVER.

Proceeding under the Declaratory Judgment Act, G.S. 1-253 *et seq.* Plaintiffs instituted this action against the City of Wilmington on behalf of themselves and other members of the Fire Department of the City of Wilmington and the Wilmington Fire Fighters' Association, Local No. 1284. The complaint alleges: Plaintiffs are residents of Wilmington and are employed by the City as firemen. Plaintiffs have requested permission to move their residences to locations in New Hanover County, outside the city limits of Wilmington. Defendants have consistently refused such permission and have informed plaintiffs that the employment of any fireman who moves outside the city limits will be terminated. Plaintiffs believe that G.S. 160-115.1 gives a city fireman the right to reside outside the municipality by which he is employed. A genuine controversy exists between plaintiffs and defendants, and plaintiffs are entitled to a declaration of their rights under the applicable statutes.

Answering, defendants admit they have refused the request of certain firemen that they be allowed to move outside the city limits. They allege (1) that G.S. 160-115.1 was repealed by G.S. 160-25; (2) that there is no justiciable controversy now existing between plaintiffs and the City; and (3) that the action should be dismissed because plaintiffs have failed to state a claim upon which relief can be granted.

Judge Cowper heard the case without a jury. He concluded that G.S. 160-115.1 and G.S. 160-25 are in conflict and, "because of the two conflicting statutes, the court is of the opinion and finds as a fact that the above action should be dismissed." From his judgment dismissing the action, plaintiffs appealed to the Court of Appeals, which affirmed the dismissal upon the premise that the allegations of the complaint "do not present a justiciable controversy." Upon plaintiffs' petition we allowed *certiorari.*

James L. Nelson for plaintiff appellants.

Yow and Yow for defendant appellees.

Attorney General Morgan; Deputy Attorney General Moody, amicus curiae.

SHARP, Justice.

Plaintiffs' assignments of error raise two questions: (1) Have plaintiffs stated a controversy justiciable under the Declaratory Judgment Act? (2) If so, may the City of Wilmington require its firemen to reside within the city limits?

The Declaratory Judgment Act permits any person affected by a statute or municipal ordinance to obtain a declaration of his rights thereunder. G.S. 1-254. Courts of record within their respective jurisdictions are expressly empowered to declare such rights even though no further relief is or could be claimed, and no proceeding is "open to objection on the ground that a declaratory judgment or decree is prayed for." G.S. 1-253. The purpose of the Declaratory Judgment Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered." G.S. 1-264.

Claiming the right under G.S. 160-115.1, city firemen of Wilmington requested permission to live outside the corporate limits. The City, contending that G.S. 160-25 repealed G.S. 160-115.1, denied permission and declared it would terminate the employment of any fireman who moved his residence outside the corporate limits. The trial judge declined to adjudicate plaintiffs' rights because he found the two statutes to be in conflict; the Court of Appeals declined upon the premise that no justiciable controversy existed.

[1] The rights of these parties are affected by G.S. 160-115.1, G.S. 160-25, and other statutes. To the end that they may be relieved "from uncertainty and insecurity," plaintiffs are entitled to have the applicable statutes construed and their rights declared. A real controversy exists between the parties, and a fireman is not required to risk his employment by moving outside the City in order to make a test case. Such a requirement would thwart the remedial purpose of the Declaratory Judgment Act. *Little v. Trust Co.*, 252 N.C. 229, 113 S.E. 2d 689. The facts in *City of Raleigh v. R. R. Co.*, 275 N.C. 454, 168 S.E. 2d 389, and *Angell v. Raleigh*, 267 N.C. 387, 148 S.E. 2d 233, the decisions upon which defendant relies, are distinguishable from this case. The first case involved the construction of a *proposed* ordinance; in the second, certain citizens, not parties to

any controversy, sought an opinion as to the validity of an ordinance for their "academic enlightenment."

We hold that the pleadings in this case present an actual controversy justiciable under the Declaratory Judgment Act.

With reference to question (2), the parties' contentions revolve around the two statutes mentioned in the pleadings. G.S. 160-115.1 provides: "The governing bodies of every incorporated city and town are authorized to employ members of the fire department and to prescribe their duties. *Persons employed as members of the fire department may reside outside the corporate limits of the municipality.*" (Emphasis added.)

The foregoing section was enacted by the General Assembly on 27 February 1969. At the same session, on 27 March 1969, it rewrote G.S. 160-25 to read as follows: "No person shall hold any elective office of any city or town unless he shall be a qualified voter therein. *Residence within a city or town shall not be a qualification for or prerequisite to appointment to any nonelective office of any city or town, unless the governing body thereof shall by ordinance so require.*" (Emphasis added.)

With reference to the foregoing statutes the City's contentions seem to be these: (1) G.S. 160-115.1 is unconstitutional in that "public officials must reside in the jurisdiction in which they serve." (2) G.S. 160-25 "repeals G.S. 160-115.1." (3) A city fireman is a nonelective public officer, and, under G.S. 160-25, firemen may be required to live within the city limits. Plaintiffs contend: (1) Firemen are specifically authorized by G.S. 160-115.1 to reside outside the city limits of the municipality which employs them. (2) Firemen are not public officials; thus there is no conflict between G.S. 160-115.1 and G.S. 160-25. (3) Even if firemen are held to be public officials the City has pled no ordinance enacted under G.S. 160-25 requiring its firemen to reside within the corporate limits and, *on this record,* they are entitled to live outside the City.

[2] Whether the General Assembly can constitutionally authorize cities to permit their firemen to reside outside the corporate limits is a question which was not raised in the court below, and it may not be raised for the first time on appeal. *Lane v. Insurance Co.*, 258 N.C. 318, 128 S.E. 2d 398. "It is a well established rule of this Court that it will not decide a constitutional question which was not raised or considered in the court below."

Johnson v. Highway Comm., 259 N.C. 371, 373, 130 S.E. 2d 544, 546. Thus the constitutionality of G.S. 160-115.1 is not before us.

[3] If there is any conflict between G.S. 160-115.1 and G.S. 160-25, the latter will prevail to the extent of the conflict since it was the last enactment. *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433; *Guilford County v. Estates Administration, Inc.,* 212 N.C. 653, 194 S.E. 295; *Commissioners v. Commissioners,* 186 N.C. 202, 119 S.E. 206. Obviously, there is no conflict between these two statutes unless firemen of the City of Wilmington are held to be nonelective public officials and unless G.S. 160-115.1 is construed to give firemen the absolute right to reside outside the city limits.

In support of its contention that a fireman is a public officer defendant calls attention to G.S. 20-114.1(b) which provides that "[i]n addition to other law enforcement officers, uniformed regular and volunteer firemen may direct traffic to enforce traffic laws and ordinances at the scene of fires in connection with their duties as firemen. . . . Except as herein provided, firemen . . . shall not be considered law enforcement officers." *(See also* G.S. 69-23.)

The Attorney General, in his brief as *amicus curiae,* also calls attention to § 28.3 of the Charter of the City of Wilmington which provides that persons exercising the duties of firemen shall have power and authority "to make arrests during fires for interference with or obstruction of their operations." (N. C. Sess. Laws, Ch. 1046, Art. 28, § 28.3, 1963).

Relying upon *State v. Hord,* 264 N.C. 149, 141 S.E. 2d 241—a case holding a policeman to be a public officer—, defendant contends that in authorizing firemen to enforce ordinances, to direct traffic at the scene of the fire, and to arrest those guilty of interfering with their operations at a fire, the legislature delegated a portion of its sovereign power to firemen and thereby made them public officers.

"A fireman may be either an officer or employee as the legislature may determine; in ascertaining whether he is one or the other, consideration should be given to such factors as the delegation of a portion of the sovereign function of government, the requirement of an official oath, the conferring of powers by law and not by contract, and the fixing of the dura-

tion of a term of office." 62 C. J. S. *Municipal Corporations* § 599 (1949). *See also Nissen v. Winston-Salem,* 206 N.C. 888, 175 S.E. 310; *Duncan v. Board of Fire & Police Com'rs, etc.,* 131 N. J. L. 443, 37 A. 2d 85; *Johnson v. Pease,* 126 Wash. 163, 217 P. 1005; *Driscoll v. City of Medford,* 328 Mass. 360, 103 N.E. 2d 712; 6 N. C. Index 2d *Public Officers* § 1 (1968); 42 Am. Jur. *Public Officers* §§ 4, 8, 13, 15; 16 McQuillin, *Municipal Corporations* § 45.11 (1963). Annot., 140 A.L.R. 1076.

Although firemen undoubtedly have certain police powers during fires, it is not necessary for us to decide whether firemen are public officers in order to answer question (2). Even if they were held to be nonelective officers, under G.S. 160-25 the governing body of a city could, by ordinance, immediately require them to reside within the city limits. Presumably Wilmington now has no such ordinance since none was pleaded. Neither did the City plead any provisions of its charter.

[4] As a general rule, a court will not take judicial notice of a private or local act unless it is pled by reference to its title or the day of its ratification; and this is true even though the act is published among the public laws. G.S. 1A-1, Rule 9(h); *Winborne, Utilities Commissioner v. Mackey,* 206 N.C. 554, 174 S.E. 577; *Bolick v. Charlotte,* 191 N.C. 677, 132 S.E. 660; *Durham v. R. R.,* 108 N.C. 399, 12 S.E. 1040; Stansbury, North Carolina Evidence § 12 (2d ed. 1963). *See McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888. However, as Hoke, Justice (later Chief Justice), pointed out in *Reid v. R. R.,* 162 N.C. 355, 78 S.E. 306, the foregoing rule is one of pleading, designed and intended primarily to prevent a litigant from being taken by surprise. It should never be allowed to prevail when a statute which effectually settles the controversy has been formally brought to the attention of the court and all parties. "It has been repeatedly held here that the court will not entertain or proceed with a case merely to determine abstract propositions. . . ." *Id.* at 359, 78 S.E. at 308.

The Attorney General has called our attention to the provisions of the City Charter of Wilmington which dictate the qualifications of its firemen. The City Charter of Wilmington was "revised, consolidated and rewritten" by Ch. 1046 of the Session Laws of 1963. Sections 11.3 and 11.7 of Article 11 relating to Civil Service were amended by Ch. 253 of the Session Laws of 1967. Section 11.3 gives the Civil Service Commission,

created by § 11.1, "full charge of passing upon the qualifications and certifying the eligibility of all persons to be appointed as police officers or firemen of such municipality." Section 11.7 provides that "[a]ll applicants for positions as police officers or firemen of the City of Wilmington shall be subject to a written examination which shall be competitive and free to all persons *possessing the right of suffrage,*" who met the other requirements as to age, health, and character. (Italics ours.)

[6] Since a city charter governs only the municipality it creates, the requirement in Wilmington's charter that its firemen possess the right of suffrage can only mean that they possess the right to vote in that city's elections. Residence within a city or town is a prerequisite to the right to vote in a municipal election. G.S. 160-45; N. C. Sess. Laws, Ch. 1046, Art. IV, § 4.3 (1963).

[5] Neither G.S. 160-115.1 nor G.S. 160-25 repealed the provisions of Wilmington's city charter prescribing the qualification of its firemen. "The rule as to the effect of a subsequent general statute on a local statute is stated in *Felmet v. Commissioners,* 186 N.C. 251, 119 S.E. 353: 'A local statute enacted for a particular municipality is intended to be exceptional and for the benefit of such municipality, and is not repealed by an enactment of a subsequent general law.' " *Charlotte v. Kavanaugh,* 221 N.C. 259, 263, 20 S.E. 2d 97, 99. *Accord, Goldsboro v. R. R.,* 241 N.C. 216, 85 S.E. 2d 125; *Power Co. v. Bowles,* 229 N.C. 143, 48 S.E. 2d 287; *Rogers v. Davis,* 212 N.C. 35, 192 S.E. 872; *Bramham v. Durham,* 171 N.C. 196, 88 S.E. 347. *See also Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1.

[6] The answer to question (2) is that firemen of the City of Wilmington are required by its charter to reside within the city.

We are constrained to believe that if the provisions of the city charter had been pleaded and brought to the attention of the trial judge he would have declared the rights of the parties. We also note that the Court of Appeals did not have the benefit of the brief filed in this Court by the *amicus curiae.*

The decision of the Court of Appeals is reversed and the case returned to that court with directions to remand it to the Superior Court for entry of judgment in accordance with this opinion.

Reversed.

IN THE MATTER OF THE APPLICATION FOR REASSIGNMENT OF SAMUEL KEVIN ALBRIGHT ET AL FROM AN ORANGE COUNTY SCHOOL TO AN ALAMANCE COUNTY SCHOOL.

No. 81

(Filed 12 May 1971)

1. **Injunctions § 12— issuance of interlocutory injunction — discretion of the court**

To issue or to refuse an interlocutory injunction is usually a matter of discretion to be exercised by the trial court.

2. **Injunctions § 13— purpose of interlocutory injunction**

The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter involved until a trial can be had on the merits.

3. **Injunctions § 13— interlocutory injunction — grounds for issuance**

The court issuing an interlocutory injunction does not decide the case; but, after weighing the equities, the advantages and disadvantages to the parties, the court determines, in the exercise of its sound discretion, whether an interlocutory injunction should be granted or refused.

4. **Injunctions § 13— primary function of interlocutory injunction**

The primary function of an interlocutory injunction is to prevent irreparable injury.

5. **Appeal and Error § 58— review of interlocutory injunction — authority of appellate court to make findings of fact**

In passing on the validity of an interlocutory injunction the appellate court is not bound by the findings of fact made by the issuing court, but it may review the evidence and make its own findings.

6. **Appeal and Error § 58— review of interlocutory injunction — presumption arising from omission of evidence**

Where, on an appeal from the granting of an interlocutory injunction, the record does not contain the evidence introduced before the trial court, the appellate court will presume the evidence supported the findings.

7. **Schools § 10— assignment of pupils — county board of education — validity of interlocutory injunction**

Trial court's findings of fact fully supported its issuance of an interlocutory injunction to restrain a county board of education from enforcing a pupil assignment order pending a trial on the merits.

"BEFORE *Martin, S.J.*, August 3, 1970, Criminal Session of ORANGE Superior Court. ORANGE COUNTY BOARD OF EDUCATION Appealed. (Filed C.A. November 6, 1970)." The proceed-

ing was transferred from the Court of Appeals to the Supreme Court for initial appellate review as provided by the rule of July 31, 1970.

The Board of Education of Orange County assigned 256 children of school age (residents of Orange County) to attend designated schools in Orange County during the school year 1970-1971. The parents of these children petitioned for their reassignment to schools in Alamance County. The petitions for reassignment were denied. As provided in G.S. 115-179, the petitioners appealed to the Superior Court of Orange County.

After the appeal was docketed in the superior court, the petitioners (parents and children) after hearing, obtained a "temporary injunction" restraining the enforcement of the assignment order pending trial in the superior court.

Material parts of the restraining order are here quoted.

"THIS MATTER coming on to be heard before the undersigned Judge Presiding on August 7, 1970, upon Petitioners' motion for the issuance of a temporary injunction restraining the Orange County Board of Education from enforcing the assignment of the students involved in this proceeding to Orange County Schools; and the Court having considered all the evidence offered at this hearing, hereby finds the material facts to be as follows:

FINDINGS OF FACT:

1. Petitioners are the parents, guardians and the persons standing in *loco parentis* to the children listed on Exhibit A attached to the Motion filed in this cause, dated July 23, 1970. Petitioners are citizens and residents of Orange County, North Carolina.

2. Petitioners live in the western part of Orange County, North Carolina, near the Town of Mebane, North Carolina; and since approximately 1903 children living in the area where Petitioners now live have attended schools in Mebane and Alamance County, North Carolina. That prior to the school year beginning 1970-71, the Orange County Board of Education had not assigned children living in the area where Petitioners live to schools in Orange County.

3. That for the school year 1970-71, the Orange County Board of Education has assigned the children listed on Exhibit A attached to the Motion filed herein to schools in Orange County, North Carolina. That Junior High Students have been assigned to schools in Hillsborough, North Carolina; and elementary grade children to schools in Efland, North Carolina. That Exhibit A contains the names of all the children involved in this proceeding and the schools to which they have been assigned by the Orange County Board of Education.

4. From the assignment of the children listed on Exhibit A attached to the Motion filed herein, Petitioners in apt time petitioned the Orange County Board of Education for reassignment of the children to schools in Alamance County, North Carolina. The requests for reassignment of the children were denied by the Orange County Board of Education and from this decision, Petitioners requested a hearing as provided by G.S. 115-178. That a hearing on the requests for reassignment was held on July 8, 1970; and following the hearing, Petitioners were notified by letter dated July 15, 1970, that the petitions for reassignment were again denied.

5. From the denial of the petitions for reassignment, each of the petitioners in apt time gave separate notice of appeal to the Superior Court of Orange County; and subsequent to the giving of said notice of appeal, filed the Motion for a Restraining Order, which is now before the court for hearing.

6. The parties have stipulated that the Motion of Petitioners for a temporary restraining order might be heard before this Court on August 7, 1970.

7. That the children involved in this proceeding will be attending schools in grades one through nine during the year 1970-1971. That the children in general live significantly closer to the schools in Alamance County that they have been attending than the schools to which they would be assigned in Orange County.

8. That many of the children involved in this proceeding have attended schools in Alamance County during their entire school career.

* * * * * * * * * * * * * * * * *

13. That the schools in Alamance County to which the children involved in this proceeding would attend are fully accredited and have ample space available for the children. That the Alamance County schools would not be fully utilized if the children involved attended school in Orange County.

14. That the Junior High School in Orange County to which ninety-four (94) of the children involved in this proceeding have been assigned was already overcrowded to some extent during the 1969-70 school year. That because of this overcrowding seventh grade children were unable to use the gym facilities at the school during the 1969-70 school year. That if the additional ninety-four (94) children involved in this proceeding are assigned to the Junior High School in Hillsborough, it will result in further overcrowding and will necessitate bringing in temporary mobile classroom facilities.

* * * * * * * * * * * * * * * * *

17. That the Alamance County Board of Education has agreed to accept the children involved in this proceeding for the 1970-71 school year.

18. That the assignment of the children involved in this proceeding to schools in Alamance County will not interfere with the proper administration of the Alamance County Schools or with the proper instruction of the pupils there enrolled and will not endanger the health or safety of the children there enrolled.

19. That it would be in the best interest of the children involved in this proceeding to continue to attend schools in Alamance County, pending the final determination of this cause.

Upon the foregoing Findings of Fact, the Court hereby makes the following CONCLUSIONS OF LAW:

1. That under the law of North Carolina, Petitioners are entitled to a hearing *de novo* in the Superior Court on their requests for reassignment. That the test to be applied in determining whether the reassignment will be granted is whether the reassignment is in the best interest of the child and if so, the reassignment should be granted

unless such reassignment would interfere with the proper administration of the school to which reassignment is requested.

2. There is probable cause for believing that Petitioners will be able to sustain their position at the trial on the merits in these actions.

3. That unless this Court enjoins the enforcement of the assignments by the Orange County Board of Education, pending final determination of this cause, there is reasonable apprehension that irreparable harm and damage will result to the children involved in this proceeding, in that these matters will not be tried before school commences, thereby denying the relief which Petitioners might be given by jury verdict when these matters are tried on their merits.

4. That Petitioners have no plain, adequate or speedy remedy at law.

5. That the reassignment of the children involved in these proceedings to Alamance County schools pending the final determination of these causes is in the best interest of the children involved in this proceeding.

Upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED and DECREED that pending the final determination of the Petitioners' appeals to the Superior Court;

1. That the Orange County Board of Education be and it is hereby restrained from enforcing the assignment of the children involved in these proceedings to schools in Orange County.

2. That the children involved in these proceedings be allowed to attend schools in Alamance County.

This the 18th day of August, 1970.

/s/ ROBERT M. MARTIN
Judge Presiding"

The respondent Board of Education of Orange County excepted to the court's conclusions of law and appealed. The parties stipulated: ". . . (T)he record on appeal shall consist of

the Motion, Stipulations, the Order of the Court dated 18th day of August, 1970, the Exceptions and Appeal Entries of the Orange County Board of Education, together with the Stipulations of the parties and the Statement of Case on Appeal, as agreed or settled."

Graham and Cheshire, by Lucius M. Cheshire, for defendant appellant.

Bryant, Lipton, Bryant & Battle, by F. Gordon Battle, for petitioner appellees.

HIGGINS, Justice.

[1-4] To issue or to refuse an interlocutory injunction is usually a matter of discretion to be exercised by the trial court. Its purpose is to preserve the *status quo* of the subject matter involved until a trial can be had on the merits. *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116. The issuing court does not decide the case, but after weighing the equities, the advantages and disadvantages to the parties, determines, in the exercise of its sound discretion, whether an interlocutory injunction should be granted or refused. Its primary function is to prevent irreparable injury. *Finance Company v. Jordan,* 259 N.C. 127, 129 S.E. 2d 882.

[5, 6] In passing on the validity of an interlocutory injunction the appellate court is not bound by the findings of fact made by the issuing court, but may review the evidence and make its own findings. However, where, as in this case, the record does not contain the evidence introduced before the trial court, the appellate court will presume the evidence supported the findings. For the purpose of the appeal, the findings are deemed conclusive.

[7] The trial court's findings, in much detail, appear in the statement of facts. When tested by the applicable rules, they are sufficient to support Judge Martin's order. However, neither the findings of fact nor the conclusions of law of the trial court are binding upon, or are to be considered, by the superior court on the final hearing. *Huskins v. Hospital, supra; Board of Elders v. Jones,* 273 N.C. 174, 159 S.E. 2d 545.

Our consideration is confined to the legal validity of Judge Martin's order. Discussion of other issues, which may or may

not be raised at the final hearing, is neither required nor pertinent at this stage.

For the reasons stated we conclude that the restraining order was properly continued to the hearing.

Affirmed.

IN THE MATTER OF THE REPORT ON EXAMINATION OF HARDWARE MUTUAL INSURANCE COMPANY OF THE CAROLINAS, INC., AS OF DECEMBER 31, 1968

No. 78

(Filed 12 May 1971)

1. **Insurance § 1— examination of insurance company — admission of incompetent evidence — harmless error**

Where there was substantial and uncontradicted evidence to support the Insurance Commissioner's findings of fact upon a hearing on the report of examination of a fire and casualty insurance company, error, if any, in the admission of a Department of Insurance exhibit and of certain opinion testimony was harmless.

2. **Insurance § 1— fire and casualty company — real property limitation — stock in subsidiary — unadmitted asset**

Where a fire and casualty insurance company's investment of $160,000 in the common stock of its wholly owned subsidiary, whose sole assets consisted of real estate, office furniture and equipment used by the parent company, would have enabled the company to convert unadmitted assets into admitted assets and in so doing evade the 10% real property limitation, the investment was prohibited and was properly deducted from the company's assets as an unadmitted asset.

APPEAL by petitioner from *Hall, J.*, October 5, 1970 Civil Session of WAKE Superior Court.

This is an action pursuant to the provisions of G.S. 58-9.3 to review a decision of the North Carolina Commissioner of Insurance rendered on 21 July 1970.

The petitioner appellant, Hardware Mutual Insurance Company of the Carolinas, Inc., is a domestic mutual insurance company insuring against fire and casualty losses. As of 31 December 1967 the petitioner had total admitted assets of $1,907,667.06, including its home office property in Charlotte valued at $178,554.28. At the time the company acquired the

home office property in 1955, it was in violation of the 10% limitation on real estate allowed by G.S. 58-79.1(e), but the Insurance Commissioner in office at that time allowed the company an exception to the statute or waived this requirement.

In January of 1968 the petitioner purchased all the assets, properties, and insurance business of Pathway Mutual Insurance Company of Florida for the sum of $285,282. Petitioner purchased all the stock of Pathway, consisting of 15,850 shares, for the sum of $25,000, and purchased the land and building, constituting the home office property of Pathway, for the sum of $151,467. These purchases were approved by the Commissioner of Insurance, but the petitioner did not get an additional waiver from the Commissioner in respect to the 10% limitation. On 11 November 1968 the Board of Directors of petitioner authorized the sale of all the petitioner's real estate at its approximate appraised fair market value and authorized the sale of all the petitioner's depreciable personal property at its approximate net book value. On 3 December 1968 HMC Corporation, a holding corporation, was incorporated as a *wholly owned* subsidiary corporation of the petitioner for the purpose of purchasing and holding the petitioner's real estate, office furniture and equipment. HMC Corporation had a three member Board of Directors, including Ralph Farmer, the president and a director of petitioner, and two other employees of petitioner. Ralph Farmer was also president of HMC Corporation.

On 11 December 1968 the land and building constituting petitioner's home office property in Charlotte was appraised for a market value of $345,000. On 27 December 1968 HMC purchased the petitioner's home office property for the sum of $325,000, after deducting the sum of $20,000 from the appraised market value for a realtor's fee. HMC Corporation further purchased the petitioner's office equipment and furniture for $34,740. The total sale price of the real estate and office furniture and equipment was $359,740. HMC Corporation paid petitioner $330,000 in cash and executed a promissory note for the balance in the amount of $29,740. At the time of the sale the petitioner's home office property had a net book value of $179,869, and the petitioner therefore realized a profit of $145,131. The petitioner realized a profit of $34,740 on the sale of the office furniture and equipment. Since this had not been carried as an admitted asset, the sale of the furniture and fixtures converted an unadmitted asset into an admitted asset.

On 27 December 1968 the petitioner purchased from HMC Corporation 5,000 shares of HMC's $10 per share common stock for the sum of $32 per share, for a total purchase price of $160,000. The petitioner then leased from HMC the home office building formerly owned by it for a monthly rental of $3,000 and leased the office furniture and equipment it formerly owned for a monthly rental of $1,000. In addition to the $160,000 which the petitioner paid to HMC, HMC financed the purchase of the real estate and office furniture and equipment by borrowing $172,500 from First Union National Bank.

Pursuant to the provisions of G.S. 58-16, on 22 September 1969 the Department of Insurance began an examination of the condition and affairs of the petitioner. The examination covered the period from 1 January 1966 through 31 December 1968. Examiners from the Insurance Departments of the States of South Carolina and Florida also participated in the examination. On 15 December 1969 the North Carolina Department of Insurance submitted its Report on Examination to the petitioner. This report determined that the petitioner's investment of the sum of $160,000 in the common stock of HMC Corporation constituted a prohibited investment under the provisions of G.S. 58-79.1(d)(8). This investment was therefore deducted from petitioner's assets as an unadmitted asset in accordance with G.S. 58-79.1(f).

On 2 January 1970 the petitioner appealed to the North Carolina Commissioner of Insurance and requested a hearing on the Report on Examination, under the provisions of G.S. 58-16.2. On 9 April 1970 the hearing was held. After reviewing and considering the evidence presented at the hearing, the Commissioner of Insurance upheld the Report on Examination. On 19 August 1970 the petitioner filed a petition for review of the Insurance Commissioner's decision in the Superior Court of Wake County. On 8 October 1970 the Superior Court entered judgment affirming the Commissioner's decision. The petitioner excepted to the court's judgment and appealed to the North Carolina Court of Appeals. The case comes to this Court under its general transferral order of 31 July 1970.

Attorney General Robert Morgan and Assistant Attorney General Isham B. Hudson, Jr., for the Commissioner of Insurance, appellee.

Bailey & Davis by Gary A. Davis for the petitioner appellant.

MOORE, Justice.

On appeal to this Court, petitioner presents the following questions:

"I. Did the North Carolina Commissioner of Insurance commit prejudicial and reversible error in admitting into evidence North Carolina Department of Insurance Exhibit No. 8, the transcript of a conference held in the office of the North Carolina Commissioner of Insurance on October 31, 1969?

"II. Did the North Carolina Commissioner of Insurance commit prejudicial and reversible error in admitting into evidence the opinion testimony of Charles F. Glover and George E. King, witnesses on behalf of the North Carolina Department of Insurance?

"III. Is the decision of the North Carolina Commissioner of Insurance supported by substantial evidence?

"IV. Are the findings and conclusions set forth in the decision of the North Carolina Commissioner of Insurance correct and in accordance with the applicable North Carolina insurance statutes?"

[1] We do not deem it necessary to decide the first and second questions involved. Conceding *arguendo* that the admission of North Carolina Department of Insurance Exhibit No. 8 and the opinion testimony of Charles F. Glover and George E. King, admitted over petitioner's objection, was error, the error was harmless. There is ample substantial and uncontradicted evidence to support the Commissioner's findings of fact. G.S. 58-9.3 provides that on appeal to Superior Court the case is heard upon the transcript of the record for review of the findings of fact and errors of law only, and if the decision of the Commissioner of Insurance is supported by *substantial* evidence, "the decision is presumed to be correct and proper." The determinative questions then are: (1) Was there substantial evidence to support the Commissioner's findings of fact? (2) If so, did the Commissioner err in his conclusion of law that the $160,000 invested by petitioner in the common stock of HMC Corporation was not such investment as would constitute an admitted asset of the petitioner?

The answers to these questions require an examination and interpretation of certain provisions of Chapter 58 of the General Statutes relating to insurance as applied to the facts in this case.

Ralph N. Farmer, the president of both the petitioner and HMC Corporation, testified that HMC Corporation was a wholly owned subsidiary of petitioner, and that in December 1968 petitioner sold its home office building in Charlotte to HMC for $325,000 and sold its office furniture and fixtures to HMC for $34,740. After the sale of the Charlotte property, petitioner still owned the real estate which it had purchased from Pathway Mutual Insurance Company of Florida in 1968 at an actual cost of $151,467.40. At the time of the Pathway purchase, petitioner owned and was carrying as an admitted asset its real estate in Charlotte at a valuation of $179,869.

The Charlotte and Pathway real estate combined gave a total real property holding valued at $331,336.40. (According to the reappraisal of the Charlotte property, the combined total would have been $496,467.40.) As of 31 December 1967, petitioner's balance sheet showed admitted assets of $1,907,667.06. Ten per cent of the admitted assets would be $190,766.70. Clearly, the combined value of the Charlotte and Pathway real estate exceeded 10% of petitioner's admitted assets.

Petitioner contends that G.S. 58-79.1(d)(4) allows it to hold the controverted stock. The statute in pertinent part reads:

> " . . . Nothing contained in this subdivision shall be deemed to prevent any investment in the stock, bonds or other securities of a corporation organized exclusively to hold and operate real estate acquired by such insurer in accordance with and subject to the provisions of subsection (c), . . . "

This allows a company to invest in the stock of its wholly owned subsidiary *subject to the provisions of subsection (c) of G.S. 58-79.1.* Provisions (8) a and b are the parts of subsection (c) applicable to the case at bar.

G.S. 58-79.1(c)(8) a and b states:

> "(c) Classes of Reserve Investments.—The reserve investments of every domestic stock and mutual insurance

company, other than a life insurance company or a fraternal benefit association, shall consist of the following:

"(8) Real estate only if acquired or used for the following purposes in the following manner:

"a. The land and the building thereon in which it has its principal office or offices.

"b. Such as shall be requisite for its convenient accommodation in the transaction of its business."

This provides that a company's reserve investment can consist of real estate *but only* if used for the company's principal office or for its convenient accommodation in the transaction of its business.

However, specifically under subsection (e) of G.S. 58-79.1 a company cannot *even* acquire real property for the above purposes *if* the value of the acquired property, together with all the real property held by the company, exceeds 10% of its total admitted assets. G.S. 58-79.1(e) in pertinent part provides:

" . . . No domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association shall hereafter acquire any real property of the kind or kinds specified in paragraphs a and b of subdivision (8) of subsection (c), if the value of such real property, together with the value of all such real property then held by it, exceeds ten percentum of its total admitted assets except as more specifically provided in this section." (The exception provided for is not applicable to the present case.)

The 10% prohibition in G.S. 58-79.1(e) prevents G.S. 58-79.1(d)(4) from applying in the present case.

G.S. 58-79.1(f) provides that any mutual insurance company is required to dispose of any investment acquired in violation of the law, and the amount of the value of such investment in excess of the limitation shall be deducted as an unadmitted asset. This section in pertinent part is as follows:

" . . . [I]n any determination of the financial condition of any such insurer, the amount of the value of such investments, if wholly ineligible, or the amount of the value

thereof in excess of any limitation prescribed in this section, shall be deducted as an unadmitted asset of such insurer."

Further, G.S. 58-79.1(h)(5) provides that the stock of a subsidiary of an insurer shall be valued on the basis of the value of only such of the assets of such subsidiary as would constitute lawful investments for the insurer if acquired or held directly by the insurer.

Mr. Farmer testified that as president of petitioner he had knowledge that petitioner's real estate holding exceeded the statutory limit of 10%, and that the office furniture and fixtures of petitioner had never been carried by petitioner as an admitted asset. Under G.S. 58-79.1(f), the excess over the 10% real property limitation would be deducted as an unadmitted asset.

It should also be noted that the $160,000 investment in the common stock of HMC, which represented the ownership of real property, would together with real property still owned by petitioner also exceed the 10% limitation imposed by the statute.

Further, HMC's sole assets consisted of real estate and office furniture and fixtures which, if held directly by petitioner, would not have been admitted assets of the petitioner. Under the express terms of G.S. 58-79.1(h)(5), the stock which petitioner held in its subsidiary, HMC, must be valued on the basis of the value of only such of the assets of such subsidiary as would have constituted lawful investment if acquired or held directly by the petitioner. In view of petitioner's other real estate holdings, none of the assets of HMC would constitute a lawful investment for petitioner. Hence, the stock in HMC would have no value as an admitted asset of petitioner.

[2] For the reasons stated, we hold the Insurance Commissioner correctly concluded that petitioner's investment in the wholly owned subsidiary, HMC Corporation, would have enabled the petitioner to convert unadmitted assets into admitted assets, and in so doing evade the real property limitation provided by law for appellant insurance company. We further hold the Commissioner correctly concluded that under these circumstances it would not be in the public interest to consider the company's investment in its wholly owned subsidiary as an admitted asset.

The judgment of the Superior Court affirming the decision of the Commissioner of Insurance is proper and is hereby affirmed.

Affirmed.

WILLIAM H. DOTSON v. ALLIED CHEMICAL CORPORATION AND WILLIAM LOWNDES CAIN

No. 62

(Filed 12 May 1971)

Evidence § 50— exclusion of testimony as to expert witness' specialty — harmless effect

In an action to recover for injuries allegedly sustained in an automobile accident, the fact that plaintiff's expert medical witness was not allowed to explain his specialty of orthopedic surgery or to state his qualifications and length of training *held* not prejudicial to plaintiff under the facts of this case, especially where the jury never reached the issue of damages.

ON *certiorari* to the Court of Appeals.

At November 17, 1969 Session of WAKE Superior Court, *Bailey, J.*, in accordance with the verdict, entered judgment for defendant. On plaintiff's appeal, the Court of Appeals awarded a new trial. 10 N.C.App. 123, 178 S.E. 2d 27. On defendant's petition, *certiorari* to review the decision of the Court of Appeals was allowed.

Plaintiff instituted this action on July 9, 1968, to recover damages for personal injuries allegedly caused by a collision of automobiles that occurred July 24, 1965, on U. S. Highway 301 "approximately 1.3 miles south of Weldon." The cars were proceeding north in a line of traffic on this two-lane highway. The front of the 1964 Chevrolet operated by defendant Cain struck the rear of the 1964 Oldsmobile operated by plaintiff and the front of the car operated by plaintiff struck the rear of the car immediately in front of it, a 1959 Oldsmobile (Smith car). The driver of a station wagon "about four cars" ahead of plaintiff had stopped to wait for southbound traffic to pass before making a left turn from 301.

The judgment recites that the following issues were submitted to the jury: "1. Were the plaintiffs injured by the negligence of the defendant William Lowndes Cain? Answer: ..... 2. Was the defendant Cain operating the car on said date as the agent of the defendant Allied Chemical Corporation and in the course and scope of his employment as its agent? Answer: ..... 3. What amount of damages is the plaintiff Thelma Dotson entitled to recover? Answer: ..... 4. What amount of damages is the plaintiff William H. Dotson entitled to recover? Answer: ....."

The jury answered only the first issue, which was answered, "No."

The court entered judgment "that the *plaintiff* recover nothing of the defendants and that the costs be taxed against the *plaintiff*." (Our italics.)

It appears from "PLAINTIFFS' APPEAL ENTRIES" that "(t)he plaintiffs" made various motions to set aside the verdict and excepted to the denial thereof; and that, after the judgment was signed, "the plaintiffs excepted" and gave notice of appeal.

Yarborough, Blanchard, Tucker & Denson, by Charles F. Blanchard, for plaintiff appellee.

Smith, Anderson, Dorsett, Blount & Ragsdale, by Willis Smith, Jr., for defendant appellants.

BOBBITT, Chief Justice.

An affidavit in the record contains the statement that "Charles F. Blanchard is counsel for the plaintiff William H. Dotson and Gene C. Smith is counsel for the plaintiff Thelma S. Dotson, which actions were consolidated and came on to be heard before The Honorable James H. Pou Bailey . . . and a jury."

The record contains the complaint, answer and reply in the William H. Dotson case. It does not contain any pleading, nor does it contain a judgment, in the Thelma D. Dotson case. It does contain *testimony* of Thelma D. Dotson. Apart from what appears in "PLAINTIFFS' APPEAL ENTRIES," nothing appears in the record before us indicating an appeal by Thelma D. Dotson was perfected.

With reference to the first issue, the controversy was whether negligence on the part of Cain proximately caused the collision and, if so, whether plaintiff was injured as a result of the collision. Since the record does not contain the court's charge to the jury, neither the court's instructions as to the law nor his review of the respective contentions of the parties is available for our consideration. If the cars were proceeding in a line of traffic at 40-45 miles per hour, as plaintiff's evidence tended to show, it may be the jury found that negligence of the driver of the station wagon, "about four cars ahead," was the sole proximate cause of the successive collisions. If the jury accepted Cain's testimony that when, "all of a sudden (he) saw (plaintiff's) red light come on," he put on his brakes and "just eased into (plaintiff)," and "felt very little force of the impact," the jury may not have been satisfied by the greater weight of the evidence that plaintiff suffered any personal injury as the result of the collision.

Plaintiff's evidence consisted of the transcript of his testimony when adversely examined by defendants on September 5, 1969, in New London, Connecticut, and of his testimony at trial; the testimony of Thelma D. Dotson, plaintiff's wife, and that of Dr. James L. Moore. The only evidence offered by defendants was the testimony of defendant Cain.

It was admitted by defendants, and the court found as a fact, that Dr. Moore was "a medical expert in the field of orthopedic surgery."

The Court of Appeals awarded a new trial on the ground the court refused to permit plaintiff's counsel to elicit testimony from Dr. Moore relating to the definition and meaning of "orthopedic surgery," the training and qualifications of an orthopedic surgeon, and the nature and length of his own training and practice. It was held the trial court's ruling in this respect constituted prejudicial error.

Admittedly, under certain circumstances the refusal to permit a party to develop testimony in detail as to the training and qualifications of an expert witness may constitute prejudicial error. Thus, where expert witnesses express conflicting or divergent opinions the jurors are entitled to have full information as to the training and qualifications of each to enable them to weigh and evaluate the testimony of each. Too, the

exclusion of such evidence may be considered prejudicial when the fact in issue is the *extent* of a person's injuries. Here, the testimony of one expert witness is involved. It was admitted and established that he is "a medical expert in the field of orthopedic surgery." Nothing in the record indicates defendants challenged either the truthfulness of his testimony as to what was discovered by his own examination of plaintiff or the accuracy of the opinion expressed by him when answering a hypothetical question. Whether the court's ruling prejudiced plaintiff must be considered in the context of the facts narrated below.

Plaintiff first saw Dr. Moore at his office on Oberlin Road, Raleigh, N. C., on November 21, 1969, that is, on the Friday before the trial. Dr. Moore "took a history" from plaintiff and examined him. Thereafter, *assuming* the jury found by the greater weight of the evidence the facts to be as narrated in a long hypothetical question asked by plaintiff's counsel, Dr. Moore testified that in his opinion the conditions he found in plaintiff's neck, shoulder and left arm "might have occurred from this accident (of July 24, 1965)."

After the collisions, plaintiff talked with Smith and with Cain at the nearby New Yorker Cafe while awaiting the arrival of a State Highway Patrolman. According to plaintiff's testimony, he was "rather in a dazed condition" and told Smith and Cain "(his) neck was hurting awfully bad." According to Cain's testimony, plaintiff stated time and again he was not hurt and, in response to the Patrolman's inquiry, stated that no one was hurt. After the arrival of the Patrolman, the three cars involved in the collisions were driven under their own power to Weldon.

Plaintiff testified that he drove that day from Weldon to Washington, D. C., by way of Petersburg, Virginia, and drove the next day to his home in Connecticut.

Plaintiff's testimony was sufficient to support a jury finding that, immediately after the collisions, while en route to his home and thereafter, plaintiff experienced pain and disability; and that, after arrival in Connecticut, plaintiff consulted doctors from time to time and received treatments. Even so, these facts were in evidence: (1) The car could be driven from the scene of the collisions and plaintiff could drive it from the scene of the collisions to Connecticut; (2) plaintiff stated repeatedly, when talking to Smith, Cain and the Patrolman, that he had

sustained no personal injury; (3) plaintiff's testimony in respect of his injuries, although corroborated by the testimony of his wife, was not supported by the testimony of any doctor whom he consulted and by whom he was treated; and (4) he deferred institution of his action until July 9, 1968, nearly three years from the date he asserts he sustained personal injury. Although the evidence would have supported a finding that plaintiff sustained personal injury as a result of the collision, whether such finding should be made was a matter for the jury to determine.

It must be presumed the judge charged the jury to answer the first issue, "No," if plaintiff failed to satisfy them from the evidence and by its greater weight that the collision was proximately caused by negligence on the part of Cain; and that the judge also charged the jury to answer the first issue, "No," if plaintiff failed to satisfy them from the evidence and by its greater weight that plaintiff sustained personal injury as a result of the collision.

Plaintiff's action is to recover damages on account of alleged *personal injuries* he sustained as a result of the collision. As indicated above, the first issue included whether plaintiff sustained *any* personal injury as a result of the collision. *If* the jury had answered the first issue, "Yes," they would have determined the *extent* of such personal injury and the damages recoverable therefor when they considered the fourth issue. Having answered the first issue, "No," the jury did not reach the fourth issue.

When considered in the context of the facts narrated above, we perceive no prejudicial error in the court's refusal to permit plaintiff's counsel to elicit testimony from Dr. Moore concerning "orthopedic surgery," the training and qualifications of an orthopedic surgeon, and the nature and length of his own training and experience.

The Court of Appeals awarded a new trial solely on the ground stated above. Hence, as stated in the opinion, it was "unnecessary to discuss plaintiff's remaining assignments of error." It is noted that we have examined and considered these other assignments of error. In our opinion, none discloses prejudicial error or merits discussion.

The decision of the Court of Appeals is reversed and the cause is remanded to that court for the entry of a judgment

affirming the judgment entered by Judge Bailey in the superior court.

Reversed and remanded.

STATE OF NORTH CAROLINA v. LONNIE BOYD, JR.

No. 92

(Filed 12 May 1971)

1. **Criminal Law § 166— the brief — abandonment of assignments**

Assignments of error not discussed in defendant's brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. **Criminal Law § 163— assignment of error to the charge — form and prerequisite**

An assignment of error to the charge on the ground that the court gave an erroneous instruction on a particular aspect should not only quote the portion of the charge objected to but should also point out the alleged error.

3. **Homicide § 14— presumptions arising from intentional shooting with gun**

If and when the State satisfies the jury from the evidence beyond a reasonable doubt that defendant intentionally shot the deceased with a shotgun and thereby proximately caused his death, two presumptions arise: (1) the killing was unlawful, and (2) the killing was done with malice; and nothing else appearing, defendant would be guilty of murder in the second degree.

4. **Homicide § 14— burden of proving defenses and mitigation**

When the presumptions from the intentional use of a deadly weapon obtain, the burden is on the defendant to show to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter or that will excuse it altogether upon the ground of self-defense.

5. **Homicide § 14— burden of proving self-defense**

The burden is on defendant to prove his plea of self-defense to the satisfaction of the jury and to prove that he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm.

6. **Criminal Law § 161— assignments of error —exceptions**

Assignments of error must be based upon exceptions in the record.

7. Criminal Law § 119— request for instructions

If the defendant desires greater elaboration in the charge on a particular point or on a particular aspect of the case, it is his duty to make a special request therefor prior to verdict.

APPEAL by defendant from *Rouse, J.*, August 31, 1970 Civil and Criminal Session of CURRITUCK Superior Court.

Defendant was indicted for the first degree murder of James Walker. When the case was called for trial, the solicitor announced the State would not insist upon a verdict of murder in the first degree but would ask for a verdict of murder in the second degree or manslaughter, as the evidence might disclose. Defendant entered a plea of not guilty. The jury returned a verdict of guilty of second degree murder.

The State's evidence consisted of the testimony of three witnesses: Leonard Reeves, George Mercer, Jr., and Elmo Rountree. Their evidence tends to show that around 9:30 p.m. on 23 May 1970 defendant went to Mercer's dance hall near the village of Moyock. About 1 a.m. James Walker, in the company of Reeves, Rountree, and others, drove to the dance hall and parked Walker's automobile about a car length behind and about a car length to the right of defendant's car. Walker entered the dance hall, remained 5 or 10 minutes, returned to his car, and got in under the steering wheel. Reeves, who had stayed in Walker's car with his girl friend, testified that Walker said nothing when he got into the car. About 15 minutes later Rountree returned to the car from the dance hall and stood on the right-hand side of the automobile. Reeves testified that he then heard some shouts, after which a shotgun was fired. Reeves saw the defendant holding the shotgun and testified that defendant laid the barrel across the hood of defendant's car and aimed it into Walker's car. Defendant then fired the shotgun twice into the driver's side of Walker's car, mortally wounding Walker and hitting Reeves and his girl friend. Reeves then got out of Walker's car, grabbed defendant, wrestled with him, and took the shotgun away from him. He examined it and found that it had been fired twice.

Mercer testified that neither defendant nor Walker appeared to be drunk the night of May 23 and that to his knowledge there was no disturbance between the deceased and the defendant. Mercer further testified that after shots were fired

from a shotgun he heard other shots which he thought came from a pistol or rifle. After the shots were fired, he went to the door of his establishment and saw defendant going back toward his car with a shotgun.

Rountree corroborated Reeves' story.

It was stipulated that James Walker died on 24 May 1970 as the result of shotgun wounds to his heart, lungs, liver, and intestines.

Defendant's evidence directly contradicted that of the State. Defendant testified that he was talking with a group of friends about 11 p.m. when Walker walked up to him, struck him twice in the face, pulled a pistol, pointed it at his head and pulled the trigger. The gun jammed and defendant ran for his car. Walker began to advance on defendant, firing as he came. Defendant reached into his automobile, got a shotgun, loaded it and fired it twice—once over Walker's head and the second time at Walker as he continued to advance on defendant. Defendant testified that all of this transpired without any provocation by him; that he had never had any trouble with Walker; that they had had a word over a woman about a year before, but no argument; that he did not say anything to Walker the night of May 23; and that he knew no reason why Walker should strike him twice. Several witnesses corroborated defendant's story, in part or in whole.

On cross-examination defendant admitted that he had been convicted of numerous traffic violations, assault on his wife, and nonsupport of his wife in 1966, 1967, and 1968, and for carrying a concealed weapon. Further, that sometime ago he was tried and acquitted for shooting and killing someone.

It was stipulated that the doctor performing the autopsy on Walker's body found that his blood contained 350 milligrams of alcohol and, in the doctor's opinion, the deceased was heavily intoxicated. It was further stipulated that Patrolman R. P. Cooke of the State Highway Patrol, found a .45 automatic pistol in the deceased's automobile, which he gave to Sheriff Sanderlin.

Currituck County Sheriff L. L. Sanderlin testified on cross-examination that when he investigated the homicide he found the vent glass on the driver's side of the deceased's automobile blown out, the door post between the vent and the windshield

damaged, and the windshield shattered in the lower left corner. He further testified that the pistol given him by Patrolman Cooke was not loaded, and that he smelled the barrel but did not smell any powder.

From the conviction of second degree murder and sentence imposed, defendant appealed to the Court of Appeals. The case comes to this Court under the general transferral order of July 31, 1970.

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

Frank B. Aycock, Jr., for defendant appellant.

MOORE, Justice.

[1] Assignments of error Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 are not discussed in defendant's brief and are, therefore, deemed abandoned under Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810; *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526.

[2] Assignments of error Nos. 7, 20, 21, 22 and 23 relate to alleged errors in the charge. In each assignment the defendant merely says: "The trial judge committed prejudicial error in charging the jury as follows:", and then quotes a portion of the charge. The assignments do not set out the defendant's contention as to what the court should have charged or the particular matters which defendant asserts were erroneous or omitted. An assignment of error to the charge on the ground that the court gave an erroneous instruction on a particular aspect should not only quote the portion of the charge to which the defendant objects but should also point out the alleged error. *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793; *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736; *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597; 1 Strong, N. C. Index 2d, Appeal and Error § 31, p. 167 [hereinafter cited as Strong]; 3 Strong, Criminal Law § 163, p. 118. Nevertheless, we have carefully examined defendant's contentions as to the alleged errors in the charge, which alleged errors are pointed out for the first time in his brief.

[3, 4] Defendant first contends that the trial court erred by placing the burden of proof upon the defendant to satisfy the jury of the legal provocation that would rob the crime of malice and thus reduce it to manslaughter or that would excuse it altogether upon the ground of self-defense. This contention is without merit. The trial court correctly charged in effect that if and when the State satisfied the jury from the evidence beyond a reasonable doubt that defendant intentionally shot Walker with a shotgun and thereby proximately caused Walker's death, 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. Reams,* 277 N.C. 391, 178 S.E. 2d 65; *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512; *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322. The court further charged that when the presumptions from the intentional use of a deadly weapon obtain, the burden is upon the defendant to show to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter or that will excuse it altogether upon the ground of self-defense. This is in accord with well-recognized principles as set out in *State v. Barrow, supra; State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305; *State v. McGirt,* 263 N.C. 527, 139 S.E. 2d 640; and *State v. Benson,* 183 N.C. 795, 111 S.E. 869. See also Stansbury, N. C. Evidence §§ 214, 234 (2d Ed., 1963).

[5] Defendant next contends the court erred in placing on defendant the burden of showing that he did not use excessive force. The trial court, after a lengthy explanation of defendant's right to defend himself, charged:

> "So I charge you further that if you find from the evidence, beyond a reasonable doubt, that on or about May 24, 1970, the defendant, Lonnie Boyd, Jr., intentionally shot James Edward Walker, with a shotgun, and that James Edward Walker's death was a natural and probable result of the defendant's act, but Lonnie Boyd, Jr., has satisfied you that he was not the aggressor, that he killed James Edward Walker under circumstances which were such as to create in the mind of a person of ordinary firmness a reasonable belief that his shooting of James Edward Walker was necessary in order to save himself from death

> or great bodily harm, and the circumstances did create such a belief in defendant's mind, and that he did not use excessive force, it would be your duty to return a [verdict of] not guilty." *(Note: The use of the phrase "natural and probable result" in the foregoing excerpt does not affect decision here, but we point out that it was expressly disapproved in State v. Woods, 278 N.C. 210, 179 S.E. 2d 358.)*

The burden is on defendant to prove his plea of self-defense to the satisfaction of the jury and to prove that he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. As is stated in *State v. McDonald,* 249 N.C. 419, 106 S.E. 2d 477, " . . . [I]t was incumbent upon defendant to satisfy the jury (1) that he did act in self-defense, and (2) that, in the exercise of his right to self-defense, he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm." Accord, *State v. Cooper, supra;* 4 Strong, Homicide § 9, and §14 at p. 211. See also, Stansbury, N. C. Evidence § 214 (2d Ed., 1963). There is no merit to this contention.

[6, 7] Assignments of error Nos. 24, 25, and 26 are not based upon any exceptions in the record and should not therefore be considered by this Court. Rules 19(3) and 21, Rules of Practice in the Supreme Court, 254 N.C. 783; *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561; *State v. Benton, supra; State v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666; *Beanblossom v. Thomas,* 266 N.C. 181, 146 S.E. 2d 36; 1 Strong, Appeal and Error § 24, p. 146; 3 Strong, Criminal Law § 161. They relate to instructions which defendant now contends should have been given by the court. At no time did defendant request that these instructions be given. At the close of the charge the trial judge asked if there were any further instructions or any corrections or additions to the charge. Defendant's attorney then requested the court to charge the jury "that the defendant testified that the deceased was advancing towards him with a pointed gun, drawn gun, just before he shot him." Pursuant to this request, the court then said: "The court, in addition to the evidence recital, which it has made with respect to the evidence of the defendant, also calls to the jury's attention the evidence offered by the defendant which tends to show that at the time the shot was

fired by him, from the shotgun, that the deceased was advancing on him with a pistol pointing in his direction." The court then asked if there was anything further. There were no other requests from either the counsel for the defendant or the solicitor. It was the duty of the defendant if he desired greater elaboration on a particular point or a particular aspect of the case to make a special request therefor prior to verdict. Prayers for special instructions should be made before the argument, in writing and signed, or they may be disregarded. *State v. Hicks,* 229 N.C. 345, 49 S.E. 2d 639; *State v. Morgan,* 225 N.C. 549, 35 S.E. 2d 621; 3 Strong, Criminal Law § 119; 7 Strong, Trial § 38, p. 347, nn. 36-39.

The evidence in this case was in sharp conflict. The issue was clear-cut: Did the defendant intentionally shoot the deceased Walker with a shotgun and thereby proximately cause Walker's death, and if so, was defendant justified in doing so on the ground of self-defense? When the charge of the court is construed "contextually as a whole," as every charge must be, it correctly states the principles of law involved and applies those principles to the facts in this case. *State v. Powell,* 277 N.C. 672, 178 S.E. 2d 417; *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765; *State v. Benton, supra; Beanblossom v. Thomas, supra;* 3 Strong, Criminal Law § 168; 7 Strong, Trial § 33, p. 330.

We find no prejudicial error. The charge fully presented defendant's contentions, and we find no reason to believe that the jury was misinformed or misled as to the applicable law. The jury, in a trial free from prejudicial error, simply accepted the State's version of the facts.

No error.

ORANGE COUNTY, A MUNICIPAL CORPORATION v. FORREST T. HEATH AND WIFE NANCY B. HEATH

No. 84

(Filed 12 May 1971)

1. **Municipal Corporations § 30; Counties § 5— zoning ordinance — presumption of validity**

A zoning ordinance is presumed to be constitutional and valid, and the burden is on the party who alleges invalidity to prove that the ordinance is unreasonable and arbitrary.

2. **Counties § 5; Municipal Corporations § 30— spot zoning**

Rezoning of 15 acres of land to permit its use as a mobile home park was not spot zoning where the rezoned land joined 5 acres already in legal use by the owners as a mobile home park.

3. **Counties § 5— rescission of rezoning ordinance — public notice and hearing**

Where the board of county commissioners, after public notice and hearing, duly passed an ordinance rezoning 15 acres of defendants' property to permit its use as a mobile home park, subsequent attempt by the board of commissioners to rescind the rezoning ordinance and return the property to its former classification without public notice or advertisement was void.

APPEAL by Orange County (plaintiff) from *Canaday, J.*, November 18, 1970 Session, ORANGE Superior Court. The record on appeal and briefs were filed in the North Carolina Court of Appeals and transferred to the Supreme Court under referral order of July 31, 1970.

On July 21, 1970, the County or Orange instituted this civil action in the Superior Court Division, General Court of Justice, to restrain the defendants, Forrest T. Heath and wife, Nancy B. Heath, from making use of fifteen acres of land in Chapel Hill Township for "non-residential purposes" in violation of Section 13.3.1, Zoning Ordinance, duly passed by the County Commissioners. The court issued a temporary restraining order, and continued it to the hearing on the merits.

By complaint the plaintiff alleged the defendants on May 30, 1970, began excavation on the fifteen acre tract preparing it for a non-residential use in violation of the zoning ordinance passed on February 6, 1967, and prayed for temporary and permanent restraining orders.

By answer the defendants admitted the excavation in preparation for the construction of a mobile home park, but alleged the proposed use was authorized by the amendment to the zoning ordinance duly passed by the Board of Commissioners on May 6, 1968; that the attempt at its revocation on May 13, 1968, was void, leaving the amended ordinance in full force and effect.

The parties stipulated:

"2. That on or about January 20, 1968, Forrest T. Heath petitioned the Board of Commissioners, Orange Coun-

ty, North Carolina that a certain tract of land he owned, located on Tax Map No. 119, Lot Number 35, and shown on accompanying plat, be rezoned from Residential District to Mobile Home Park District.

3. That on April 23, 1968, the Orange County Planning Board by motion made and carried recommended to the County Commissioners that Mr. Heath's rezoning request be approved with the stipulation that the density of mobile home spaces be no more than four per acre with no more than 75 for the total 20 acre tract.

4. That on May 6, 1968, the Orange County Commissioners, after due notice and advertisement as by law required, considered the above recommendation of the Planning Board and after discussion the following motion was made and carried: 'that fifteen acres belonging to Forrest Heath be rezoned from a residential area to a mobile home park area upon condition that the rezoned fifteen acres plus the five acres presently zoned for a mobile home park area not exceed sixty trailer spaces which said trailer spaces shall be evenly distributed throughout the entire twenty acres.'

5. That thereafter, one week later, on May 13, 1968, in special session without any further petition, the Orange County Commissioners did by motion made and carried, state 'that the Board rescind the action taken on May 6' (referring to above herein.)

6. That this action (on May 13, 1968) was taken without any public notice or advertisement.

7. That issuance of the required permit would have been granted except for the action taken by the said Commissioners at the said May 13, 1968 special session, provided that the defendants had complied with the zoning and subdivision ordinance."

At the conclusion of the hearing both plaintiff and defendants moved for summary judgment. The court denied plaintiff's motion that the defendants be restrained from making any nonresidential use of the described lands. The court granted defendants' motion adjudging the described lands were properly zoned "a mobile home park district," that the temporary restraining

order be dissolved and that the action be dismissed. The plaintiff appealed.

Graham and Cheshire by Lucius M. Cheshire for plaintiff appellant.

Winston, Coleman & Bernholz by Alonzo Brown Coleman, Jr., for defendant appellees.

HIGGINS, Justice.

The plaintiff alleged the defendants were in violation of the original zoning ordinance of February 6, 1967, limiting the described lands to residential use. The complaint did not refer either to an amendment passed on May 6, 1968, rezoning the area to use as a trailer home park, or to the attempt of the Orange County Board of Commissioners to rescind the amended ordinance in a special meeting held on May 13, 1968. However, by brief, the plaintiff suggested the rezoning order is void as an act of spot zoning and, being void, may be ignored. In the alternative the plaintiff seems to argue that if the rezoning ordinance of May 6, 1968, be adjudged to be valid, the rescinding resolution of May 13, 1968, repealed it, reinstating the limitation to residential use.

The record discloses the defendants purchased twenty acres of land in rural Chapel Hill Township and began developing it as a trailer home park. After five acres had been so developed, the area was zoned as a residential district. The defendants did not seek a permit to complete the project as a non-conforming use. See *In re Tadlock,* 261 N.C. 120, 134 S.E. 2d 177. On the contrary, they filed a petition for a rezoning order including the fifteen acres in the area zoned for trailer home park use. The zoning board conducted an investigation and recommended to the Board of Commissioners that the fifteen acres referred to be rezoned as prayed for in the defendants' petition. The Board of Commissioners posted the required notices and conducted a hearing as contemplated by G.S. 153-266.16 and rezoned the land for mobile home park use as prayed for in the petition. The Board of Commissioners entered upon the records the resolution that the area was rezoned for trailer home park purposes.

[1] A zoning ordinance is a legislative determination as to what restrictions should be placed on the use of land. The

legislative judgment in such matters may not be disputed unless it is arbitrary or unreasonable. " . . . (A) legislative act is presumed to be constitutional and valid. This presumption applies to zoning ordinances. . . . The presumption of constitutionality is rebuttable, but it imposes upon the litigant who alleges invalidity the burden of proving that the ordinance is unreasonable and arbitrary." Anderson, American Law of Zoning, Vol. 1, § 2.14, pp. 67-69. See also *Raleigh v. Morand*, 247 N.C. 363, 100 S.E. 2d 870; *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E. 2d 325; *In re Appeal of Parker*, 214 N.C. 51, 197 S.E. 706; *Helms v. Charlotte*, 255 N.C. 647, 122 S.E. 2d 817.

[2] The plaintiff does not allege the rezoning ordinance of May 6, 1968, is invalid, nor does it offer proof of facts which would establish invalidity. In fact, Stipulation No. 4, when properly construed, seems to be a concession that the rezoning act is valid. The argument in the brief, however, seems to challenge validity on the ground it is spot zoning. "Spot zoning arises where a small area, usually a single lot or a few lots, surrounded by other property of similar nature, is placed arbitrarily in a different use zone from that to which the surrounding property is made subject." *Zopfi v. City of Wilmington, supra.* The defendants' tract of fifteen acres rezoned by the ordinance of May 6 was not isolated, but joined the five acres already in legal use as a mobile home park. The rezoning act placed the defendants' entire area in the same use category, the use for which they acquired it at a time prior to the beginning of the zoning procedures.

The complaint and the stipulations when properly interpreted take from the plaintiff all legal grounds for its objection to the zoning ordinance of May 6, 1968. Necessarily the plaintiff's cause must fail unless it establishes the validity of the rescission ordinance attempted on May 13, 1968. The defendants filed a proper petition for the change which the zoning board had investigated and had approved after a duly advertised and duly conducted public hearing. The Board of Commissioners allowed the petition and rezoned the remainder of defendants' property for inclusion in the trailer home park, the construction of which they had begun before any rezoning procedure began. One week later in a special meeting without request or petition, without notice and without the knowledge on the part of the defendants, or others, or an opportunity for

anyone to be heard, the Board attempted to rescind the ordinance.

G.S. 153-266.15 provides: "No amendment may be adopted until after a public hearing thereon." G.S. 153-266.16 provides: "Whenever in this article a public hearing is required, all parties in interest and other citizens shall be given an opportunity to be heard." In the case of *Freeland v. Orange County*, reported in 273 N.C. 452, 160 S.E. 2d 282, the opinion by the present Chief Justice, this language is used: "The manifest intention of the General Assembly was that a public hearing be conducted at which those who opposed and those who favored adoption of the ordinance would have a fair opportunity to present their respective views. The requirement that such a public hearing be conducted is mandatory."

[3] A public hearing in a meeting held pursuant to notice was a prerequisite to the passage of the rezoning ordinance of May 6, 1968. The same procedure (notice and a hearing) would be required in order for the Board to rescind that ordinance and return the property to the former classification. The plaintiff's Stipulation No. 6 is fatal to the plaintiff's claim. "6. That this action (on May 13, 1968) was taken without any public notice or advertisement."

The plaintiff's attack on the judgment entered in the superior court failed for lack of merit. For the reasons herein assigned the judgment of the superior court is

Affirmed.

STATE OF NORTH CAROLINA v. VARDELL JACOBS

No. 83

(Filed 12 May 1971)

1. Criminal Law § 161— assertion of error on appeal — necessity for exceptions

Any error asserted on appeal must be supported by an exception duly taken and shown in the record. Supreme Court Rules of Practice Nos. 19 and 21.

2. Criminal Law § 161— exceptions appearing for first time in assignments

Exceptions which appear for the first time in the purported assignments of error present no question for appellate review.

3. Criminal Law § 161— requisite of assignment of error

An assignment of error must specifically state the alleged error so that the question sought to be presented is therein revealed.

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

An assignment based on the court's failure to charge should set out the defendant's contention as to what the court should have charged.

5. Attorney and Client § 5; Criminal Law § 146— obligations of court — appointed counsel — compliance with appellate rules

Appellate rules of practice are applicable to indigent defendants and their court-appointed counsel as they are to all others.

6. Rape § 17— assault on female under the age of twelve — definition of the offense

An assault upon a female under the age of 12 years, made with intent to have sexual intercourse with her, constitutes the crime of assault with intent to commit rape—the elements of force and lack of consent being conclusively presumed.

APPEAL by defendant from *Clark, J.*, at the 6 October 1969 Criminal Session of ROBESON. *Certiorari* allowed by Court of Appeals 29 December 1970; transferred from the Court of Appeals for initial appellate review by the Supreme Court under G.S. 7A-31 (b) (4).

Defendant was tried upon a bill of indictment which charged that on 28 June 1969 he feloniously assaulted Jeanne Oxendine, a female child six years of age, with the intent to rape her. At the trial, and at the preliminary hearing, defendant was represented by his privately employed attorney.

Evidence for the State tended to show: About 11:00 on the night of 28 June 1969, Sherrod Oxendine and his wife, the parents of six-year-old Jeanne Oxendine, left her and their other six children at the home while they attended a tobacco barn some distance away. Upon their return Oxendine found one George Arthur Locklear, who had been forbidden to come on the premises, in an old automobile parked in the yard. He also observed defendant, whom he did not know, seated in the kitchen. Oxendine procured his shotgun and ordered the men away. The next morning Jeanne told her mother that during

her absence the night before, she had been asleep on the couch in the TV room; that she was awakened by defendant, who put his finger in her private parts. He then removed her pants, unzipped his own, and attempted to have intercourse with her. He hurt her and she cried out. Her brother David woke up and came into the room. While her pants were off, defendant told David to get him a glass of water, but David would not leave the room. He saw defendant pull off Jeanne's pants and put them back on. Jeanne bled some, and the blood got on her pants. Jeanne was taken to the emergency room at the hospital where she was examined by a gynecologist. He found her hymenal ring intact, but he observed within the vagina two scratches, each one-half inch in length. She had several scratches between the opening of the vagina and the rectum. At the sheriff's office, Jeanne identified defendant as the man who had molested her and said that Locklear had not touched her.

Defendant offered no evidence.

The jury's verdict was "guilty as charged," and the court sentenced defendant to serve a term of not less than ten nor more than fifteen years in the State's prison. After being informed by his attorney, N. L. Britt, of his right to appeal—at the State's expense if he was indigent—and after a "thorough discussion, it was the decision of defendant to serve the sentence and not to appeal." Two days later, however, defendant gave notice of appeal, and N. L. Britt was appointed to prosecute his appeal. Thereafter Mr. Britt became ill, and the appeal was never perfected. A year later, when the solicitor moved to dismiss the appeal, the court substituted Evander M. Britt as counsel for defendant and directed him to apply to the Court of Appeals for *certiorari.* The Court of Appeals allowed the petition, and the appeal was transferred to us under our order of 31 July 1970.

Robert Morgan, Attorney General; Sidney S. Eagles, Jr., Assistant Attorney General; Russell G. Walker, Jr., Staff Attorney, for the State.

Evander M. Britt, attorney for defendant.

SHARP, Justice.

Defendant makes four assignments of error. His case on appeal, however, shows no objection to any evidence offered by

the State and no exception to any ruling by the trial judge or to his charge to the jury. In his first assignment of error defendant's counsel asserts "that the lower court erred in failing to declare and explain the law arising on the evidence given in the case as required by G.S. 1-180, *as set forth in this Exception No. 1.*" (Italics ours.)

[1-5] The Rules of Practice (19 and 21) of both this Court and the Court of Appeals require any error asserted on appeal to be supported by an exception duly taken and shown in the record. Exceptions which appear for the first time in the purported assignments of error present no question for appellate review. *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789. *See State v. Merrick,* 172 N.C. 870, 90 S.E. 257. Furthermore, each assignment must specifically state the alleged error so that the question sought to be presented is therein revealed. *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225. An assignment based on the court's failure to charge should set out the defendant's contention as to what the court should have charged. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736. Appellate rules of practice are applicable to indigent defendants and their court-appointed counsel as they are to all others. *State v. Price,* 265 N.C. 703, 144 S.E. 2d 865.

[6] Defendant's brief discloses that in his first assignment he complains of the charge upon the premise that the court did not properly define either assault or assault with the intent to commit rape. This postulate, the foundation of defendant's appeal, is not supported by the record. After giving the usual definitions of assault and rape, the judge explained to the jury that an assault upon a female under the age of 12 years, made with intent to have sexual intercourse with her, constitutes the crime of assault with the intent to commit rape—the elements of force and lack of consent being conclusively presumed. This was a correct instruction, fully supported by the decisions of this Court. *State v. Hartsell,* 272 N.C. 710, 158 S.E. 2d 785; *State v. Lucas,* 267 N.C. 304, 148 S.E. 2d 130; *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826. A child under the age of twelve cannot consent, G.S. 14-21, and "[t]he law resists for her." *State v. Lucas, supra* at 307, 148 S.E. 2d at 131.

Defendant expressly abandoned his second assignment of error, that is, that the judge erred in refusing to set aside the jury's verdict as being against the weight of the evidence. The

third and fourth assignments, that the court erred in refusing to grant defendant's motion for a new trial and in entering judgment, are formal and also without merit.

The court instructed the jurors that they might return one of three verdicts: guilty of the felony charged, guilty of an assault on a female, or not guilty. The evidence was short and uncontradicted; the charge, uncomplicated. Nothing suggests that the jury did not fully understand the instructions or that there has been a miscarriage of justice. In the trial we find

No error.

STATE OF NORTH CAROLINA v. BOBBY GENE MAYNOR

No. 90

(Filed 12 May 1971)

1. **Homicide § 21; Kidnapping § 1— sufficiency of State's evidence**

The State's evidence was sufficient for submission to the jury on issues of defendant's guilt of first degree murder and of kidnapping.

2. **Criminal Law § 75— in-custody statements — admissibility**

Testimony by a deputy sheriff as to statements made by defendant while in custody was properly admitted in evidence where there was plenary evidence on *voir dire* to support the court's findings that any statement made by defendant was made voluntarily and was not obtained in violation of defendant's constitutional rights.

APPEAL by defendant from *McKinnon, J.*, November 30, 1970 Session, CUMBERLAND Superior Court.

In separate indictments, defendant was charged, jointly with Nathan Owen Chance, (1) with the murder of Lawrence C. Burris, and (2) with kidnapping Lawrence C. Burris, on June 5, 1970.

The court determined defendant was an indigent within the meaning of G.S. 7A-450 and appointed Sol G. Cherry, Esq., Public Defender of the Twelfth Judicial District, to represent him.

On Saturday, June 6, 1970, the body of Lawrence C. Burris (Burris) was found in the Cape Fear River. The arms,

wrists and body had been tied up with hemp rope. The death of Burris was caused by drowning.

On Friday, June 5, 1970, about 10:00 p.m., Burris, accompanied by defendant, his codefendant, Nathan Owen Chance (Chance), and Betty Joyce Whitehead (Betty), aged 13, defendant's girl friend, left the Silver Dollar Bar in a green Chevrolet owned and operated by Burris. They rode around for about fifteen or twenty minutes and then stopped in a wooded area. Earlier that day defendant and Burris had been drinking together. When Burris stopped the car, Betty got out and went farther into the woods. While she was gone defendant and Chance assaulted and robbed Burris. When she returned, Burris was lying on the ground and defendant and Chance were kicking him. Defendant and Chance got rope from the trunk, tied Burris' hands, wrists and body, and put Burris in the trunk. Then defendant drove Burris' car to another wooded area near the Cape Fear River. They stopped there and opened the trunk. Burris got out, ran and fell down an embankment. Defendant and Chance chased and caught him. Each hit Burris over the head two or more times with a flashlight. Then they threw him into the river. When Burris was trying to get up out of the water, defendant put his foot on Burris' head "for a few minutes." Then Burris' body floated off. When defendant remarked to Chance "that he couldn't look at it any more," defendant and Chance returned to the car. Then defendant drove away in Burris' car, accompanied by Betty and by Chance.

The State's evidence included the testimony of Betty and of witnesses who testified (1) to defendant's subsequent statements that he had "beat" a man and "thrown" him into the river, and (2) to the sale by defendant of tools taken from the trunk of Burris' green Chevrolet. It also included testimony of Deputy Sheriff Washburn as to statements made to him by defendant. These statements are in substantial accord with Betty's testimony. However, Betty did not leave the car and go to the river bank. Washburn's testimony as to defendant's incriminating statements constitute the evidence as to precisely what happened when Burris was thrown into the river. In corroboration of his incriminating statements, defendant showed Washburn the wooded area where he and Chance had assaulted, robbed and tied Burris, and had put him in the trunk. Defendant also showed Washburn the place where the trunk was opened and he and Chance had chased Burris to the Cape Fear, assaulted

him and thrown him into the river. Articles found at these sites and also in Burris' green Chevrolet tended to corroborate defendant's incriminating statements.

In the murder case, the jury returned a verdict of guilty of murder in the first degree with a recommendation of life imprisonment; and the court pronounced judgment that defendant be imprisoned for life in the State's prison.

In the kidnapping case, the jury returned a verdict of guilty as charged; and the court pronounced judgment that defendant be imprisoned for life in the State's prison.

Defendant excepted to the judgments and gave notice of appeal. The Public Defender was appointed to represent him in connection with his appeal.

The only assignments of error are (1) that the court erred in the denial of defendant's motion(s) for judgment as in case of nonsuit, and (2) in failing to exclude the statements attributed to defendant by Deputy Sheriff Washburn.

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

Sol G. Cherry, Public Defender, for defendant appellant.

BOBBITT, Chief Justice.

[1] As indicated by the evidential facts summarized in our preliminary statement, the State's evidence was amply sufficient to withstand defendant's motions for judgments as in case of nonsuit and to support the verdicts. There was evidence of all essential elements of first degree murder and of kidnapping.

On objection, a *voir dire* hearing was conducted to determine the admissibility of the testimony of Deputy Sheriff Washburn as to statements made by defendant while in custody. Washburn testified in detail, both on direct and cross-examination, as to the warnings given defendant concerning his constitutional rights and as to the circumstances under which defendant made the statements. Defendant did not testify or offer evidence.

[2] On the uncontradicted evidence, the court found that, before he made any statement, Washburn warned defendant that

he had the right to remain silent; that any statement he made could be used against him; that he had the right to retain an attorney for advice; that counsel would be provided by the State if he was unable to employ counsel; that if he chose to make a statement he had the right to stop at any time; that defendant had signed "a waiver of rights," and indicated he understood his rights with reference to making a statement; and that any statement made by defendant was made voluntarily and was not obtained in violation of defendant's constitutional rights. Since there was plenary evidence to support the court's findings, Washburn's testimony as to defendant's statements was properly admitted for consideration by the jury.

Although we find no error in the admission of Washburn's testimony as to defendant's in-custody statements, it is noteworthy that there was plenary evidence to sustain the verdicts independent of the testimony concerning in-custody statements made by defendant.

In his brief, counsel for defendant states he has found "(n)o specific prejudicial error" in the record. Our consideration of the record indicates there was no error in the manner in which the trial was conducted. The grievous error was that of defendant who, for a pittance, assaulted, robbed, tied, imprisoned in the trunk, transported, and thereafter deliberately drowned, a man with whom he had been associating ostensibly as a friend.

The verdicts and judgments will not be disturbed.

No error.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BEASLEY v. INDEMNITY CO.

No. 73 PC.

Case below: 11 N.C. App. 34.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 10 June 1971.

FREIGHT CARRIERS v. TEAMSTERS LOCAL

No. 68 PC.

Case below: 11 N.C. App. 159.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971.

HODGE v. FIRST ATLANTIC CORP.

No. 46 PC.

Case below: 10 N.C. App. 632.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971.

KIRBY v. CONTRACTING CO.

No. 69 PC.

Case below: 11 N.C. App. 128.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971.

LIBERTY/UA, INC. v. TAPE CORP.

No. 48.

Case below: 11 N.C. App. 20.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971. Motion of plaintiff to dismiss appeal of defendants allowed 10 June 1971.

MORRIS v. PERKINS

No. 64 PC.

Case below: 11 N.C. App. 152.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971.

NYE v. DEVELOPMENT CO.

No. 53 PC.

Case below: 10 N.C. App. 676.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971.

PENNY v. R. R. CO.

No. 48 PC.

Case below: 10 N.C. App. 659.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. INGLAND

No. 63 PC.

Case below: 10 N.C. App. 715.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971.

STATE v. INNMAN

No. 76 PC.

Case below: 11 N.C. App. 202.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971.

TRUST CO. v. ARCHIVES

No. 47 PC.

Case below: 10 N.C. App. 619.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971.

YOUNG v. MARSHBURN

No. 52 PC.

Case below: 10 N.C. App. 729.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 June 1971.

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.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW

§ 4. Proceedings of Administrative Agencies

The statute providing that rules of evidence as applied in the superior and district courts shall be followed in all administrative proceedings before State agencies is not applicable to an automobile insurance rate hearing. *In re Filing by Automobile Rate Office,* 302.

§ 5. Review of Administrative Orders

On judicial review of the suspension and revocation of licenses by the State Board of Alcoholic Control, the "whole record" test is applicable. *Underwood v. Board of Alcoholic Control,* 623.

ADVERSE POSSESSION

§ 5. Continuity of Possession

While adverse possession is not required to be unceasing, if it is interrupted, claimant must show that he has, from time to time, continuously subjected the land to the use of which it is susceptible for the statutory period—and such use must have been under known and visible lines and boundaries. *Cutts v. Casey,* 390.

§ 21. Presumption of Title Out of State

In condemnation proceeding, there was a presumption that title was out of the State. *S. v. Johnson,* 126.

§ 25. Sufficiency of Evidence

Litigant in a condemnation proceeding failed to establish ownership by adverse possession under color of title in lands sought to be condemned by the State. *S. v. Johnson,* 126.

Defendants failed to establish title by 20 years' adverse possession where they offered no evidence that any known or visible line marked the southeastern boundary of land claimed by their predecessors in title. *Cutts v. Casey,* 390.

APPEAL AND ERROR

§ 1. Jurisdiction in General

Where Court of Appeals unanimously affirmed dismissal of plaintiff's action against two corporate defendants and, by divided vote, reversed dismissal against an individual defendant, plaintiff is not entitled to appeal to the Supreme Court as a matter of right the unanimous decision as to the corporate defendants by reason of dissent as to the individual defendant. *Hendrix v. Alsop,* 549.

§ 3. Review of Constitutional Questions

The Supreme Court will not decide a constitutional question which was not raised or considered in the court below. *Bland v. City of Wilmington,* 657.

§ 9. Moot Questions

In a proceeding to restrain a school consolidation election, plaintiff's appeal from a judgment stating that he was not entitled to the injunctive

APPEAL AND ERROR — Continued

relief sought is dismissed as moot by the Supreme Court, where the election had been held prior to the entry of judgment. *McKinney v. Bd. of Comrs,* 295.

§ 57. Findings or Judgments on Findings

Findings of fact by the trial court, if supported by any competent evidence, are conclusive on appeal notwithstanding evidence to the contrary. *S. v. Johnson,* 126.

In nonjury trial, presumption is that judge disregarded incompetent evidence. *Statesville v. Bowles,* 497.

§ 58. Injunctions

Trial court's findings of fact supported by the evidence are binding on appeal when permanent injunction is involved, but not when temporary injunction is involved. *Coggins v. Asheville,* 428.

Where, on appeal from the granting of an interlocutory injunction, the record does not contain evidence introduced before the trial court, the appellate court will presume the evidence supported the findings. *In re Reassignment of Albright,* 664.

§ 68. Law of the Case and Subsequent Proceedings

Decision on prior appeal that plaintiff's evidence was sufficient for jury remains law of the case in subsequent trial upon substantially the same evidence. *Cutts v. Casey,* 390.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

Where officers sitting in living room of defendant's boardinghouse could look through open door of defendant's bedroom and see the articles that had been forcibly removed at gunpoint some four hours earlier, the officers had probable cause to arrest defendant without a warrant for armed robbery. *State v. Thompson,* 277.

Assault victim's description of her assailant and his clothing furnished reasonable ground for arrest of defendant without a warrant. *S. v. Dickens,* 537.

§ 6. Resisting Arrest

The First Amendment right of freedom of speech does not protect a defendant who by the use of loud and abusive language wilfully obstructed a police officer in the investigation of a reported crime. *S. v. Leigh,* 243.

A citizen may lawfully advise a person under police investigation of his constitutional rights as long as the advice is given in an orderly and peaceable manner. *Ibid.*

ATTORNEY AND CLIENT

§ 5. Representation of Client

Appellate rules of practice are applicable to indigent defendants and their court-appointed counsel as they are to all others. *S. v. Jacobs,* 693.

AUTOMOBILES

§ 19. Right of Way at Intersection

Rights and liabilities of motorists involved in a collision at a T-intersection at which the stop sign controlling the servient street had fallen down. *Dawson v. Jennette,* 438.

§ 59. Negligence in Entering Highway

Evidence was sufficient to support trial court's findings that sole proximate cause of collision which occurred after plaintiff entered the highway from a private driveway was negligence of defendant in failing to keep a proper lookout and in failing to keep his vehicle under proper control. *Blackwell v. Butts,* 615.

AVIATION

§ 1. Airport Authorities

Airport authority may not bar a car rental company from entering its premises to discharge an outgoing passenger or pick up an incoming passenger pursuant to a previously made contract or previously received request for such service. *Airport Authority v. Stewart,* 227.

BAILMENT

§ 3. Liabilities of Bailee to Bailor

A bus company could be held liable as a gratuitous bailee for the loss of a bag and its contents that was carried aboard the company's bus in the custody of a passenger and that remained on the bus after the passenger was left behind during a stopover. *Clott v. Greyhound Lines,* 378.

BANKRUPTCY

§ 1. Insolvency Within Meaning of Bankruptcy Act

The test of solvency in this State is whether or not the entire assets of the person or entity in question equal or exceed in value the total indebtedness of such person or entity. *Kessing v. Mortgage Corp.,* 523.

BANKS AND BANKING

§ 13. Loans and Pledges to Secure Loans

Loan was made on date it was closed and not on prior date when application for loan was approved. *Kessing v. Mortgage Corp.,* 523.

In order for loan of money to be made, there must be delivery of the money and an understanding to repay. *Ibid.*

BILLS AND NOTES

§ 13. Acceleration of Maturity

Summary judgment was properly entered dismissing defendant's counterclaim for recovery of entire principal balance of note and accrued interest under an acceleration clause. *Kessing v. Mortgage Corp.,* 523.

BOUNDARIES

§ 2. Courses and Distances and Calls to Natural and Artificial Monuments

Discrepancy between length of ocean frontage called for in grant and that shown on surveyor's map of the property is factor for the jury to consider in determining whether disputed line of an adjoining tract has been correctly located. *Cutts v. Casey,* 390.

A line of another tract which is well known and established on the ground is a fixed monument. *Ibid.*

§ 3. Reversing Calls

Calls in a deed may be reversed only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line. *Cutts v. Casey,* 390.

§ 6. Junior and Senior Deeds

Defendants in a quieting title action were not entitled to use a description in a junior conveyance to locate the lines called for in a senior conveyance. *Development Co. v. Phillips,* 69.

Line created by a senior grant cannot be established by reversing the calls in a junior grant. *Cutts v. Casey,* 390.

§ 13. Maps and Ancient Documents

Surveyor's map purportedly showing division of land conveyed by an 1879 deed was not admissible as substantive evidence locating the 1879 conveyance but should have been admitted for illustrative purposes. *Cutts v. Casey,* 390.

BURGLARY AND UNLAWFUL BREAKINGS

§ 8. Sentence and Punishment

Statute providing for capital punishment for first degree burglary does not violate prohibition against cruel and unusual punishment. *S. v. Barber,* 268.

CANCELLATION OF INSTRUMENTS

§ 2. Cancellation for Fraud

The husband had a clear duty to disclose to his estranged wife the value of stock transferred by her to the husband without consideration. *Link v. Link,* 181.

The fact that the transactions in question occurred after the husband's departure from the home, following the wife's disclosure of her own misconduct, does not show that the previously established confidential relationship between them had terminated so as to free the husband to deal with the wife as if they were strangers. *Ibid.*

In wife's action to set aside her transfer of corporate securities to her estranged husband, the evidence was sufficient to be submitted to the jury on separate issues of fraud, duress and undue influence, and was insufficient to show ratification of the transaction by the wife when she signed a gift tax return prepared by the husband's accountant which reported the transfer as a gift from the wife to the husband. *Ibid.*

CANCELLATION OF INSTRUMENTS — Continued

§ 3. Cancellation for Undue Influence

While fraud, duress and undue influence are related wrongs, they are not synonomous. *Link v. Link,* 181.

An announcement by a husband, to whom the wife has confessed her adultery, that he intends to separate himself from her and to institute legal proceedings to obtain the sole custody of their children constitutes duress when made for the purpose of coercing her into transferring, without consideration, her individual property to the husband, the proposal being to leave the children in her custody if she make such transfer. *Ibid.*

§ 12. Damages, Verdict and Judgment

In an action to set aside the wife's transfer of corporate stock and debentures to her estranged husband, the trial court did not abuse its discretion in the submission to the jury of three separate issues on fraud, duress and undue influence. *Link v. Link,* 181.

CARRIERS

§ 2. State Franchise

Airport authority may not bar a car rental company from entering its premises to discharge an outgoing passenger or pick up an incoming passenger pursuant to a previously made contract or previously received request for such service. *Airport Authority v. Stewart,* 227.

§ 16. Carrier's Liability for Baggage

A bus company could be held liable as a gratuitous bailee for the loss of a bag and its contents that was carried aboard the company's bus in the custody of a passenger and that remained on the bus after the passenger was left behind during a stopover. *Clott v. Greyhound Lines,* 378.

CONSTITUTIONAL LAW

§ 4. Waiver

Defendants waived their right to challenge the decision of the Court of Appeals that an order submitting a boundary dispute to a compulsory reference did not violate their constitutional right to a jury trial, where defendants failed to apply for *certiorari* following the decision. *Development Co., Inc. v. Phillips,* 69.

§ 7. Delegation of Powers by the General Assembly

Power of the Commissioner of Insurance to fix rates effective from a specified future date is a delegated legislative power. *In re Filing by Automobile Rate Office,* 302.

§ 14. Morals and Public Welfare

The regulation of the sale and use of alcoholic beverage is within the police power of the State. *Underwood v. Board of Alcoholic Control,* 623.

§ 18. Free Speech

The First Amendment right of freedom of speech does not protect a defendant who by the use of loud and abusive language wilfully obstructed a police officer in the investigation of a reported crime. *S. v. Leigh,* 243.

CONSTITUTIONAL LAW — Continued

§ 29. Right to Indictment and Trial by Duly Constituted Jury

U. S. Supreme Court decision relating to exclusion of veniremen who voice general objections to the death penalty does not apply where jury in capital case recommends life imprisonment. *S. v. Dickens*, 537.

The death penalty has not been abolished in N. C. by federal decisions. *S. v. Barber*, 268.

§ 30. Due Process in Trial in General

Confrontation in courtroom before trial commenced was not so unnecessarily suggestive as to be a denial of due process. *S. v. Haskins*, 52.

The constitutional guarantee of a speedy trial does not preclude good faith delays which are reasonably necessary for the State to present its case. *S. v. Neas*, 506.

After a complaint has been filed, an inordinate delay in serving the warrant or in securing an indictment will violate the right to a speedy trial. *Ibid.*

Defendant was not denied a speedy trial by delay of 15 months between time warrants were issued and time they were served and defendant was brought to trial, where the cause of delay was that evidence necessary for trial would not be released by officers of another county until charges in that county were disposed of. *Ibid.*

The procedure by which the victim of an attempted armed robbery identified defendant in his jail cell was unnecessarily suggestive and was a violation of due process. *S. v. Smith*, 476.

§ 32. Right to Counsel

Defendant effectively waived his right to counsel during a police lineup. *S. v. Hill*, 365.

§ 34. Double Jeopardy

No person can be twice put in jeopardy for the same offense. *S. v. Cutshall*, 334.

§ 36. Cruel and Unusual Punishment

Imposition of the death penalty upon defendant's conviction of the rape of his four-year-old stepdaughter is not cruel and unusual punishment. *S. v. Atkinson*, 168.

Death penalty for first degree burglary and rape does not constitute cruel and unusual punishment. *S. v. Barber*, 268.

CONTRACTS

§ 32. Actions for Wrongful Interference by Third Persons

A plaintiff who was discharged from employment as the general manager of a farm equipment dealership failed to offer sufficient evidence that the defendant farm equipment manufacturer had wrongfully and maliciously interfered with his contract of employment with the dealership. *Kelly v. Harvester Co.*, 153.

COUNTIES

§ 5. County Zoning

A zoning ordinance is presumed to be constitutional. *Orange County v. Heath,* 688.

Rezoning of 15 acres to permit its use as a mobile home park was not spot zoning. *Ibid.*

Attempt by board of county commissioners to rescind a rezoning ordinance and return property to its former classification without public notice or advertising was void. *Ibid.*

COURTS

§ 9. Jurisdiction of Superior Court After Order of Another Superior Court Judge

Judge of superior court was without authority to overrule an order entered in the case by another superior court judge denying defendant's motion to dismiss the charges against him. *S. v. Neas,* 506.

CRIMINAL LAW

§ 2. Intent

Intent is an attitude of the mind and must ordinarily be proven by circumstantial evidence. *S. v. Little,* 484.

§ 5. Mental Capacity in General

The test for insanity which precludes responsibility for crime is the ability to distinguish between right and wrong. *S. v. Jones,* 259.

§ 9. Aiders and Abettors

When two or more persons aid and abet each other in the commission of a crime, all are principals and equally guilty. *S. v. Terry,* 284.

§ 16. Concurrent and Exclusive Jurisdiction

Superior court has jurisdiction to try a misdemeanor which may be properly consolidated for trial with a felony. *S. v. Barbour,* 449.

§ 23. Plea of Guilty

In the absence of any evidence that defendant's plea of guilty before the first superior court judge was obtained through duress, second superior court judge properly denied defendant's motion that he be allowed to withdraw his guilty plea and to enter a plea of not guilty. *S. v. Jones,* 259.

Trial court was warranted in accepting defendant's plea of guilty to voluntary manslaughter where the court's questioning cleared up any uncertainty as to defendant's sobriety. *S. v. Wynn,* 513.

Evidence admitted after femme defendant's guilty plea to the manslaughter of her father-in-law did not require the trial judge to advise defendant to withdraw her guilty plea. *Ibid.*

§ 26. Plea of Former Jeopardy

The burden is upon defendant to sustain his plea of double jeopardy. *S. v. Cutshall,* 334.

CRIMINAL LAW — Continued

Defendant could not raise the plea of double jeopardy in a second trial for homicide where the first trial ended in a mistrial on the ground that a juror had met with defendant during a weekend recess. *Ibid.*

Jeopardy did not attach when defendant, prior to selection of the jury, tendered pleas of guilty which were accepted by the solicitor but rejected by the court. *S. v. Neas,* 506.

§ 29. Suggestion of Mental Incapacity to Plead

Trial court correctly determined that defendant had mental capacity to enter a plea of guilty to three capital charges although there was some evidence defendant was suffering from a sociopathic personality. *S. v. Jones,* 259.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Testimony that defendant was AWOL at the time of his arrest was not prejudicial. *S. v. Jones,* 88.

In a prosecution charging defendant with the rape of his four-year-old stepdaughter, who died as a result of the offense, allusions during the trial to the child's murder were not erroneous. *S. v. Atkinson,* 168.

§ 42. Articles and Clothing Connected with the Crime

Various exhibits of the State were properly admitted in evidence in this rape prosecution. *S. v. Atkinson,* 168.

Clothing taken from defendant after his valid arrest without a warrant was properly admitted in evidence. *S. v. Dickens,* 537.

§ 43. Photographs

Photographs of a homicide victim were properly admitted in evidence. *S. v. Cutshall,* 334.

§ 51. Qualification of Experts

Testimony by FBI expert in the field of hair and fiber analysis was competent. *S. v. Vestal,* 561.

§ 52. Examination of Experts

Trial court properly restricted defendant's cross-examination of a metallurgist. *S. v. Vestal,* 561.

§ 53. Medical Expert Testimony

Testimony by the examining pathologist in a rape prosecution did not invade the province of the jury. *S. v. Atkinson,* 168.

§ 60. Evidence of Fingerprints

Evidence of fingerprints taken while defendant was in custody under a warrant charging him with capital crimes was not rendered inadmissible by U. S. Supreme Court decision. *S. v. Barber,* 268.

Exhibits containing fingerprints lifted from crime scene and fingerprints taken from defendant were sufficiently identified for their submission in evidence. *Ibid.*

CRIMINAL LAW — Continued

§ 66. Evidence of Identity by Sight

Defendant, without at least a general objection, was not entitled to a *voir dire* hearing on admissibility of identification testimony. *S. v. Haskins*, 52.

Confrontation in courtroom before trial commenced was not so unnecessarily suggestive as to be a denial of due process. *Ibid.*

A cab driver who carried the defendant to the locality where an armed robbery was committed later that night was properly allowed to identify the defendant at the trial for armed robbery. *S. v. Thompson*, 277.

The procedure by which the victim of an attempted armed robbery identified defendant in his jail cell was unnecessarily suggestive and was a violation of due process, but admission of testimony relating thereto was harmless error where the witness' in-court identification was based on observations prior to and during the crime. *S. v. Smith*, 476.

Trial court properly found that the in-court identification of armed robbery defendant was based on the victim's observations at the time of the robbery. *S. v. Tyson*, 491.

The fact that the participants in a police identification lineup were required three or four times to change their numbers and shift their positions in the line did not render the lineup suggestive or conducive to mistaken identification. *S. v. Hill*, 365.

The fact that the defendant was not identified in the first of two police identification lineups goes to the weight of the identification testimony rather than to its competency. *Ibid.*

§ 68. Other Evidence of Identity

Trial court properly admitted testimony that hair found on linen taken from bed where rape occurred was microscopically identical to hair taken from defendant. *S. v. Barber*, 268.

Testimony that officer found hairs at the crime scene five days after crime was committed which matched hairs found on defendant's clothing was properly admitted. *S. v. Dickens*, 537.

§ 71. "Short-hand" Statement of Fact

Reference to defendant's jocular expression was admissible as a short-hand statement of fact. *S. v. Dawson*, 351.

§ 73. Hearsay Testimony

Testimony by the wife of a homicide victim that on the day of the homicide her husband told her of plans to go on a business trip with the defendant, held admissible as an exception to the hearsay rule. *S. v. Vestal*, 561.

§ 74. Confessions

Where the State introduces defendant's confession, defendant is entitled to claim the benefit of any part thereof which is favorable to him. *S. v. Johnson*, 252.

CRIMINAL LAW — Continued

§ 75. Tests of Voluntariness of Confession; Admissibility

The rule in Miranda that the in-custody interrogation of defendant must cease when the defendant indicates that he wishes to remain silent does not bar the subsequent interrogation of a defendant who invites the police officer to resume talks with him. *S. v. Jones,* 88.

Words which convey substance of Miranda warnings along with the required information are sufficient to meet the requirements of that decision. *S. v. Haskins,* 52.

Warnings given to defendant prior to his in-custody interrogation, which included statement that "it is our duty as police officers to get you a lawyer," sufficiently conveyed to defendant the information that he had a right to have a lawyer present during the interrogation. *Ibid.*

Whether defendant did in fact make inculpatory in-custody statements is question of fact for the jury. *Ibid.*

The correct test of the admissibility of a confession is whether the confession was, in fact, voluntary under all the circumstances of the case. *S. v. Dawson,* 351.

§ 76. Determination and Effect of Admissibility of Confession

Defendant's confession made to investigating officers subsequent to his arrest for the pistol slaying of a housewife during a robbery was properly admitted in evidence upon findings of fact that the confession was freely and voluntarily made. *S. v. Smith,* 36.

Trial court properly held a *voir dire* hearing in jury's absence to determine whether in-custody statements allegedly made by defendant were in fact voluntarily and understandingly made. *S. v. Haskins,* 52.

Failure of trial court to make specific findings as to whether defendant was under the influence of drugs when he made in-custody statements to police officers was not prejudicial error in this case. *Ibid.*

The admission of a police officer's testimony which corroborated previous testimony relating to defendant's confession does not require a second *voir dire* hearing. *S. v. Atkinson,* 168.

Voir dire evidence was sufficient to support court's findings and conclusion that defendant's confession was voluntary. *S. v. Barber,* 268.

In-custody statements of a minor defendant were not rendered inadmissible by the fact that defendant's mother was not allowed to be present at the interrogation. *S. v. Dawson,* 351.

§ 80. Books, Records and Private Writings

Various documents purporting to show financial transactions between the defendant and the homicide victim were improperly admitted in evidence when there was no testimony that defendant's signature on the documents was genuine. *S. v. Vestal,* 561.

§ 84. Evidence Obtained by Unlawful Means

A police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the auto-

CRIMINAL LAW — Continued

mobile or other conveyance carries contraband materials. *S. v. Simmons,* 468.

Police officers lawfully seized plastic jugs containing non-taxpaid liquor from defendant's car without a warrant, notwithstanding contents of jugs were not visible to the officers standing outside the car. *Ibid.*

Although defendant objected to the admission of evidence obtained by a search without a warrant, trial judge was not required, under the facts of this case, to interrupt the progress of the trial in order to hold a *voir dire* hearing into the lawfulness of the search. *S. v. Vestal,* 561.

§ 86. Credibility of Defendant

The State could impeach defendant's testimony that he was in no physical condition to kick a homicide victim to death. *S. v. Dawson,* 351.

§ 87. Direct Examination of Witnesses

The solicitor could ask leading questions of teenage sisters whose father was on trial for the murder of his wife. *S. v. Clanton,* 502.

§ 88. Cross-examination

The rule that a party is bound by a witness' answer on cross-examination as to collateral matters does not apply when the answer tended to show bias, interest or prejudice. *S. v. Bailey,* 80.

When defendant's son denied on cross-examination that he had ever made the statement that his father was in a certain town establishing an alibi for a homicide, it was reversible error to allow the State to offer testimony contradicting the son's denial. *S. v. Cutshall,* 334.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

Questions designed to impeach the witness, if relevant to the controversy, may cover a wide range and are permissible within the discretion of the court. *S. v. Dawson,* 351.

Part of sheriff's answer which was not responsive to the question but which was competent for the purpose of impeachment, held admissible over defendant's general objection to the answer. *S. v. Little,* 484.

§ 91. Time of Trial and Continuance

Where defendant's pleas of guilty were accepted by the solicitor but rejected by the court, the court did not abuse its discretion in continuing the case on its own motion until the next session. *S. v. Neas,* 506.

§ 92. Consolidation of Counts

Consolidation of assault and kidnapping charges was proper. *S. v. Barbour,* 449.

§ 99. Conduct of Court and its Expression of Opinion on Evidence During Progress of Trial

Defendant's contention that the trial judge prejudiced defendant by his angry tone of voice in ruling on defendant's objections to leading questions was not supported by the record. *S. v. Clanton,* 502.

CRIMINAL LAW — Continued

Cumulative effect of trial court's remarks was prejudicial to defendant and warranted a new trial. *S. v. Frazier*, 458.

§ 101. Misconduct Affecting Jury

Trial court's findings of fact that a juror had met with defendant during a weekend recess in the trial was sufficient to support an order of mistrial. *S. v. Cutshall*, 334.

In ordering a mistrial the court was not required to examine the very juror whose misconduct created the necessity for the mistrial. *Ibid.*

§ 102. Argument and Conduct of Solicitor

Statement by solicitor in jury argument that "If a jury says guilty, the appeals can go on from now until Doom's Day," held not prejudicial. *S. v. Dickens*, 537.

§ 104. Consideration of Evidence on Motion to Nonsuit

On motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State. *S. v. Vincent*, 63.

In determining the nonsuit motion, incompetent evidence which has been admitted must be considered as if it were competent. *S. v. Dawson*, 561.

Conflicts in the evidence present questions for the jury and do not supply a basis for a judgment of nonsuit. *S. v. Greene*, 649.

§ 105. Functions of Motion to Nonsuit

Questions presented on nonsuit motion. *S. v. Vestal*, 561.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

The test of the sufficiency of the evidence to withstand the motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct, or both. *S. v. Vestal*, 561.

§ 112. Instructions on Burden of Proof and Presumptions

In the absence of a request, the trial judge is not required to define reasonable doubt. *S. v. Ingland*, 42; *S. v. Vestal*, 561.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court was not required to review defendant's evidence relating to self-defense. *S. v. Greene*, 649.

§ 114. Expression of Opinion by Court on Evidence in Charge

Trial court's instruction that "if the jury do not recommend that defendant's punishment shall be imprisonment for life it will be the duty of this court, and you may rest assured that the court will comply with its duty and sentence him to death," held not prejudicial. *S. v. Atkinson*, 168.

Trial court's statement in his further instructions on manslaughter that "I am referring to such cases as the one that we are now concerned with" was not an expression of opinion. *S. v. Greene*, 649.

CRIMINAL LAW — Continued

§ 116. Charge on Failure of Defendant to Testify

Court's instruction that defendant's failure to testify was not to be considered against him met minimum requirements. *S. v. Barbour,* 449.

§ 119. Requests for Instructions

If defendant desires greater elaboration on a particular point in the charge, he should make a request therefor. *S. v. Boyd,* 682.

§ 122. Additional Instructions After Initial Retirement of Jury

Trial judge did not commit prejudicial error in repeating definition of second-degree murder when requested to repeat definitions of voluntary and involuntary manslaughter. *S. v. Dawson,* 351.

§ 126. Unanimity of Verdict

In the absence of a request, the trial judge is not required to charge the jury that its verdict must be unanimous. *S. v. Ingland,* 42.

§ 127. Arrest of Judgment

Arrest of judgment. *S. v. Cooke,* 288.

§ 132. Setting Aside Verdict as Being Contrary to Weight of Evidence

Where there was sufficient evidence to support the verdict, trial court acted within its discretion in denying defendant's motion to set aside the verdict. *S. v. Leigh,* 243.

§ 134. Form and Requisites of Judgment

Trial judge's action in accepting defendant's guilty plea and in committing defendant to a State hospital for psychiatric treatment prior to sentencing him, held not prejudicial to defendant. *S. v. Jones,* 259.

§ 135. Judgment and Sentence in Capital Case

Defendant's motion to quash a first degree murder indictment on the ground that the jury in a capital case is required to decide both guilt and punishment was properly denied by the trial court. *S. v. Smith,* 36.

The trial court in a rape case properly excused those jurors who stated that they were irrevocably committed before the trial to vote against the death penalty regardless of the facts and circumstances which might be revealed by the evidence. *S. v. Atkinson,* 168.

The death penalty has not been abolished in N. C. by federal decisions. *S. v. Barber,* 268.

U. S. Supreme Court decision relating to exclusion of veniremen who voice general objections to the death penalty does not apply where jury in capital case recommends life imprisonment. *S. v. Dickens,* 537.

§ 136. Mental Capacity to Receive Sentence

A defendant who had sufficient mental capacity to plead had sufficient mental capacity to receive sentence. *S. v. Jones,* 259.

CRIMINAL LAW — Continued

§ 146. Nature and Grounds of Appellate Jurisdiction

Appellate rules of practice are applicable to indigent defendants and their court-appointed counsel as they are to all others. *S. v. Jacobs*, 693.

§ 154. Case on Appeal

On defendant's appeal from the refusal of the superior court judge to grant defendant a new trial because of the court reporter's failure to provide a trial transcript, the Supreme Court remands the appeal to superior court upon delivery of the transcript to the defendant. *S. v. Winford*, 67.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted

In the absence of evidence in the record, it will be assumed an order of mistrial was supported by sufficient evidence. *S. v. Cutshall*, 334.

Supreme Court could not consider defendant's affidavit that was not certified as part of the case on appeal. *S. v. Clanton*, 502.

§ 159. Form and Requisites of Transcript

The fact that an order declaring a mistrial was not signed in term time did not constitute prejudicial error, since the order was available in ample time for the defendant to prepare his case on appeal. *S. v. Cutshall*, 334.

§ 160. Correction of Record on Appeal

Various additions to a signed order of mistrial merely gave a meaning to a sentence which had evidently been clouded by an inadvertent omission and were not prejudicial to the defendant. *S. v. Cutshall*, 334.

§ 161. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General

An exception to the signing and entry of the judgment raises only the question of whether there is error or a fatal defect upon the face of the record proper. *S. v. Vincent*, 63.

An assignment of error not supported by an exception is ineffectual and will not be considered on appeal. *S. v. Jones*, 259; *S. v. Greene*, 649; *S. v. Boyd*, 682; *S. v. Jacobs*, 693.

§ 162. Objections, Exceptions and Assignments of Error to Evidence

Overruling a general objection to evidence will not be considered reversible error if the evidence is competent for any purpose. *S. v. Dawson*, 351.

§ 163. Exceptions and Assignment of Error to Charge

Assignments of error to the charge should specifically bring out the alleged error. *S. v. Boyd*, 682; *S. v. Jacobs*, 693.

§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit

Defendant's introduction of evidence constituted a waiver of the denial of his motion for nonsuit at the close of the State's evidence. *S. v. Greene*, 649.

CRIMINAL LAW — Continued

§ 166. The Brief

Assignments of error which are not preserved and properly brought forward in defendant's brief are deemed abandoned. *S. v. Dawson*, 351; *S. v. Greene*, 349; *S. v. Boyd*, 682.

§ 167. Harmless and Prejudicial Error in General

Omissions beneficial to defendant afford no grounds for reversal. *S. v. Ingland*, 42.

Harmless error is not sufficient to justify new trial. *S. v. Jones*, 259.

§ 168. Harmless and Prejudicial Error in Instructions

To merit the retrial of a case, an omission in the charge must not only be erroneous but must also be material and prejudicial. *S. v. Ingland*, 42.

Trial judge's clarifying instructions which correctly defined kidnapping at one point and incorrectly defined kidnapping at another point was reversible error. *Ibid.*

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

When defendant's son denied on cross-examination that he had ever made the statement that his father was in a certain town establishing an alibi for a homicide, it was reversible error to allow the State to offer testimony contradicting the son's denial. *S. v. Cutshall*, 334.

Admission of testimony in kidnapping prosecution that witness telephoned her husband and told him "to be sure to get the keys out of the truck and make the kids stay in the house" was harmless error. *S. v. Barbour*, 449.

It was not error to admit that portion of testimony to which no objection was interposed. *S. v. Vestal*, 561.

The benefit of an objection seasonably made is lost if thereafter substantially the same evidence is admitted without objection. *Ibid.*

The admission of a witness' testimony that it was her personal feeling that the defendant had "moved back" with his wife "because it would make a better show," *held* not substantially prejudicial under the facts of this homicide prosecution. *Ibid.*

§ 170. Harmless and Prejudicial Error in Remarks of Court and Argument of Solicitor

Solicitor's statement that he was of the opinion that defendant and his witnesses were lying was improper but did not warrant a new trial in this case. *S. v. Thompson*, 277.

Solicitor's improper reference to failure of defendant to testify in his defense was cured by the trial court's proper instructions to ignore the reference. *S. v. Lindsay*, 293.

Cumulative effect of trial court's remarks was prejudicial to defendant and warranted a new trial. *S. v. Frazier*, 458.

CRIMINAL LAW — Continued

§ 171. Error Relating to One Degree of the Crime Charged

Where kidnapping and assault charges were consolidated for judgment, defendant was not prejudiced by any error in instructions relating to separate assault charge. *S. v. Barbour*, 449.

§ 175. Review of Findings

The findings of fact of the trial judge are conclusive on appeal if supported by the evidence. *S. v. Smith*, 36.

§ 177. Disposition of Cause

On defendant's appeal from the refusal of the superior court judge to grant defendant a new trial because of the court reporter's failure to provide a trial transcript, the Supreme Court remands the appeal to superior court upon delivery of the transcript to the defendant. *S. v. Winford*, 67.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

Justiciable controversy was presented by municipal firemen who alleged they have a statutory right to live outside city limits. *Bland v. Wilmington*, 657.

Declaratory relief was not precluded by fact plaintiff had another adequate remedy. *Construction Co. v. Board of Education*, 633.

§ 2. Proceedings

Successful bidder for school construction contract was necessary party to proceeding instituted by unsuccessful bidder to obtain a declaration that the contract award was invalid. *Construction Co. v. Board of Education*, 633.

DEEDS

§ 15. Defeasible Fees

Grantor's conveyance of a fee simple determinable estate leaves in the grantor a possibility of reverter. *Charlotte v. Recreation Comm.*, 26.

§ 19. Restrictive Covenants

A grantee of land cannot benefit from covenants contained in the deed to his vendor except such as attach to, and run with, the land. *Stegall v. Housing Authority*, 95.

A deed containing a restrictive covenant must be construed most favorably to the grantee, and all doubts and ambiguities are resolved in favor of the unrestricted use of the property. *Ibid.*

Restrictions in a deed will be regarded as for the personal benefit of the grantor unless a contrary intention appears, and the burden of showing that they constitute covenants running with the land is upon the party claiming the benefit of the restrictions. *Ibid.*

In the absence of a general plan of subdivision, development and sales subject to uniform restrictions, restrictions limiting the use of a portion

EJECTMENT — Continued

§ 7. Burden of Proof and Pleadings

In an action involving title to land, claimant must show that the land he claims lies within the area described in each conveyance in his chain of title and, whether relying upon his deed as proof of title or color of title, must fit the description in his deed to the land claimed. *Cutts v. Casey*, 390.

§ 9. Competency and Relevancy of Evidence

Surveyor's map purportedly showing the division of land conveyed by an 1879 deed was not admissible as substantive evidence of the location of the 1879 conveyance. *Cutts v. Casey*, 390.

ELECTIONS

§ 10. Sufficiency of Evidence, Issues and Judgment

Misrepresentations as to site of proposed municipal civic center made in public speeches and through the news media by the mayor, other city officials and members of a Citizens Bond Information Committee appointed by the mayor did not vitiate a special election at which the voters approved issuance of bonds for the civic center. *Sykes v. Belk*, 106.

EMINENT DOMAIN

§ 5. Amount of Compensation

In a municipality's proceeding to condemn park land subject to a possibility of reverter, the park commission was entitled to recover as compensation the difference between the full market value of the land immediately before and after the condemnation without restrictions as to its use as park land. *Charlotte v. Recreation Comm.*, 26.

§ 6. Evidence of Value

In action to condemn municipal sewer easement wherein amount of damages was only issue, error by court in allowing owners to cross-examine city engineer with reference to another possible location of the sewer line across their property was harmless. *Statesville v. Bowles*, 497.

§ 7. Proceedings to Take Land and Assess Compensation

The Department of Administration complied with applicable statutory requirements prior to institution of the action to condemn land adjacent to Fort Fisher Historic Site. *S. v. Johnson*, 126.

The filing of a supplemental memorandum in a condemnation action is required only where the amendment to the complaint and declaration of taking affected the property taken. *Ibid.*

§ 14. Judgment, Nature and Extent of Rights Acquired

The simultaneous condemnation of a fee simple determinable estate and the possibility of reverter destroys the possibility of reverter. *Charlotte v. Recreation Comm.*, 26.

§ 16. Persons Entitled to Compensation Paid

The owner of a fee simple determinable estate is entitled to the full award of compensation for the condemnation of land subject to the fee. *Charlotte v. Recreation Comm.*, 26.

ESTATES

§ 4.1. Fee Simple Determinable Estates

In a municipality's proceeding to condemn park land subject to a possibility of reverter, the park commission was entitled to recover as compensation the difference between the full market value of the land immediately before and after the condemnation without restrictions as to its use as park land. *Charlotte v. Recreation Comm.*, 26.

The condemnation of land subject to a possibility of reverter does not cause a reversion of the title to the grantor. *Ibid.*

Grantor's conveyance of a fee simple determinable estate leaves in the grantor a possibility of reverter. *Ibid.*

ESTOPPEL

§ 5. Parties Estopped

The doctrine of estoppel generally will not be applied against a municipality in its governmental capacity. *Sykes v. Belk*, 106.

EVIDENCE

§ 1. Legislative, Executive and Judicial Acts of This State

While courts generally will not take judicial notice of private or local acts unless pled, rule should not prevail when a statute which effectually settles the controversy has been formally brought to the attention of the court and all the parties. *Bland v. Wilmington*, 657.

§ 11. Transactions with Decedent

An exception to the hearsay rule permits the admission of a decedent's declarations to show his intention. *S. v. Vestal*, 561.

§ 25. Competency of Maps in Evidence

Private maps may be used only when a witness testifies to their correctness from first-hand knowledge. *Cutts v. Casey*, 390.

Surveyor's map purportedly showing division of land conveyed by an 1879 deed was not admissible as substantive evidence locating the 1879 conveyance but should have been admitted for illustrative purposes. *Ibid.*

§ 33. Hearsay Evidence

An exception to the hearsay rule permits the admission of a decedent's declarations to show his intention. *S. v. Vestal*, 561.

§ 50. Medical Testimony

The fact that plaintiff's expert medical witness was not allowed to explain his specialty of orthopedic surgery or state his qualifications was not prejudicial under the facts of this case. *Dotson v. Chemical Corp.*, 677.

EXECUTORS AND ADMINISTRATORS

§ 30. Taxes and Assessments

Statute exempting from intangibles tax property held or controlled by a fiduciary domiciled in this State for the benefit of a non-resident does

EXECUTORS AND ADMINISTRATORS — Continued

not apply to intangibles held by a personal representative of a resident decedent while the estate is being administered in accordance with law. *Ervin v. Clayton,* 219.

FALSE IMPRISONMENT

§ 1. Nature of the Action

The unlawful detention of a human being against his will is false imprisonment. *S. v. Ingland,* 42.

FRAUD

§ 1. Nature and Elements of Fraud

While fraud, duress and undue influence are related wrongs, they are not synonomous. *Link v. Link,* 181.

§ 4. Intent to Deceive

Intent to deceive is not an essential element of constructive fraud resulting from breach of a fiduciary or confidential obligation. *Link v. Link,* 181.

§ 7. Constructive or Legal Fraud

Where a transferee of property stands in a confidential or fiduciary relationship with the transferor, his failure to disclose to the transferor all material facts relating to the transaction constitutes fraud. *Link v. Link,* 181.

§ 12. Sufficiency of Evidence

In wife's action to set aside her transfer of corporate securities to her estranged husband, the evidence was sufficient to be submitted to the jury on separate issues of fraud, duress and undue influence, and was insufficient to show ratification of the transaction by the wife when she signed a gift tax return prepared by the husband's accountant which reported the transfer as a gift from the wife to the husband. *Link v. Link,* 181.

HOMICIDE

§ 1. Definitions and Distinctions in General

Establishment of *corpus delicti* in homicide case. *S. v. Dawson,* 351.

A person who engages in an affray and unintentionally kills a bystander is guilty or innocent exactly as though the fatal act had caused the death of his adversary. *S. v. Wynn,* 513.

§ 4. Murder in the First Degree

Premeditation and deliberation defined. *S. v. Johnson,* 252.

§ 5. Murder in the Second Degree

A defendant who intentionally fired her gun at close range in the deceased's direction and thereby caused his death would be guilty of murder in the second degree unless she was entitled to shoot in self-defense. *S. v. Woods,* 210.

HOMICIDE — Continued

§ 6. Manslaughter

Definition of voluntary manslaugher. *S. v. Wynn,* 513.

§ 9. Self-Defense

One who uses excessive force while fighting in self-defense is guilty of voluntary manslaughter. *S. v. Woods,* 210.

When one voluntarily enters into a fight, he cannot invoke the doctrine of self-defense unless he first withdraws from the fight and gives notice to his adversary that he has done so. *S. v. Johnson,* 252; *S. v. Wynn,* 513.

§ 14. Presumptions and Burden of Proof

The presumption that a homicide was unlawful and done with malice arises when the defendant intentionally assaults another with a deadly weapon and thereby proximately causes the death of the person assaulted. *S. v. Woods,* 210; *S. v. Johnson,* 252.

Defendant has burden of proving self-defense and mitigation. *S. v. Boyd,* 682.

§ 15. Relevancy and Competency of Evidence in General

In a prosecution charging defendant with homicide by kicking the victim to death, it was proper to admit testimony that, when defendant was describing to others how hard he had kicked his victim, he "seemed to be joking about it." *S. v. Dawson,* 351.

The State could impeach defendant's testimony that he was in no physical condition to kick a homicide victim to death. *Ibid.*

Testimony by the wife of a homicide victim that on the day of the homicide her husband told her of plans to go on a business trip with the defendant, held admissible as an exception to the hearsay rule. *S. v. Vestal,* 561.

Testimony by defense witness relating to the length of time she had been dating the homicide victim and their actions on those occasions, *held* inadmissible on grounds of irrelevancy, the character of the victim not being in issue. *Ibid.*

§ 17. Evidence of Threats, Motive and Malice

Defendant was prejudiced by admission of a handwritten note found in homicide victim's car and apparently intended for defendant but never delivered to him, the note expressing the victim's anger over a debt owed him by defendant and the victim's determination to collect the money *S. v. Vestal,* 561.

§ 18. Evidence of Premeditation and Deliberation

Circumstances to be considered in determining whether a killing was with premeditation and deliberation. *S. v. Johnson,* 252.

§ 20. Demonstrative Evidence; Photographs and Physical Objects

Photographs are admissible to illustrate testimony establishing the *corpus delicti* in a homicide prosecution. *S. v. Dawson,* 351.

HOMICIDE — Continued

Bloodstained skirt worn by a woman who was sitting next to a homicide victim when he was shot was admissible. *S. v. Cutshall,* 334.

Photographs of homicide victim were properly admitted in evidence. *Ibid.*

Photographs of homicide victim's body immediately after it was taken out of a lake were admissible. *S. v. Vestal,* 561.

§ 21. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to sustain verdict finding defendant guilty of first degree murder by striking deceased with a board. *S. v. Johnson,* 252.

State's circumstantial evidence was sufficient to support a jury finding of defendant's guilt of killing his wife. *S. v. Clanton,* 502.

Issue of defendant's guilt of aiding and abetting the actual perpetrators of a homicide was properly submitted to the jury. *S. v. Little,* 484.

Issue of defendant's guilt of homicide was sufficient to go to the jury. *S. v. Vestal,* 561; *S. v. Greene,* 649; *S. v. Maynor,* 697.

§ 23. Instructions

A manslaughter instruction that the jury must be satisfied beyond a reasonable doubt that the victim's death was the "natural and probable result" of a wound intentionally inflicted by defendant is disapproved, the crucial question being whether the death was *proximately caused* by the wound. *S. v. Woods,* 210.

Femme defendant who testified that she intentionally fired a rifle in the deceased's direction and that its discharge hit him, but who did not admit that the wound so inflicted caused his death, *is held* entitled to the explicit instruction that the jury should return a verdict of not guilty if the State failed to prove beyond a reasonable doubt that the bullet wound proximately caused the deceased's death. *Ibid.*

Instructions which permitted the jury to return a verdict of not guilty only if they found that defendant acted in lawful self-defense held reversible error. *Ibid.*

Trial judge did not commit prejudicial error in repeating definition of second-degree murder when requested to repeat definitions of voluntary and involuntary manslaughter. *S. v. Dawson,* 351.

§ 27. Instructions on Manslaughter

Trial court's statement, in his further instructions on manslaughter, that "I am referring, of course, to such cases as the one that we are now concerned with," was not an expression of opinion but was merely an attempt to eliminate involuntary manslaughter from his definition. *S. v. Greene,* 649.

§ 28. Instructions on Defenses

Evidence that a dispute arose about payment for fuel oil delivered by deceased to defendant, that the deceased took steps toward defendant, and that defendant immediately seized a board and used it with deadly effect,

HOMICIDE — Continued

held insufficient to justify an instruction that the jury could return a verdict of not guilty on the ground of self-defense. *S. v. Johnson,* 252.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

The court was not required to instruct on manslaughter where there was no evidence to sustain a verdict of manslaughter. *S. v. Vestal,* 561.

§ 31. Verdict and Sentence

Defendant's motion to quash a first-degree murder indictment on the ground that the jury in a capital case is required to decide both guilt and punishment was properly denied by the trial court. *S. v. Smith,* 36.

HUSBAND AND WIFE

§ 1. Marital Rights, Disabilities and Liabilities

Relationship of husband and wife is the most confidential of all relationships. *Link v. Link,* 181.

§ 4. Contracts and Conveyances Between Husband and Wife

An announcement by a husband, to whom the wife has confessed her adultery, that he intends to separate himself from her and to institute legal proceedings to obtain the sole custody of their children constitutes duress when made for the purpose of coercing her into transferring, without consideration, her individual property to the husband, the proposal being to leave the children in her custody if she make such transfer. *Link v. Link,* 181.

The fact that transactions in question occurred after the husband departed from the home, following wife's disclosure of her own misconduct, does not show that previously established confidential relationship between them had terminated. *Ibid.*

In wife's action to set aside her transfer of corporate securities to her estranged husband, the evidence was sufficient to be submitted to the jury on separate issues of fraud, duress and undue influence and was insufficient to show ratification of the transaction by the wife when she signed a gift tax return prepared by the husband's accountant. *Ibid.*

INCEST

A conviction for incest may be had against a father upon the uncorroborated testimony of the daughter. *S. v. Vincent,* 63.

In a prosecution for incest, positive testimony by the 16-year-old prosecutrix that her father had had sexual intercourse with her was sufficient to be submitted to the jury. *Ibid.*

INJUNCTIONS

§ 12. Issuance and Dissolution of Temporary Orders

To issue or to refuse an interlocutory injunction is usually a matter of discretion to be exercised by the trial court. *In re Reassignment of Albright,* 664.

INJUNCTIONS — Continued

§ 13. Grounds for Issuance of Temporary Orders

The purpose of an interlocutory injunction is to preserve the *status quo* and prevent irreparable injury. *In re Reassignment of Albright,* 664.

INSURANCE

§ 1. Control and Regulation in General

Power of the Commissioner of Insurance to fix rates effective from a specified future date is a delegated legislative power. *In re Filing by Automobile Rate Office,* 302.

Insurance company's investment of $160,000 in the common stock of its wholly owned subsidiary which would have enabled the company to convert unadmitted assets into admitted assets and to evade the 10% real property limitation was properly deducted from the company's assets as an unadmitted asset. *In re Insurance Co.,* 670.

§ 79.1. Auto Insurance Rate Hearing

The statute providing that rules of evidence as applied in the superior and district courts shall be followed in all administrative proceedings before State agencies is not applicable to an automobile insurance rate hearing. *In re Filing by Automobile Rate Office,* 302.

In fixing a 2.8% increase on passenger liability insurance effective 28 January 1970, the Commissioner of Insurance could properly consider evidence compiled by the Automobile Rate Administrative Office from various sources, notwithstanding much of the evidence would have been inadmissible in a trial in the superior court. *Ibid.*

Data submitted to the Rate Office by automobile liability insurers must reflect the insurers' underwriting profit and loss experience in N. C. *Ibid.*

INTOXICATING LIQUOR

§ 1. Validity of Control Statutes

The regulation of the sale and use of alcoholic beverages is within the police power of the State. *Underwood v. Board of Alcoholic Control,* 623.

§ 2. Duties and Authority of ABC Boards; Beer Licenses

There was insufficient evidence to support the suspension of a retail beer license on the grounds that the licensee permitted his customers to engage in an affray and to consume alcoholic liquor on his premises. *Underwood v. Board of Alcoholic Control,* 623.

On judicial review of the suspension and revocation of licenses by the State Board of Alcoholic Control, the "whole record" test is applicable. *Ibid.*

§ 12. Competency and Relevancy of Evidence

Plastic jugs containing non-taxpaid liquor seized from defendant's car without a search warrant were properly admitted in a trial for possession and transportation of non-taxpaid liquor. *S. v. Simmons,* 468.

JURY

§ 1. Right to Trial by Jury

A party may waive his right to a jury trial (1) by failing to appear at the trial, (2) by written consent filed with the clerk, (3) by oral consent entered in the minutes of the court, or (4) by failing to demand a jury trial pursuant to G.S. 1A-1, Rule 38(b). *Sykes v. Belk*, 106.

Trial court properly denied plaintiff's motion for jury trial where stipulations filed in the cause show that the parties waived a jury trial, and the parties had stipulated and judicially admitted facts sufficient to support a judgment determining their rights. *Ibid.*

§ 5. Selection Generally

It was proper for the State to pass upon a panel of 12 prospective jurors before any jurors were interrogated by the defense. *S. v. Atkinson*, 168.

§ 7. Challenges

Trial court in a rape case properly excused those jurors who were irrevocably committed before trial to vote against the death penalty regardless of the evidence. *S. v. Atkinson*, 168.

Appellate court will not speculate as to solicitor's motive in challenging jurors. *S. v. Dickens*, 537.

U. S. Supreme Court decision relating to exclusion of veniremen who voice general objections to the death penalty does not apply where jury in capital case recommends life imprisonment. *Ibid.*

Trial court properly allowed State's challenges for cause of three prospective jurors who stated they would not under any circumstances vote to return a verdict which would result in the imposition of the death penalty. *Ibid.*

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions

The unlawful taking and carrying away of a person by fraud is kidnapping. *S. v. Ingland*, 42.

Failure of the trial judge in a kidnapping prosecution to charge on the law applicable to kidnapping effected by fraud was not prejudicial to defendant. *Ibid.*

Statement in previous decisions that kidnapping constitutes the seizure and detention of a human being for the purpose of carrying him away against his will is no longer authoritative. *Ibid.*

Trial judge's clarifying instructions which correctly defined kidnapping at one point and incorrectly defined kidnapping at another point was reversible error. *Ibid.*

Evidence was sufficient for jury in kidnapping prosecution. *S. v. Maynor*, 697.

KIDNAPPING — Continued

There was an unlawful taking within the definition of kidnapping where a motorist who invited a hitchhiker to ride with him was compelled by force and intimidation exerted upon him by the hitchhiker to abandon his own course of travel and to drive his vehicle as commanded by the hitchhiker. *S. v. Barbour*, 449.

§ 2. Punishment

Imprisonment for life is the maximum punishment for kidnapping. *S. v. Barbour*, 449.

LARCENY

§ 4. Warrant and Indictment

Indictment charging larceny of property having a value of more than $200, but which contains no allegation of larceny from the person, will not support a verdict finding defendant guilty of larceny from the person. *S. v. Benfield*, 199.

MORTGAGES AND DEEDS OF TRUST

§ 19. Right to Foreclose and Defenses

Summary judgment was properly entered dismissing defendant's counterclaim for recovery of entire principal balance of note and accrued interest under an acceleration clause. *Kessing v. Mortgage Corp.*, 523.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

A property owner cannot successfully resist annexation because a city ordinance will adversely affect his financial interest. *In re Annexation Ordinance*, 641.

Slight irregularities will not invalidate annexation proceedings. *Ibid.*

Scope of superior court's review of a municipal annexation proceeding. *Ibid.*

Petitioners who opposed a city's annexation plans were not materially prejudiced by the city's failure to have a representative present at the annexation hearing to explain its report on proposed services for the annexed area. *Ibid*

§ 5. Governmental and Private Powers

The doctrine of estoppel generally will not be applied against a municipality in its governmental capacity. *Sykes v. Belk*, 106.

While the operation of a civic center is a proprietary function, the choice of the site for the center by the city council is a public or governmental function. *Ibid.*

§ 9. Officers and Employees Generally

Justiciable controversy was presented by municipal firemen who alleged they have a statutory right to live outside city limits. *Bland v. Wilmington*, 657.

MUNICIPAL CORPORATIONS — Continued

Firemen of City of Wilmington are required by the city charter to live within the city. *Ibid.*

§ 30. Zoning Ordinances

A zoning ordinance is presumed to be constitutional. *Orange County v. Heath,* 688.

Rezoning of 15 acres to permit its use as a mobile home park was not spot zoning. *Ibid.*

Municipal board of adjustment's denial of a special use permit for construction of a mobile home park on ground that proposed use was not in accord with "purpose and intent" of municipal ordinance constituted an unlawful exercise of legislative power. *Keiger v. Board of Adjustment,* 17.

§ 39. Issuance of Bonds

Misrepresentations as to site of proposed municipal civic center made in public speeches and through the news media by the mayor, other city officials and members of a Citizens Bond Information Committee appointed by the mayor did not vitiate a special election at which the voters approved issuance of bonds for the civic center. *Sykes v. Belk,* 106.

Use of proceeds from separate auditorium and arts center bond issues for a combined facility to meet basic purposes of both projects is held not to constitute an unlawful diversion of the bond proceeds. *Coggins v. Asheville,* 428.

OBSTRUCTING JUSTICE

Warrant was sufficient to charge the statutory offense of obstructing an officer in the performance of his duties. *S. v. Leigh,* 243.

A citizen may lawfully advise a person under police investigation of his constitutional rights as long as the advice is given in an orderly and peaceable manner. *Ibid.*

In a prosecution charging defendant with obstructing a police officer in the performance of his duties, evidence of the State tending to show that defendant, by the repeated use of loud and abusive language over a period of several minutes, prevented a deputy sheriff from talking with a suspect at the scene of a reported crime, *held* sufficient to be submitted to the jury. *Ibid.*

PARTIES

§ 1. Necessary Parties

Successful bidder for school construction contract was necessary party to proceeding instituted by unsuccessful bidder to obtain a declaration that the contract award was invalid. *Construction Co. v. Board of Education,* 633.

PARTNERSHIP

§ 1. Nature and Requisites

Limited partnership agreement entered into by the borrower and lender as part of a usurious loan transaction was void. *Kessing v. Mortgage Corp.,* 523.

PLEADINGS

§ 1. Filing of Complaint

Trial court did not abuse its discretion in denial of plaintiff's motion for enlargement of time for filing complaint where plaintiff had filed complaint over one year after time permitted but before defendant moved to dismiss. *Hendrix v. Alsop*, 549.

Where the clerk extended the time for filing plaintiff's complaint until 20 days after filing of a report of adverse examination of defendant, and the Court of Appeals held that plaintiff had failed to show necessity for adverse examination, the period of 20 days in which plaintiff was permitted to file his complaint began to run on the date the opinion of the Court of Appeals was certified to the superior court. *Ibid.*

§ 32. Motion to be Allowed to Amend

Plaintiffs were not prejudiced by court's refusal to allow an amendment to the complaint relating to their right to bring the action. *Sykes v. Belk*, 106.

QUIETING TITLE

§ 1. Nature and Grounds of Remedy

In a quieting title action it is only required that the plaintiff have such an interest in the lands as to make the claim of the defendants adverse to him. *Development Co. v. Phillips*, 69.

§ 2. Actions to Remove Cloud From Title

Corporate plaintiff's failure to show fee simple title to all the land claimed by it was not fatal to its action to quiet title to the lands. *Development Co. v. Phillips*, 69.

The trial court's findings and conclusions in a quieting title action that the corporate plaintiff was the owner of the two tracts of land described in its complaint must be set aside on appeal when plaintiff's own evidence failed to show its ownership. *Ibid.*

RAPE

§ 4. Relevancy and Competency of Evidence

Testimony by the examining pathologist in a rape prosecution did not invade the province of the jury. *S. v. Atkinson*, 168.

Trial court properly admitted testimony that hair found on linen taken from bed where rape occurred was miscroscopically identical to hair taken from defendant. *S. v. Barber*, 268.

Various exhibits of the State were properly admitted in evidence in this rape prosecution. *S. v. Atkinson*, 168.

A seven-year-old victim of rape who stated that she knew the meaning of an oath and the consequences of a falsehood was competent to testify in the trial of her assailant. *S. v. Cooke*, 288.

§ 5. Sufficiency of Evidence

State's evidence was sufficient to establish fifteen-year-old defendant's guilt of the rape of a seven-year-old girl. *S. v. Cooke*, 288.

RAPE — Continued

§ 7. Verdict and Judgment

Statute providing for capital punishment for rape does not violate prohibition against cruel and unusual punishment. *S. v. Barber*, 268; *S. v. Atkinson*, 168.

§ 17. Assault with Intent to Commit Rape

An assault upon a female under the age of 12 years, made with intent to have sexual intercourse with her, constitutes the crime of assault with intent to commit rape—the elements of force and lack of consent being conclusively presumed. *S. v. Jacobs*, 693.

REFERENCE

§ 11. Preservation of Right to Jury Trial

Compulsory reference did not deprive the parties in a boundary dispute of their constitutional right to a jury trial. *Development Co. v. Phillips*, 69.

ROBBERY

§ 1. Nature and Elements of the Offense

The critical difference between armed robbery and common law robbery is that in order for the jury to convict for armed robbery the victim must be endangered or threatened by the use or threatened use of a firearm or other dangerous weapon. *S. v. Bailey*, 80.

§ 3. Competency of Evidence

When one party to a robbery points a pistol, the act is deemed to be the act of other participants. *S. v. Terry*, 284.

Articles which were the subject of armed robbery were properly admitted as exhibits. *S. v. Thompson*, 277.

§ 4. Sufficiency of Evidence

Evidence held sufficient to be submitted to jury on theory of aiding and abetting in armed robbery. *S. v. Terry*, 284.

State's evidence was sufficient to show defendant's guilt of armed robbery. *S. v. Lindsay*, 293.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Where the prosecuting witness could not state whether the gun in defendant's hand was a real gun or a toy, trial court was required to charge the jury on the offense of common law robbery. *S. v. Bailey*, 80.

In instructing the jury in armed robbery prosecution, trial court's use of the words "some weapon" rather than the statutory language "firearms or dangerous weapon" could not have misled the jury under the facts of the case. *Ibid.*

Trial court in an armed robbery prosecution was not required to instruct the jury on the lesser included offense of common law robbery where there was no evidence to support such an instruction. *S. v. Terry*, 284; *S. v. Tyson*, 491.

RULES OF CIVIL PROCEDURE

§ 12. Motion for Judgment on the Pleadings

Motions under Rules 12(b)(6) and 12(c) can be treated as summary judgment motions, the difference being that under Rules 12(b)(6) and 12(c) the motion is decided on the pleadings alone, while under Rule 56 the court may receive and consider various kinds of evidence. *Kessing v. Mortgage Corp.*, 523.

§ 15. Amended and Supplemental Pleadings

Plaintiffs were not prejudiced by court's refusal to allow an amendment to the complaint relating to their right to bring the action. *Sykes v. Belk*, 106.

§ 41. Dismissal of Actions

A dismissal under Rule 41(a)(2) is without prejudice unless the judge specifies otherwise. *Cutts v. Casey*, 390.

Plaintiff can no longer take a voluntary nonsuit as a matter of right or secure a voluntary dismissal after he has rested his case. *Ibid.*

Contention by defendant in nonjury trial that plaintiff has shown no right to relief should be presented by motion to dismiss. *Blackwell v. Butts*, 615.

§ 49. Issues and Verdict

Form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge. *Link v. Link*, 181.

§ 50. Motion for Directed Verdict

Trial judge cannot direct a verdict in favor of party having burden of proof when his right to recover depends upon the credibility of his witnesses. *Cutts v. Casey*, 390.

In nonjury trials the motion for nonsuit has been replaced by the motion for dismissal, and in jury trials by the motion for directed verdict. *Ibid.*

On motion for directed verdict, plaintiff's evidence must be taken in the light most favorable to him. *Dawson v. Jennette*, 438; *Kelly v. Harvester Co.*, 153.

When a motion for a directed verdict under Rule 50(a) is granted, the defendant is entitled to judgment unless the court permits a voluntary dismissal of the action under Rule 41(a)(2). *Kelly v. Harvester Co.*, 153; *Cutts v. Casey*, 390.

In ruling on motion for directed verdict, trial judge was not required to make findings of fact; the jury has no role in the granting of the motion. *Kelly v. Harvester Co.*, 153.

Defendant's motion for a directed verdict does not operate as a waiver of jury trial. *Ibid.*

§ 52. Findings by Court

Trial court in a nonjury trial should state separately his conclusions of law instead of merely answering issues of negligence and contributory negligence. *Blackwell v. Butts*, 615.

RULES OF CIVIL PROCEDURE — Continued

§ 56. Summary Judgment

Summary judgment procedure is for disposition of cases where there is no genuine issue of fact. *Kessing v. Mortgage Corp.*, 523.

Summary judgment is not limited to any particular types of action and is available to both plaintiff and defendant. *Ibid.*

Motions under Rules 12(b)(6) and 12(c) can be treated as summary judgment motions, the difference being that under Rules 12(b)(6) and 12(c) the motion is decided on the pleadings alone, while under Rule 56 the court may receive and consider various kinds of evidence. *Ibid.*

§ 57. Declaratory Judgments

Declaratory relief was not precluded by fact plaintiff had another adequate remedy. *Construction Co. v. Board of Education*, 633.

SCHOOLS

§ 3. Consolidation of Schools

In a proceeding to restrain a school consolidation election, plaintiff's appeal from a judgment stating that he was not entitled to the injunctive relief sought is dismissed as moot by the Supreme Court, where the election had been held prior to the entry of judgment. *McKinney v. Bd. of Comrs.*, 295.

§ 10. Assignment and Supervision of Pupils

Trial court's findings of fact fully supported its issuance of an interlocutory injunction to restrain a county board of education from enforcing a pupil assignment order pending a trial on the merits. *In re Reassignment of Albright*, 664.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Where officers sitting in the living room of defendant's boardinghouse could look through an open door into the defendant's bedroom and see therein the articles that had been forcibly removed at gunpoint from a home some four hours earlier, the officers had probable cause to arrest the defendant without a warrant for armed robbery; consequently, the seizure of the articles following the arrest was lawful. *S. v. Thompson*, 277.

A police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. *S. v. Simmons*, 468.

Police officers lawfully seized plastic jugs containing non-taxpaid liquor from defendant's car without a warrant, notwithstanding contents of jugs were not visible to the officers standing outside the car. *Ibid.*

The warrantless seizure of pistols that were wholly concealed under an automobile seat was lawful where the pistols were discovered during the lawful removal of visible weapons from the car. *S. v. Hill*, 365.

SEARCHES AND SEIZURES — Continued

It was lawful for officers to make a warrantless search of defendant's automobile that had been taken to the police station following defendant's arrest for armed robbery. *Ibid.*

§ 2. Consent to Search Without Warrant

The owner of the premises may consent to a search thereof and thus waive the necessity of a valid search warrant so as to render the evidence obtained in the search competent. *S. v. Vestal,* 561.

The warnings required by *Miranda v. Arizona* need not be given by officers before obtaining the consent of the owner to a search of his premises. *Ibid.*

§ 3. Requisites and Validity of Search Warrant

Affidavit in a search warrant based in part upon reports from FBI laboratories concerning the examination of materials taken from a warehouse held sufficient to support a magistrate's finding of probable cause for the issuance of the warrant to search the warehouse. *S. v. Vestal,* 561.

A search warrant whose affidavit was based in part on an FBI lab examination of draperies obtained in a prior valid search without a warrant held lawful. *Ibid.*

STATUTES

§ 5. General Rules of Construction

Words of a statute must be construed, insofar as possible, to effectuate the legislative intent. *S. v. Johnson,* 126.

§ 6. Construction of Provisos

The words of a proviso must be construed to effectuate the purpose of the statute. *S. v. Johnson,* 126.

§ 11. Repeal and Revival

A local statute enacted for a particular municipality is not repealed by the enactment of a subsequent general law. *Bland v. Wilmington,* 657.

If there is a conflict between two statutes, the last statute enacted will prevail to the extent of the conflict. *Ibid.*

TAXATION

§ 6. Necessary Expenses and Necessity for Vote

The construction and operation of an auditorium by a municipality is not a necessary expense, and the voters must therefore approve a bond issue for such purpose. *Sykes v. Belk,* 106.

§ 32. Taxes on Intangibles

Statute exempting from intangibles tax property held or controlled by a fiduciary domiciled in this State for the benefit of a non-resident does not apply to intangibles held by a personal representative of a resident decedent while the estate is being administered in accordance with law. *Ervin v. Clayton,* 219.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

In determining rates for a telephone company, it was error of law for the Utilities Commission (1) to include in the rate base the value of the plant that was under construction at the end of the test period but not in operation and (2) to add to the company's operating revenue for the test period the interest that was charged to construction during the test period. *Utilities Comm. v. Morgan,* 235.

TRESPASS TO TRY TITLE

§ 2. Presumptions and Burden of Proof

In action for trespass when both parties claim title to the land involved, each has burden of establishing his title by one of the methods recognized by law, and failure of one party to carry his burden of proof on issue of title does not entitle adverse party to an adjudication that title is in him. *Cutts v. Casey,* 390.

In an action involving title to land, claimant must show that the land he claims lies within the area described in each conveyance in his chain of title and, whether relying upon his deed as proof of title or color of title, must fit the description in his deed to the land claimed. *Ibid.*

§ 4. Sufficiency of Evidence

Defendant's evidence was insufficient to establish record title to land described in their answer where it failed to locate on the ground an 1879 conveyance in their chain of title by reference to the description in the 1879 deed, and was also insufficient to establish title by adverse possession. *Cutts v. Casey,* 390.

§ 5. Instructions

Court's failure to submit issues of trespass and damages was harmless error where jury answered issue of title adversely to plaintiff. *Cutts v. Casey,* 390.

TRIAL

§ 40. Form and Sufficiency of Issues

Form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge. *Link v. Link,* 181.

§ 56. Waiver of Jury Trial

Trial court properly denied plaintiff's motion for jury trial where stipulations filed in the cause show that the parties waived a jury trial, and the parties had stipulated and judicially admitted facts sufficient to support a judgment determining their rights. *Sykes v. Belk,* 106.

A party may waive his right to a jury trial (1) by failing to appear at the trial, (2) by written consent filed with the clerk, (3) by oral consent entered in the minutes of the court, or (4) by failing to demand a jury trial pursuant to G.S. 1A-1, Rule 38 (b). *Ibid.*

USURY

§ 1. Contracts and Transactions Usurious

Where there is no dispute as to the facts, the court may declare a transaction usurious as a matter of law. *Kessing v. Mortgage Corp.*, 523.

Loan was made on date it was closed and not on prior date when application for loan was approved. *Ibid.*

Corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. *Ibid.*

Loan of $250,000 at 8% interest and in consideration of which the borrower was required to enter a limited partnership with the lender and to convey to the partnership the properties securing the loan, held usurious under G.S. 24-8 either before or after 1969 amendment. *Ibid.*

§ 6. Recovery of Double Amount of Usurious Interest Paid

Where loan transaction was rendered usurious by a limited partnership agreement, but no partnership earnings had been paid to the lender and the only interest actually paid was at the legal rate of 8%, borrower is not entitled to recover double the amount of interest paid but is entitled to forfeiture of all interest on the loan. *Kessing v. Mortgage Corp.*, 523.

UTILITIES COMMISSION

§ 6. Hearings and Orders; Rates

In determining rates for a telephone company, it was error of law for the Utilities Commission (1) to include in the rate base the value of the plant that was under construction at the end of the test period but not in operation and (2) to add to the company's operating revenue for the test period the interest that was charged to construction during the test period. *Utilities Comm. v. Morgan*, 235.

WATERS AND WATERCOURSES

§ 6. Title and Rights in Navigable Waters

"Accretion" denotes the act of depositing, by gradual process, of solid material in such a manner as to cause that to become dry land which was before covered with water; it is the opposite of avulsion, which is the sudden and perceptible gain or loss of riparian land. *S. v. Johnson*, 126.

In determining the boundary line of properties that were situated north and south of a coastal inlet until the inlet was closed by accretion, the trial court properly fixed the boundary at the point where the accretion from both north and south finally closed the inlet. *Ibid.*

WILLS

§ 35. Time of Vesting of Estate and Whether Estate is Vested or Contingent

Provision of a will stating that share of testator's son "shall be put in trust for him and he shall get interest from this when he reaches 60 years of age" held to give the son a vested remainder in all accumulated income

WILLS — Continued

from his trust so that if he died before age 60 such accumulated income would be paid to his estate. *Kale v. Forrest*, 1.

§ 43. "Heirs" and "Children"

The natural and ordinary meaning of the word "heir" is one who inherits or is entitled to succeed to the possession of property after the death of the owner. *Kale v. Forest*, 1.

Where will provided that testator's son should get interest from a trust when he reached 60 years of age and that "At his death the balance shall be given to my surviving heirs," the "surviving heirs" of testator who will take the balance of the trust fund should be determined at the death of the life beneficiary. *Ibid.*

§ 58. General and Specific Legacies and Order of Payment

Language of entire will shows that it was intent of testator that $25,000 educational bequest for five of testator's granddaughters should be taken from the one-fourth share of their father in testator's estate. *Kale v. Forrest*, 1.

WITNESSES

§ 1. Competency of Witness

A seven-year-old victim of rape who stated that she knew the meaning of an oath and the consequences of a falsehood was competent to testify in the trial of her assailant. *S. v. Cooke*, 288.

§ 2. Contradiction in Testimony by a Witness

The competency of a seven-year-old rape victim to testify as a witness at her assailant's trial was not affected by her conflicting testimony on *voir dire*. *S. v. Cooke*, 288.

§ 8. Cross-examination

The rule that a party is bound by a witness' answer on cross-examination as to collateral matters does not apply when the answer tended to show bias, interest or prejudice. *S. v. Bailey*, 80.

WORD AND PHRASE INDEX

PRINTED BY
COMMERCIAL PRINTING COMPANY, INC.
RALEIGH, NORTH CAROLINA