NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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[1]Retired 1 January 1972. Succeeded by Winifred T. Wells, Wallace, 1 February 1972.
[2]Retired and appointed Emergency Judge 31 October 1971. Succeeded by Perry Martin, Rich Square, 12 November 1971.
[3]Appointed effective 22 November 1971.
[4]Appointed effective 24 November 1971.
[5]Appointed effective 3 December 1971.

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CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

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RICHARD TELFAIR RODGERS	Chapel Hill
FREDERICK ALEXANDER ROGERS, III	Chapel Hill
RICHMOND WILLISTON RUCKER	Winston-Salem
RONALD HAROLD RUIS, II	Durham
JOSEPH ANTHONY RUTION	Salisbury
LUIS PHILLIP SALAS	Winston-Salem
THOMAS GATEWOOD SAMPSON	Durham
ALEXANDER PAUL SANDS, III	Reidsville
ROBERT RODES SCHOCH	High Point
MICHAEL ROBERT SCHOENENBERGER	Chapel Hill
TED ALAN SCHUMACHER	Durham
CHRISTOPHER LAWRENCE SEAWELL	Greensboro
JAMES LARRY SENTER	Franklinton
NORMAN WILSON SHEARIN, JR.	Rocky Mount
MICHAEL ANTHONY SHEELY	Durham
RUSSELL GRAHAM SHERRILL, III	Raleigh
JOHN MAYER SILVERSTEIN	Chapel Hill
CLAUDE ERNEST SIMONS, JR.	Wilson
EATON LLEWELLYN KITTRELL SMITH	Chapel Hill
JAMES WALTER SMITH	Louisburg
GARY STEVEN SMITHWICK	Winston-Salem
JOHN JOYNER SNOW, JR.	Murphy
ROBERT WORTHINGTON SPEARMAN	Chapel Hill
EDWIN MARION SPEAS, JR.	Boonville
BARNEY STEWART, III	Gastonia
FREDERICK STOKES	Winston-Salem
JOHN CHESTON STOUT, JR.	Charlotte
ODES LAWRENCE STOUPE	Crossnore
JACK BOYCE STYLES	Clemmons
JOHN RICHARD SUTTON	Asheville
JAMES EDWARD SWITZER, JR.	Wilkesboro
GARY BUNTING TASH	Winston-Salem
JOSEPH OVANDER TAYLOR, JR.	Sanford
GEORGE MAJOR TEAGUE	Chapel Hill
BEN FORTUNE TENNILLE	Winston-Salem
PATRICK VINCENT TERRANOVA	Winston-Salem
ALLEN ROGER TEW	Clayton
DELBERT CLAYTON THOMAS	Raleigh
WRIGHT TISDALE, JR.	Durham
WILLIAM MACNIDER TROTT	Raleigh
HENRY RUTHERFORD TURNBULL, III	Chapel Hill
BRUCE WILLIAM VANDERBLOEMEN	Carrboro
MICHAEL EDWARD VAUGHN	Hendersonville
JAMES ALLEN VINSON, III	Goldsboro
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FRANK PELOUZE WARD, JR.	Lumberton
MELVIN LUTHER WATT	Charlotte
WILLIAM WOODWARD WEBB	Chapel Hill
RICKY LEE WELBORN	Chapel Hill
SAMUEL CRAMER WHITT, JR.	Carolina Beach
WILLIAM RANSOM WHITTENTON, JR.	Chapel Hill
CLARENCE DAVID WILLIAMS, JR.	Asheville

CHRISTINE ANN WITCOVER.....Fayetteville
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TERRY WAYNE YARBROUGH.....Lexington
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MICHAEL EDWARD HANRAHAN.....Charlotte
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HENRY WALLACE WITCOVER.....Fayetteville
AUGUST KENNETH PYE.....Durham
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Given over my hand and the Seal of the Board of Law Examiners, this 13th day of September, 1971.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1971

STATE OF NORTH CAROLINA v. ELMORE LYNCH, JR.

No. 42

(Filed 10 June 1971)

1. **Criminal Law §§ 99, 162— conduct of trial court — failure to rule on objections — prejudicial error**

Trial judge prejudiced the defendant's case when he instructed the court reporter to put an "overruled" after every objection made by defense counsel and when he thereafter failed to rule on 38 objections made by defense counsel.

2. **Constitutional Law §§ 30, 32— right to counsel — right to impartial trial**

Every person charged with crime has the right to the assistance of counsel at a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.

3. **Attorney and Client § 5— attorney's duty to represent client — making of objections**

It is a lawyer's duty to represent his client, even though his objections and exceptions may frequently harass the judge.

4. **Criminal Law § 99— conduct of trial — expression of opinion on the evidence**

Under our law a judge is forbidden to express an opinion upon the credibility of the evidence.

5. **Criminal Law § 75— admissibility of a minor's confession**

A confession is not inadmissible merely because the person making it is a minor.

6. Constitutional Law § 32; Criminal Law § 75— rights of minors — waiver of counsel — confession

A minor who has arrived at the age of accountability for crime may waive counsel in the manner provided by law and may make a voluntary confession without the presence of either counsel or an adult member of his family provided he fully understands his constitutional rights and the meaning and consequences of his statement.

7. Criminal Law § 76— in-custody confession by minor — determination of admissibility

In determining whether a minor's in-custody confession was voluntarily and understandingly made, the judge will consider not only his age but his intelligence, education, experience, the fact that he was in custody, and any other factor bearing upon the question.

8. Constitutional Law § 32— right to counsel — indigent defendant — in-custody interrogation — waiver of counsel

An indigent charged with a felony is entitled to the services of counsel at an in-custody interrogation, and the indigent can waive this right only in writing. G.S. 7A-451; G.S. 7A-457.

9. Criminal Law § 76— admission of confession — findings of fact

Where there was no conflicting evidence on *voir dire*, the trial judge could admit a confession without making specific findings of fact.

10. Criminal Law § 75— narrative statement by indigent defendant — absence of counsel — admissibility

An indigent defendant's narrative statement that was not the result of an in-custody interrogation is admissible in evidence even though the statement was given in the absence of counsel.

11. Criminal Law § 75— inadmissibility of confession — absence of counsel at interrogation — indigent defendant

Defendant's statements during an in-custody interrogation in the absence of counsel are inadmissible if, at the time of the interrogation, the defendant was indigent and had not signed a written waiver of counsel. G.S. 7A, Art. 36.

12. Criminal Law §§ 70, 74, 75— admissibility of tape-recorded confession

A tape-recorded confession, like any other form of confession, is substantive evidence and is admissible in evidence if the confession is voluntary and otherwise lawful.

13. Criminal Law § 76— tape-recorded statements — determination of admissibility

Upon objection to the introduction of defendant's tape-recorded statements made during an in-custody interrogation, the trial judge must conduct a *voir dire* and listen to the recording in the absence of the jury in order to determine if the recording meets the applicable standards.

14. Criminal Law § 169— testimony that defendant was member of Black Panthers — prejudicial error

In a prosecution charging defendant with arson, testimony that defendant was a member of the Black Panther organization was prejudicial to defendant.

15. Criminal Law § 169— arson case — prejudicial error in admission of evidence

In a prosecution charging defendant with the felony of arson, the trial court erred in (1) admitting defendant's in-custody statements without making a factual determination whether defendant was indigent and properly waived right to counsel and (2) admitting defendant's tape-recorded statements without determining whether the tape-recording complied with applicable standards.

Justice LAKE concurs in result.

APPEAL by defendant under G.S. 7A-30(2) from the decision of the Court of Appeals reported in 9 N.C. App. 71, 175 S.E. 2d 327. This appeal was docketed and argued at the Fall Term as case No. 40.

At the 2 March 1970 Session of GASTON, before *Falls, J.*, defendant was tried upon an indictment which charged that on 10 August 1969 he did wilfully and feloniously attempt to burn the dwelling house of Marshall J. Welch and wife, located south of Stanley, North Carolina, on N. C. Highway No. 275, a violation of G.S. 14-67.

The first charge made against defendant with reference to the burning of the Welch residence was a charge of arson contained in a warrant issued by the District Court of Gaston County on 20 September 1969. Defendant was bound over to the Superior Court upon his preliminary hearing on 16 October 1969. At that hearing defendant was represented by his privately employed counsel. At the 3 November 1969 Session, and again at the 9 February 1970 Session, the grand jury returned a bill of indictment which purported to charge defendant with the common-law crime of arson as alleged in the warrant. Each bill, however, failed to charge one of the essential elements of that capital crime. At the 2 March 1970 Session the grand jury returned the bill charging a violation of G.S. 14-67, upon which defendant was tried. At the trial he was represented by his present attorney, Robert Powell, Esquire, who was appointed to represent him on 24 November 1969, the day he executed an affidavit of indigency.

Evidence for the State tended to show: The Welch residence, situated on the Dallas-Stanley Highway in Gaston County, was set on fire about 9:30 p.m. on Sunday, 10 August 1969, when a gasoline bomb, made from a quart size Coca-Cola bottle, was thrown on the front porch. Before the fire was extinguished it had charred the asbestos siding and the window casings to the right of the front door, melted the aluminum window screens, scorched the concrete porch and surrounding ground upon which gasoline had spilled.

Upon the intimation of a State's witness that defendant had made a statement to the investigating officers, the judge immediately excused the jury and conducted a *voir dire*. Upon this inquiry the testimony of Officers Auten and Hovis tended to establish the following facts:

On 19 September 1969 defendant was arrested upon a charge that on 27 June 1969, in violation of G.S. 14-62, he had wantonly and wilfully burned the *barn* of Marshall Welch, located on Highway No. 275 in Gaston County. Defendant was arrested on this charge and taken into custody. He was then fully and properly advised of his constitutional rights. He was not questioned at that time, however, and he made no statement.

On the following day the warrant was issued charging defendant with arson in connection with the burning of the Welch *residence*. About 3:00 p.m. on that day defendant told the jailer that he wanted to see Detective Hovis. In compliance with this request defendant was taken to the sheriff's office about 5:00 p.m. There he informed Officers Hovis, Holmsley, and Auten that he wanted to make a statement. At that time no officer had questioned defendant, and before he was allowed to say anything further Captain Auten told him that he was charged with arson, a crime punishable by death, and that he might go to the gas chamber if he confessed. Notwithstanding, defendant insisted he wanted to tell the truth about the burnings and "get it over with." No threats or promises of any kind were made to him, and he was not under the influence of alcohol or drugs. Because of the seriousness of the crime with which he was charged Auten attempted to locate defendant's mother. Although his efforts were not immediately successful defendant's mother did come to the jail later that night.

Notwithstanding the fact that Hovis had advised defendant of his constitutional rights earlier, Auten again told him that he didn't have to make any statements; that he could have an attorney present when he talked to the officers if he desired one; that if he couldn't afford an attorney the court would appoint one for him; that anything he told the officers could be used against him; that he could answer their questions "to any degree that he desired and he could stop answering questions at any point he desired." Defendant said that he did not want to talk to an attorney. However, he was not asked to sign any waiver of counsel or any other statement, and he did not do so. Auten asked defendant several times if he understood his rights, and each time he said he did. After Auten was "thoroughly convinced that defendant understood his constitutional rights" defendant was permitted to make his statement. Defendant, in his own words, told the officers "who made the bombs and how they started the fires; who took part." He "related all these things in narrative form." Thereafter defendant's answers to questions propounded by Detective Captain Jim Auten were recorded on tape.

After Captain Auten had completed his testimony on *voir dire* defendant's counsel requested permission to examine Detective Hovis before the court ruled on the admissibility of the confession. Hovis then testified in corroboration of Captain Auten. Defendant introduced the warrant issued 19 September 1969, which charged defendant with burning the Welch barn, and offered no other evidence. Thereupon Judge Falls made the following ruling:

"Based upon the foregoing testimony elicted from this witness, the court finds as a fact that this defendant knowingly, understandingly, and voluntarily made whatever statements the tape indicates. Now, I haven't heard the tape yet and don't know what it says, but at this juncture, the only thing I can rule on is whether or not he understood and voluntarily submitted to this interrogation on tape. I'm holding now that he did understand and voluntarily submitted to this tape, whatever it shows. It may exonerate him, for all I know. Let the jury come back, Mr. Sheriff."

The jury returned and Captain Auten testified that defendant after having been fully warned of his constitutional

rights, made the following statement in the presence of Officers Hovis, Holmsley, and Brandon: On the 10th of August defendant, Thadus Benton, Larry Benton, and Harry Hall were in Stanley at the home of Thadus. Thadus made a bomb by pouring gasoline into a quart Coco-Cola bottle and putting a piece of gauze shirt in the bottle neck. The four then went in Hall's automobile to the vicinity of the Welch residence, where defendant and Larry Benton got out of the car. Thadus handed the gas bomb to Larry, and defendant and Larry went across a field to the Welch home. After igniting the gauze Larry threw the bottle against the house and ran. As they fled "the bomb fired up," and they heard Mrs. Welch scream.

After hearing defendant's statement, Auten questioned him in great detail and made a tape of their conversation on a Tandburg Recorder. With reference to this tape Auten testified: At the time of the trial the tape was just as it was when the interrogation was completed; nothing had been erased or deleted from it. He recorded the entire conversation and the voices on the tape were his and defendant's. The tape had been in his possession, locked up in his office since 20 September 1969. On cross-examination Auten said he did not recall whether the recorder was cut off at any time during the conversation.

The State then offered the tape in evidence. Defendant's objection, made on the grounds that the recorded conversation was in violation of his constitutional rights and that the proper foundation had not been laid "for the playing of the tape," was overruled. The tape was then "played" in the presence of the jury.

At the beginning of the taped conversation Auten advised defendant of his constitutional rights in minute detail, and defendant said he understood each one of them. He also said that since his arrest no threats or promises had been made to him by any person; that he had not been questioned by any officer prior to the time he told the jailer he wanted to talk to a detective; that he was making the statement because he wanted to tell the truth "about these burnings in Stanley." Defendant said he was then sixteen years old. Thereafter, in response to Auten's questions, defendant repeated the statement about which Auten had testified.

In the taped conversation defendant was next asked if he knew who had burned Mr. Welch's barn. He said that he was present when the plans to burn the barn were made but not when it was burned; that Thadus made the gas bombs, and about midnight on 27 June 1969 Thadus, June Lynch, Tommy Wingate, and Larry had burned the Welch barn and Mamie Brown's unoccupied house. Thadus and Terry Barnwell set fire to the Brown house "to draw the police up there so Larry would have time enough to get Mr. Welch's barn." Larry and Thadus had also burned a two-story house belonging to Mrs. Summerow. Defendant had been with them three days earlier when their first attempt to burn the Summerow house had failed. The group had decided to burn the Welch barn and residence to revenge the death of Billy Gene McDowell, "the boy that Mr. Welch ran over." Thadus, the leader, had given defendant a black patch to put on his coat and said, "We belong to the Black Panthers." He also told defendant that "they could walk up and down the street with their coats on, being cool and all that, and have people scared of them and saying they belonged to the Black Panthers."

At the close of the taped conversation defendant conceded that, in 1968, he had given the officers information about the burning of another barn but had later changed his story. In explanation he said he was then only fifteen, and Thadus had threatened to kill him. However, he said he was no longer afraid and had no intention of changing the story he had just retold on the tape—"not ever."

After the jury had heard the tape, defendant moved "to strike everything contained on that tape." The court's ruling was: "Motion allowed as it pertains to parts or responses not contained in this indictment. Motion denied as to the tape concerning the dwelling house of Mr. and Mrs. Welch." Defendant then moved "to strike any testimony about the Black Panthers and all that sort of thing." This motion was also denied.

Detective Hovis testified that, in consequence of the information which defendant gave the officers on 21 September 1969, he was taken to Thadus Benton's home. There defendant showed them the spot in a nearby field where Thadus had made the bombs. Under some wood they found, *inter alia,* matches in a sack and a funnel.

At the conclusion of the State's evidence defendant's motion for nonsuit was overruled. Defendant then offered evidence which consisted of his own testimony and that of his mother.

Defendant's testimony, except when quoted, is summarized below:

At the time of the trial defendant was seventeen years old and had completed the tenth grade in school. When he was arrested Mr. Hovis asked him if he wanted to make any phone calls and if he wanted to make a statement. To both inquiries he answered no, and that was all Hovis asked him. The next day he was taken to the sheriff's office. At that time he asked permission to call his mother. Mr. Auten reported that defendant wasn't going to call his mother "unless he told him something." When defendant said he knew nothing to tell, Auten threatened to take him back to jail, where he would rot and never see his mother again. Defendant "wanted to see his mother real bad and Auten read something off a piece of paper and rehearsed it three times and put it on tape." He said: "They promised to let me make a phone call if I would concoct a story about this thing, and that's what I want the jury to believe. I didn't know anything about these burnings but just told the officers anything out of my imagination. I don't know whether it fit what had happened or not. . . . I want the jury to believe that the Captain of the Rural Police Detective Division read off a story and rehearsed it with me and had me repeat it on the tape. It is my voice on the tape. . . . I was scared when I was making the tape." Defendant denied that he requested the jailer to take him to the detective's office and that he told the officers he "wanted to make a clean breast of this thing and wanted to tell the truth."

The day after the tape was made defendant went to Stanley with Detectives Brandon, Hovis, and Holmsley. Defendant does not know where he was on August 10th. He knows the names of Larry and Thadus Benton, but he has "done nothing with them in reference to any burning." He does not remember what he said in Mr. Auten's office immediately prior to making the tape with reference to any occurrences in Stanley. He "was feeling scared—sorta scared when he was in his office." He did recall, however, that it was in Thadus' trashpile, not in the field behind Thadus' house, that the officers found the

matches and "other materials for making Molotov cocktails." He knows nothing about the Black Panther organization.

On cross-examination the solicitor asked defendant if, at the end of the taped conversation, Mr. Auten inquired of him if anybody had coerced or threatened him. To this question counsel for defendant objected. When the court made no ruling or comment whatever defendant answered, "I don't know." The court then said to the reporter: "Put an overruled every time he says objection." Prior thereto Judge Falls had ignored four other objections by defendant's counsel. Thereafter, the solicitor asked defendant 59 questions with reference to his taped statement. To 34 of the questions defendant's counsel interposed objections, each of which the court ignored. The transcript shows: "Objection by defendant. No ruling by the court." Then appears defendant's answer to the question.

Defendant's mother testified that he was at home from 5:00 p.m. Sunday, 10 August 1969, until the following morning when he went to work with her. Upon cross-examination the solicitor asked Mrs. Lynch three questions to which defendant's counsel objected. The court also ignored each of these objections and the witness answered the questions.

At the conclusion of defendant's evidence, in rebuttal, the State offered the testimony of Cora Lee Crawford. She testified that during August 1969 she had seen defendant in the company of Thadus and Larry Benton in Stanley, "walking on the streets together like a bunch of boys usually do if they are together." Judge Falls ignored defendant's objection to this testimony just as he had ignored previous objections. Mrs. Crawford also testified that between 9:30 and 10:00 p.m. on the night Mr. Welch's house was burned Larry Benton came into the Bossa Nova 300 Club, which she operated, and asked her for water with which to wash his hands. She observed that "he had dirt on his hands and the perfume of gas."

The jury found defendant guilty of the offense charged. From a sentence of ten years' imprisonment in the State's Prison defendant appealed to the Court of Appeals, which found no error in the trial. Without discussion, two members of the hearing panel overruled all of defendant's assignments of error as having no merit. The third member registered his dissent, and defendant appealed to this Court as a matter of right.

Attorney General Morgan; Deputy Attorney General White; Staff Attorney Satisky for the State.

Robert C. Powell for defendant appellant.

SHARP, Justice.

[1] Defendant brings forward seven assignments of error, three of which require consideration. We first examine the assignment which presents the question whether the judge prejudiced defendant's trial by failing to rule upon 38 objections made by defense counsel after having instructed the court reporter to "put an overruled after every time he says objection."

[2] Every person charged with crime has the right to the assistance of counsel at a trial "before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Carter,* 233 N.C. 581, 583, 65 S.E. 2d 9, 10. In every trial the judge and the defendant's counsel share the twofold responsibility of enforcing a defendant's right to a fair trial and of keeping the trial moving at a reasonable speed. The judge, however, is in charge of proceedings.

[3] In this day of congested criminal dockets and overcrowded calendars, a lawyer's objections and exceptions frequently harass the judge. However it is a lawyer's duty to represent his client. *State v. Mansell,* 192 N.C. 20, 133 S.E. 190. In doing so he is required "to present everything admissible that favors his client and to scrutinize by cross-examination everything unfavorable. The inevitable result is that the lawyer usually feels that he is unfairly prodded by the judge, while the judge feels the lawyer obstinately drags his feet." Annot., 62 A.L.R. 2d 166, 237 (1958). This conflict tests the mettle of both as officers of the court. The trial judge, who occupies "an exalted position," must abstain from conduct or language which tends to discredit the defendant or his cause in the eyes of the jury. *State v. Carter, supra; Withers v. Lane,* 144 N.C. 184, 56 S.E. 855. An attorney must, upon all occasions, manifest "a marked respect for the court in which he practices, and for the judge thereof. . . . In return, he is entitled to similar treatment from the trial judge, and most certainly to the extent that the interest of his clients will not be prejudiced." *Dennison v. State,* 17 Ala. App. 674, 676, 88 So. 211, 213.

[4] Under our law a judge is forbidden to express an opinion upon the credibility of the evidence. "Regardless of how unreasonable or improbable the defendant's story, the court must maintain the 'cold neutrality of an impartial judge.' " *State v. Taylor,* 243 N.C. 688, 91 S.E. 2d 924, 925. In his manner of ruling upon objections, "the judge must exercise the same caution as at other stages of the trial not to express an opinion as to the credibility of the witness or the merits of the case." Stansbury, N. C. Evidence § 28 (2d ed. 1963). If, at any time, during the trial, the judge "uses language which tends to bring an attorney into contempt before the jury . . . he commits an error of law, which would, of necessity, effect a reversal of the judgment and a remandment of the cause." *Dennison v. State, supra* at 676, 88 So. at 213. In *Dennison,* a new trial was awarded for the failure of the court to allow defense counsel to make the objections and motions he deemed the interest of his client to require.

In *State v. Phillips,* 59 Wash. 252, 109 P. 1047, following a heated colloquy, the judge told defendant's counsel to take an exception every time the court spoke and every time he batted his eye. In awarding a new trial because of this "challenge," the court said:

" . . . The aid of counsel is guaranteed by the Constitution to every person accused of crime, and this is universally recognized as one of the surest safeguards against injustice and oppression. Any conduct or statement on the part of the court that tends to impair the influence or destroy the usefulness of counsel is palpable and manifest error." *Id.* at 259, 109 P. at 1050.

In *State v. Lee,* 166 N.C. 250, 80 S.E. 977, after defense counsel had argued from the testimony of the prosecuting witness that the prosecution was motivated by jealousy, the trial judge told the jury there was no evidence of this; that counsel was not sworn; and they should "pay no attention to anything that he has said about this." This Court granted a new trial, saying:

" . . . The relation between courts and counsel should always be courteous. Should counsel forget their duty in this respect, the presiding judge has authority to enforce respect by proceedings in contempt. Judges should therefore be careful

to observe the respect which is due from them to counsel, for when this is not done there is not only no remedy except by appeal to this Court, but the cause which the counsel is advocating may be seriously damaged in the estimation of the jury, as was very probably the case in this instance." *Id.* at 255, 80 S.E. at 978.

[1] The record discloses very little, if any, merit in the objections which the court ignored, but it also discloses that defense counsel at all times accorded the presiding judge the high degree of courtesy and respect to which the court is entitled. Judge Falls' blanket instruction to the court reporter to overrule *any* objection which defendant's counsel might make necessarily belittled both defendant's cause and his attorney in the eyes of the jury. The clear implication was that there could be no merit in any objection defendant's counsel might make or that defendant was so obviously guilty his objections were a waste of the court's time. Because the court's language and conduct tended to prejudice defendant's cause with the jury there must be a new trial.

Since there must be a new trial, we deem it necessary to discuss the two assignments of error relating to defendant's confession and the taped recording of the interrogation which followed it. Defendant contends that both were improperly admitted in evidence because (1) he was an indigent minor, without counsel at the time it was made; (2) he did not voluntarily and understandingly waive his right to counsel; (3) he did not waive counsel in writing as required by G.S. 7A-450; (4) the trial judge made no findings on *voir dire* that he had waived counsel; and (5) the evidence before the court would not support a finding that he waived counsel in the manner provided by statute. With reference to the recording defendant makes additional contentions which will be noted later.

[5, 6] In this jurisdiction a confession is not inadmissible merely because the person making it is a minor. A minor who has arrived at the age of accountability for crime may waive counsel in the manner provided by law and make a voluntary confession without the presence of either counsel or an adult member of his family provided he fully understands his constitutional rights and the meaning and consequences of his statement. *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738; *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885.

[7] In determining whether a minor's in-custody confession was voluntarily and understandingly made the judge will consider not only his age but his intelligence, education, experience, the fact that he was in custody, and any other factor bearing upon the question. In other words, "the 'totality of circumstances' rule for the admission of out-of-court confessions applies to the confessions of minors as well as adults." *State v. Dawson,* 278 N.C. 351, 180 S.E. 2d 140. In *State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171, we held the in-custody confession of a minor who was without counsel to have been improperly admitted in evidence; in *State v. Murry, supra,* and *State v. Hill, supra,* the confessions of minors made in the absence of counsel were held admissible.

The rule is that one may waive counsel if he does so freely and voluntarily and with full understanding that he has the right to be represented by an attorney. *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602; *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353. Prior to the enactment of G.S. 7A-450 *et seq.,* effective 1 July 1969, there was no difference in the requirements for a waiver of counsel by indigents and nonindigents. Each could waive the right either orally or in writing. *State v. Williams, supra; State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667. This remains the rule in the federal courts. *Miranda v. Arizona, supra; United States v. Hayes,* 385 F. 2d 375 (4th Cir. 1967); *Klingler v. United States,* 409 F. 2d 299 (8th Cir. 1969); *Bond v. United States,* 397 F. 2d 162 (10th Cir. 1968).

[8] Article 36 of N. C. Gen. Stats. ch. 7A, *which is applicable to indigents only,* provides, *inter alia,* that an indigent charged with a felony or a misdemeanor for which the punishment exceeds six months' imprisonment or a fine of $500.00 is entitled to an attorney as soon as feasible after his arrest. Such entitlement continues through any critical stage of the proceeding, including an in-custody interrogation. G.S. 7A-451. An indigent person is defined as one "financially unable to secure legal representation and to provide all other necessary expenses of representation" in defending the criminal action against him. G.S. 7A-450(a).

An indigent who has been informed of his right to counsel under Article 36 may, *in writing,* waive this right, "if the court

finds of record that at the time of the waiver the indigent person acted with full awareness of his rights and of the consequence of a waiver." G.S. 7A-457. In imposing the requirement that an *indigent's* waiver of counsel must be in writing, the North Carolina General Assembly imposed a more stringent requirement than the federal courts have done.

Under Article 36 it is the duty of the authority having charge of a person who is without counsel for more than forty-eight hours after being taken into custody to so inform the clerk of the superior court. The clerk, after making a preliminary determination of the person's entitlement to counsel, shall so inform any district or superior court judge holding court in the county. The judge so informed may assign counsel. G.S. 7A-453(b). If a defendant upon being taken into custody, states that he is indigent and desires counsel, the authority having custody shall immediately inform the clerk who shall immediately inform the judge. G.S. 7A-453(c).

At the hearing which Judge Falls conducted for the purpose of determining the competency of defendant's in-custody statements, only Detectives Auten and Hovis testified to the circumstances under which they were made. Defendant himself did not testify. There was no conflict in the testimony of the two officers. It tended to show that defendant, after having been brought to the sheriff's office at his request, said he "wanted to tell the truth about the thing, what he knew about it, and what part each one of them had in it"; that prior thereto no officer had interrogated him; that he was not permitted to talk until after he had been clearly and repeatedly warned of his constitutional rights as required by the *Miranda* decision; that after being fully apprised of his right to have counsel present when he made a statement, and after being told that the State would provide him with a lawyer if he was unable to employ one, defendant said he did not want counsel; and that he then gave an account of the burning of the Welch residence which implicated him in the crime.

[9] At the conclusion of the *voir dire* Judge Falls, without making any findings of fact as to the voluntariness of defendant's confession, permitted Captain Auten to testify to the narrative summarized above, which the officer said he volunteered. If, on *voir dire,* there is conflicting testimony bearing on the admissibility of a confession, it is error for the judge to

admit it upon a mere statement of his conclusion that the confession was freely and voluntarily made. In such a situation the judge must make specific findings so that the appellate court can determine whether the facts found will support his conclusions. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53; *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51; *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. When, as in this case, no conflicting testimony is offered on *voir dire,* it is not error for the judge to admit the confession without making specific findings. *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841. Clearly, however, it is always the better practice for the court to find the facts upon which it concludes any confession is admissible.

[10] Accepting the credibility of the uncontradicted testimony adduced on *voir dire,* as Judge Falls obviously did since he admitted the evidence, defendant's *narrative statement* was not the result of an in-custody interrogation. Thus, even though his indigency be assumed, the presence of counsel was not required at that time. As the Supreme Court said in *Miranda v. Arizona, supra:* "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without benefit of warnings and counsel, *but whether he can be interrogated.* There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding to-day." *Id.* at 478, 16 L. Ed. 2d at 726 (Emphasis added).

On this record, we hold that the admission of defendant's narrative confession was not error. The question and answer period which followed that narration, however, was an in-custody interrogation at which defendant gave incriminating information not included in his previous statement. The admissibility of the sound recording of defendant's interrogation, therefore, involves additional considerations not pertinent to the volunteered confession. The first is whether defendant was an indigent at the time of the interrogation. As to this, Judge Falls made no finding. Indeed, the only "finding" which the *voir dire* produced was his *conclusion* "that this defendant

knowingly, understandingly, and voluntarily made whatever statement the tape indicates."

[11] At his preliminary hearing on 16 October 1969 defendant was represented by privately employed counsel. It was not until 24 November 1969 that defendant executed an affidavit of indigency and counsel was appointed to represent him at his trial. Upon the *voir dire* neither court nor counsel made any inquiry whether defendant was indigent on 20 September 1969, the day of the interrogation. If he was indigent, he was entitled to the services of counsel at the interrogation and, under G.S. 7A-457, he could waive that right only in writing. The evidence on *voir dire* was plenary and uncontradicted that, after his right to counsel had been fully explained to him, defendant said he did not want a lawyer. However, there is no evidence in the record that defendant signed a written waiver of counsel and no evidence bearing upon whether he was an indigent on 20 September 1969. Upon the retrial the question of defendant's indigency must be inquired into on *voir dire* and findings made *of record* as provided by G.S. 7A-457. If, at the time of his in-custody interrogation, defendant was indigent and had not signed a written waiver of counsel, Article 36 renders the statements made on interrogation inadmissible; and this is true whether the evidence offered to prove them be the testimony of a witness who was present or a sound recording of the interrogation itself.

Defendant's other contentions are that the recording of his interrogation was erroneously admitted over his objection because (1) the judge did not conduct a *voir dire* to ascertain whether it met the requirements of admissibility and whether it contained incompetent testimony; and (2) he did not instruct the jury that they should consider it only as it tended to corroborate the testimony of the detectives.

If a defendant's statement is inadmissible because impermissibly obtained, *a fortiorari,* a recording of it is equally inadmissible in evidence. However, "it is now almost universally held that sound recordings, if relating to otherwise competent evidence, are admissible providing a proper foundation is laid for their admission." Annot., Sound Recordings in Evidence, 58 A.L.R. 2d 1024, 1027 (1958); 29 Am. Jur. 2d *Evidence* § 534 (1967). Such recordings were received in evidence in *State v. Godwin,* 267 N.C. 216, 147 S.E. 2d 890; *State v. Walker,*

251 N.C. 465, 482-3, 112 S.E. 2d 61, 74-75. *See State v. Fox*, 227 N.C. 1, 175 S.E. 2d 561.

[12] A taped recording of an accused's statement is only one method of perpetuating it. When properly authenticated, a recorded confession—if voluntary and otherwise lawful—"is admissible the same as if it had been in (defendant's) own handwriting, transcribed by a reporter who had taken notes, or testimony of one who heard the statements." *Thomas v. Davis*, 249 F. 2d 232, 235 (10th Cir. 1957). In other words a recorded confession, like any other form of confession, is substantive evidence. Indeed "it has been said that a sound recording of a confession is of more value to the court than one in writing, especially where an issue has been raised as to whether it was voluntary." 29 Am. Jur. 2d *Evidence* § 534 (1967); 58 A.L.R. 2d 1024, § 13.

To lay a proper foundation for the admission of a defendant's recorded confession or incriminating statement, courts are in general agreement that the State must show to the trial court's satisfaction (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and (7) the custody and manner in which the recording has been preserved since it was made. Annot., 58 A.L.R. 2d 1024, §§ 4 and 8 and cases therein cited; 29 Am. Jur. 2d *Evidence* § 436 (1967).

[13] Upon an objection to the introduction of a recorded statement, in order to ascertain if it meets the foregoing requirements, the trial judge must necessarily conduct a *voir dire* and listen to the recording in the absence of the jury. "In this way he can decide whether it is sufficiently audible, intelligible, not obviously fragmented, and, also of considerable importance, whether it contains any improper and prejudicial matter which ought to be deleted." *State v. Driver*, 38 N.J. 255, 288, 183 A. 2d 655, 672. This procedure affords counsel the opportunity to object to any portions of the recording which he deems incompetent and permits incompetent matter to be kept from the

jury in some appropriate manner. In *State v. Strickland,* 276 N.C. 253, 173 S.E. 2d 129, we prescribed analogous procedure for the preview of sound moving pictures taken of a defendant, who had been arrested for operating an automobile upon the public highway while under the influence of an intoxicant. *Accord, Sanders v. State,* 237 Miss. 772, 115 So. 2d 145; *Wright v. State,* 38 Ala. App. 64, 79 So. 2d 66; 58 A.L.R. 2d 1024, §§ 4 and 8.

[14, 15] If, on the next trial, the State offers defendant's recorded statement in evidence, and defendant objects to its introduction, the judge must conduct a *voir dire* to determine (1) whether defendant's interrogation without counsel was proper; (2) if so, whether the recording meets the tests for admissibility specified herein. If he holds the recording to be admissible, in the absence of the jury, he must also hear and pass upon any objections which defendant desires to make to *specific* statements contained in it. On this record, defendant's motion to strike the references to the Black Panther organization should have been allowed. This prejudicial testimony was irrelevant to the issue of defendant's guilt of the crime charged. Although not the subject of a specific objection the testimony as to information which defendant gave the officers in 1968 with reference to burnings during that year was likewise incompetent and prejudicial.

New trial.

Justice LAKE concurs in result.

STATE OF NORTH CAROLINA v. JAMES NATHANIEL WESTBROOK, JR.

No. 94

(Filed 10 June 1971)

1. **Constitutional Law § 30; Criminal Law § 135; Homicide § 31— punishment for first degree murder — absolute discretion of jury**

No constitutional right of defendant was violated by the provision of G.S. 14-17 giving the jury the absolute discretion, if it found defendant guilty of first degree murder, to determine whether the punishment should be death or imprisonment for life.

2. **Constitutional Law § 30; Criminal Law § 135; Homicide § 31— first degree murder — simultaneous verdict as to guilt and punishment**

In a first degree murder prosecution, no constitutional right of defendant was violated by the fact that, under G.S. 14-17, the jury was required to return simultaneously its verdict upon the issue of guilt and its determination of the punishment to be imposed.

3. **Constitutional Law § 36; Criminal Law § 135; Homicide § 31— death penalty — cruel and unusual punishment**

The imposition of the death penalty for murder in the first degree does not constitute cruel and unusual punishment.

4. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of jurors who would never return death penalty**

In this prosecution for the capital crime of first degree murder, the trial court properly sustained the State's challenges for cause of 24 prospective jurors who made it clear on *voir dire* examination that, before hearing any of the evidence, each of them had already made up his mind that he would not return a verdict pursuant to which the defendant might lawfully be executed, whatever the evidence might be.

5. **Constitutional Law § 29; Jury § 5— excusing juror for hardship**

In this prosecution for murder in the first degree, the trial court did not err in excusing on the ground of hardship a juror who had been accepted both by the State and by the defendant and had been sworn, but not impaneled, upon being informed by the juror that she was greatly needed at home to care for a son-in-law so afflicted with multiple sclerosis that he could not care for himself, and her husband, who was also under the care of a physician.

6. **Criminal Law § 43; Homicide § 20— photographs of body**

The trial court did not err in the admission of two photographs of the body of a homicide victim, the jury having been instructed that they were to be considered solely for the purpose of illustrating the testimony of the witness.

7. **Criminal Law § 42; Homicide § 15— clothing found on homicide victim's body**

The trial court did not err in the admission of articles of clothing found upon a homicide victim's body and bearing bullet holes and powder burns which tended to show that the pistol was held close to the victim's body when the shots were fired.

8. **Criminal Law §§ 42, 78; Homicide § 15— photographs of body — deceased's clothing — stipulations by defendant**

Articles of clothing found upon a homicide victim's body and photographs of the body were properly admitted in evidence, notwithstanding defendant in open court admitted the identity of the deceased, the location where the body was found, its general condition and the cause of death, since defendant by such admissions cannot deprive the State of the right to place before the jury all the cir-

cumstances of a homicide in order to show the degree of guilt and to support its request for the death penalty.

9. **Homicide § 15— atrocity of offense — callous disregard of victim — relevancy in capital case**

Evidence bearing upon the atrocity of the offense and the callous disregard exhibited by the defendant toward the victim is especially relevant and material in a prosecution for a capital crime in which the punishment to be imposed is to be fixed by the jury.

10. **Criminal Law § 73; Homicide § 15— testimony as to why witness and defendant went to certain house — competency**

In this homicide prosecution, the trial court did not err in permitting a State's witness to testify as to why he and the defendant went twice to a certain residence on the day the crime was committed and that defendant knew the lady who lived there, since it appears from the testimony of the witness that he and defendant had been acting in concert throughout that day.

11. **Criminal Law §§ 89, 95— in-custody statements by accomplice — corroboration of accomplice's testimony**

Where a State's witness, an alleged accomplice of defendant, testified as to the circumstances of a homicide and that he had given officers a signed statement relating thereto, which statement he supplemented with another fifteen or twenty minutes later, the trial court did not err in permitting the witness to read the supplementary statement to the jury after instructing the jury that it was not substantive evidence but was to be considered with reference to the weight and credit to be given the witness' testimony if the jury found the statement corroborated his testimony.

12. **Criminal Law §§ 89, 95— in-custody statements by accomplice — corroboration of accomplice's testimony**

Where defendant's accomplice was cross-examined with reference to the first signed statement he had given to police officers after he had read to the jury a supplementary statement which he had given the officers, and the first statement tended to corroborate portions of the accomplice's testimony, the trial court did not err in admitting the first statement into evidence after instructing the jury that it should be considered only for corroborative purposes.

13. **Criminal Law §§ 89, 95— in-custody statements of accomplice — testimony by police officer — corroboration of accomplice**

In this homicide prosecution, testimony by a police officer concerning statements made to him by defendant's accomplice and the route which the accomplice showed the officer that he and the defendant had taken was properly admitted for the purpose of corroborating the accomplice's testimony, notwithstanding there was some variation between the officer's testimony and that given by the accomplice.

14. Criminal Law §§ 77, 89— in-custody declaration by defendant — cross-examination of accomplice and police officer — corroboration of defendant

Where defendant had not yet testified, the trial court did not err in refusing to allow cross-examination of defendant's accomplice and a police officer as to the contents of defendant's statement to police officers which had been read to the accomplice between the time the accomplice signed his first statement to the investigating officers and the time he signed a supplementary statement, and in refusing to admit defendant's statement into evidence, since at that time defendant's declaration could not be admitted as corroboration of his testimony.

15. Criminal Law § 166— abandonment of assignments of error

Assignments of error not brought forward into the brief are deemed abandoned.

16. Criminal Law § 135; Homicide § 31— first degree murder — death penalty — State policy

It is the policy of this State, as declared in its Constitution, Art. XI, § 1, and by the General Assembly in G.S. 14-17, that one convicted of murder in the first degree, after a fair trial in accordance with law, shall be put to death if the jury does not, in its discretion, recommend punishment by imprisonment for life.

17. Criminal Law § 102— right of solicitor to seek death penalty— evidence — jury argument

It was the right and duty of the prosecuting attorney vigorously, but fairly and in accordance with law, both in the presentation of evidence and in his jury argument, to seek the death penalty in this prosecution for first degree murder. G.S. 15-176.1.

18. Criminal Law § 102— argument of counsel — discretion of court

The argument of counsel must be left largely to the control and discretion of the presiding judge.

19. Criminal Law § 102— argument of counsel

While counsel must be allowed wide latitude in the argument of hotly contested cases, he may not by argument, insinuating questions, or other means place before the jury incompetent and prejudicial matters not legally admissible in evidence, and may not "travel outside of the record" or inject into his argument facts of his own knowledge or other facts not included in the evidence.

20. Criminal Law § 102— argument of prosecuting attorney — uncomplimentary characterization of defendant

When the prosecuting attorney does not go outside of the record and his characterizations of defendant are supported by evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument.

21. Criminal Law § 102— argument of prosecuting attorney — epithets — death penalty

The prosecuting attorney may use appropriate epithets which are warranted by the evidence and may vigorously urge the jury to convict and to impose the death penalty in light of the evidence.

22. Criminal Law § 102— argument of prosecuting attorney — first degree murder prosecution

The prosecuting attorney did not depart from the evidence and legitimate inferences to be drawn therefrom in his argument and urging that the jury return a verdict of guilty of murder in the first degree without a recommendation as to punishment.

23. Criminal Law § 102— homicide prosecution — jury argument — characterization of defendant as robber, thief and gunman

In this homicide prosecution, the prosecuting attorney's characterization of defendant and his alleged accomplice as "two robbers, two thieves, two gunmen, who practice their trade with a sawed-off shotgun" was supported by defendant's own testimony.

24. Criminal Law § 102— homicide prosecution — jury argument — characterization of defendant as a "killer"

It was not improper for the prosecuting attorney to characterize as "killers" a defendant being tried for first degree murder and his companion in the crime.

25. Criminal Law § 102— jury argument — comment that defendant's testimony was not truthful

Prosecuting attorney's observation that defendant's testimony, "I don't go for violence," was not "truthful" was proper in view of defendant's criminal record as disclosed by his own testimony.

26. Criminal Law § 102— homicide prosecution — jury argument — offenses committed by defendant — defendant's treatment of victim and another person

In this prosecution for first degree murder, prosecuting attorney's catalogue of criminal offenses committed on the day of the victim's death and on previous occasions by defendant and his alleged accomplice, his reminder to the jury of the callous contempt with which defendant and his accomplice had disposed of the victim's body, and his comment concerning the treatment of another person whom defendant and his accomplice had kidnapped earlier the same day of the homicide were supported by the testimony of defendant and his accomplice.

27. Criminal Law §§ 9, 113; Homicide § 25— instructions — concert of action in robbery — guilt of other crime committed pursuant to the robbery

In this first degree murder prosecution, the trial court did not err in instructing the jury that if two persons join in a purpose to commit a robbery, each of them, if actually or constructively present, is not only guilty as principal if the other commits that particular

crime, but is also guilty of any other crime committed by the other in pursuance of the common purpose to rob or as a natural or probable consequence thereof.

28. Criminal Law § 112— instructions on circumstantial evidence

While circumstantial evidence is sufficient to justify a conviction only when the circumstances proved are consistent with the hypothesis of guilt and inconsistent with every other reasonable hypothesis, no set form of words is required to be used in conveying to the jury this rule relating to the degree of proof required for conviction upon circumstantial evidence.

29. Criminal Law § 112— instructions on circumstantial evidence

In this homicide prosecution in which the court charged that concert of action by defendant and his alleged accomplice could be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto, the court did not err in failing further to instruct the jury that circumstantial evidence is sufficient to justify conviction only when the circumstances proved are inconsistent with the hypothesis that the accused is innocent and with every reasonable hypothesis except that of guilt, where the court fully charged the jury on the State's burden of proving defendant's guilt beyond a reasonable doubt, and defendant made no request for such an instruction.

APPEAL by defendant from *Harry C. Martin, J.*, at the 2 November 1970 Criminal Session of MECKLENBURG.

Upon an indictment, proper in form, charging the defendant with the murder of Carla Jean Underwood, he was tried and convicted of murder in the first degree, the jury making no recommendation that he be sentenced to life imprisonment. From a judgment imposing the sentence by death by asphyxiation, pursuant to the verdict, the defendant appeals.

The evidence for the State included the testimony of the defendant's alleged accomplice, Johnny Frazier, whose counsel was present. Frazier gave a detailed account of the activities of the defendant and himself on the day in question. The evidence for the State was to the following effect:

On 18 June 1970, Carla Jean Underwood, 17 years of age, was employed by Belk's Department Store at the SouthPark Shopping Center in Charlotte, the shopping center being then still under construction. At approximately 12:20 p.m., a fellow worker met her coming out of the store and going toward her automobile in the employees' parking lot. After chatting briefly

with the other employee, Miss Underwood went on to her car alone.

The defendant and Frazier had driven into the parking lot a few minutes earlier. They arrived in a stolen Volkswagen belonging to Mrs. Rose Collins. About an hour before, they had kidnapped Mrs. Collins at gunpoint at another shopping center in the city (Woolco) and had taken her out into the country where they left her alone in the woods, bound and lying face down.

Returning to the city in Mrs. Collins' automobile, the defendant and Frazier drove to the SouthPark Shopping Center and, shortly after their arrival, observed Miss Underwood enter her car. The defendant then remarked to Frazier, "There's a hit." The defendant got out of the car, which was then driven by Frazier, went to Miss Underwood's car and forced his way into the passenger seat, she being in the driver's seat. A struggle followed and Miss Underwood was shot in the abdomen by the defendant with a .22 caliber pistol. Frazier then drove the stolen Collins vehicle up to the Underwood car and the defendant, driving the Underwood car, said to him, "Let's go." They left the parking lot, the defendant driving the Underwood vehicle and Frazier following in the Collins vehicle. They drove a short distance to a wooded area. There, Frazier got out of the vehicle he was driving and went to the passenger side of the Underwood vehicle, driven by the defendant. Miss Underwood was lying on the front seat with her head toward the door. When Frazier opened the door, standing outside the car, he put one leg up and propped it behind Miss Underwood's shoulder. She was trying to talk. The defendant then fired four more bullets into Miss Underwood's abdomen, holding the pistol only a few inches from her body as he fired. One of the bullets passed entirely through her body and into the leg of Frazier. Only six or seven minutes elapsed between the first shooting of Miss Underwood and the firing of the four additional bullets into her body.

The defendant and Frazier then removed Miss Underwood's body from the car. The defendant dragged her by the feet to some bushes where they left her after placing over her body a piece of plywood and an old carpet. The body was found three days later badly decomposed. An autopsy was performed in which four .22 caliber bullets were removed from the body,

a fifth wound resulting from the bullet which passed entirely through the girl's body and into the leg of Frazier. In the opinion of the County Medical Examiner, who conducted the autopsy, the cause of death was multiple gunshot wounds.

The defendant, in open court, through his counsel, made a judicial admission that the body of Carla Jean Underwood was so discovered on 21 June 1970 and examined by the medical examiner and that Miss Underwood died as the result of five gunshot wounds in the abdomen inflicted by .22 caliber bullets.

There is no suggestion that either the defendant or Frazier knew Miss Underwood or had ever seen her prior to this occasion.

Following the shooting of Miss Underwood and the disposal of her body, the defendant and Frazier, one driving the Collins car and the other driving the Underwood car, returned to the point where they had left Mrs. Collins. Not finding her there, they abandoned the Collins vehicle and, riding together in the Underwood vehicle, returned to the city and proceeded to a residence at which Mr. and Mrs. Bozart were visiting. They conversed with Mrs. Bozart briefly, then left and subsequently returned in about twenty minutes. This time they were met at the door by Mr. Bozart and after a brief conversation again left. They then went to the defendant's house, from there to a dry cleaning establishment to pick up some clothes belonging to Frazier, carried these to Frazier's house and then drove to a point in the city at which Westbrook poured gasoline into the interior of the Underwood car and burned it. The City Fire Department arrived at the burning car at approximately 3:50 p.m.

After the burning of the Underwood car, Frazier, in order to obtain medical attention for his wound without accounting for it truthfully, falsely swore out a warrant against his father-in-law charging him with shooting Frazier. (The bullet removed from Frazier's leg was introduced in evidence and was a .22 caliber bullet fired from the same weapon as three of the bullets removed from Miss Underwood's body, the fourth bullet removed from her body being so distorted that it could not be determined from what weapon it was fired.)

On cross-examination by the defendant, Frazier testified that he, himself, was also under indictment for the murder of Miss Underwood, that on 16 June he was arrested for armed robbery in Cabarrus County, and that he had also been arrested a short time earlier for cutting his wife on the street in Charlotte, posting a bond for his release pending trial on this charge. He further testified on cross-examination that he was then under a suspended sentence of two years for another offense, not specified, and had pending against him a charge of arson, a charge of assault on his wife by cutting her, a charge of shooting into his father-in-law's house, a charge of kidnapping (apparently the kidnapping of Mrs. Collins) and a charge of murder (apparently the murder of Miss Underwoood).

The defendant testified as a witness in his own behalf. The substance of his testimony was as follows:

He is 22 years of age. In 1966, while in high school, he was sentenced to prison for housebreaking. While serving this sentence, he escaped twice. He was paroled 5 January 1970. He got a job and was married 27 April 1970, but was laid off about the middle of May because his employer got caught up on its work. Thereafter, he became acquainted with Frazier. On 13 June, five days before the killing of Miss Underwood, he, Frazier and another man, committed an armed robbery in Concord.

On 18 June 1970, he requested Frazier to take him to his former employer's place of business to see about resuming his job. They traveled in Frazier's mother's car, the defendant driving. At Frazier's suggestion, they turned into a shopping center (Woolco) and parked. Frazier got out of the car and two or three minutes later the defendant followed him. When he overtook Frazier, he observed that Frazier was standing over Mrs. Collins who was lying on the ground, Frazier holding a .22 caliber pistol in his hand. The defendant helped Frazier put Mrs. Collins in the Collins car. He and Frazier took her out to a place off Highway 49 and, after tying her up, left her there, Frazier having taken from her pocketbook the money therein, which Frazier called "chump change."

Returning to the city in Mrs. Collins' car, they picked up Frazier's mother's car and left the Collins vehicle at the K-Mart parking lot. They proceeded in the Frazier car to the SouthPark

Shopping Center, the defendant driving. When they stopped there, Frazier said, "I see a hit town," and immediately got out of the car, telling the defendant to follow him, which the defendant did in the Frazier car. When he reached the Underwood car, the defendant saw Frazier and Miss Underwood therein, Miss Underwood being seated in the driver's seat. When the defendant parked the Frazier vehicle and got out, he heard a shot. He rushed to the passenger's side of the Underwood car and saw Frazier and Miss Underwood struggling, Frazier having a pistol in his hand. The defendant grabbed the pistol through the car window and the pistol fired again, the shot striking Frazier in the leg. Thereupon, the defendant having released the pistol, Frazier commenced shooting Miss Underwood and shot her there in the parking lot more than twice. The defendant then followed Frazier out of the parking lot, Frazier driving the Underwood car containing Miss Underwood's body, and the defendant driving Frazier's mother's car. When they stopped and tried to remove Miss Underwood's body from the car, Frazier dropped her because of the injury to his leg. Miss Underwood's body was dragged about three feet and, at Frazier's request, the defendant handed him a piece of plywood which Frazier put over the body. The defendant threw some rags over it.

They then drove to Frazier's home, remaining there just long enough to leave the Frazier car. Thereupon, riding together in the Underwood car, the defendant driving, they went back to the K-Mart, where they had left the Collins vehicle. Frazier then got into the Collins car, the defendant continuing to drive the Underwood car, and they drove back out to where they had left Mrs. Collins, bound and lying in the woods. Their intent was to bring her back to the city and leave her bound in her car in the shopping center parking lot. They did not find Mrs. Collins where they had left her. They then left the Collins car there and returned to the city in the Underwood vehicle. Thereupon, they stopped at the house where they saw Mr. and Mrs. Bozart. Following their second stop at this house, they went to the dry cleaning establishment to get Frazier's clothes. They took the clothes to Frazier's home and then drove the Underwood car to the place where it was set on fire and left burning, Frazier sprinkling the gasoline in the car and setting it on fire for the purpose of removing his fingerprints from within the car.

As they carried Mrs. Collins out to the wooded area where they bound and left her, the defendant heard Frazier tell Mrs. Collins that he wanted $5,000 from her. Statements given by Frazier and also those given by the defendant to the investigating officers concerning their activities on the day of the kidnapping of Mrs. Collins and the killing of Miss Underwood contained untruths.

In 1963 the defendant was convicted of seven counts of housebreaking and larceny. In 1966 he was convicted of unlawfully taking automobiles. He does not remember whether he was convicted in 1966 of three cases of housebreaking and larceny. On 16 November 1966, he escaped from prison and was convicted of that offense. He was again convicted of escape on 17 January 1967 and was indicted for larceny while an escapee the second time.

The defendant was the driver of the car in the robbery perpetrated by him, Frazier and their companion in Concord five days before the killing of Miss Underwood. In that robbery they used a sawed-off shotgun. In the course of the robbery, the defendant went into the store and at one time held the gun as he searched through the store for other occupants than those who were tied up by him and his companions. The victims of that robbery, who were tied and left in the store, were both women. The defendant has known how to steal since 1963 and needed no training by Frazier in that activity.

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

Ernest S. DeLaney, Jr., and Channing O. Richards for the defendant.

LAKE, Justice.

[1-3] The defendant's first assignment of error is to the overruling of his motion to quash the bill of indictment. He does not assert that the indictment is insufficient in form or allegation. His contention is that to subject him to trial under this indictment upon the capital offense of first degree murder violates his rights under the Constitution of the United States and under the Constitution of North Carolina in that:

(1) Pursuant to G.S. 14-17, the jury was vested with the absolute discretion, if it found him guilty of murder in the first degree, to elect between the penalty of death and the penalty of life imprisonment, which he contends is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and a violation of Art. I, § 17, of the Constitution of North Carolina;

(2) Under G.S. 14-17, the jury was required to render simultaneously its verdict as to the issue of guilt and as to the punishment to be imposed, which he contends is a violation of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States; and

(3) The imposition of the death penalty for murder in the first degree is a cruel and unusual punishment in violation of the provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States and of Art. I, § 14, of the Constitution of North Carolina.

G.S. 14-17 provides:

"Murder in the first and second degree defined; punishment.—

"A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death; Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. * * * * "

In *McGautha v. California,* 402 U.S. 183, 91 S.Ct. 1454, 28 L. Ed. 2d 711, 39 Law Week 4529, decided 3 May 1971, the Supreme Court of the United States held: (1) Nothing in the Constitution of the United States forbids a state to commit to the untrammeled discretion of the jury the power to determine whether a defendant found guilty of murder in the first degree shall be put to death or imprisoned for life; and (2) nothing in

the Constitution of the United States forbids a state to adopt a procedure whereby the jury shall return simultaneously its verdict upon the issue of guilt and its determination of the sentence to be imposed. In *Trop v. Dulles,* 356 U.S. 86, 99, 78 S.Ct. 590, 2 L. Ed. 2d 630, 641, the Supreme Court of the United States said: "Whatever the arguments may be against capital punishment * * * it cannot be said to violate the constitutional concept of cruelty."

In numerous cases, this Court has rejected attacks on constitutional grounds upon judgments imposing death sentences pursuant to the procedure followed in the present case. *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487; *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593. In the Roseboro case, we held no constitutional right of the defendant is violated by the provision of G.S. 14-17 authorizing the jury, upon finding the defendant guilty of murder in the first degree, to determine whether the punishment shall be death or imprisonment for life, notwithstanding the absence from the statute of any standards to guide the jury in making that determination. In the Atkinson case, *supra,* at page 319, we held that the imposition of the death penalty for murder in the first degree is not, *per se,* a violation of the Fourteenth Amendment to the Constitution of the United States or of any provision of the Constitution of North Carolina. It is not cruel and unusual punishment in the constitutional sense, being expressly authorized by Art. XI, § 2, of the Constitution of North Carolina. *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404. No provision of the Constitution of this State supports the defendant's contention that the General Assembly may not provide, as it has done in G.S. 14-17, that the jury shall make its determination as to punishment at the same time it renders its verdict upon the question of guilt. *State v. Sanders, supra.* There is, therefore, no merit in the defendant's first assignment of error.

[4] The defendant's Assignment of Error No. 2 relates to the sustaining of the State's challenges for cause to 24 prospective jurors, the basis for each challenge being the prospective juror's statement on *voir dire* concerning his or her inability to return a verdict in any case which would result in the imposition of a sentence to death.

The *voir dire* examination of each prospective juror so challenged is set forth in detail in the record. It discloses that no juror was excused because of his or her expression of a general objection to the death penalty or of moral or religious scruples against inflicting it. Each was examined patiently, carefully and fairly by the prosecuting attorney and, in some instances, by the court. In a number of instances, due to equivocal statements by the prospective juror, apparently resulting from a lack of clear understanding of the question, the examination was lengthy. While there were variations in their statements, here, as in *State v. Sanders, supra,* "It is perfectly clear from these answers * * * that each of these prospective jurors, before hearing any of the evidence, had already made up his mind that he would not return a verdict pursuant to which the defendant might lawfully be executed whatever the evidence might be."

The sustaining of the State's challenges for cause was not contrary to the decision of the Supreme Court of the United States in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L. Ed. 2d 776, in which the Court expressly stated that it did not have before it the right of the prosecution to challenge for cause prospective jurors "who say that they could never vote to impose the death penalty." *State v. Sanders, supra; State v. Miller,* 276 N.C. 681, 174 S.E. 2d 481; *State v. Atkinson, supra.* There is, therefore, no merit in the defendant's Assignment of Error No. 2.

[5] The defendant's Assignment of Error No. 3 is directed to the court's excusing Mrs. Foster from the jury after she was accepted both by the State and by the defendant and was sworn, but before the selection of the jury was completed and the jury was impaneled. She had not, in the meantime, been in contact with any of the jurors previously selected. After she was sworn and conducted from the courtroom, pending the further interrogation of prospective jurors, she was brought back and, in the absence of other jurors, she, a great grandmother, informed the court that she was greatly needed at home to care for a son-in-law so afflicted with multiple sclerosis that he could not care for himself, and her husband, who was also under the care of a physician, her daughter being necessarily absent from home during the day by reason of her employment. She did not make any of these circumstances known prior to

being sworn as a juror. Over objection by counsel for the defendant, the court, in its discretion, excused Mrs. Foster on the ground of hardship. In this we find no error. See *State v. Atkinson, supra; State v. Spence,* 271 N.C. 23, 32, 155 S.E. 2d 802, judgment vacated on another ground, 392 U.S. 649, 88 S.Ct. 2290, 20 L. Ed. 2d 1350.

The record shows that the defendant did not exhaust the peremptory challenges allowed him by G.S. 15-163. It further shows that after the selection of the jury was completed and the jury was impaneled, the defendant, in response to an inquiry by his counsel, informed the court that the defendant had been consulted by his counsel concerning every juror and had expressed his approval of every juror accepted as a member of the jury which tried him. There is no merit in this assignment of error.

The defendant's Assignments of Error 4 through 14 relate to rulings of the court on the admission of evidence.

[6] There was no error in the admission of the two photographs of the body of Miss Underwood, the court instructing the jury that they were to be considered solely for the purpose of illustrating the testimony of the witness. In *State v. Atkinson, supra,* at page 311, we said, "[I]n a prosecution for homicide, photographs showing the condition of the body when found, the location where found and the surrounding conditions at the time the body was found are not rendered incompetent by their portrayal of the gruesome spectacle and horrifying events which the witness testifies they accurately portray." See also *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824.

[7] Likewise, the admission in evidence of the articles of clothing found upon Miss Underwood's body was not error. The location of the bullet holes in her dress and the presence thereon of stains, identified by an expert witness as powder burns, were material and tended to show, as Frazier subsequently testified, that when the shots were fired the pistol was held close to the victim's body. As to the admission of clothing in evidence, see: *State v. Atkinson, supra,* at page 310; *State v. Bass,* 249 N.C. 209, 105 S.E. 2d 645; *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294; *State v. Fleming,* 202 N.C. 512, 163 S.E. 453.

[8] These exhibits were competent notwithstanding the admission by the defendant, through his counsel, in open court, that the body was that of Miss Underwood, that it was discovered in a wooded area, partially hidden under boards and an old quilt and in a state of decomposition, and that the cause of death was five gunshot wounds in the abdomen. Notwithstanding these admissions, the circumstances with reference to the shooting of the deceased and the disposition of her body were material upon the question of the degree of the homicide and the decision as to the punishment to be inflicted, if the jury should find the defendant guilty of murder in the first degree.

[8, 9] In *State v. Westmoreland,* 181 N.C. 590, 107 S.E. 438, this Court said, "There are authorities for the position that any unseemly conduct toward the corpse of the person slain, or any indignity offered it by the slayer, and also concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying, depending, of course, upon the particular circumstances of the case." In 40 C.J.S., Homicide, § 211, it is said, "Any unseemly conduct toward the corpse of the person slain or any indignity offered it by the slayer should go to the jury on the question of malice." See also *State v. Robertson,* 166 N.C. 356, 363, 81 S.E. 689. Evidence bearing upon the atrocity of the offense and the callous disregard exhibited by the defendant toward the victim is especially relevant and material when, as here, the punishment to be imposed is to be fixed by the jury in its discretion. A defendant cannot deprive the State of the right to place before the jury all the circumstances of a homicide by admitting the bare facts as to identity, the location where the body was found, its general condition and the cause of death. The State is entitled to ask the jury, not only to find the defendant guilty of murder in the first degree but also to impose the death penalty. G.S. 15-176.1. It follows, necessarily, that it may introduce evidence, otherwise competent, to support such a verdict.

[10] It appearing from the testimony of Frazier that he and the defendant had been acting in concert throughout the day, there was no error in permitting him to testify as to why he and the defendant went twice to the residence where they saw Mr. and Mrs. Bozart and that the defendant knew the lady who lived at the house, his grandmother having formerly worked there. Subsequently, the defendant testified that he did know

the people who lived there and that they first stopped at the house to seek permission to use the telephone, which he said was Frazier's idea, and returned to get water. In response to the question, "If that lady had come to that door, there would have been another killing and robbery out there, wouldn't there?" the defendant testified, "No, there wouldn't have." The admission of this evidence was not prejudicial to the defendant, the fact of the two visits to the house, where Mr. and Mrs. Bozart were visiting, having been previously established by their testimony.

[11] After Frazier, the State's witness, had testified as to the circumstances of the killing of Miss Underwood, he testified that he had given to the investigating police officers a signed statement with reference thereto, which statement he supplemented with another fifteen or twenty minutes later, he having failed to tell the officers "all the truth" in the first statement. He was then permitted, over objection, to read from the supplementary statement. It related to their departure from the parking lot following the first shooting, their driving to the wooded area, the further shooting of Miss Underwood and the disposal of her body and was in substantial accord with the testimony of Frazier at the trial. The court properly instructed the jury that it was not substantive evidence but was to be considered by them with reference to the weight and credit they would give to Frazier's testimony if the jury found the statement corroborated his testimony. In this there was no error. *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869; *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429.

[12] On cross-examination by the defendant concerning these two statements, Frazier testified that the earlier one contained a markedly different version of the killing from that set forth in the supplement which had been read by him to the jury on his direct testimony. On redirect examination, the State was permitted to read to the jury the earlier statement. This earlier statement given by him to the police officers was substantially in accord with Frazier's testimony concerning the theft of the automobiles, the arrival of Frazier and the defendant at the SouthPark Shopping Center, their observance of Miss Underwood, the defendant's getting into her car and Frazier's hearing a shot thereafter. This statement omitted any account of the killing of Miss Underwood and the disposal of her body, except

that the following week Frazier heard that she was dead. It did corroborate his testimony with reference to the subsequent driving about and the burning of the Underwood car. There was nothing in this statement which contradicted Frazier's testimony as to the shooting of Miss Underwood and the disposition of her body. In view of the cross-examination of Frazier with reference to this statement and its tendency to corroborate other portions of his testimony, there was no error in admitting this statement into evidence, the court again instructing the jury that it was admitted not as substantive evidence but only for consideration as to the weight and credit to be given to Frazier's testimony if they found the statement corroborated that testimony.

[13] For the same reason, the defendant's objections to the admission of the testimony of Officer Painter, concerning the statements made to him by Frazier and Frazier's taking him over the route followed by Frazier and the defendant, are without merit. The court instructed the jury that this testimony was not substantive evidence but was to be considered by the jury only in determining the weight and credit it would give the testimony of Frazier, it being for the jury to determine whether or not the officer's testimony corroborated that of Frazier. It did so in all respects except that Officer Painter testified that Frazier had stated to the officer that the purpose for which he and the defendant went to the house where they saw Mr. and Mrs. Bozart was to rob a safe in the house. Frazier, in his testimony, made no mention of a safe in the house. Where the testimony offered to corroborate a witness does so substantially, it is not rendered incompetent by the fact that there is some variation. *State v. Case, supra.*

[14] On cross-examination, Frazier testified that, between the time he signed his first statement to the investigating officers and the time he signed the supplementary statement above mentioned, the officers read to him a portion of a statement made to them by the defendant, designated Defendant's Exhibit 9. Officer Painter testified to the same effect and designated the portion of the exhibit so read to Frazier. The defendant assigns as error the refusal of the court, on objection by the State, to permit him to cross examine Frazier concerning the contents of that portion of Defendant's Exhibit 9 which was so read to him by the officers. He also assigns as error the refusal of the

court, on objection by the State, to permit Officer Painter, upon cross-examination, to read the portion of Defendant's Exhibit 9 which Officer Painter so read to Frazier. The defendant further assigns as error the court's sustaining of the State's objection to his offer of Defendant's Exhibit 9 in evidence. This offer of proof was made in the absence of the jury immediately prior to the State's resting its case. It appears, however, that the offer and the court's ruling were made at that time as a matter of convenience and were treated as if made at the commencement of the defendant's evidence.

There was no error in these rulings. At the time they were made, the defendant had not testified. His declaration to the officers could not, therefore, have been then admitted as corroboration of his testimony. In any event, the record shows that, at the conclusion of the defendant's testimony, his Exhibit 9 was again offered in evidence by the defendant and was admitted. Thus, had there been error in the prior rulings of the court, it was cured. Consequently, there is no merit in the defendant's Assignments of Error 8, 11 and 13 relating to these rulings.

[15] The defendant's Assignments of Error 5 and 10, relating to the admission, over objection, of evidence offered by the State are not brought forward into the brief and are, therefore, deemed abandoned. Rule 28 of the Rules of Practice in the Supreme Court. We have, nevertheless, considered all of the defendant's exceptions to the admission or exclusion of evidence, including those to which these abandoned assignments relate. We find therein no basis for the granting of a new trial.

The defendant assigns as error portions of the argument to the jury by the privately employed prosecuting attorney, whose argument is set out in full in the record. The record does not contain the argument of defense counsel.

The prosecution of one charged with a criminal offense is an adversary proceeding. The prosecuting attorney, whether the solicitor or privately employed counsel, represents the State. It is not only his right, but his duty, to present the State's case and to argue for and to seek to obtain the State's objective in the proceeding. That objective is not conviction of the defendant regardless of guilt, not punishment disproportionate to the offense or contrary to the State's policy. It is the con-

viction of the guilty, the acquittal of the innocent and punishment of the guilty, appropriate to the circumstances, in the interest of the future protection of society. In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand.

[16, 17] It is the policy of this State, as declared in its Constitution, Art. XI, § 1, and by the General Assembly in G.S. 14-17, that one convicted of murder in the first degree, after a fair trial in accordance with the law, shall be put to death if the jury does not, in its discretion, recommend punishment by imprisonment for life. In the present instance, the grand jury, an agency of the State, after investigation according to law, indicted the defendant for murder in the first degree. The solicitor, an officer of the State, after investigation, determined, on behalf of the State, that the defendant should be tried for this offense and that the death penalty should be sought. These determinations having been made on behalf of the State, it was the right and duty of the prosecuting attorney, vigorously, but fairly and in accordance with law, both in the presentation of evidence and in his argument, to seek that result. G.S. 15-176.1 expressly provides that the solicitor or other counsel appearing for the State may argue to the jury that a sentence of death should be imposed and that the jury should not recommend life imprisonment.

In the present case, the defendant contends that the prosecuting attorney passed over the boundary of this right and duty in his argument to the jury by his vigorous denunciation of the defendant and thereby denied him a fair trial. If this contention is correct, the defendant is entitled to a new trial. In *State v. Smith,* 279 N.C. 163, 181 S.E. 2d 458, decided this day, we have awarded the defendant therein a new trial upon a charge of the utmost gravity, because there the record shows the solicitor violated the right of the defendant to a fair trial by the nature of his argument to the jury. In the present case, as there, it is our duty to make this determination from the record, irrespective of our views as to the policy of the State with regard to the punishment of the offense in question and without regard to the sufficiency of the evidence to support the verdict and sentence.

The guiding principle is thus stated in 23A C.J.S., Criminal Law, § 1081:

> "In the trial of a criminal case, a high and important duty and responsibility are imposed on the prosecuting attorney. It is his duty to see that the state's case is properly presented with earnestness and vigor, and to use every legitimate means to bring about a just conviction; but he has the duty to refrain from improper methods calculated to produce a wrongful conviction, and while he may strike hard blows, he is not at liberty to strike foul ones."

In amplification of this principle, it is said in this treatise:

It is the duty of the prosecuting attorney "to show the whole transaction as it was." § 1081. "[H]owever, the efforts of a prosecuting attorney discharging his duty, not only to punish crime, but to deter others, should not be so encompassed as to discourage vigorous arguments to the jury in the solicitor's own style." § 1083. He has much latitude in the language or manner of presenting his side of the case "consistent with the facts in evidence." § 1090. "Generally, the gravity of the crime charged, the volume of evidence, credibility of witnesses, inferences to be drawn from various phases of evidence, and legal principles involved, to be presented in instructions to the jury, are all matters within the proper scope of argument." § 1090. "As warranted by the record, the prosecuting attorney may in a proper manner comment on the credibility of witnesses for accused. Accordingly, where the evidence justifies it, it is not error for the prosecuting attorney to state, in his argument, that a witness is untruthful or that his testimony is false * * * . However, abusing the witnesses for accused, making remarks which reflect on their credibility or character * * * is improper, unless such a statement is reasonably justified by the circumstances or evidence." § 1097. "The prosecuting attorney may allude to other crimes committed by the accused where there is evidence properly before the jury supporting the particular reference." § 1100. "Generally, it is not improper for the prosecuting attorney to comment on, and make inferences from, the conduct of the accused, where the purported facts referred to are supported by competent evidence and the inferences sought to be made are within the bounds of proper argument; such comments may be couched in denunciatory or opprobrious terms appropriate to the evidence adduced." § 1102.

"The prosecuting attorney may appeal to the jury to do their full duty in enforcing the law, and may employ any legitimate means of impressing on them their true responsibility in this respect, or may urge a severe penalty." § 1107.

[18-20] This Court has said that the argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432; *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; *State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466; *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542. He may not, however, by argument, insinuating questions, or other means, place before the jury incompetent and prejudicial matters not legally admissible in evidence, and may not "travel outside of the record" or inject into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762; *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; *State v. Little, supra.* On the other hand, when the prosecuting attorney does not go outside of the record and his characterizations of the defendant are supported by evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument. *State v. Bowen, supra.*

[21] The prosecuting attorney may use "appropriate epithets which are warranted by the evidence," *People v. Turville,* 51 Cal. 2d 620, 335 P. 2d 678, *cert. den.,* 360 U.S. 939, and "may vigorously urge the jury to convict and to impose the death penalty in the light of the evidence." *People v. Wein,* 50 Cal. 2d 383, 326 P. 2d 457, *cert. den.,* 358 U.S. 866. In *State v. Correll,* 229 N.C. 640, 50 S.E. 2d 717, *cert. den.,* 336 U.S. 969, the epithet, "a small-time racketeering gangster," applied to the defendant in the argument of the private counsel for the prosecution, was not supported by anything in the record and a new trial was ordered. In *State v. Bowen, supra,* the epithet, "these two thieves," was not approved by this Court but was held not to be ground for a new trial because it was "a conclusion drawn from the evidence." In 53 AM. JUR. Trial, § 504, note 8, it is said, "The line between denunciation and abuse which will reverse a conviction, and that which will not, * * * seems to rest on the distinction between mere personal abuse and invective called forth by the character of the crime shown by the evidence." In

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L. Ed. 1314, the Court said the prosecuting attorney's argument to the jury contained improper insinuations and assertions calculated to mislead the jury. Likewise, in *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335, "with no supporting evidence the solicitor defiled the characters of the defendants in his argument to the jury" and this Court, acting under its supervisory power over the lower courts, granted a new trial.

[22-26] Applying these principles to the present case, we find, in the vigorous argument of the prosecuting attorney and his urging that the jury return a verdict of guilty of murder in the first degree without a recommendation as to punishment, which, in effect, fixes the punishment at death by asphyxiation, no departure from the evidence and legitimate inferences to be drawn therefrom. His catalogue of the criminal offenses committed on the day of Miss Underwood's death, and on previous occasions, by the defendant and his alleged accomplice, was merely a summary of their own testimony. His characterization of them as "two robbers, two thieves, two gunmen, who practiced their trade with a sawed-off shotgun," cannot be deemed to have prejudiced the defendant unfairly in the eyes of the jury in view of his own testimony that he and Frazier had, a few days prior to the killing of Miss Underwood, held up and robbed a place of business in Concord, using a sawed-off shotgun, had on that occasion and on the one in question stolen one or more automobiles, that he "knew how to steal a long time ago" and was "not only a thief but * * * also a robber." The defendant being charged on this trial with murder in the first degree, it was not improper for the prosecuting attorney to characterize him and his companion as "killers." The characterization of them as "loafers," if not expressly supported by the evidence, could hardly be deemed prejudicial under the circumstances. In view of the defendant's criminal record, as disclosed by his own testimony, the prosecuting attorney's observation that the defendant's testimony, "I don't go for violence," was not "truthful" barely measures up to the minimum standard of a vigorous argument. It was not unfairly prejudicial for the prosecuting attorney to remind the jury of the callous contempt, with which the testimony of the defendant, himself, and of his companion, Frazier, disclosed that they disposed of the body of Miss Underwood. His comment concerning the treatment of Mrs. Collins earlier on the same day was

fully supported by the defendant's own testimony concerning that activity.

The distinction between this case and *State v. Smith, supra,* decided this day, is that in *State v. Smith,* the prosecuting attorney, in his argument, "traveled outside the record," used language offensive in its nature, and, in support of his plea for the death penalty, injected into his argument his own account of his record as a solicitor in other cases, for the purpose of persuading the jury that he did not ask the death penalty where it was not deserved. In the present case, the prosecuting attorney, while making a vigorous plea for the imposition of the death penalty, did not depart from or distort the record. We find nothing in his argument which would tend to mislead the jury or deprive the defendant of a fair trial. In *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667, a judgment imposing the death penalty was affirmed although "the solicitor reviewed the evidence and argued with great zeal and fervor that in the light of the defendant's conduct in connection with the killing of [the victim], the punishment therefor should be death and the jury should bring a verdict of guilty of murder in the first degree without a recommendation that the punishment should be life imprisonment." There is no merit in this assignment of error.

The defendant's Assignments of Error 18 and 19 relate to exceptions to the charge of the court to the jury. We have carefully examined the entire charge and find therein no error.

[27] The court instructed the jury that one of the theories upon which the State was proceeding was that the defendant and Frazier were acting in concert. He thereupon charged the jury correctly that the mere presence of a person at the scene of a crime at the time of its commission does not make him guilty of the offense, but that if two persons are acting together, in pursuance of a common plan and common purpose to rob, and one of them actually does the robbery, both would be equally guilty within the meaning of the law and if "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose; that is, the common plan to rob,

or as a natural or probable consequence thereof." In this we find no error.

[29] The court then instructed the jury: "Now in order to show a community of unlawful purpose, it is not necessary to show an express agreement or an understanding between the parties, nor is it necessary that the conspiracy or common purpose shall be shown by positive evidence. Its existence may be inferred from all the circumstances accompanying the doing of the unlawful act, and from conduct of the defendant subsequent to the criminal act. In other words, preconcert or a community of purpose may be shown by circumstances as well as by direct evidence." The defendant contends that this instruction was error for that the court should further have instructed the jury that circumstantial evidence is sufficient to justify a conviction when, and only when, the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with the hypothesis that he is innocent and with every other reasonable hypothesis except that of guilt.

In the present case, Frazier testified that when he and the defendant left the defendant's home on the morning of these events: "We were going to those two places [the Woolco Shopping Center and the K-Mart] looking for transportation, looking for a car. We needed transportation to get out of town. We were going to take the car. We did not have a car parked up there. We were going to take any car we see. From Woolco we went to SouthPark [where Miss Underwood was shot and her car taken]." This is direct evidence of concerted action.

[28] As the trial court instructed the jury, such concert of action may also be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto. While circumstantial evidence is sufficient to justify a conviction when, and only when, the circumstances proved are consistent with the hypothesis of guilt and inconsistent with every other reasonable hypothesis, this Court has repeatedly held that no set form of words is required to be used in conveying to the jury this rule relating to the degree of proof required for conviction upon circumstantial evidence. *State v. Lowther,* 265 N.C. 315, 144 S.E. 2d 64; *State v. Shoup,* 226 N.C. 69, 36 S.E. 2d 697; *State v. Shook,* 224 N.C. 728, 32 S.E. 2d 329.

In *State v. Lowther, supra,* upon which the defendant relies, a new trial was granted because the court, after instructing the jury that the State relied upon circumstantial evidence and instructing them that such evidence is a recognized instrumentality in North Carolina and highly acceptable in matters of grave moment, added only this: "[B]ut the circumstances and conditions relied upon must be such as are not only consistent with guilt, but must be inconsistent with innocence." This Court said that such charge "on circumstantial evidence is inadequate and prejudicial, and entitles defendant to a new trial."

In *State v. Shook, supra,* it is said:

> "The objection is that the judge did not add to the instruction given that, in order to justify a verdict of guilty, the circumstantial evidence must 'exclude every reasonable hypothesis of innocence.' That, indeed, it must do; but after all, the convincing effect of circumstantial evidence on the mind of the jury is measured by the same standard of intensity required of any other evidence—the jury must be convinced beyond a reasonable doubt as to every element of the crime before they find the defendant guilty of it, whether the evidence is wholly circumstantial, only partly so, or entirely what we sometimes refer to as direct. No set formula is required to convey to the jury this fixed principle relating to the degree of proof required for conviction."

In *State v. Adams,* 138 N.C. 688, 50 S.E. 765, this Court said:

> "There is no particular formula by which the Court must charge the jury upon the intensity of proof. 'No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed, that unless after due consideration of the evidence they are "fully satisfied" or "entirely convinced" or "satisfied beyond a reasonable doubt" of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a "formula" for the instruction of the jury, by which

to "gauge" the degrees of conviction, has resulted in no good.' We reproduce these words from the opinion delivered by *Pearson, C.J.*, in *S. v. Parker,* 61 N.C. 473, as they present in a clear and forcible manner the true principle of law upon the subject."

In *State v. Warren,* 228 N.C. 22, 44 S.E. 2d 207, Justice Denny, later Chief Justice, speaking for the Court, said:

"This defendant also assigns as error the failure of the trial judge to define circumstantial evidence and to instruct the jury how to appraise or evaluate such testimony. In the absence of a request to do so, the failure of the court to instruct the jury regarding circumstantial evidence, or as to what such evidence should show, will not be held for reversible error, if the charge is correct in all other respects as to the burden and measure of proof. * * *

"It makes no difference whether the State is relying on circumstantial or direct evidence, or both, the evidence must produce in the mind of the jurors a moral certainty of the defendant's guilt, otherwise the State has not proven his guilt beyond a reasonable doubt."

[29] In the present case, the court instructed the jury that the presumption of the defendant's innocence remained with him and surrounded him throughout the trial and "entitles him to a verdict of not guilty unless and until the State has satisfied you of his guilt beyond a reasonable doubt." He then instructed the jury: "A reasonable doubt is not a vain, imaginary or fanciful doubt, but it is a sane, rational doubt. It means that you must be entirely convinced or fully satisfied, or satisfied to a moral certainty of the truth of the charge." As to the contention with reference to a common plan, the court charged the jury:

"If the State has satisfied you from the evidence and beyond a reasonable doubt, that the defendant Westbrook and Frazier, on June 18, 1970, entered into a common plan and purpose to rob Carla Jean Underwood, and that the defendant Westbrook was present, acting in concert with, or aiding and abetting Frazier, in pursuance of a common plan and purpose to rob Carla Jean Underwood, and that Frazier shot and killed Carla Jean Underwood while com-

mitting or attempting to commit the felony of robbery, it would be your duty to return a verdict of guilty of murder in the first degree.

"If the State has failed to so satisfy you or if you have a reasonable doubt as to the guilt of the defendant Westbrook, it would be your duty to return a verdict of not guilty."

At the conclusion of the charge, the court called counsel for the defendant and the solicitor to the bench and inquired if they desired any additions to or corrections of the charge. Each answered in the negative.

No error.

STATE OF NORTH CAROLINA v. JOE C. BROOKS, SR., AND WIFE, ANNE BROOKS; THELMA B. McEACHERN, SINGLE; JIM BROOKS AND WIFE, ALENE W. BROOKS; FRANCES B. FURLONG, SINGLE; MARY BROOKS, SINGLE; LULA BROOKS, SINGLE

No. 43

(Filed 10 June 1971)

1. **State § 2; Waters and Watercourses § 7— title to marshlands — burden of proof**

In an action instituted by the State of North Carolina to remove cloud on title to a certain tract of marshlands located on the coast, defendant claimants to the land had the burden of proof to connect their chain of title to the State's original grant of the marshlands in 1770.

2. **Boundaries § 10— description in deed — insufficiency of description**

Description in a deed which merely referred to the property in question as "200 acres of the marsh and islands" that had been granted by a 1770 patent from the State, *held* patently and fatally defective.

3. **Ejectment § 10; Trespass to Try Title § 4— break in chain of title**

Where there is a missing link in the claimant's purported chain of title, the chain is severed and no benefit can accrue from the earlier conveyances.

4. **State § 2; Waters and Watercourses § 7— title to marshlands— statutory presumption of title in the State**

In an action instituted by the State of North Carolina to remove cloud on title to a certain tract of coastal marshlands, the State assert-

ing its title under an 1837 statute vesting it with title to all marshlands not previously conveyed, the title to the tract is conclusively presumed in the State as a matter of law, since the defendant claimants to the tract failed to connect their chain of title to the State's original grant of the tract in 1770. G.S. 146-79; Session Laws of 1955, Chapter 1372.

APPEAL by defendants from *Bone, E.J.*, April 1970 Civil Session of BRUNSWICK Superior Court, certified, pursuant to G.S. 7A-31(a), for review by the Supreme Court without prior determination in the Court of Appeals, docketed and argued as No. 42 at Fall Term 1970.

Plaintiff, the State of North Carolina, alleging it is the owner in fee simple and entitled to the immediate possession of a tract of land (marshlands) in Shallotte Township, Brunswick County, North Carolina, described below, instituted this civil action for trespass thereon by defendants; for the removal of a cloud on its title on account of an invalid claim thereto asserted by defendants; and for mandatory injunction requiring the removal of obstructions placed by defendants in the navigable streams.

Answering, defendants denied plaintiff's title; and, as a cross action, alleged they were the owners in fee simple of the described lands.

The tract of land referred to in the pleadings is described in the complaint as follows:

"BEGINNING at a stake in the north line of Sunset Beach approximately 1000 feet east of Tubbs Inlet, said stake being located north 24° 30′ west 703 feet from a stone located in the strand of Sunset Beach, M. C. Gore's corner; running thence 5350 feet to the northern edge of the Intra-Coastal Waterway; thence north 77° east 2365 feet to a point; thence north 82° 15′ east 1015 feet to a point; thence north 86° east 1500 feet to an iron pipe, Mary Brooks' corner; thence south 30′ west 5952 feet to an iron pipe; thence south 45° west 2120 feet to a point; thence south 75° west 640 feet to the BEGINNING point, containing approximately 447.21 acres, subject to the navigation easement of the United States of America within the right-of-way boundaries of the Intra-Coastal Waterway, excepting from this description, however, the island known as Simmons Island."

The case was first tried at October 1967 Civil Session before Hall, J., and a jury. The record of that trial, now a part of the records of this Court, discloses the following: Evidence was offered by both plaintiff and defendants. At the close of all the evidence, plaintiff moved for nonsuit of the cross action in which defendants alleged they owned the marshlands in controversy. The court overruled plaintiff's motion and submitted four issues, to wit: (1) Are the defendants the owners and entitled to possession of the lands described in the complaint, except that portion thereof covered by navigable waters? (2) Is the plaintiff, the State of North Carolina, the owner and entitled to immediate possession of the lands as described in the complaint? (3) If so, have the defendants trespassed on said land, as alleged in the complaint? (4) Have the defendants obstructed the navigable waters of the State of North Carolina as alleged in the complaint?

The jury answered the first issue, "Yes"; they did not answer the second and third issues; and they answered the fourth issue, "No."

Upon the verdict, the court adjudged that defendants were the owners of the lands described in the complaint except the portion thereof covered by navigable waters; and that, as stipulated, Still Creek, Simmons Creek, the Eastern Channel and the Cut Off Creek, portions of which are within boundaries of the tract of land described in the complaint, were navigable waters. Upon plaintiff's appeal, the Court of Appeals affirmed. 2 N.C. App. 115, 162 S.E. 2d 579.

This Court, upon review on *certiorari, reversed* that portion of the decision of the Court of Appeals which affirmed the portion of the judgment of the superior court which adjudged that defendants were the owners of the lands described in the complaint. This Court affirmed that portion of the decision of the Court of Appeals which adjudged that defendants had not obstructed the navigable waters of the State of North Carolina as alleged in the complaint. The cause was remanded for further proceedings in the superior court to determine whether plaintiff, the State of North Carolina, was the owner and entitled to the immediate possession of the lands described in the complaint. *State v. Brooks,* 275 N.C. 175, 166 S.E. 2d 70.

At the commencement of the second trial (presently under review), Judge Bone, after reciting the prior proceedings referred to above, entered a judgment in which the court "ORDERED, ADJUDGED AND DECREED that said counterclaim of the defendants be, and it is hereby, dismissed." Defendants excepted. Thereafter a jury was duly selected, sworn and impaneled to try the issue stated in this Court's order of remand.

Plaintiff offered evidence consisting solely of a stipulation and of the map referred to therein. The record shows: "It is stipulated by Counsel for the plaintiff and counsel for the defendants that the property in question is located south of Seaside between the mainland and Ocean Isle Beach, represented on a map of a survey of H. R. Hewett dated 14 April 1964, recorded in Map Book 8 at Page 33, records of Brunswick County, and further, the map illustrates and *locates* the lands in dispute." (Our italics.)

The evidence offered by defendants, consisting of testimony and documentary evidence, will be referred to in the opinion.

The court submitted one issue, to wit: "Is the plaintiff, the State of North Carolina, the owner and entitled to the immediate possession of the land described in the complaint?" The court instructed the jury peremptorily as follows: "(I)f you believe the evidence which has been offered here by both sides, and if you find the facts to be as all the evidence tends to show, then you should answer that issue, 'Yes.'" Notwithstanding, the jury answered the issue, "No."

Thereupon, the court entered the following judgment:

"This cause coming on to be heard and being heard, and after the return of the verdict herein, the Plaintiff having moved that the verdict be set aside and judgment be entered in accordance with Plaintiff's motion for directed verdict.

"AND IT APPEARING to the Court, and the Court finding as a fact that the verdict is contrary to the evidence and should be set aside, and it further appearing to the Court that the Plaintiff's motion for directed verdict should be allowed and that Judgment should be entered in accordance with Plaintiff's motion for directed verdict;

"NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that the verdict is set aside and Judgment is hereby entered in accordance with Plaintiff's motion for directed verdict;

"AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Plaintiff, the State of North Carolina, is the owner and entitled to the immediate possession of the property described in the Complaint.

"Let the defendants be taxed with the costs."

Defendants excepted and appealed.

Attorney General Morgan, Assistant Attorney General Rich, and George Rountree, Jr., and John Richard Newton, of counsel, for plaintiff appellee.

E. J. Prevatte for defendant appellants.

BOBBITT, Chief Justice.

The allegations in their cross action did not disclose the basis on which defendants asserted ownership of the tract of land described in the complaint. When tried by Judge Hall, the case was submitted to the jury to determine whether defendants had acquired ownership by thirty years adverse possession under known and visible lines and boundaries. On appeal, the crucial question was whether defendants had offered evidence sufficient to withstand plaintiff's motion to nonsuit defendants' cross action. The Court of Appeals held the evidence was sufficient. This Court reversed that decision and in effect nonsuited defendants' cross action. The formal judgment to this effect by Judge Bone was not necessary but was appropriate. The exception to the entry thereof is without merit. The question now before us is whether plaintiff has established ownership of the described lands.

G.S. 146-79 in pertinent part provides: "In all controversies and suits for any land to which the State or any State agency or its assigns shall be a party, the title to such lands shall be taken and deemed to be in the State or the State agency or its assigns until the other party shall show that he has a good and valid title to such lands in himself."

Relying upon the quoted statutory provisions, plaintiff identified by stipulation and by map the tract of land in controversy and rested.

Defendants offered no evidence of adverse possession. They offered a grant dated April 9, 1770, signed "Wm. Tryon," from the State of North Carolina to "William Gaus." They offered various deeds which they contend connect them with the "Gause" grant. They offered testimony which they contend shows the land in controversy is included in the Gause grant and that all or part thereof is included in the various deeds in evidence.

In only two of the deeds offered by defendants is the land described in substantial accord with the description in the complaint and with the Hewett map. One is a deed dated August, 1967, from "ELIZABETH BROOKS, widow of Joseph William Brooks, ERIC BROOKS and wife, MARY ALICE, MAE B. ALBURY, widow, RUTH CREECH and husband, LONNIE, M. ROXIE NEWCOMER, widow, all heirs-at-law of Henry Gore, all of Dade County, Florida," to Joe C. Brooks, Sr., and wife, Ann Brooks. The other is a deed dated August 25, 1969, from "HENRY C. LONG and wife, AURIE M. LONG, of Tampa, Florida (the said Henry C. Long being an heir-at-law of the late Henry Gore)," to Joe C. Brooks, Sr., and wife, Ann Brooks. These two deeds were executed, acknowledged and recorded subsequent to the institution of this action, which was instituted on September 26, 1966. Seemingly, defendants now claim ownership by purchase from persons who purport to be heirs-at-law of Henry Gore.

[1] Assuming, without deciding, that the subject land is included in the Gause grant, defendants, in order to show they have a good and valid title to the subject land in themselves, must connect themselves with the Gause grant. They must carry the burden of proof "by showing a connected chain of title from the sovereign to (them) for the identical lands claimed by (them)." *Sledge v. Miller,* 249 N.C. 447, 451, 106 S.E. 2d 868, 872 (1959). Accord: *Gahagan v. Gosnell,* 270 N.C. 117, 119, 153 S.E. 2d 879, 880 (1967).

The land covered by the Gause grant is described therein as follows: "470 acres Brunswick being a tide marsh between Tubs Inlet and Mad Inlet joining and between Needham Gaus, John Simmons, *his own,* Peter Allston and Isaac Ludlams line, Beginning at a pine by the mouth of the Spring Branch on Peter Allstons line by the marsh side thence along with the up land and marsh joining Peter Allstons his own John Sim-

mons and Needham Gaus lines to a pine on the marsh side by Shelleys Point 12 poles to eastward of Need Gaus westermost corner which on a straight line is south 74 west 882 poles, thence south 120 poles to a stake by his beach tract; thence along said line or beach north 68 east 320 poles, thence north 76 east 560 poles to a stake by Tubs Inlet by the mouth of Morgans Creek; thence along by the side of said creek about north 49 east 40 poles to the Beginning." (Our italics.)

To show a connected chain of title from William Gause to them, defendants offered the following deeds:

1. A deed dated July 25, 1796, from William Gause to Samuel Gause which purports to convey "a certain plantation and tract of land" containing 610 acres, more or less, "that is to say, 110 acres on the Plead, also 200 acres *of* the marsh and islands Tubbs Inlet joining the above and granted by patent dated the 9th of April 1770 to said William Gause. Also 300 acres . . . . " (Our italics.)

2. A deed dated September 10, 1807, from Samuel Gause to William Tilly, which purports to convey "a plantation tract or parcel of land" containing 610 acres, more or less, "that is to say 110 acres on the head of the east branch of Little River granted by patent to John Ludlum the 26th day of May, 1757, 200 acres of the tide marsh and island near Tubbs Inlet, and joining the above, granted by patent bearing date 9th day of April, 1770, to William Gause." (Note: No reference is made to the additional 300 acres referred to in the deed from William Gause to Samuel Gause.)

3. A deed dated July 31, 1848, from Sterling B. Everett, Clerk and Master in Equity, to William Frink, which purports to convey a tract of land "near Shallotte and opposite Tubbs Inlet and known as the Tilly Place and Gold Plantation whereon Andrew L. Gold last resided and died, bounded on the south and west by the lands of William Frink, on the north and east by the lands of Henry Nutt, and on the south by the Atlantic Ocean, containing about 800 acres, more or less, ... " This deed recites that it was made pursuant to a sale under a decree of the Court of Equity of Brunswick County on petition of Eliza L. Gold, by her guardian and next friend, Bryan Gause, and Uriah Morse and wife, Margaret Ann Morse.

4. A deed dated June 7, 1853, from William Frink to Henry Gore which purports to convey a tract of land described therein as follows: "BEGINNING at a stake at the mouth of Roaring Branch run thence up said branch about North 16 West 140 poles to a pine; thence North 17 West 214 poles to a pine in a large swamp; thence South 53 West 168 poles to a red oak; thence North 1° 30′ East 230 Poles to a gum in the mouth of Walling Branch; thence up said branch crossing the public road to a stake in the head of said branch; thence South 69 West 232 poles to a stake in William Frink's line; thence with his line South 24 East 640 poles to a stake on the marsh; thence to Simmons Creek; thence with said Creek to the main river; thence with said river to opposite the mouth of Roaring Branch; thence to the Beginning, containing 1062 acres, more or less, known as the Gold Land, ... "

Two instances of the failure to show a connected chain of title from William Gause to defendants are pointed out in the following numbered paragraphs:

[2] 1. The description in each of two deeds, namely, the deed from William Gause to Samuel Gause and the deed from Samuel Gause to William Tilly, is patently and fatally defective. The only relevant portion of the description in each of these deeds is the reference to 200 acres *of* the land granted on April 9, 1770, to William Gause. The principles applicable in determining the sufficiency of the description are well established. *Hodges v. Stewart,* 218 N.C. 290, 10 S.E. 2d 723 (1940), and cases cited therein. "The description must identify the land, or it must refer to something that will identify it with certainty. Otherwise the description is void for uncertainty." *Deans v. Deans,* 241 N.C. 1, 84 S.E. 2d 321 (1954). Accord, *Carlton v. Anderson,* 276 N.C. 564, 173 S.E. 2d 783 (1970). Parol evidence is admissible to fit the description to the land. G.S. 8-39. "Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence *aliunde* to make the description complete is to be sought." *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889 (1939). Accord, *Baldwin v. Hinton,* 243 N.C. 113, 119, 90 S.E. 2d 316, 320 (1955). Thus, in *Hodges v. Stewart, supra,* the devise of 25 acres out of the home tract of 82 acres, the land devised to include "the dwelling and outhouses," was held void for vagueness and uncertainty in the description of the property.

[3] 2. There is *at least* one missing link in defendants' purported connected chain of title. "Where a link is missing the chain is severed, and no benefit can accrue from the earlier conveyances." *Sledge v. Miller, supra* at 452, 106 S.E. 2d at 873. The validity of the deed from Sterling B. Everett, Clerk and Master in Equity, to William Frink, is predicated on ownership of the 800 acres, more or less, described therein, by Eliza L. Gold, Uriah Morse and Margaret Ann Morse, or by one or more of them. The record is silent as to how these persons or any of them acquired title. Thus, there is a hiatus or break between William Tilly and William Frink. *Lindsay v. Carswell,* 240 N.C. 45, 81 S.E. 2d 168 (1954); *Sledge v. Miller, supra; Bowers v. Mitchell,* 258 N.C. 80, 128 S.E. 2d 6 (1962).

[4] Since defendants have failed to show they have a good and valid title to the subject land in themselves, our next inquiry is whether title vests in plaintiff, the State of North Carolina, *as a matter of law* by virtue of G.S. 146-79.

With reference to plaintiff's claim of ownership, we take judicial notice of the statutory provisions set forth and discussed below.

Chapter XXIII, Laws of 1837, created "The President and Directors of the Literary Fund of North Carolina," a body politic and corporate, and vested in it and its successors, in trust, as a public fund for education and the establishment of common schools, "all the swamp lands of this State, not heretofore duly entered and granted to individuals . . . . " These provisions of the 1837 Act were codified as Sections 1 and 3, Chapter 67, Revised Statutes of 1837, and as Sections 1 and 3, Chapter 66, Revised Code of 1854.

Chapter 200, Laws of 1881, created the State Board of Education, a body politic and corporate, and provided that it "shall succeed to all the powers and trusts of the 'president and directors of the literary fund of North Carolina.' " The 1881 Act provided further that the State Board of Education "shall likewise succeed to and have all the property of every kind and use, powers, rights, privileges and advantages which in anywise belonged or appertained to the said 'president and directors of the literary fund of North Carolina,' and may, in its own name, assert, use, apply and enforce the same." These provisions of the 1881 Act were codified as Sections 2503 and

2506, Chapter 15, Code of 1883; as Sections 4030 and 4033, Chapter 89, Revisal of 1905; and as Sections 5384 and 5385, Chapter 95, of the Consolidated Statutes of 1919.

Article IX, § 9, of the Constitution of North Carolina, as amended by the electorate in the General Election of November, 1942, provides in pertinent part: "The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted." (Note: The revised Constitution adopted by the electorate in the General Election of November, 1970, becomes effective on July 1, 1971.) Pursuant thereto, the General Assembly enacted Chapter 721, Session Laws of 1943, providing in pertinent part that the State Board of Education as constituted under Article IX, § 8, of the Constitution of North Carolina, as amended by the electorate in the General Election of November, 1942, "shall succeed to the title to all property, real and personal, and shall succeed to and exercise and perform all the powers, functions and duties . . . of the State Board of Education as constituted prior to the first day of April, one thousand nine hundred and forty-three, including the power to take, hold and convey property, both real and personal, to the same extent that any corporation might take, hold and convey the same under the laws of this State." These provisions of the 1943 Act were codified as Sections 115-19 and 115-19.1 of the General Statutes of 1943.

Chapter 1372, Session Laws of 1955, is entitled "AN ACT REWRITING, REARRANGING, RENUMBERING AND AMENDING CHAPTER 115 OF THE GENERAL STATUTES, AND REPEALING CERTAIN OBSOLETE SECTIONS THEREOF." Section 2, Article 2, Subchapter II, entitled "The State Board of Education," provides: "The powers and duties of the State Board of Education are defined as follows: 1. . . . . 2. Successors to powers of president of Literary Fund and to boards or commissions. The board shall succeed to all the powers and trusts of the president and directors of the Literary Fund of North Carolina; and to all the powers, functions, duties, and property of all abolished commissions and boards including the State School Commission, the State Textbook Commission, the State Board for Vocational Education, and the State Board of Commercial Education, including the power to take, hold and convey property, both real

and personal, to the same extent that any corporation might take, hold and convey the same under the laws of this State."

It appears from the foregoing that the title to swamp lands vested in "The President and Directors of the Literary Fund of North Carolina" by the 1837 Act and successive codifications thereof now vests in the State Board of Education. The title so vested related to "all of the swamp lands of this State, not heretofore duly entered and granted to individuals . . . . "

It has seemed appropriate to take notice of the statutes reviewed above in order to consider in proper historical perspective the statute now codified as G.S. 146-79.

Chapter XXXVI, Laws of 1842-1843, contains this provision: "Sec. 3. *Be it further enacted,* That in all controversies and suits at law, for any of the swamp lands in this State to which 'the President and Directors of the Literary Fund of North Carolina,' or their assigns shall be a party, the title to the said lands shall be taken and deemed to be in the said President and Directors of the Literary Fund of North Carolina, or their assigns until the other party shall shew, that he, she or they, have a good and valid title to the said lands in him, her or themselves." This provision of the Act of 1842-1843 is codified as Section 24, Chapter 66, Revised Code of 1854, which provides: "24. In all controversies and suits for any of the swamp lands, to which the said corporation ('The President and Directors of the Literary Fund of North Carolina') or their assigns shall be a party, the title to the said lands shall be taken and deemed to be in the corporation or their assigns, until the other party shall show that he hath a good and valid title to the said lands in himself."

Subsequent to the enactment of Chapter 200, Laws of 1881, referred to above, which created the State Board of Education, the quoted provision of the Act of 1842-1843 was codified as Section 2527, Chapter 15, Code of 1883, as follows: "In all controversies and suits for any of the swamp lands, to which the said board of education or their assigns shall be a party, the title to the said lands shall be taken and deemed to be in the said board or their assigns until the other party shall show that he hath a good and valid title to the said lands in himself." It is also so codified as Section 4047, Chapter 89, of the Revisal of 1905; as part of Section 7617, Chapter 128, of the Consoli-

dated Statutes of 1919; and as part of Section 146-90, Chapter 146, of the General Statutes of 1943 (Replacement 1958).

The statute now codified as G.S. 146-79 was enacted by Chapter 683, Session Laws of 1959, entitled, "AN ACT TO REWRITE CHAPTER 146 OF THE GENERAL STATUTES, ENTITLED 'STATE LANDS.'" G.S. 146-79 provides: "In all controversies and suits for any land to which the State or any State agency or its assigns shall be a party, the title to such lands shall be taken and deemed to be in the State or the State agency or its assigns until the other party shall show that he has a good and valid title to such lands in himself." The statute codified as G.S. 146-70, also enacted by the comprehensive 1959 Act, provides: "Every action or special proceeding in behalf of the State or any State agency with respect to State lands or any interest therein, or in respect to land being condemned by the State, shall be brought by the Attorney General in the name of the State, upon complaint of the Director of Administration." The complaint herein was verified by the Director of Administration.

Defendants rely largely on *Shingle Co. v. Lumber Co.*, 178 N.C. 221, 100 S.E. 332 (1919), where the plaintiffs offered a deed dated July 3, 1896, from the State Board of Education to one Carrier and mesne conveyances connecting themselves with it. The defendants offered: (1) A grant dated May 29, 1795, to one Allison; (2) mesne conveyances connecting themselves with the Allison grant; and (3) evidence of possession since 1906 of the lands covered by the Allison grant and by their mesne conveyances. Admittedly, the Allison grant covered the land in controversy. Rejecting the plaintiffs' contention, Justice Brown, for the Court, said:

"The statute conferring title to certain lands on the president and directors of the Literary Fund, to which the State Board of Education is the successor, excepts from its operation swamp lands 'heretofore entered and granted to individuals' (Rev. Sta., ch. 67, sec. 3), and it follows that when the defendants introduced a grant from the State to David Allison, issued in 1795, and mesne conveyances to the defendants, covering the land described in the complaint, they rebutted any presumption raised by statute in favor of the deed of the State Board of Education of date 3 July, 1896.

"The effect of the introduction of the grant and the other conveyances was not only to show that the land had been granted to an individual before the statute in favor of the Literary Fund was enacted, and therefore the title did not pass by the terms and language of the statute, but also to establish title in the defendants, nothing else appearing, and the statute in favor of the deeds of the State Board of Education provides that the presumption shall last only 'until the other party shall show that he hath a good and valid title to such lands in himself.' "

Decision in *Shingle Co. v. Lumber Co., supra,* depended upon whether the Board of Education had acquired a valid title at a tax sale subsequent to the Allison grant and prior to its deed to Carrier.

As indicated above, the evidence offered in *Shingle Co. v. Lumber Co., supra,* established that the defendants had a good and valid title to the lands in themselves unless the Board of Education had acquired a valid title under a tax deed prior to its conveyance to Carrier. Incidentally, the plaintiffs failed to show the Board of Education had acquired a good title by virtue of the tax sale.

Contrary to defendants' contention, the import of *Shingle Co. v. Lumber Co., supra,* is that, in an action such as this, title to the lands in controversy shall be taken to be in the State *unless* and *until* the other party shall show that he has a good and valid title to such lands *in himself.* In *Shingle Co. v. Lumber Co., supra,* the defendants, apart from their evidence as to possession, established the Allison grant and mesne conveyances of the land described therein from Allison to them. Here, assuming, without conceding, the subject land is included in the lands described in the Gause grant, defendants have failed to show the connected chain of title thereto from Gause to them. Thus, whether the evidence, competent or incompetent, offered by defendants was sufficient to afford an evidential basis for a finding that the subject land is included in the lands described in the Gause grant is immaterial. If G.S. 146-79 were interpreted otherwise, title to the subject land, under the circumstances of this case, would be in limbo. Presumably this statutory provision was enacted to avoid such an undesirable and chaotic result.

Since defendants failed to show they have a good and valid title to the subject land in themselves, and the identity and location of the subject land having been established by stipulation, as between plaintiff, the State of North Carolina, and defendants, G.S. 146-79 vests title in plaintiff. Thus, the court erred in submitting the issue to the jury. The question for decision being a matter of law for the court, the verdict of the jury had no legal significance and the court acted properly in setting it aside.

Obviously, the granting of plaintiff's motion for a directed verdict was a formality. For the reasons stated, plaintiff was entitled to judgment as a matter of law. Therefore, the judgment of Judge Bone is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. GRADY DELANEY WINFORD

No. 110

(Filed 10 June 1971)

1. **Criminal Law § 42; Evidence § 15; Homicide § 15— real evidence — proper identification**

When real evidence (i.e., the object itself) is offered into evidence, it must be properly identified and offered.

2. **Criminal Law § 42; Homicide § 20— knife found on deceased — identification**

In this homicide prosecution, a small pen knife found on the body of deceased was sufficiently identified for its admission in evidence, although the proper procedure for introduction of real evidence was not strictly followed.

3. **Criminal Law § 169— admission of evidence — evidence of like import admitted without objection — harmless error**

Defendant in a homicide prosecution was not prejudiced by error, if any, in admission of a pen knife found on the body of deceased, where a police officer testified, without objection, that the pen knife was found on the person of deceased and described the knife in detail.

4. **Homicide § 5— second degree murder defined**

An unlawful killing with malice is murder in the second degree.

5. Homicide § 14— intentional use of deadly weapon causing death — presumptions

If the State satisfies the jury beyond a reasonable doubt that a defendant intentionally used a deadly weapon and thereby caused the death, the presumptions arise that the killing was (1) unlawful and (2) with malice, and nothing else appearing, defendant would be guilty of murder in the second degree.

6. Homicide § 24— intentional use of deadly weapon causing death — erroneous instruction favorable to defendant

Erroneous instruction that the law raises two presumptions "when it is admitted or proven that defendant *intentionally killed* the deceased with a deadly weapon" was not prejudicial to defendant, since it placed upon the State the added burden of proving a specific intent to kill.

7. Homicide § 28— instructions — use of deadly weapon to repel simple assault

Instruction that under ordinary circumstances the law justifies or excuses the use of a deadly weapon to repel a simple assault is erroneous.

8. Homicide § 28— instructions — withdrawal from affray — self-defense

The evidence in this homicide prosecution did not warrant an instruction on the principle of the right to kill in self-defense which arises when a defendant at fault in bringing on a difficulty withdraws from the combat and so notifies the deceased.

9. Homicide § 28— instructions — facts reducing crime to manslaughter — burden on defendant

Instruction in this homicide prosecution which placed the burden on defendant to show beyond a reasonable doubt facts which would reduce the crime from second degree murder to manslaughter constituted prejudicial error even though the court thereafter correctly and fully charged on the defendant's burden, since the jury may have acted upon the incorrect instruction.

10. Criminal Law § 118— error in statement of contentions — necessity for objection

While objections to a statement of contentions ordinarily must be brought to the court's attention in time for correction, when the misstatement presents an erroneous view of the law or an incorrect application of it, counsel is not required to bring the inadvertence to the court's attention.

11. Criminal Law § 118; Homicide § 23— instructions — contentions of State — use of "murder" in lieu of "manslaughter"

Instruction that the State contended that "defendant is guilty of murder in the second degree, or at least is guilty of murder" might have created some confusion in the minds of the jurors by the misuse of "murder" in lieu of "manslaughter."

12. Homicide § 24— instructions — proximate cause — self-defense

In this second degree murder prosecution, the trial court did not err in failing to instruct the jury that it should return a verdict of not guilty if the State had failed to satisfy it beyond a reasonable doubt that deceased came to his death as a proximate result of the pistol wound inflicted by defendant, or in failing to instruct that the jury should return a verdict of not guilty if the State had failed to satisfy it beyond a reasonable doubt that defendant was either guilty of second degree murder or manslaughter, where defendant had judicially admitted that deceased's death was proximately caused by a bullet inflicted by defendant, and the court correctly instructed the jury as to self-defense, the only defense or excuse presented by the facts of the case.

APPEAL by defendant from *Seay, J.*, 25 May 1970 Session of IREDELL Superior Court.

Defendant was charged in a bill of indictment with the murder of Clayton McCombs. When the case came on for trial, the solicitor announced in open court that he would try defendant for second degree murder or manslaughter, as the evidence might warrant. Defendant entered a plea of not guilty.

The State offered evidence tending to show that on the night of 18 January 1970 defendant and Clayton McCombs engaged in an argument at the Elks Club in Mooresville, North Carolina. McCombs left the club, and later in the evening, at around 10:00 o'clock, was sitting in the right-hand front seat of his automobile in front of the club with his wife and five children. Winford came to the automobile with a .25 caliber automatic pistol in his hand and opened the door on the driver's side. McCombs left the car and ran towards Winford. They "tusseled" to the highway, where several shots were fired and McCombs fell.

McCombs' brother-in-law, O'Neal Sanders, took the pistol from defendant and later delivered it to the police. It was stipulated that McCombs died from "bullet wounds fired from a pistol." Police officers found a small unopened pen knife in deceased pocket, which knife they described as being about three inches long when the blade was open.

Defendant offered evidence tending to show that he engaged in an argument with deceased at the Elks Club at about 9:00 o'clock p.m., and at that time McCombs threatened him with a long-bladed "Barlow" knife; that McCombs was taken

out of the building by friends, but he kept trying to go back in the building. After about ten minutes defendant left the club by a rear door and returned to the premises about thirty minutes later to pick up his brother. As defendant walked up the driveway of the club, he asked O'Neal Sanders where McCombs was; whereupon McCombs answered, "Here I am," and jumped from his automobile, swinging a long-bladed "Barlow" knife. Defendant told him to get back, but deceased pressed the attack, cutting defendant's right hand. Defendant retreated, pulled his .25 caliber pistol, and shot it in the air, again telling McCombs to get back. Defendant backed down the driveway of the club, across the street to a ditch, where he fired the pistol, striking deceased, who fell into the road, still grasping the knife. Defendant fired a total of five shots. He denied opening the door of the automobile with pistol in hand. One of defendant's witnesses, however, testified that defendant did enter the car and that deceased's wife said, "Don't shoot him here with the chaps here." Whereupon, defendant backed out of the automobile and met deceased at its rear, where they began to fight.

Defendant's testimony was partially corroborated by the wife of deceased. The long knife described by defendant was not offered into evidence.

The State, in rebuttal, offered testimony contradicting Mrs. McCombs and, over objection, introduced the small pen knife previously described by the police officers.

The jury returned a verdict of guilty of second degree murder, and from judgment imposed defendant gave notice of appeal. Defendant's counsel was unable to procure a transcript of the trial proceedings from the court reporter, and obtained two extensions of time for serving the case on appeal. On 22 October 1970 defendant filed a motion for a new trial on the ground that he had been unable to obtain the transcript and that without it he could not properly prepare his appeal. Disposition of this motion and the manner of obtaining the transcript were detailed in the *per curiam* opinion at 278 N.C. 67, 178 S.E. 2d 777. This Court remanded the case to Iredell Superior Court to the end that defendant could, if so advised, perfect his appeal. Defendant duly perfected his appeal and the case was calendared and argued at the May 1971 Session of this Court.

Attorney General Morgan, Assistant Attorney General Briley, and Walter E. Ricks III, Associate Attorney, for the State.

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

BRANCH, Justice.

Defendant assigns as error the admission into evidence, over objection, of a small pen knife allegedly found on the body of deceased. Defendant argues that the State failed to lay the necessary foundation before offering the knife into evidence and that the trial judge failed to "adequately discuss the evidence as to the knife." The record shows the following:

COURT: Any further evidence from the State?

MR. STAGG: Yes, we'd like to offer into evidence State's Exhibit 7 and marked for identification, which is a pocket knife found on the body of the deceased, Clayton McCombs.

MR. HOMESLEY: Objection.

COURT: Overruled. State's Exhibit 7 is received into evidence.

MR. HOMESLEY: We take exception to that, your Honor.
EXCEPTION # 7

[1] Any evidence which is relevant to the trial of a criminal action is admissible. *State v. Macklin,* 210 N.C. 496, 187 S.E. 785. However, when real evidence *(i.e.,* the object itself) is offered into evidence, it must be properly identified and offered. *State v. Eagle,* 233 N.C. 218, 63 S.E. 2d 170.

In Stansbury, North Carolina Evidence, § 26, p. 47, it is stated:

" . . . Even if the evidence to be offered is a tangible object, such as a writing, a weapon, or a photograph, it must first be authenticated or 'identified' by a witness, and this can be done only by presenting the object to the witness and asking him if he recognizes it and, if so, what it is."

In instant case defendant testified that he shot deceased in self-defense because deceased was attacking him with a

long-bladed "Barlow" knife. The "Barlow" knife was not produced at the trial. Thus, the knife found on the person of deceased contradicted testimony of defendant and was relevant to the trial of this criminal action.

[2, 3] Although the procedures approved for introduction of real evidence were not strictly followed, the knife was sufficiently identified before it was offered. Even had there been error in the former introduction of the knife, it would not have been prejudicial since Police Officer Burnett testified, without objection, that the small pen knife was found on the person of deceased, and he described the knife in detail. The admission of evidence, over objection, where testimony of the same import has been previously introduced without objection, is ordinarily not prejudicial error. *State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4; *State v. Creech,* 265 N.C. 730, 145 S.E. 2d 6.

The trial judge did not commit error in allowing the pen knife to be introduced into evidence.

Defendant assigns as error the Court's definition of second degree murder as contained in the following portion of the charge:

> (C) When it is admitted or proven that the defendant *intentionally killed* the deceased with a deadly weapon, or that the defendant intentionally inflicted the wound which—with a deadly weapon, that directly resulted in the death of the deceased, the law raises two presumptions against the defendant. First of all, it raises the presumption that the killing was unlawful, and, second, the law raises the presumption that it was done with malice. And an unlawful and intentional killing with malice is murder in the second degree. And, when that is shown, the law places upon the defendant the burden of proof and to the satisfaction of the jury, not by the weight, the greater weight of the evidence and not beyond a reasonable doubt, but simply to the satisfaction of the jury, that legal provocation that will derive the term of "malice" and thus reduce it to manslaughter, or if it disproves it altogether on the ground of self-defense. (D)
>
> Defendant EXCEPTS to that portion of the charge between (C) and (D). EXCEPTION # 9

(E) In an intentional killing, if it is established that the killing was from intentional use of a deadly weapon, then the defendant is guilty of murder in the second degree, unless he can satisfy the jury of the truth of the facts which justify his act and mitigate it to manslaughter. The burden is on the defendant to establish the facts to the satisfaction of the jury, unless they arrive out of the evidence, that he is speaking the truth. (F)

Defendant EXCEPTS to that portion of charge between (E) and (F). EXCEPTION #10

As to the offense charged, (G) [I]f the defendant, out of anger, because of ill will or malice which he harbored against the deceased, unlawfully, that is without justifiable or legal excuse, intentionally shot the deceased with a .25 caliber automatic pistol, and killed the deceased, then the defendant would be guilty of murder in the second degree; and if the jury shall so find beyond a reasonable doubt, it would be the duty of the jury to return a verdict of guilty of murder in the second degree. (H).

Defendant EXCEPTS to that porton of charge between (G) and (H) EXCEPTION # 11.

In determining the guilt or innocence of the defendant as to that charge, it is the duty of the jury to consider all of the evidence, facts and circumstances growing out of the evidence, if you find and—if you find from the evidence and beyond (I) a reasonable doubt that the defendant intentionally shot the deceased in the chest with a .25-caliber automatic pistol, a deadly weapon, and that he killed the deceased, or that the defendant intentionally, with a deadly weapon, inflicted the wound which resulted in the death of the deceased, he is presumed to be guilty of murder in the second degree. (J)

Defendant EXCEPTS to that portion of charge between (I) and (J). EXCEPTION # 12.

[4] An unlawful killing with malice is murder in the second degree. *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328.

[5] If the State satisfies the jury beyond a reasonable doubt that a defendant intentionally used a deadly weapon and thereby

caused the death, then two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice; *and nothing else appearing,* the defendant would be guilty of murder in the second degree. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Mercer, supra.*

The correct principles of law concerning these presumptions were stated in *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322, where Bobbitt, J. (now C. J.), speaking for the Court, stated:

> "When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. In *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387, where the defense was that an *accidental* discharge of the shotgun caused the death of the deceased, it was stated that the presumptions arise only when there is an *intentional killing* with a deadly weapon; and since the *Gregory case* it has been often stated that these presumptions arise only when there is an intentional killing with a deadly weapon. But the expression, *intentional killing,* is not used in the sense that a specific intent *to kill* must be admitted or established. The sense of the expression is that the presumptions arise when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted. *S. v. Cephus,* 239 N.C. 521, 80 S.E. 2d 147; *S. v. Wingler,* 238 N.C. 485, 78 S.E. 2d 303; *S. v. Jones,* 188 N.C. 142, 124 S.E. 121. A specific intent *to kill,* while a necessary constitutent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. *S. v. Quick,* 150 N.C. 820, 64 S.E. 168. The presumptions do not arise if an instrument, which is *per se* or may be a deadly weapon, is not intentionally used as a weapon, *e.g.,* from an accidental discharge of a shotgun."

[6] In instant case the trial judge in the challenged portion of the charge stated that "when it is admitted or proven that defendant *intentionally killed* the deceased with a deadly weapon . . . the law raises two presumptions . . . " In the same para-

graph the Judge charged correctly. The challenged definition does not conform to the one approved by this Court; however, the erroneous definition, standing alone, does not constitute prejudicial error since the definition complained of placed upon the State the added burden of proving a specific intent to kill. This is patently favorable to defendant, and defendant cannot ordinarily complain of instructions favorable to him. *State v. Price,* 271 N.C. 521, 157 S.E. 2d 127. The only possible vice in this instruction is that the giving of almost contemporaneous instructions—one correct and one incorrect—may have caused confusion in the minds of the jurors.

Defendant further contends that the effect of the above quoted portion of the charge is to require at least a finding of murder in the second degree, when it is proven that defendant with a deadly weapon intentionally inflicted the wound which proximately caused deceased's death.

It is true that when the presumptions of malice and an unlawful killing arise, nothing else appearing, defendant would be guilty of murder in the second degree. However, it is incumbent upon the trial judge to instruct the jury that the law casts upon the defendant the burden of showing to the satisfaction of the jury, not beyond a reasonable doubt, but simply to satisfy the jury as to legal provocation that would deprive the crime of malice and thus reduce it to manslaughter, or that will excuse it on some ground recognized in law as a complete defense. *State v. Mercer, supra; State v. Franklin,* 229 N.C. 336, 49 S.E. 2d 621.

[7] Here, the judicial stipulations and defendant's own testimony establish that defendant intentionally shot McCombs with a .25 caliber pistol, inflicting wounds which proximately caused his death. There was competent evidence showing legal provocation which could have satisfied the jury that defendant was only guilty of manslaughter. Likewise, there was competent evidence which might have satisfied the jury that defendant acted in self-defense so as to require a verdict of not guilty. This record contains adequate charges as to self-defense and as to the legal provocation which could reduce the verdict from second degree murder to manslaughter. Defendant, nevertheless, points to that portion of the charge which states

"Under ordinary circumstances the *law justifies or excuses the use of a deadly weapon to repel a simple assault.* This rule does not apply, however, where, from the testimony, a jury may find that the use of such weapon was justifiably, reasonably and necessarily used to save the person assaulted from great bodily harm or death, which person, having been in no fault himself, in bringing on the difficulty. The right of self-defense may, in exceptional cases, arise conditions of the assault, the position of the parties, and the size and strength of the parties as proven by the evidence, to satisfy the jury, that the danger of death or great bodily harm was eminent, where a defendant or an individual is without fault in bringing on the assault and a murderous or felonious assault is made upon him, that is, assault with intent to kill, is it—he is not required to retreat, but may stand his ground. . . . " (Emphasis added.)

Obviously, the first sentence above quoted is erroneous, but again appears to be non-prejudicial when considered out of context. However, some contradiction and confusion arises when the whole paragraph is contextually read.

[8] Defendant contends that the trial court erred in that it "failed to instruct on the principle of the restoration of the right to kill in self-defense which arises where there is evidence that a defendant at fault in bringing on a difficulty withdrew from the combat and so notified the deceased."

This assignment of error would have merit if the facts show that defendant withdrew from the conflict and so notified the deceased.

In the case of *State v. Kennedy,* 169 N.C. 326, 85 S.E. 42, the State's evidence tended to show that the defendant went into the deceased's store with pistol in hand, quarreled with decedent, and then shot and killed him. The defendant offered evidence tending to show that he was first assaulted by deceased and his brother, who beat him to his knees, and the defendant thereupon stated, "Boys, get off me," three or four times, then threatened to shoot, and when the assault continued, did shoot and kill the deceased. There, speaking to the question of withdrawal after provocation upon plea of self-defense, Justice Hoke stated:

"In *S. v. Brittain,* 89 N.C. 481, and in reference to defendant's first exception, this Court held: 'Where a prisoner makes an assault upon A. and is reassaulted so fiercely that the prisoner cannot retreat without danger of his life, and the prisoner kills A.: *Held,* that the killing cannot be justified upon the ground of self-defense. The first assailant does the first wrong and brings upon himself the necessity of slaying, and is therefore not entitled to a favorable interpretation of the law.' . . .

". . . .

"It may be well to note that the term 'quitting the combat,' within the meaning of these decisions, does not always and necessarily require that a defendant should physically withdraw therefrom. If the counter attack is of such a character that he cannot do this consistently with safety of life or limb, such a course is not required; but before the right of perfect self-defense can be restored to one who has wrongfully brought on a difficulty, and particularly where he has done so by committing a battery, he is required to abandon the combat in good faith and signify this in some way to his adversary. The principle here and the basic reason for it is very well stated in case of *Stoffer v. The State,* 15 Ohio St., 47: 'There is every reason for saying that the conduct of the accused relied upon to sustain such a defense must have been so marked in the matter of time, place, and circumstance as not only to clearly evince the withdrawal of the accused in good faith from the combat, but also as fairly to advise his adversary that his danger has passed and to make his conduct thereafter the pursuit of vengeance rather than measures taken to repel the original assault.' And when, as heretofore shown, the counter assault is so fierce that the original assailant cannot comply with this requirement, then, in the language of *Lord Hale,* 'He that first assaulted hath done the first wrong and brought upon himself this necessity, and shall not have the advantage of his own wrong to gain the favorable interpretation of the law, that that necessity which he brought on himself should, by way of interpretation, be accounted a flight to save himself from murder or manslaughter."

In 40 C.J.S., Homicide, Section 121, p. 995, we find the following:

> " . . . In order that the right of self-defense may be restored to a person who has provoked or commenced a combat, he must attempt in good faith to withdraw from the combat. He must also in some manner make known his intention to his adversary; and if the circumstances are such that he cannot notify his adversary, as where the injuries inflicted by him are such as to deprive his adversary of his capacity to receive impressions concerning his assailant's design and endeavor to cease further combat, it is the assailant's fault and he must bear the consequences. As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault."

See also *State v. Correll,* 228 N.C. 28, 44 S.E. 2d 334; *State v. Robinson,* 213 N.C. 273, 195 S.E. 824; *State v. Tate,* 161 N.C. 280, 76 S.E. 713; *State v. Cox,* 153 N.C. 638, 69 S.E. 419; *State v. Gadwood,* 342 Mo. 466, 116 S.W. 2d 42.

[8] The facts presented by this record do not show that defendant attempted, in good faith, to withdraw from the affray, or that defendant clearly indicated to McCombs an intention so to withdraw. Thus, the trial judge was not required to instruct on this facet of the law of self-defense.

Defendant's 14th Assignment of Error is that the trial judge dwelt continually upon "the burden which defendant had to bear, thereby indicating that defendant had to prove his innocence and implanted in the minds of the jurors that the burden of proof lay upon defendant." This Assignment of Error presents one of defendant's more serious contentions.

We quote a portion of the charge pertinent to decision of this Assignment of Error:

> "Now, upon the consideration of all the evidence, if you find that the defendant unlawfully and intentionally killed the deceased with a deadly weapon, *and if you find, so find beyond a reasonable doubt,* that the defendant has satisfied you, the *burden being on him to so satisfy you,* that the killing was done without malice, then it would be your duty to acquit the defendant on the charge of murder in the second degree, *and if he has so satisfied you* that the killing of the deceased was done without malice, then it

would be your duty to consider whether this defendant is guilty of manslaughter." (Emphasis added.)

In the case of *State v. Howell,* 239 N.C. 78, 79 S.E. 2d 235, the defendant assigned as error this portion of the trial judge's charge:

> "I charge you, gentlemen, that if you find from the evidence or from the admissions of the defendant *beyond a reasonable doubt,* that the defendant, Harry Howell, killed the deceased, Larry Graham, that he killed him intentionally, that he killed him in the heat of passion by reason of anger suddenly aroused on account of the assault which deceased was making upon the defendant, Harry Howell, and before a sufficient time had elapsed for the passion to subside and reason to resume its habitual control, then the defendant would be guilty of manslaughter, and if you so find it would be your duty to render a verdict of guilty of manslaughter against the defendant unless the defendant has satisfied you that he killed the deceased, Larry Graham, in self-defense."

The Court, speaking through Parker, J. (later C. J.), held the charge to be prejudicial error, and stated:

> " . . . [I]n applying the law to the facts the court charged the jury that the defendant *must show beyond a reasonable doubt* facts and circumstances sufficient to reduce the crime to manslaughter, and in so charging the court committed prejudicial error.
>
> . . . .
>
> "Even if the court before and after in its charge stated the general principle of law correctly that the defendant must show to the satisfaction of the jury facts and circumstances sufficient to reduce the crime to manslaughter, yet that did not cure the error in the vital part of its charge when it applied the law to the facts, by requiring the defendant to show those facts beyond a reasonable doubt. This Court has uniformly held that where the court charges correctly in one part of the charge, and incorrectly in another part, it will cause a new trial, since the jury may have acted upon the incorrect part of the charge. *S. v. Morgan,* 136 N.C. 628, 48 S.E. 670; *S. v. Isley,*

221 N.C. 213, 19 S.E. 2d 875; *S. v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685; *S. v. McDay,* 232 N.C. 388, 61 S.E. 2d 86; *S. v. Stroupe,* 238 N.C. 34, 76 S.E. 2d 313."

See also: *Graham v. R. R.,* 240 N.C. 338, 82 S.E. 2d 346; *State v. Hardison,* 257 N.C. 661, 127 S.E. 2d 244.

[9] The charge here complained of clearly places the burden on defendant to show beyond a reasonable doubt facts which would reduce the charge from second degree murder to manslaughter. This is error and is not cured by the fact that the trial judge did thereafter correctly and fully charge as to the burden which defendant must assume in order to reduce the charge from second degree murder to manslaughter.

In giving the State's contentions, the trial judge stated:

"Now, in this case the State says and contends that you and each of you are to be satisfied from the evidence and beyond a reasonable doubt that the defendant is guilty of murder in the second degree, or at least is guilty of murder."

[10] Objections to a statement of contentions must be brought to the court's attention in apt time to allow correction. *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477. However, when the misstatement presents an erroneous view of the law or an incorrect application of it, counsel is not required to bring the inadvertence to the court's attention. *Baxley v. Cavenaugh,* 243 N.C. 677, 92 S.E. 2d 68; *State v. Gause,* 227 N.C. 26, 40 S.E. 2d 463; *State v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387.

[11] Although the trial judge in other parts of the charge had clearly stated that the only verdicts to be considered by the jury were second degree murder, manslaughter, or not guilty, the misuse of "murder" in lieu of "manslaughter" might well have created some degree of confusion in the minds of the jurors.

[12] Defendant, relying on *State v. Ramey,* 273 N.C. 325, 160 S.E. 2d 56, contends that the trial judge erred by not specifically charging in his final mandate to the jury that if the State had failed to satisfy the jury beyond a reasonable doubt that deceased came to his death as the proximate result of the pistol wound inflicted by defendant, that they should return a verdict of not guilty.

Admittedly, it would have been the better practice to clearly charge in the final mandate as to all possible verdicts, however, it should be noted that instant case is distinguishable from *Ramey* in that in *Ramey* there was no judicial admission that the deceased's death was proximately caused by a bullet wound inflicted by the defendant. Here there was such admission.

Defendant further contends that the trial judge in his final mandate should have stated that if the State had failed to satisfy the jury beyond a reasonable doubt that defendant was either guilty of second degree murder or of manslaughter, that it should return a verdict of not guilty. In this case, when the trial judge correctly stated the law as to self-defense and instructed the jury that if they found to their satisfaction that defendant acted in self-defense they would return a verdict of not guilty, that he thereupon instructed as to the only defense or excuse presented by the facts of this case. We therefore conclude that neither of these contentions concerning the trial judge's final mandate to the jury would, standing alone, constitute prejudicial error.

It should be noted that the trial judge clearly charged as to the proper burden of proof required of the State, and that in other portions of the charge he correctly instructed as to the burden to be placed upon defendant to show self-defense or to show legal provocation which might have reduced the charge from murder in the second degree to manslaughter. The clear and correct statements of the applicable law in these portions of the charge compel the conclusion that errors of transcription created the erroneous and conflicting statements found in the record. In this connection it should be remembered that this Court and defendant's attorneys encountered tremendous difficulty in obtaining the transcript from the court reporter. Perhaps this difficulty in obtaining the transcript also deprived the Solicitor for the State of adequate opportunity to discover, before he agreed to the record and case on appeal, the erroneous additions and omissions which create an awkward and confusing charge.

This Court, however, is bound by the record as certified and judicially knows only that which appears of record. *Tomlins v. Cranford,* 227 N.C. 323, 42 S.E. 2d 100; *State v. Morgan,* 225 N.C. 549, 35 S.E. 2d 621.

This record convinces us that the total charge did not aid the jury in understanding the precise material issues necessary for determination of their verdict.

We have not discussed the remaining assignments of error since in all probability they will not occur upon a new trial.

For reasons stated, there must be a

New trial.

STATE OF NORTH CAROLINA v. LEO DUBOISE

No. 4

(Filed 10 June 1971)

1. **Criminal Law § 115— instructions on lesser degrees of crime charged**

Where it is permissible under the bill of indictment to convict defendant of a lesser degree of the crime charged, and there is evidence to support a milder verdict, defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions.

2. **Criminal Law §§ 115, 172— error in failure to submit lesser degrees — verdict of guilty**

Error in failing to submit the question of defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged.

3. **Criminal Law § 115— failure to instruct on unsupported lesser degree**

Where all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show commission of a crime of less degree, the court correctly refuses to charge on the unsupported lesser degree.

4. **Homicide § 6— manslaughter defined**

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

5. **Homicide § 5— second degree murder defined**

Murder in the second degree is the unlawfull killing of a human being with malice but without premeditation and deliberation.

6. **Homicide § 4— first degree murder defined**

Murder in the first degree is the unlawfull killing of a human being with malice and with premeditation.

7. Homicide § 14— intentional use of deadly weapon causing death — presumptions

The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful and (2) done with malice, and an unlawful killing with malice is murder in the second degree. Expressions in *State v. McNeil,* 229 N.C. 377, that the presumptions arise only when there is an "intentional killing" with a deadly weapon are disapproved.

8. Homicide § 30— failure to instruct on manslaughter

In this first degree murder prosecution, the trial court did not err in failing to instruct the jury on the issue of manslaughter where all the evidence tended to show that, without the slightest provocation, defendant over a period of hours assaulted a helpless victim time after time with various deadly weapons and thereby caused the victim's death, since the evidence affords no basis upon which defendant could be found guilty of manslaughter.

9. Homicide § 14— burden of proving justification or mitigation

Where presumptions arose upon the State's evidence that a killing was unlawful and done with malice, it was incumbent upon defendant to satisfy the jury of the truth of facts which would mitigate the killing to manslaughter or excuse it altogether.

10. Homicide § 18— premeditation and deliberation

Premeditation and deliberation necessary in first degree murder may be inferred from the vicious and brutal circumstances of the homicide, e.g., lack of provocation, threats before and during the occurrence, infliction of lethal blows after the victim had been felled and rendered helpless, and conduct of the defendant before and after the killing.

11. Homicide § 18— killing by torture — premeditation and deliberation

When a homicide is perpetrated by means of torture, premeditation and deliberation are presumed and defendant is guilty of murder in the first degree. G.S. 14-17.

12. Homicide § 30; Criminal Law § 115— instruction that manslaughter does not arise on evidence — expression of opinion

It is not an expression of opinion, but rather the duty of the trial judge, where the evidence so warrants, to inform the jury that manslaughter does not arise on the evidence in the case.

13. Criminal Law § 84; Searches and Seizures § 1— unreasonable searches and seizures — articles in plain view

The constitutional guaranty against unreasonable searches and seizures applies only in those instances where the seizure is assisted by a necessary search and does not prohibit a seizure without a warrant where the contraband is fully disclosed and open to the eye and hand.

State v. Duboise

14. Criminal Law §§ 77, 169— erroneous admission of evidence favorable to defendant

Defendant cannot complain of the admission of testimony by police officers as to various self-serving declarations made by defendant to the officers, all of which tended to exonerate him, and which were incompetent, even for corroborative purposes, since defendant did not take the stand, the admission of such testimony being favorable to defendant.

APPEAL by defendant from *McKinnon, J.*, May 1962 Criminal Term COLUMBUS Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of David Preston Williams in Columbus County on 8 December 1961.

The jury returned a verdict of guilty and recommended life imprisonment. Judgment was pronounced accordingly and defendant gave notice of appeal to the Supreme Court. Thereafter, allegedly with defendant's knowledge, consent and approval, the appeal was withdrawn by his court-appointed counsel, John A. Dwyer and Richard E. Weaver of the Columbus County Bar. Defendant was committed to prison and is now serving the sentence imposed.

After six petitions to the United States District Court for writ of *habeas corpus* were denied by Butler, District Judge, the Fourth Circuit Court of Appeals vacated the sixth order dismissing the petition and remanded the case to Judge Butler for consideration of three allegations made by petitioner. (See *Duboise v. Mahoney,* No. 13287, Memorandum Decision, 4th Cir., April 28, 1969). These allegations were: (1) That evidence introduced at his trial was obtained as a result of an unlawful search and seizure; (2) that a statement improperly extracted from him was introduced into evidence at his trial; and (3) that his direct appeal was withdrawn without his knowledge or consent.

Pursuant to the mandate of the Fourth Circuit, Judge Butler conducted an evidentiary hearing on 5 March 1970 to consider the three allegations. Following the hearing, Judge Butler concluded that defendant's appeal to the Supreme Court of North Carolina had not been withdrawn in conformity with the requirements of G.S. 15-84, and that he was entitled to an appeal on the merits within a reasonable time. Decision on the

other two allegations was reserved pending state appellate review. We allowed *certiorari* and the case is here for review on the merits.

Willa Dean Simmons was the State's principal witness. Her testimony tends to show the following facts. She had been living in adultery with the defendant at the house on Snake Island Road, where the killing occurred, since November 1960. In January 1961 David Preston (Pop) Williams, the deceased, began staying at this home. Six weeks before Williams was killed, Herman Lewis (Pee Wee) Watson began staying there. Williams and Watson helped defendant make and sell liquor, receiving as wages only the food they ate and the liquor they drank.

On 8 December 1961 Williams and Watson arose early and went to defendant's blockade still which was located in the woods about a mile from the house. Watson returned about 3:45 p.m. and brought one case of whiskey with him. Defendant inquired about the remainder of the whiskey and Watson "said he supposed the rest was with Pop." Soon thereafter, Williams came out of the woods and into the yard and defendant inquired about the remainder of the whiskey. Williams said, "Come with me and I'll show you where it is at." Defendant had been drinking and thereupon began kicking and cursing Williams. Defendant knocked him down, tore off his clothing, beat him with his fists, and then held a live electric wire against his flesh. Defendant told Williams to get up but he was unable to do so. While Williams was lying flat on his back, defendant struck him in the chest two or three times with an eight pound maul.

By this time Williams was completely helpless. Defendant seemed infuriated that Williams would not get up when commanded to do so. Willa Dean Simmons suggested that they should take Williams in the house because it was cold and he was freezing. Defendant said he would warm him up and thereupon poured kerosene into a weed burner, lighted it, and turned it on so that the flame was shooting out of the burner about a foot or more, and burned Williams all over his body, singeing the hair on his head to its roots, finally placing the burner under Williams' legs in the area of the buttock and walked away, leaving it there. This torture continued for an hour or more, during which time Willa Dean Simmons was

begging defendant to cease, was attempting to aid Williams, and was trying to put out the flame in the weed burner. Defendant was angry because Williams had left some of the liquor in the woods and was angry at Willa Dean Simmons because of her acts of mercy. He then poured alcohol over Williams' body, said he always knew that fire would move a dead man, and forced Willa Dean Simmons to put a match to the alcohol. It caught fire and burned across the bottom of his stomach.

Finally, Willa Dean Simmons put Williams to bed and went to a store to buy ointments for his burns. She returned and put medication on his back where he was beaten and applied pine oil to the burns on his body and legs. She told defendant that Williams' ribs were broken, that he was going to die, and requested permission to get a doctor. Defendant said "aw hell, I have heard broke ribs and doctor until I am sick of it. . . . I am going to doctor your head, if you don't shut up . . . just take a drink and shut up." Thereupon Willa Dean Simmons replied, "I might as well join the crowd, get drunk and go to bed. One passing out at the table, and you crazy and Pop beat and burned to death"; and she drank about a half pint of whiskey and went to bed.

The next morning Williams was dead. Defendant instructed Watson to rake the yard and he did so, burning the pieces of clothing belonging to Williams. Defendant thereupon instructed Watson and Willa Dean Simmons to say that Williams came home in his bruised, beaten, and burned condition; that defendant was in bed and didn't know anything about it—"just say that Pop came home in that condition." Defendant and Willa Dean Simmons then went to town to get the undertaker. She told the undertaker and the coroner what defendant had instructed her to say. Later, however, she told SBI agents substantially what is narrated above and contained in her testimony in court. She told the officers she was afraid of defendant and asked for protective custody.

A. D. Peacock, the undertaker, testified that on 9 December 1961 at 10 a.m. defendant came to his funeral home and asked him if he would like to have some business, stating that there was a dead man at his house; that the man had fallen off a bed, probably hurt himself and died, and he found him the

next morning; that the dead man had a fight with some boys the night before. He further testified that he later embalmed the body of David Preston Williams at which time he found numerous burns and bruises on it.

J. B. Long, the coroner, testified that on 9 December 1961, he went to defendant's home and there saw the body of David Preston Williams. The feet were under the edge of the bed and the head almost out the door. The body was dressed in a pajama top only. He observed burns and abrasions all over the body. The hair was singed off the top of the head. The coroner had the body delivered to the funeral home where he examined it more thoroughly and then had it removed to the Columbus County Hospital. There Dr. George Lumb, a pathologist, performed an autopsy.

Dr. Lumb testified that the body was covered from head to foot, both in front and behind, with small lacerations and abrasions; that the abrasions were apparently second-degree burns and these were all over the body so it was impossible to count them; that a larger area, approximately eight inches by five inches, in the general area below the buttock was definitely burned; that there was a severe burn on the left forehead at the hairline and the hair in the central part of the head was singed and burned to the roots; that there was burning of the left ear and the right cheek, and the scrotum was discolored and charred and appeared also to have been burned; that there was considerable bruising of the chest on both sides; that the collarbone and the third through the eighth ribs on the left side and the eighth and ninth ribs on the right side were fractured; that there was a pint of blood in both chest cavities; that the ribs were completely fractured and the clavicle was broken with considerable separation; that the body had been dead for more than twenty-four hours. It was Dr. Lumb's opinion that Williams died of respiratory failure, terminal shock, in the presence of multiple chest injuries with fractures of the ribs and multiple burns, lacerations, and abrasions scattered over the entire body surface.

Ben Duke, Sheriff of Columbus County, testified that he arrived at defendant's house at about 11 a.m. on the date alleged and made an investigation of the premises. The smell of kerosene was on the ground outside the house. A maul and a weed

burner were on the back porch. The sheriff followed boot tracks, the same size as a pair of boots on the back porch, and eventually came upon a still in the woods about three quarters of a mile from the house. There he found three barrels of mash. Approximately 150 yards from the still he found a case of whiskey and 250 yards from the still he found a second case with eight jars of whiskey in it. He later returned to defendant's house and took possession of the maul. The weed burner had been moved and he was never able to find it.

SBI Agent Satterfield interviewed defendant on 13 December 1961, told him he was a police officer investigating the case and would tell in court anything defendant told him. Defendant stated he was not drunk on the occasion in question, was not insane, and that there was no evidence of insanity in his family. Defendant told him he did not know what happened to the deceased; that he had no knowledge of a liquor still; and that Willa Dean Simmons, his girl friend, slept in one room and he in the other. Agent Satterfield talked with Willa Dean Simmons in the presence of defendant and she said: "Leo, I have got to tell the truth, this is on my conscience." She then related to Agent Satterfield in defendant's presence substantially what she testified to on the witness stand.

The testimony of Herman Lewis Watson corroborates the testimony of Willa Dean Simmons in all essential respects. Watson said he was drinking and that defendant was drinking at the time and appeared to be angry. He said he was afraid of the defendant.

Defendant offered no evidence. From a judgment of life imprisonment in accordance with the jury's verdict, defendant appealed to the Supreme Court assigning errors noted in the opinion.

Charles H. Yarborough, Jr., and Jacob W. Todd, Attorneys for defendant appellant.

Robert Morgan, Attorney General, by Edward L. Eatman, Jr., Staff Attorney, for the State.

HUSKINS, Justice.

Defendant assigns as error that the trial court failed to instruct the jury on the issue of manslaughter and limited the

jury in its deliberations to one of three verdicts, to wit: murder in the first degree (with or without recommendation as to punishment), murder in the second degree, and not guilty.

[1, 2] Where it is permissible under the bill of indictment to convict defendant of a lesser degree of the crime charged, *and there is evidence to support a milder verdict,* defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. *State v. Robinson,* 188 N.C. 784, 125 S.E. 617 (1924); *State v. Keaton,* 206 N.C. 682, 175 S.E. 296 (1934); *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535 (1970). Error in failing to submit the question of defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees *arising on the evidence* had been correctly presented in the court's charge. *State v. Davis,* 242 N.C. 476, 87 S.E. 2d 906 (1955); *State v. Childress,* 228 N.C. 208, 45 S.E. 2d 42 (1947).

[3] The foregoing principle applies only in those cases where there is evidence of guilt of the lesser degree. *State v. Smith,* 201 N.C. 494, 160 S.E. 577 (1931). Where all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show commission of a crime of less degree, the principle does not apply and the court correctly refuses to charge on the *unsupported lesser degree. State v. Manning,* 221 N.C. 70, 18 S.E. 2d 821 (1942); *State v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34 (1944); *State v. Brown,* 227 N.C. 383, 42 S.E. 2d 402 (1947); *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834 (1948). *Compare State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461 (1969), which discusses the law in this and other jurisdictions when there *is* evidence sufficient to require submission of manslaughter and the jury convicts of murder in the first degree.

Defendant does not contend on this appeal that the element of malice is not shown by the evidence. Rather, his contention is that the evidence as a whole gives rise to a permissible inference that he did not *intentionally* kill the deceased. Therefore, defendant argues, the jury could have found him guilty of manslaughter and, on authority of *State v. McNeill,* 229

N.C. 377, 49 S.E. 2d 733 (1948), the judge was required to so instruct the jury.

[3-6] The record in this case is barren of any evidence of manslaughter. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Baldwin,* 152 N.C. 822, 68 S.E. 148 (1910); *State v. Benge,* 272 N.C. 261, 158 S.E. 2d 70 (1967). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; *State v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188 (1950).

[7-9] The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful and (2) done with malice, and an unlawful killing with malice is murder in the second degree. Here, all the evidence tends to show that defendant stubbornly continued over a period of hours to curse the deceased and to assault his helpless victim time after time with various deadly weapons while Willa Dean Simmons was begging him to cease and desist. By these persistent assaults without the slightest provocation he inflicted mortal wounds proximately causing the death of his victim. This evidence affords no basis upon which defendant could be found guilty of manslaughter. Upon this evidence the presumptions arose, and it was then incumbent upon defendant, in keeping with legal principles too well settled to require repetition, to satisfy the jury of the truth of facts which would mitigate the killing to manslaughter or excuse it altogether. He offered absolutely nothing in mitigation of his crime.

In the following language from *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322 (1955), Justice Bobbitt (now Chief Justice) wrote the applicable law:

> "When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. In *State v. Gregory,* 203 N.C. 528, 166 S.E. 387 [1932], where the defense was that an *accidental* discharge

of the shotgun caused the death of the deceased, it was stated that the presumptions arise only when there is an *intentional killing* with a deadly weapon; and since the *Gregory case* it has been often stated that these presumptions arise only when there is an intentional killing with a deadly weapon. But the expression, *intentional killing,* is not used in the sense that a specific intent *to kill* must be admitted or established. The sense of the expression is that the presumptions arise when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted. [Citations omitted] A specific intent *to kill,* while a necessary constitutent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions."

Accord State v. Barber, 270 N.C. 222, 154 S.E. 2d 104 (1967); *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969); *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337 (1965); *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971).

State v. McNeill, supra (229 N.C. 377, 49 S.E. 2d 733), relied on by defendant, was decided prior to decision in *State v. Gordon, supra.* Inexact expressions therein contrary to the legal principles laid down in *Gordon* are disapproved and may not be considered authoritative on the facts disclosed by the evidence in this case.

[10, 11] It is clear that, upon the State's evidence, defendant was guilty of at least murder in the second degree. The additional ingredient of premeditation and deliberation necessary in first degree murder may be inferred from the vicious and brutal circumstances of the homicide, *e.g.,* lack of provocation, threats before and during the occurrence, infliction of lethal blows after the victim had been felled and rendered helpless, and conduct of the defendant before and after the killing. *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Hamby,* 276 N.C. 674, 174 S.E. 2d 385 (1970); *State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484 (1969); *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769 (1961); *State v. Stanley,* 227 N.C. 650, 44 S.E. 2d

196 (1947). Moreover, when a homicide is perpetrated by means of torture, as here, premeditation and deliberation are presumed and defendant is guilty of murder in the first degree. *State v. Dunheen,* 224 N.C. 738, 32 S.E. 2d 322 (1944). "A murder which shall be perpetrated by means of . . . torture . . . shall be deemed to be murder in the first degree. . . . " G.S. 14-17.

For the reasons stated, we hold that the trial court correctly refused to submit the issue of manslaughter to the jury.

[12] In declining to submit manslaughter as a possible verdict, the court used the following language: "And, gentlemen, I instruct you there is in this case, no evidence upon which a verdict of manslaughter could be based and you will not be concerned further with that degree of homicide." Defendant assigns this instruction as error, contending that it constitutes an expression of opinion on the credibility of the evidence in violation of G.S. 1-180. It suffices to say that the judge is required to declare and explain the law arising on the evidence. It is not an expression of opinion, but rather the duty of the trial judge, where the evidence so warrants, to inform the jury that manslaughter does not arise on the evidence in the case. It is the duty of the judge to determine, in the first instance, if there is any evidence or any inference fairly deducible therefrom tending to prove one of the lower grades of murder. Having done so, and having concluded that there was no basis for submission of manslaughter to the jury, it was the duty of the judge to instruct it accordingly. *State v. Spivey,* 151 N.C. 676, 65 S.E. 995 (1909). *Accord State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969). This assignment is overruled.

The brief filed for defendant by his court-appointed counsel does not discuss two allegations made by defendant in his proceedings in the United States District Court, to wit: (1) that evidence introduced at his trial was obtained by an unlawful search and seizure and (2) that a statement improperly extracted from him was introduced into evidence at his trial. Defense counsel stated during argument of the case that those matters had not been raised and discussed in the brief because there was nothing in the record to support them. Nevertheless, defendant has written this Court directly, calling attention to the omission and reasserting those contentions. He does not specify the items allegedly illegally seized, but the record

shows that several items were offered in evidence against him, including the maul, the trousers and cap worn by the deceased, and numerous photographs showing the scene of the crime, the body of the deceased, and the liquor still down the road from the house. The record shows no objection to the admission of any of the exhibits or to the testimony of law enforcement officers describing the scene of the crime.

[13] Moreover, it appears from the record that defendant reported the death to the undertaker who notified the coroner. Defendant returned to the scene of the crime with the coroner who, after arriving at the scene, called the sheriff. When the sheriff arrived about 11 a.m., he entered defendant's home and viewed the surrounding premises. Defendant was present and made no objection. The record discloses that the maul and weed burner were in plain view on the back porch. The trousers worn by the deceased were in plain view in the room where the body lay. No search was made to discover these items. None was necessary. It is settled law that under circumstances requiring no search the constitutional immunity from unreasonable 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 of 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); *State v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95 (1967); *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736 (1961); *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394 (1961).

[14] The record is barren of any evidence to support defendant's assertion that a statement was "improperly extracted from him" and evidence thereof offered at his trial. Defendant voluntarily made various self-serving declarations to the officers, all of which tended to completely exonerate him, and these were related to the jury by the officers who testified in the case. They were incompetent, even for corroborative purposes, since defendant did not go upon the stand. Even so, their admission was favorable to defendant and he is in no position to complain. We find no merit in these contentions.

Defendant was fortunate to have been tried before a compassionate jury. In the trial below we find

No error.

STATE OF NORTH CAROLINA v. WILLIAM DALLAS FLETCHER
— AND —
STATE OF NORTH CAROLINA v. WESLEY ST. ARNOLD

No. 70

(Filed 10 June 1971)

1. **Criminal Law § 74— what constitutes a confession**

Defendant's statement admitting his participation in an armed robbery amounted to a confession and was governed by the constitutional and evidentiary rules relating to confessions.

2. **Criminal Law § 75— admissibility of confession**

Voluntariness remains the test of admissibility of a confession.

3. **Criminal Law § 75— admissibility of confession — defendant in jail**

The fact that a defendant is in jail and under arrest when he makes a confession does not, standing alone, render it involuntary.

4. **Criminal Law § 75— custodial interrogation — Miranda warnings**

The "Miranda warnings" are only required when the defendant is being subjected to custodial interrogation.

5. **Criminal Law § 75— admissibility of defendant's statement — absence of counsel**

Defendant's in-custody statement to the victim of armed robbery, "We have nothing against you; we were broke and needed money," was not the result of a custodial interrogation and was properly admitted in evidence despite the absence of *Miranda* warnings to defendant.

6. **Criminal Law § 169— harmless error in admission of incriminating statement**

Any error in the admission of an incriminating statement is harmless when there is no reasonable possibility that its admission would have contributed to the conviction.

7. **Criminal Law §§ 95, 169— joint trial of defendants — admission of extra-judicial statements implicating nontestifying codefendant**

In a joint trial of three defendants for armed robbery, it was error to admit in evidence an extra-judicial statement made by one defendant to the prosecuting witness, "*We* have nothing against you; *we* were broke and needed money"; nevertheless, such error was harm-

less beyond a reasonable doubt as to a nontestifying codefendant where there was overwhelming evidence of the codefendant's participation in the robbery.

8. **Constitutional Law § 31— identity of informer**

Defendant's motion for disclosure of the identity of an informer *held* properly denied by the trial judge under the facts of this case.

9. **Criminal Law § 7— defense of entrapment — insufficiency of evidence**

Evidence that police officers received information from an informer that a certain individual would be robbed, that the officers stationed themselves in a boxcar across from the individual's place of business, and that the defendants were apprehended when they attempted to take money by gunpoint from the individual's place of business, *held* insufficient to support the defense of entrapment.

10. **Criminal Law § 34— evidence of defendant's prior crimes — admissibility**

A nontestifying defendant was not prejudiced by a codefendant's testimony on cross-examination that he had met the defendant in the "Virginia State Pen," since the admission was admissible to show that the two defendants had known each other for many years and could have planned the crime in question.

11. **Criminal Law § 64 —testimony relating to defendant's being on drugs**

Refusal of trial court to allow defendant to cross-examine a patrolman on whether defendant was under the influence of drugs at the time of the crime, *held* not prejudicial where (1) the officer's answer would have been negative and (2) the defendant was later permitted to examine the officer on this question.

12. **Criminal Law § 169— admission of prejudicial evidence elicited by defendant**

A defendant may not complain of prejudicial evidence which he elicited on cross-examination.

13. **Criminal Law § 64— opinion testimony — person under the influence of drugs**

A lay witness may state his opinion as to whether a person is under the influence of drugs where the witness has observed the person and such testimony is relevant to the issue being tried.

14. **Criminal Law § 162— exclusion of evidence — failure of record to show answer of witness**

An exception to the exclusion of evidence cannot be sustained when the record fails to show what the witness would have testified had he been permitted to answer.

15. **Criminal Law § 64— defendant under influence of drugs — intent to to commit crime — exclusion of evidence relating to drugged condition**

Defendant was not prejudiced when his codefendant was prevented from testifying as to whether defendant's intent to commit

armed robbery was impaired or nullified by drugs, where other evidence elicited on the trial strongly showed that defendant was in possession of his senses at the time of the robbery and knew the difference between right and wrong.

16. Criminal Law § 161— exception to the judgment

An exception to the judgment presents the face of the record for review.

17. Criminal Law § 127— arrest of judgment

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

APPEAL by defendants Fletcher and St. Arnold from *Beal, S. J.*, 4 May 1970 Criminal Session of DAVIDSON.

Defendants William Dallas Fletcher (Fletcher) and Wesley St. Arnold (St. Arnold) and James Preston Swaney (Swaney) were charged in separate bills of indictment with armed robbery of Dalton Myers (Myers). The cases were consolidated for trial, and the jury returned a verdict of guilty as to each defendant. Each defendant gave notice of appeal from judgment imposed, but only defendant Swaney timely perfected his appeal. This Court found no error in the trial of Swaney by opinion reported at 277 N.C. 602, 178 S.E. 2d 399. On 11 February 1971 this Court entered an order allowing defendants Fletcher and St. Arnold to perfect their appeals and ordered that their respective cases be consolidated for the purpose of appeal and hearing.

The State offered the testimony of Myers and several police officers which, in substance, tended to show that SBI Agent Poole was informed that Myers would be robbed at his home on 27 February 1970 or at his place of business on the following day. On 28 February 1970 SBI Agent Poole and Captain Stamey of the Thomasville Police Department, went to a diner near Myers Oil Company at about 3:00 o'clock p.m. Other police officers were stationed in a boxcar across from Myers' business. At about 4:00 o'clock a Mercury Comet driven by St. Arnold parked near Myers Oil Company. Swaney was in the middle front seat and Fletcher was in the right front seat. St. Arnold and Fletcher got out of the automobile, and at that time St. Arnold put on a jacket and put a pistol in his right-hand pocket. Swaney remained in the automobile. Fletcher and St. Arnold went in the front door of Myers Oil Company

with drawn pistols, and by threat of the arms took Myers' wallet containing approximately $43 and $105 from the money box of the business. Myers was tied up and placed in a small room in the back, and Fletcher and St. Arnold left the building. When they emerged from the building they were ordered to halt by the police officers, whereupon Fletcher fired the first shot and attempted to run. The officers returned fire and Fletcher was wounded in the left shoulder. St. Arnold dropped a paper bag containing money when he saw the police officers. St. Arnold, Fletcher, and Swaney were immediately arrested at the scene. A pistol with four spent cartridges was found near the spot where Fletcher was arrested, and a pistol was found on the person of St. Arnold.

Defendant Swaney was found sitting under the steering wheel of the Comet automobile, with the motor running. At the trial Swaney stated that he knew nothing of the plan to rob the Oil Company.

Defendants Fletcher and St. Arnold did not testify.

Attorney General Morgan and Staff Attorney Eatman for the State.

Jerry B. Grimes for defendant Fletcher.

William H. Steed for defendant St. Arnold.

BRANCH, Justice.

APPEAL OF WESLEY ST. ARNOLD

Defendant St. Arnold contends that the trial court erred in admitting, over his objection, the custodial statement made by him to Myers while in a police officer's presence.

Major Kirkman of the Thomasville Police force, accompanied Myers to St. Arnold's cell about 7:00 p.m. on 28 February 1970. At that time the record shows that the following conversation occurred between Myers and St. Arnold:

"Q. Describe in your own words the conversation that took place between you and St. Arnold.

MR. GRIMES AND MR. STEED: Objection.

OBJECTION OVERRULED AS TO ST. ARNOLD.

OBJECTION SUSTAINED AS TO DEFENDANTS FLETCHER AND SWAMEY *(sic)*.

DEFENDANTS EXCEPT. DEFENDANTS' EXCEPTION NO. 5.

"A. I asked St. Arnold what did they have against me to rob me; he answered, 'We have nothing against you. We were broke and needed some money.'

MR. BEEKER: Motion to strike the answer as to the defendant Swamey *(sic)*.

MR. STEED: Motion to strike.

COURT: I sustained the answer at the outset as to Swamey *(sic)* and Fletcher."

DEFENDANTS EXCEPT. DEFENDANTS' EXCEPTION NO. 6."

[1] The statement made by defendant St. Arnold amounted to a confession since it, in effect, admitted that he took part in the armed robbery. *State v. Williford,* 275 N.C. 575, 169 S.E. 2d 851; *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193. Thus, the constitutional and evidentiary rules of law relative to confessions are applicable.

[2, 3] Voluntariness remains the test of admissibility of a confession. *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37; *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753. The fact that a defendant is in jail and under arrest when he makes a confession does not, standing alone, render it involuntary. *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232.

In *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581, it is stated:

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

him. After having been so advised, a defendant may waive these constitutional rights provided the waiver is made voluntarily, knowingly, and intelligently."

[4] The so-called "Miranda warnings" are only required where defendant is being subjected to custodial interrogation. *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638; *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245. Unquestionably, St. Arnold was in custody in a police dominated atmosphere. *Miranda v. Arizona,* 384 U.S. 436, 16 L. ed. 2d 694, 86 S.Ct. 1602. However, whether the question addressed to St. Arnold by Myers constituted interrogation within the meaning of *Miranda* poses a more serious question.

In 29 Am. Jur. 2d, Evidence, § 555, p. 610, it is stated:

"The court in the Miranda Case noted . . . that the fundamental import of the privilege against self-incrimination while an individual is in custody is not whether he is allowed to talk to the police without benefit of warnings and counsel, but whether he can be *interrogated.*" (Emphasis added.)

In *People v. Morse,* 76 Cal. Rptr. 391, 452 P. 2d 607, the defendant, a prisoner, was accused of murdering one of the prison inmates. The prison guard found the victim outside defendant's cell, and the guard was permitted to testify that while he was trying to revive the victim he asked defendant, "Joe, did you do this?" The defendant nodded his head in the affirmative, and said "Yeah." The Court, holding that the guard's questions were "devoid of inquisitorial techniques" and that no process of interrogation had been undertaken, stated:

" . . . [A]ny determination as to whether or not a process of interrogations was undertaken must rest upon an objective test according to which we 'analyze the total situation which envelops the questioning by considering such factors as the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of the police and all other relevant circumstances.' *(People v. Stewart,* (1965), 62 Cal. 2d 571, 579, 43 Cal. Rptr. 201, 206, 400 P. 2d 97, 102, affd. sub nom. *California v. Stewart* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694.)

In *Howell v. State,* 5 Md. App. 337, 247 A. 2d 291, the defendant had been questioned initially and had terminated the questioning by stating he did not wish to be questioned further. An hour later, while the appellant was being "processed" at the police station, he was told that his accomplice had made incriminating statements about him. He thereupon made a statement which he later attacked in court. It was held that the statement did not result from "interrogation" but was more in the nature of volunteered information.

In *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541, the defendant was confined to jail awaiting trial for murder. Upon his trial the court allowed his cellmate to testify that the defendant told him that he (the defendant) shot the deceased. Holding that the court need not conduct a *voir dire* hearing to determine the voluntariness of the admission, this Court, speaking through Higgins, J., stated:

> "The defendant misinterprets the necessity for the *voir dire* examination to determine the voluntariness of his admissions to his jailmate Pierce. As a general rule, voluntary admissions of guilt are admissible in evidence in a trial. To render them inadmissible, incriminating statements must be made under some sort of pressure. Here we quote from the Supreme Court of the United States in *Hoffa v. United States,* 385 U.S. 293, 17 L. Ed. 2d 374: 'Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. . . . 'The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak. (A)ll have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion.' . . . "

Accord: *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802.

[5, 6] We do not think that the statement made to Myers by St. Arnold was a result of custodial interrogation as condemned by the line of authority represented by *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S.Ct. 1758; *Miranda v.*

Arizona, supra; and Davis v. North Carolina, 384 U.S. 737, 16 L. Ed. 2d 895, 86 S.Ct. 1761. Even had there been error in the admission of this statement, it would not have been prejudicial since there is no reasonable possibility that it would have contributed to St. Arnold's conviction. We believe that the admission of the statement, if erroneous, would have been harmless error beyond a reasonable doubt. *Harrington v. California,* 395 U.S. 250, 23 L. Ed. 2d 284, 89 S.Ct. 1726; *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824.

THE APPEAL OF WILLIAM DALLAS FLETCHER

[7] Defendant Fletcher assigns as error the admission of the above-quoted extra-judicial statement made by his codefendant St. Arnold to Myers.

The rules of law pertinent to decision of this question were enunciated and applied as they relate to the defendant in *State v. Swaney, supra.* In that case, this Court, relying particularly on *State v. Fox* 274 N.C. 277, 163 S.E. 2d 492, and *Bruton v. United States,* 391 U.S. 123, 20 L. Ed. 2d 476, 88 S.Ct. 1620, held the admission of St. Arnold's statement to be erroneous; however, the error was declared "harmless beyond a reasonable doubt." See also *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398, and *Chapman v. California, supra.* The principles upon which Swaney was decided are even more clearly applicable to Fletcher. Swaney was found sitting in an automobile near the scene of the crime, with the motor running. Fletcher was identified by the victim as one of the men who robbed him. Several police officers saw him emerge from the building where the alleged robbery occurred. He immediately fired at the officers and attempted to flee, but was wounded and arrested at the very scene of the robbery. This overwhelming evidence of his participation in the robbery demands an application of the rule declaring the admission of St. Arnold's statement to be "harmless error beyond a reasonable doubt."

This assignment of error is overruled.

[8] Defendant Fletcher contends that the trial judge erred by denying his motion to disclose the identity of an alleged informer.

Fletcher's motion was made in apt time. We must therefore consider whether the circumstances of this case require

disclosure of the informer's identity. *State v. Swaney, supra,* differs factually from instant case, in that Swaney contended that he knew nothing about the robbery. However, both Swaney and Fletcher rely on the defense of entrapment to support this assignment of error.

We find in 76 A.L.R. 2d, at p. 282, the following:

> "The privilege of nondisclosure must give way and disclosure of the identity of an informer is required where disclosure is essential or relevant (material) and helpful to the defense of an accused, or lessens the risk of false testimony, or is necessary to secure useful testimony, or is essential to a fair determination of the cause. Contrariwise, the privilege of nondisclosure will be upheld where disclosure of the identity of an informer does not aid defendant in regard to his defense, and is not essential nor relevant (material) for that purpose or for the fair disposition of the case. Important factors in this connection are that the accused admits or does not deny guilt, or makes no defense on the merits or that there is independent evidence of accused's guilt."

The North Carolina cases on entrapment are accurately summarized in 2 Strong's N. C. Index 2d, Criminal Law, § 7, as follows:

> "Mere initiation, instigation, invitation, or exposure to temptation by enforcement officers is not sufficient to establish the defense of entrapment, it being necessary that the defendants would not have committed the offense except for misrepresentation, trickery, persuasion, or fraud. . . . [I]f the officer or agent does nothing more than afford to the person charged an opportunity to commit the offense such is not entrapment. Therefore, mere acts affording defendant an opportunity to commit the offense and steps taken to apprehend him in its commission, or even the fact that officers pretended to act in conjunction with the defendant in committing an offense, does not constitute entrapment when the idea of committing the offense originates with the defendant or defendants."

We think that the language used by the U. S. Supreme Court in *Lopez v. United States,* 373 U.S. 427, 10 L. Ed. 2d

462, 83 S.Ct. 1381, is appropriate to decision of the question here presented. There the Court stated:

> "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. Such conduct, of course, is far different from the permissible stratagems involved in the detection and prevention of crime. Thus before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged."

[9] Here there is not only strong independent evidence of Fletcher's guilt, but there is complete failure to show any conduct by police officers which may have induced defendant Fletcher to commit the crime of armed robbery. The evidence shows only that officers received information that a crime might be committed and thereupon took appropriate action. Neither do we find prejudicial error in the fact that the trial court did not rule on this motion until the State had completed a portion of its evidence. We fail to see that the ruling denying this motion prejudiced Fletcher since he was not forced to develop inconsistent defenses and had full opportunity to offer any available defense.

Under the circumstances of this case we hold that the trial judge properly denied the motion to disclose the identity of the informer.

Fletcher next assigns as error the action of the trial judge in allowing the solicitor to cross-examine Swaney concerning his prior criminal record.

[10] The general rule is that when a defendant in a criminal action testifies in his own behalf, the State's solicitor may, for the purpose of impeachment and attacking his credibility as a witness, cross-examine him as to previous criminal convictions. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310; Stansbury, North Carolina Evidence, 2d, § 112. Fletcher, however, points to the further cross-examination when the solicitor asked Swaney where he met Fletcher, and Swaney, over defendant Fletcher's objection, replied, "Virginia State Pen."

The rule controlling the question here presented is well stated in Stansbury, North Carolina Evidence, 2d Ed., § 91, p. 210, as follows:

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

Here Swaney testified that as a result of automobile trouble he was hitchhiking and was picked up by Fletcher and St. Arnold. His testimony implied that there was an accidental meeting, and that no plan or design to commit armed robbery could have existed between the parties. This cross-examination was properly allowed in order to show that Fletcher and Swaney had known each other for many years and that a plan or design could have existed between them to commit the armed robbery. See Stansbury, North Carolina Evidence, § 92, p. 216.

[11] Defendant Fletcher further contends that the trial judge erred in sustaining the State's objection to lay testimony relative to defendant's being under the influence of Wyamine, an amphetamine drug.

In this connection defendant's attorney asked Patrolman Scruggs if he had an opinion as to "whether or not he (defendant) was under the influence of some drug to a sufficient amount to have deprived him of his reason or control." The court sustained the State's objection, but permitted his answer to be placed in the record. The answer to the question as shown in the record is "I don't know." Later, Patrolman Scruggs was recalled for further cross-examination by defendant's attorney, and the following transpired:

> "Q. Based on your observation of the defendant at the time that you observed his conduct on the premises of Myers Oil Co. have you an opinion satisfactory to yourself whether the defendant was under the influence of some drug or other substance to such extent that his normal functions of body and mind were so interfered with or impaired?
>
> A. Yes, I have an opinion.

Q. You have an opinion?

A. Yes.

Q. What is that opinion?

A. That he was not under the influence of some drug or whatever.

. . . .

"Q. Let me ask you this question—have you an opinion satisfactory to yourself based on your observation of the defendant at this time as to whether his mental faculties were sufficiently impaired as to deprive him of the ability to know the consequences of his acts?

OBJECTION OVERRULED.

Q. Have you an opinion?

A. Yes.

Q. What is that?

A. I don't know whether he is, or not.

Q. You don't know whether he was or not?

A. No."

[12] It is evident that defendant was not prejudiced by the court's first ruling in light of the patrolman's negative answer. Upon recall, the court allowed defendant's counsel fully to explore Patrolman Scruggs' opinion as to defendant's condition relative to drugs. Even if the evidence then elicited were prejudicial, defendant may not complain of evidence elicited by him on cross-examination. *State v. Burton,* 256 N.C. 464, 124 S.E. 2d 108.

On cross-examination defendant's counsel elicited from Swaney that he had seen defendant Fletcher inject himself with Wyamine six to ten times during the week immediately preceding 28 February, 1970, and that after such injections he would appear to get a "feeling of well-being and be relaxed . . . and mostly just talked and get very excited." During the cross-examination of Swaney by defendant's counsel the record shows the following:

Q. I'll ask you have you an opinion based upon your observation of the defendant and conversation with the defendant Fletcher on the afternoon of the 28th of Febuary, 1970, immediately prior to the time he left the automobile which has been indicated on the diagram parked on West Main St. and left going in the direction of Myers Oil Co., if at that time he was under the influence of Wyamine?

A. Yes, he was.

Q. To such an extent that his normal functions of body and mind were so interfered with, that is—that he was in such condition that he could not understand or could not form the intent of the act that he was about to commit?

OBJECTION SUSTAINED.

DEFENDANT FLETCHER EXCEPTS.

DEFENDANT FLETCHER'S EXCEPTION NO. 62.

Q. I asked—have you an opinion.

OBJECTION

COURT: He asked if he had an opinion.

MR. CLARK: He is not a medical expert.

COURT: I understand.

MR. CLARK: If he has an opinion it's irrelevant.

COURT: Let him ask.

Q. Have you an opinion. Yes or no?

A. Yes, in my opinion he was.

MR. CLARK: Motion to strike the answer as not responsive.

COURT: Motion to strike the answer of the defendant beyond the word "yes" is allowed. Members of the jury, you will not consider anything else the witness said beyond the word "yes."

Thereafter, Swaney was allowed to testify that he himself had used Wyamine from 1961 to 1966, and had been using the

same drug for some time immediately preceding the armed robbery.

[13] This Court has long recognized that a lay witness may give his opinion as to whether a person is under the influence of intoxicants when the witness has personally observed him. *State v. Warren,* 236 N.C. 358, 72 S.E. 2d 763; *State v. Flinchem,* 247 N.C. 118, 100 S.E. 2d 206. Likewise, a lay witness may state his opinion as to whether a person is under the influence of drugs when he has observed the person and such testimony is relevant to the issue being tried. *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49.

Swaney appeared to be well qualified by special experience to give opinion testimony as to whether Fletcher was under the influence of the drug Wyamine, and he had ample opportunity to observe Fletcher on the occasion of the alleged robbery. See 47 N.C.L. Rev. 193. However, it must be noted that the question to which objection was made was patently a leading question.

In Stansbury, North Carolina Evidence, § 31, p. 58, it is stated:

> " . . . A leading question is a question that suggests the answer desired, and usually a question that may be answered by "yes" or "no" is regarded as leading.
>
> "The rule is based, however, on the real or assumed friendliness of the witness to the party on whose behalf he is being examined, and not on the technical distinction between direct examination and cross-examination. Hence leading questions may be asked on direct examination when the witness is unwilling or evasive or is hostile to the party calling him, and the cross-examiner may be prohibited from asking such questions when the witness shows a strong bias in favor of the cross-examining party. And even in the case of a friendly witness the rule has its reasonable limitations."

Further, the answer as to whether defendant could form an intent to commit the crime was unresponsive and was properly stricken on the solicitor's motion. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916.

[14] The record does not contain an answer to many of the questions asked Swaney concerning Fletcher's condition with respect to drugs. An exception to the exclusion of evidence cannot be sustained when the record fails to show what the witness would have testified had he been permitted to answer. *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342; *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416.

[15] Aside from the technical rules of evidence, the opinion evidence which counsel sought to elicit from Swaney concerning Fletcher's ability to form an intent to commit the crime of armed robbery runs counter to the *actions* of Fletcher as described by Swaney and all of the other eyewitnesses. We cannot perceive how a person who could not form an intent to commit a crime could know right from wrong. Fletcher's actions in firing at the police officers and in attempting to flee demonstrates his ability to distinguish right and wrong. The possession of his senses was further demonstrated by his actions during the robbery. He told St. Arnold where the money box could be found, and he asked Myers if he had other money. He assisted in tying up the victim and, after placing him in a small room, helped secure the door with wire. These actions would overwhelmingly rebut any testimony which counsel sought to elicit from Swaney concerning Fletcher's ability to form an intent to commit the act of armed robbery. Thus, if the judge did technically err in his ruling, which we do not concede, the facts of this case would relegate such error to the class of harmless error.

[16, 17] Defendant assigns as error the signing of the judgment and denial of his motion in arrest of judgment. An exception to the judgment presents the face of the record for review, and a motion in arrest of judgment is one generally made after verdict to prevent entry of judgment based upon insufficiency of the indictment or some other fatal defect appearing on the face of the record. We have carefully searched the record in instant case, and no fatal defect appears on its face. *State v. Kirby, supra.*

Fletcher and St. Arnold were simply caught "red-handed" in the very act of committing the crime of armed robbery. This record recites the uncontradicted testimony of seven eyewitnesses which unerringly points the finger of guilt to both

Fletcher and St. Arnold. In light of the overwhelming evidence presented by the State, any errors which might have occurred in this trial are clearly harmless beyond a reasonable doubt.

We find no prejudicial error as to either William Dallas Fletcher or Wesley St. Arnold.

No error.

IN THE MATTER OF CALLIE HOOPER KING, ADMINISTRATRIX OF THE ESTATE OF ALBERT KING, DECEASED; AND ROBERT I. KING AND WIFE, CALLIE HOOPER KING, PETITIONERS v. MARY ALICE KING LEE AND HUSBAND, CHARLIE LEE; IRENE KING BROADNAX AND HUSBAND, ROBERT BROADNAX; WILLIE ALBERT KING AND WIFE, DOROTHY LAWSON KING; DAVID KING, SINGLE; FRANCES KING GALLOWAY AND HUSBAND, JOHN GALLOWAY; BESSIE KING GALLOWAY AND HUSBAND, FRANK GALLOWAY; JESSIE KING LAWSON AND HUSBAND, LINDSEY LAWSON; PRICIE KING HARRIS, WIDOW; DAISY KING TOTTEN AND HUSBAND, JAMES TOTTEN; GEORGE KING AND WIFE, FRANCES G. KING; JIMMIE A. KING AND WIFE, JUANITA SELLERS KING; AND HENRY KING, WIDOWER, DEFENDANTS

No. 50

(Filed 10 June 1971)

1. **Partition § 4— conversion of partition proceeding into action to try title**

Partition proceeding was converted into an action to try title as in ejectment where the answering defendants denied that petitioners' intestate owned any interest in one tract sought to be partitioned and pleaded that one defendant is the sole owner thereof in fee.

2. **Ejectment § 7— burden of proof**

The burden was on petitioners in an action to try title as in ejectment to show title as alleged.

3. **Ejectment § 6— common source doctrine**

Whenever both parties claim under the same person, neither of them can deny his right, and as between them, the elder is the better title and must prevail.

4. **Ejectment § 10— insufficiency of evidence of title**

In this action to try title as in ejectment, petitioners failed to establish ownership of the land in controversy by their intestate at the time of his death and present ownership thereof by the intestate's children as tenants in common.

5. **Rules of Civil Procedure § 50— directed verdict in favor of party having burden of proof**

Since the burden of proof was on petitioners in this action to try title as in ejectment, the granting of their motion for a directed verdict was erroneous.

6. **Ejectment § 10; Rules of Civil Procedure § 50— failure of petitioners to carry burden of proof — directed verdict for defendants**

Where petitioners failed to carry their burden of proof in this action to try title as in ejectment, the motion of defendants under G.S. 1A-1, Rule 50(a), for a directed verdict against petitioners should have been granted in the absence of a motion by petitioners for an order of voluntary dismissal without prejudice under Rule 41(a)(2).

7. **Rules of Civil Procedure § 41; Trial § 29— voluntary dismissal without prejudice**

In contrast to former practice, a voluntary dismissal without prejudice is permissible under Rule 41(a)(2) only when so ordered by the court, in the exercise of its judicial discretion, upon finding that justice so requires.

8. **Rules of Civil Procedure §§ 41, 50— remand to superior court — motion for voluntary dismissal — directed verdict**

Upon remand of this action in ejectment to the superior court, petitioners are entitled to move, prior to the granting of defendants' motion for a directed verdict and the entry of a judgment adverse to petitioners, that an order be entered providing for a voluntary dismissal without prejudice upon such terms and conditions as justice requires; whether such order should be entered will be addressed to the discretion of the superior court.

ON *certiorari*, granted on motion of petitioners, to review the decision of the Court of Appeals reported in 9 N.C. App. 369, 176 S.E. 2d 394, docketed and argued in the Supreme Court as No. 75 at Fall Term 1970.

Upon appeal by defendants Willie Albert King and wife, Dorothy Lawson King, from the judgment entered by *McConnell, J.*, at the March 9, 1970 Session of ROCKINGHAM Superior Court, the Court of Appeals found error in the judgment and remanded the cause for entry of a new judgment in accordance with its directions.

Albert King died intestate on January 15, 1968. On September 3, 1968, Callie Hooper King, wife of Robert I. King, was appointed administratrix of the estate of Albert King. Robert I. King is one of the thirteen children of Albert King.

On April 22, 1969, Callie Hooper King, as administratrix, and Robert I. King and wife, Callie Hooper King, individually,

instituted this special proceeding for a partition sale of lands allegedly owned by Albert King. All twelve of the brothers and sisters of Robert I. King and their spouses are defendants and have been served with process.

Petitioners alleged that Albert King, the intestate, was the owner in fee simple of three tracts of land in Ruffin Township, Rockingham County, separately described as Tract #1, Tract #2 and Tract #3. They excepted from Tract #3 two lots (described with particularity) which they alleged had been previously conveyed out of Tract #3.

Petitioners alleged each of the children of Albert King is entitled to a 1/13th interest in the described lands; that an actual partition could not be made without injury to the interested parties; and prayed that a commissioner be appointed to advertise and sell the lands.

The only answer was that filed by defendants Willie Albert King and wife, Dorothy Lawson King. They admitted that Albert King at the time of his death was the owner in fee simple of the lands described in the petition as Tract #1 and as Tract #2 and interposed no objection to a partition sale thereof. They "specifically denied that Albert King, father of Willie Albert King, was the owner of any interest" in the land described in the petition as Tract #3. They asserted the two lots referred to in the petition as having been previously conveyed out of Tract #3 had been conveyed out of Tract #2, not out of Tract #3.

By way of cross action, the answering defendants alleged that Willie Albert King is the sole owner and in possession of the land described as Tract #3. They prayed that Willie Albert King be adjudged the owner of Tract #3 and for judgment removing the cloud cast upon his title thereto by the allegations of the petition.

Tract #3 is described in the petition and also in the cross complaint as follows: "TRACT #3: It being a tract or parcel of land situated in Rockingham County near the Caswell County and Rockingham County line, described and bounded as follows: Bounded on the North by the Watlington Estate; on the East by the lands of Lester Harrelson; on the South by Paw Paw branch and the R. H. Johnston homeplace; on the West by Hogan's Creek and the lands of J. L. Butler, containing 100

acres, more or less, and being a part of the Billie Garrett tract, later owned by George Johnston. Paw Paw branch is the south boundary of the lands herein conveyed; Hogan's Creek and the lands of J. L. Butler are the western boundary thereof and the Watlington line is the northern boundary. The northeastern boundary is a small branch running from Lester Harrelson's land southeasterly to Paw Paw branch."

By order of September 22, 1969, the clerk transferred the proceeding to the civil issue docket for trial of the issue as to the ownership of Tract #3.

At trial in the superior court, petitioners offered in evidence, as proof that Albert King, the intestate, was the owner in fee simple of Tract #3 at the time of his death, the following:

(1) The record and original of a deed dated September 11, 1946, recorded in Book 373, Page 593, in the office of the Register of Deeds of Rockingham County, North Carolina, "by B. M. Johnston and wife, Mattie I. Johnston, . . . of the first part, to Albert King and wife, Lula King, . . . of the second part." This deed provides "(t)hat said parties of the first part in consideration of two thousand dollars ($2,000.00) to them paid *by parties of the first part,* the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do grant, bargain, sell and convey *to said parties of the first part* and their heirs and assigns, to be held by the parties of the second part by the entireties their heirs and assigns, a certain tract or parcel of land in Rockingham County, State of North Carolina, and adjoining the lands of B. M. Johnston, Lester Harrelson, J. L. Butler and others, and bounded as follows:" (Our italics.) Then follows a description in exact accord with the description of Tract #3 in the petition and in the cross complaint. The *habendum* clause and the warranty provisions are regular in form and run to the parties of the second part, their heirs and assigns.

(2) A record of the death of Lula King, wife of Albert King, on June 5, 1947.

(3) Tax listings for Ruffin Township: In the name of Albert King for 1967; in the name of Albert King, deceased, for 1968; in the name of Albert King Estate for 1969; in the name of Albert King Estate for 1970. These are listings of real property which petitioners *contend* include the land referred to as

Tract #3. The answering defendants *contend* these listings describe lands lying *west* of Hogan's Creek.

(4) Tax listings for Ruffin Township in the name of Willie Albert King for the years 1967, 1968, 1969 and 1970. These listings do not include real property.

There was no evidence the land referred to as Tract #3 is in Ruffin Township. Nor was there evidence with reference to the payment of taxes assessed on the basis of any of the above listings. Nor was there evidence of the location of Tract #3 on the surface of the earth or of the person(s) in actual possession thereof.

At the close of the evidence offered by petitioners, the answering defendants moved for a directed verdict, stating specific grounds therefor. Upon denial thereof, they rested their case without offering evidence, renewed their motion for a directed verdict and restated the specific grounds therefor. This motion was denied. Thereupon, petitioners moved for a directed verdict in their favor.

Allowing petitioners' motion, the court, on the evidence offered by petitioners, adjudged that the thirteen children (naming them) of Albert King, deceased, were the owners in fee simple as tenants in common of Tract #3 and remanded the proceeding to the clerk of the superior court for appropriate orders.

The answering defendants excepted to the denial of their motions for a directed verdict, to the court's refusal to sign the judgment they had tendered, and to the judgment, and appealed to the Court of Appeals.

Bethea, Robinson & Moore, by Norwood E. Robinson, for petitioner appellants.

Gwyn, Gwyn & Morgan, by Julius J. Gwyn, for defendant appellees Willie Albert King and Dorothy Lawson King.

BOBBITT, Chief Justice.

[1, 2] The denial by the answering defendants that Albert King, the father of defendant Willie Albert King, owned any interest in Tract #3, and their plea that defendant Willie Albert King is the sole owner thereof in fee, converted the proceeding into an action to try title as in ejectment. 6 Strong, N. C. Index

2d, Partition § 4, at 199 (1968). The burden was on petitioners to show title as alleged, that is, the tenancy in common. *Bailey v. Hayman,* 218 N.C. 175, 177, 10 S.E. 2d 667, 668 (1940); *Jernigan v. Jerigan,* 226 N.C. 204, 206, 37 S.E. 2d 493, 494 (1946), and cases cited. This required proof that title to Tract #3 was in Albert King at the time of his death.

[3] Petitioners, in attempting to prove the alleged tenancy in common, relied upon the sixth method stated in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142 (1889), that is, the common source doctrine. This doctrine is aptly stated by Justice Battle in *Gilliam v. Bird,* 30 N.C. 280, 283 (1848), as follows: "(W)henever both parties claim under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail." This statement is quoted with approval in *Stewart v. Cary,* 220 N.C. 214, 221, 17 S.E. 2d 29, 33 (1941), where many cases relating to the common source doctrine are cited. See Annotation, "Comment Note.—Common Source of Title Doctrine," 5 A.L.R. 3d 375 (1966).

[4, 5] The fallacy in petitioners' position and in the ruling and judgment of the trial judge lies in the fact that defendant Willie Albert King does not claim under his father, Albert King; on the contrary, he asserts Albert King owned no interest in Tract #3 when he died. Under these circumstances, as held by the Court of Appeals, petitioners failed to establish that Tract #3 is owned by the thirteen children of Albert King as tenants in common. Since the burden of proof was on petitioners, the granting of their motion for a directed verdict was clearly erroneous. See *Cutts v. Casey,* 278 N.C. 390, 417, 180 S.E. 2d 297, 311. The judgment in petitioners' favor, impliedly vacated by the Court of Appeals, is expressly vacated.

[6] On account of petitioners' failure to offer evidence sufficient to show ownership of Tract #3 by Albert King at the time of his death and present ownership thereof by his thirteen children as tenants in common, the motion of the answering defendants under Rule 50(a), G.S. 1A-1, for a directed verdict against petitioners should have been granted in the absence of a motion by petitioners for an order of voluntary dismissal without prejudice under Rule 41(a)(2). *Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396 (1971). As to this, our decision is in full accord with that of the Court of Appeals. However, further consideration must be given to that portion of the decision of

the Court of Appeals which remands the cause to the superior court for the entry of a judgment which (1) denies petitioners' request for a partition sale of Tract #3, and (2) remands the cause to the clerk of the superior court for further proceedings relating to the partition sale of Tract # 1 and Tract #2.

[7] Under Rule 41(a)(2), 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). In contrast to the former practice (see 7 Strong, N. C. Index 2d, Trial § 29—Voluntary Nonsuit), a dismissal without prejudice is permissible under Rule 41(a)(2) only when so ordered by the court, in the exercise of its judicial discretion, upon finding that justice so requires. See *Safeway Stores v. Fannan*, 308 F. 2d 94 (9th Cir. 1962).

[8] We apprehend the order of remand of the Court of Appeals will be understood as a positive directive that the superior court enter a judgment adverse to petitioners with reference to the portion of the proceeding which relates to Tract #3. Under Rule 41(a)(2), the court *may*, at the instance of the petitioners, order a voluntary dismissal *without prejudice* upon such terms and conditions as justice requires. Thus, prior to granting the motion of the answering defendants for a directed verdict against petitioners and the entry of a judgment adverse to petitioners, petitioners are entitled to move, if so advised, that an order be entered providing for a voluntary dismissal upon such terms and conditions as justice requires. Whether such order should be entered will be addressed to the discretion of the superior court judge.

In respect of Tract #3, petitioners' case failed because of the deficiency in the evidence. Seemingly, petitioners' counsel and the court proceeded under a misapprehension of the applicable law. Admittedly, Albert King died intestate and defendant Willie Albert King is one of his thirteen children. Willie Albert King denies his father owned Tract #3 and pleads sole seizin.

Whether petitioners can convince the superior court, prior to granting the motion of the answering defendants for a directed verdict against petitioners and the entry of a judgment adverse to petitioners, that additional evidence is available which,

if brought forward and presented in a new proceeding, would establish their right to partition, will be for consideration and determination by the superior court judge. The obvious purpose of Rule 41 (a) (2) is to permit a superior court judge in the exercise of his discretion to dismiss an action without prejudice if in his opinion an adverse judgment with prejudice would defeat justice. Whatever the merits of the present controversy, it appears plainly that the facts in evidence at the trial did not afford a basis upon which the court could adjudicate the respective rights of petitioners and defendants.

On this appeal, it is unnecessary to determine whether the evidence offered by petitioners is also deficient because of the absence of evidence tending to locate Tract #3. If the court should order a voluntary dismissal without prejudice under Rule 41 (a) (2), petitioners would be well advised, before instituting a new partition proceeding, to determine whether they are in position to offer evidence sufficient to establish the location of Tract #3 on the surface of the earth. It is noted that the two lots which petitioners purport to except from Tract #3 are described in the petition, *inter alia,* as portions of the property conveyed to Albert King by *Hence King and wife, Maggie King,* by deed dated January 21, 1933, registered in Book 278, Page 274, Rockingham County Registry.

The answering defendants contend it is not incumbent upon them to set forth in their pleading the facts upon which defendant Willie Albert King bases his plea of sole seizin. Whether their pleading is deficient in this respect is not presented. Be that as it may, Rule 33 prescribes the procedure by which defendant Willie Albert King could have been required to state the facts on which the plea of sole seizin was based.

As noted above, the judgment in favor of petitioners based on the granting of their motion for a directed verdict is vacated. The decision of the Court of Appeals is modified so as to permit petitioners to move for a voluntary dismissal *without prejudice* prior to granting the motion of the answering defendants for a directed verdict against petitioners and the entry of a judgment adverse to petitioners. If the court, in the exercise of its discretion, grants petitioners' motion for a voluntary dismissal, it will enter an order to that effect upon such terms and conditions as justice requires. If the court, in the exercise of its discretion, denies petitioners' motion for a voluntary dismissal, it will enter a judgment adverse to petitioners.

The decision of the Court of Appeals is modified as provided herein. The cause is remanded to the Court of Appeals with directions to that court to remand the case to the Superior Court of Rockingham County for further proceedings in respect of Tract #3 as provided herein.

Modified and remanded.

STATE OF NORTH CAROLINA v. WILLIAM S. JESSUP

No. 114

(Filed 10 July 1971)

1. **Executors and Administrators § 6— title to property of intestate**

Upon the death of decedent without a will, the title to his real estate vested *eo instanti* in his heirs and the title to his personal estate vested in his personal representative.

2. **Executors and Administrators § 6— estate of decedent**

The estate of a deceased person is not an agency for holding title to property, but is the property itself, to be administered by a personal representative commissioned by the court.

3. **Executors and Administrators § 6; Trusts § 14— possession of property belonging to estate — constructive trust — executor de son tort**

One who takes property belonging to an estate during the interval between decedent's death and the qualification of the personal representative is a constructive trustee for the benefit of the administrator and must account to him; if he does not account to the administrator, he becomes executor *de son tort*. G.S. 28-4.

4. **Executors and Administrators § 8— recovery of estate property**

G.S. 28-69 provides an immediate remedy by which a personal representative may examine any party if he has reasonable grounds to believe a person, firm or corporation has possession of any property belonging to the estate, and the clerk may force delivery or attach for contempt for failure to deliver.

5. **Executors and Administrators § 8; Trusts § 11— refusal to account to administrator — breach of trust**

One who takes and refuses to account to the personal representative becomes a trustee for the benefit of the estate and subject to the penalties provided for breach of trust.

6. **Larceny § 4— allegation of ownership in estate — fatal defect**

Indictment alleging the larceny of money "of the estate of W. M. Jessup, deceased," is fatally defective in failing to charge the owner-

ship, possession or right to possession of the money in any person, corporation, organization or agency capable of possessing or holding title to personal property.

ON *certiorari* to the North Carolina Court of Appeals to review its decision reported in 10 N.C. App. 503, finding no error in the defendant's trial before *Armstrong, J.*, at the September 28, 1970 Criminal Session, STOKES Superior Court.

This criminal prosecution was based on the following bill of indictment:

> "The jurors for the State upon Their Oath present, that William S. Jessup, late of the County of Stokes, on the 13th day of October in the year of our Lord one thousand nine hundred and sixty-seven, with force and arms, at and in the County aforesaid, Twenty Thousand and One Hundred (20,100.00) Dollars in money, of the value of Twenty Thousand and One Hundred ($20,100.00) Dollars, of the goods, chattels and moneys of the estate of W. M. Jessup, deceased, then and there being found, feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

At the trial the defendant, William S. Jessup, entered a plea of not guilty. The evidence in its light most favorable to the State disclosed that W. M. Jessup was the owner and lived with his wife, Lily Jessup, on a tobacco farm in Stokes County. During the year 1964 he suffered a heart attack, spent a considerable time in the hospital and thereafter was able to do only a limited amount of farm work. He died suddenly at his home on the early morning of October 12, 1967. He was survived by his wife; a daughter, Mrs. Jamie Callum, who lived in Rockingham County; and two sons, Wilton Jessup who lived in Georgia, and the defendant, William S. Jessup. The defendant lived on a nearby farm and assisted his father in his tobacco farming, both before and after the latter's heart attack.

The deceased and Mrs. Jessup lived in a two story frame house on a country road near the Virginia line. About 100-150 yards from the house and near the highway was located a packhouse used for storing tobacco. Prior to his death Mr. Jessup kept his money (estimated to be in excess of $20,000) in a wooden box concealed in the packhouse which was kept locked.

The evidence indicated that Mrs. Lily Jessup, the widow, had approximately $3,000 in the box.

On Tuesday before Mr. Jessup died on Thursday, Mrs. Jessup had seen the box in the packhouse. She did not examine the contents. Within a few hours after the death of her husband, the box and the money were missing. At the time, the defendant had a quantity of tobacco stored in the packhouse.

The family had a disagreement about the selection of an administrator. Finally, Mr. VanNoppen, an attorney, qualified. No one made claim or complaint to the administrator that any money was missing. The defendant paid his father's burial expenses, but did not request the administrator to reimburse him.

Approximately eleven months after Mr. Jessup's death, Highway Patrolman Blalock arrested the defendant for driving drunk. At the time of the arrest the officer took the keys from the automobile. In the car were some beer cans and on the back seat was an empty cardboard pistol box. When the prosecution sought to have the officer identify the contents of the glove compartment, the court made inquiry whether the officer requested permission to make the search. The officer replied, "No, sir, he was intoxicated."

The officer unlocked the glove compartment with the keys he had taken from the defendant and found in the glove compartment 201 $100 bills, a total of $20,100. These bills were old and some were of large size. They were in packs wrapped with paper bands. On one of the bands was the name "North Wilkesboro Bank" and on another "Pilot Mountain Bank." Both bore the date 1945.

After the discovery of the money by Officer Blalock, the defendant's sister, Mrs. Callum swore out a warrant charging her brother with the theft of the exact amount of money that Officer Blalock had found. The warrant, likewise the bill of indictment, charged the theft from "the estate of W. M. Jessup, deceased."

At the preliminary hearing, according to Mrs. Lily Jessup, she asked the defendant if he got his father's money. "He said that he had it. And he got mad and said, I got it and you and Jamie and Wilton won't get a 'God damn' dollar."

At the close of the evidence the defendant made a motion to dismiss the case on account of the variance between the indictment and the proof. The court denied the motion and submitted the case to the jury which returned a verdict of guilty. From a judgment of imprisonment of not less than nine, nor more than ten years, the defendant appealed.

Robert L. Morgan, Attorney General, by William W. Melvin, Assistant Attorney General T. Buie Costen, Assistant Attorney General, for the State.

Hatfield, Allman and Hall, by Roy G. Hall, Jr. James W. Armentrout for defendant appellant.

HIGGINS, Justice.

[1] The basic question of law at issue in this case is the validity of the bill of indictment. Indictment is the foundation upon which a felony charge must rest. If it be found defective, the prosecution fails.

In this case, the defendant, a son of W. M. Jessup who died on October 12, 1967, is charged with having stolen $20,100 "of the goods, chattels and moneys of the estate of W. M. Jessup, deceased." The indictment alleges the offense occurred on October 13, 1967, the day following Mr. Jessup's death. The deceased did not leave a will. Upon his death *eo instanti,* the title to his real estate vested in his heirs. *Paschal v. Autry,* 256 N.C. 166, 123 S.E. 2d 569. The title to the personal estate vested in his personal representative. *Spivey v. Godfrey,* 258 N.C. 676, 129 S.E. 2d 253.

[2] The estate of a deceased person is not an agency for holding title to property. It is the property itself, to be administered by a personal representative commissioned by the court. "Estate" is described as "The aggregate of property . . . of all kinds that a person leaves for disposal at his death." Webster's Third New International Dictionary.

> "In its broadest and most extensive sense, the term 'estate' embraces every species of property possessed by an individual and everything of which riches or fortune may consist, and includes both real and personal property, . . .
>
> ". . . . As used in a statute, it may mean property of all kinds held . . . by any legal representative appointed by the probate court . . . whose duty it is to keep such

property safely and finally to distribute it under the direction of the probate court." 28 Am. Jur. 2d Estates § 1, p. 70.

"The word 'estate' has a broader signification than the word 'property.' The former includes choses in action. The latter does not." Opinion by Pearson, J., in *Pippin v. Ellison,* 34 N.C. 61.

"A warrant (or indictment) for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning (or holding) property, is fatally defective." *State v. Biller,* 252 N.C. 783, 114 S.E. 2d 659. See also *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901.

In the case of *State v. McKoy,* 265 N.C. 380, 144 S.E. 2d 46, Justice Parker, for this Court said:

"The second (larceny) count in the bill of indictment is fatally defective. While it alleges the larceny of '$60.00 in money,' it fails to designate in any manner the owner thereof or the person in possession thereof at the time of the alleged unlawful taking. . . .

"Since the second (larceny) count is fatally defective and insufficient to confer jurisdiction, this Court *ex mero motu* arrests the judgment . . . ."

In *State v. Law,* 227 N.C. 103, 40 S.E. 2d 699, the city officers of Winston-Salem seized an automobile loaded with contraband. They parked it in the city lot. During the night the automobile was stolen. The indictment charged the defendants with larceny from the City of Winston-Salem. The Court said: "Usually a fatal variance results, in larceny cases, where title to the property is laid in one person and the proof shows it to be in another . . . . 'In all cases the charge must be proved as laid.' " The court held the larceny charge was fatally defective.

In *State v. Thornton, supra,* this Court said: "If the property alleged to have been stolen is that of an individual, the name of the individual, if known, should be stated. If it is the property of a partnership, or other *quasi* artificial person, the names . . . should be given . . . . The bill of indictment on its face is fatally defective."

[3] After his father's death, the defendant and each heir, as a tenant in common, had a legal right to enter the packhouse. If any heir or distributee of the estate discovered money or other valuables exposed to loss, it would be proper to take possession for the purpose of preserving it for the administrator. The law recognizes the fact that a period of time must elapse between death and the qualification of the personal representative. During that interval one who takes possession of property belonging to and a part of the estate is a constructive trustee for the benefit of the administrator and must account to him. If he does not account to the administrator, he becomes executor *de son tort.* The administrator's duty is set forth in G.S. 28-4 (which comes to us from the Mother Country) :

> "§ 28-4. *Executor de son tort.*—Every person who receives goods or debts of any person dying intestate, or any release of a debt due the intestate, upon a fraudulent intent, or without such valuable consideration as amounts to the value or thereabout, is chargeable as executor of his own wrong, so far as such debts and goods, coming to his hands, or whereof he is released, will satisfy."

[4, 5] The law (G.S. 28-69) provides a quick and immediate remedy by which a personal representative may examine any party if he has reasonable grounds to believe a person, firm or corporation has possession of any property belonging to the estate. The clerk may force delivery or attach for contempt for failure to deliver. This remedy is in addition to other remedies and is for the purpose of discovery and recovery without waiting for the slower process of a suit in the superior court. One who takes and refuses to account to the personal representative, becomes a trustee for the benefit of the estate and subject to the penalties provided for breach of trust.

In the case of *Norfleet v. Riddick,* 14 N.C. 221, Chief Justice Henderson, for the Court, said that after the death of Thomas Riddick and before Joseph Riddick qualified as executor, Joseph Riddick took possession of certain personal property (claiming it as his own). The Court in discussing his liability said that he was a "privileged intermeddler . . . liable to creditors as executor *de son tort.*" The case was cited by Ruffin, J., in *Burton v. Farinholt,* 86 N.C. 261 @ 267, and is quoted in 26 A.L.R. 1362. One who takes and holds a decedent's property is deemed an intermeddler. Such person holds as executor *de son tort. Norfleet v. Riddick, supra.*

The discussion of any question except the validity of the indictment, is by way of answer to the holding of the Court of Appeals that a *hiatus* exists between the death of the intestate and the qualification of the administrator which permitted the State to charge larceny from the estate. The Court of Appeals for its holding cites as authority the case of *Edwards v. State* (Texas), 286 S.W. 2d 157. It is true that in Edwards "The indictment alleged the ownership of the money to be in the estate of Mary E. Rose, deceased." If the indictment contained nothing more, the case would be in point. *But,* "The indictment alleged the possession to be in W. C. Shandley as one of the heirs of the estate of Mary E. Rose, deceased." The allegation of possession in Shandley would enable the defendant to establish a plea of former jeopardy if he were again charged for the same offense. Without such latter allegation a defendant could be subject to repeated charges of theft from an "estate." The allegation of theft from Shandley served to emphasize the defect in the indictment against Jessup.

For the reasons heretofore assigned, we conclude the State's argument does not satisfy the requirement of the law that the identity of the owner or the person in possession of the stolen property should be named in the indictment with certainty to the end that another prosecution cannot be maintained for the same offense.

[6] We are forced to conclude the indictment in this case fails to charge the ownership, possession, or right to possession of the $20,100 in any person, corporation or organization or agency capable of possessing or holding the title to, or to possession of, personal property. The indictment is fatally defective.

This Court held in *State v. Law, supra:* "The question of variance may be raised by demurrer to the evidence or by motion to nonsuit. . . . 'It challenges the right of the State to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide, as matter of law, that the State has failed in its proof.' "

The decision of the Court of Appeals, finding no error in the trial, is reversed. The Court of Appeals will remand the case to the Superior Court of Stokes County with instructions to arrest the judgment, to set the verdict aside and to quash the indictment.

Reversed.

STATE OF NORTH CAROLINA v. JUNIOR ALLEN

No. 69

(Filed 10 June 1971)

1. **Burglary and Unlawful Breakings § 1— distinction between first and second degree burglary — occupancy of dwelling house**

The only distinction between first and second degree burglary is the element in first degree burglary requiring that the dwelling house be actually occupied at the time of the breaking and entering. G.S. 14-51.

2. **Criminal Law § 30— solicitor's election to try defendant on lesser degrees of the offense — effect of the election**

When the solicitor elects not to try the defendant on the maximum degree of the offense charged but to try defendant for the lesser degrees of the offense, the effect of the solicitor's election is that of a verdict of not guilty upon the maximum degree.

3. **Burglary and Unlawful Breakings § 3; Criminal Law § 30— solicitor's election to try defendant for second degree burglary**

In a prosecution on indictment charging defendant with first degree burglary, the solicitor's announcement in open court that he would seek no verdict greater than burglary in the second degree, *held* proper.

4. **Criminal Law § 30; Burglary and Unlawful Breakings § 3— trial for second degree burglary — objection to verdict**

Where a defendant charged with first degree burglary failed to object to the solicitor's election to seek a verdict no greater than second degree burglary, the defendant could not thereafter attack the verdict of second degree burglary on the ground that all the evidence tended to show his guilt of first degree burglary.

5. **Burglary and Unlawful Breakings § 3— solicitor's election to seek verdict of second degree burglary — effect**

Solicitor's election to seek a verdict no greater than second degree burglary was in effect a stipulation that the dwelling house was not actually occupied at the time of the breaking and entering.

6. **Criminal Law §§ 30, 104— solicitor's election to try defendant on lesser degrees of the offense — consideration of evidence**

When the solicitor announces that he will not seek a conviction upon the maximum degree of the crime charged in the indictment, and the defendant interposes no objection to being tried on the lesser degree of the offense, the sufficiency of the evidence to support a conviction of the lesser degree must be measured by the same standards which would be applied had the indictment charged only the lesser degree of the offense.

ON *certiorari*, pursuant to the petition of the defendant, to review the judgment of *Bailey, J.*, at the 19 October 1970 Criminal Session of JOHNSTON.

The defendant, having given in open court notice of appeal to the Supreme Court, but having failed to perfect his appeal within the time allowed therefor, petitioned for *certiorari*, which petition was allowed for consideration of the matter by the Supreme Court as upon appeal.

The defendant was charged under an indictment, proper in form, alleging, in substance, that on 3 July 1970, at about 12:30 a.m., he feloniously and burglariously broke and entered the dwelling house of Mrs. Lessie Johnson, then actually occupied by Mrs. Johnson, with intent to steal a television set, the property of Mrs. Johnson. A second count, not involved in this appeal, charged the defendant with stealing, feloniously and burglariously, from the dwelling of Mrs. Johnson, a described television set belonging to her.

When the matter came on for trial, prior to the taking of any testimony, the solicitor announced that he would not try the defendant for first degree burglary but for burglary in the second degree. The record shows no objection or exception interposed by the defendant at that time. The presiding judge thereupon caused the record to show that, prior to the arraignment, the solicitor so announced in open court in the presence of the defendant and his attorney. Thereupon, the solicitor arraigned the defendant by reading the bill of indictment, to which the defendant, through his counsel, entered a plea of not guilty. At this point the record shows an exception, which is the basis of the present appeal, but it does not appear that the defendant interposed any objection or took his exception in open court at that time.

The trial proceeded as a trial upon the charge of burglary in the second degree. The court, in its charge to the jury, read the bill of indictment and told the jury that it charged the crime of burglary in the first degree, but the State, through the solicitor, had announced that it would seek no verdict greater than burglary in the second degree, to which offense the defendant had entered a plea of not guilty. To this the defendant also excepts, the record not showing any objection interposed at the time the instruction was given.

The court then instructed the jury that it might find the defendant guilty of burglary in the second degree, guilty of felonious breaking or entering, guilty of nonfelonious breaking or entering or not guilty, and gave instructions as to the elements of each such offense. To these instructions the defendant does not except.

The jury found the defendant guilty of burglary in the second degree. Thereupon, the court sentenced him to imprisonment for life.

Mrs. Johnson did not testify. Her son testified as a witness for the State to the following effect:

He was at his mother's home on the night of 2 July 1970, leaving about 10 p.m. Just before he left, his mother, 87 years of age, went to bed. No one else was in the house when he left it. He and his mother had been watching television and when he left the house, he turned off the set, leaving two lights on according to custom. The doors to the house were not locked. The next morning he returned to the house about 7:30 a.m. The television set was gone. He found no broken window and no door open. He observed footprints leading to his mother's door and then returning to and across the road. These prints were of boot tracks showing "heavy set knobs" which had sunk down into the dirt, making good prints.

The tracks led to the room in a labor camp where the defendant lodged. The television set taken from his mother's home was found in the woods approximately 100 yards from the labor camp, covered with brush, leaves and a pair of pants. It was identified and introduced in evidence.

Agent O'Daniels of the State Bureau of Investigation testified that the defendant told him the defendant entered Mrs. Johnson's home by merely turning the knob of the unlocked door, opening the door and entering one room from which he removed and carried away the television set; that he took the television set to a wooded area in the rear of the migrant camp where he was then residing and that at the time he was wearing the boots with "knotty holes" on them. No exceptions relating to the admission of evidence are brought forward in the defendant's brief on appeal.

Attorney General Morgan and Assistant Attorney General Myron C. Banks for the State.

W. Kenneth Hinton for defendant appellant.

LAKE, Justice.

The sole question raised by the defendant in this Court is thus stated in his brief: "Did the trial court commit error by placing the defendant on trial for burglary in the second degree when all the evidence tended to show burglary in the first degree?"

The defendant thus brings forward into his brief only his Assignment of Error No. 1. This assignment is directed to his Exceptions Nos. 1 and 8. Exception No. 1 is to the direction by the court that the record show that, prior to arraigning the defendant, the solicitor announced, in open court and in the presence of the defendant and of his attorney, that he would seek no verdict greater than burglary in the second degree, and to the subsequent arraignment of the defendant by reading the bill of indictment to which the defendant entered a plea of not guilty. Exception No. 8 was to the court's statement in its charge to the jury that the State had announced it would seek no verdict greater than burglary in the second degree, to which offense the defendant entered a plea of not guilty. The defendant's Assignments of Error Nos. 2, 3 and 4 are, therefore, deemed abandoned. Rule 28 of the Rules of Practice in the Supreme Court.

[1] The bill of indictment returned by the grand jury charged all of the elements of burglary in the first degree. Consequently, it necessarily charged all of the elements of burglary in the second degree plus the additional allegation that the dwelling house in question was actually occupied at the time of the alleged breaking and entry by the defendant. This further element of actual occupancy at the time of the breaking and entering is the only distinction between the two degrees of burglary. G.S. 14-51. Thus, had there been no announcement by the solicitor, the bill of indictment would have supported a verdict of guilty of either first degree burglary or second degree burglary as the evidence might warrant. G.S. 15-170.

[2, 3] Upon the return of an indictment sufficient in form to support a conviction of the defendant of either the maximum de-

gree of the offense charged, a lesser degree thereof or a lesser offense, all of the elements of which are included in the crime charged, the solicitor has the authority to elect not to try the defendant on the maximum degree of the offense charged but to put him on trial for the lesser degree thereof and lesser offenses included therein. *State v. Peeden,* 272 N.C. 494, 158 S.E. 2d 615. The effect of such election by the solicitor, announced as in this instance, is that of a verdict of not guilty upon the maximum degree of the offense charged, leaving for trial the lesser degree and the lesser included offenses. *State v. Miller,* 272 N.C. 243, 158 S.E. 2d 47; *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918. Thus, there was no error in arraigning and trying the defendant upon the charge of second degree burglary. At that stage of the proceeding, the court could not know what the evidence would tend to show. There is no merit in the defendant's Exception No. 1.

Upon the question of the occupancy of the dwelling at the time of the breaking and entering by the defendant, the evidence was to the effect that the dwelling was the home of Mrs. Johnson, 87 years of age, and that she had gone to bed shortly before her son's departure about 10 p.m. When he left there was no one in the house except Mrs. Johnson. The breaking and entering occurred about midnight. Mrs. Johnson did not testify. The statement of the defendant to the investigating officer indicates that no one was in the room which he entered, and contains no indication that he ever saw Mrs. Johnson.

While this evidence would permit the jury to draw an inference that Mrs. Johnson was in the house at the time the defendant broke and entered, it does not, even if true, compel a finding to that effect. Consequently, the question of whether the house was actually occupied at the time of the breaking and entering was for the jury, and had there been no announcement by the solicitor, it would have been necessary for the court to submit to the jury, as possible verdicts, both burglary in the first degree and burglary in the second degree, depending upon whether they found, upon this evidence beyond a reasonable doubt, that the house was or was not occupied at the time of the breaking and entering.

In *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269, the exact time of the breaking and entering was not fixed by the evidence. The evidence was that the house was unoccupied for a brief in-

terval immediately before the residents therein retired for the night. Under these circumstances, this Court held there was no error in instructing the jury that if it did not find from the evidence, beyond a reasonable doubt, that the house was occupied at the time of the breaking and entering, it should find the defendant not guilty of burglary in the first degree, but it should return a verdict of burglary in the second degree if it did so find each of the elements thereof.

[4, 5] The solicitor's announcement precluded a verdict of guilty of burglary in the first degree in the present case. It was, in effect, a stipulation by the State that the house was not actually occupied at the time of the breaking and entering. The defendant, not having objected thereto at the time of the announcement, may not await the outcome of the trial and then attack the validity of the verdict that he was guilty of second degree burglary on the ground that the house was occupied and so he was guilty of the more serious crime.

Had the bill of indictment, by omitting any allegation as to occupancy of the building, charged second degree burglary only and had the evidence, as here, been sufficient to show all of the elements thereof, proof of actual occupancy of the dwelling at the time of the breaking and entering would not be a defense to the charge. In that event, the defendant would not be entitled to a judgment of nonsuit by reason of the fact that the uncontradicted testimony of the State's witness showed such actual occupancy. The reason is that such evidence of actual occupancy does not negate any element of the offense of second degree burglary. To hold otherwise would force the State, in all cases, to charge the defendant with the most serious degree of the offense and to try him therefor lest it be surprised at the trial by evidence from its witnesses stronger than it knew it had available, or be surprised by evidence of the defendant to the effect that he had committed a more serious crime than charged.

[6] When the solicitor, upon the calling of the case for trial, announces that he will not seek a conviction upon the maximum degree of the crime charged in the bill of indictment, and the defendant interposes no objection to being tried upon the lesser degree of the offense, the sufficiency of the evidence to support a conviction of the lesser degree must be measured by the same

standards which would be applied had the bill of indictment charged only the lesser degree of the offense.

The defendant relies upon *State v. Spain,* 201 N.C. 571, 160 S.E. 825, and *State v. Locklear,* 226 N.C. 410, 38 S.E. 2d 162. In the Spain case, the indictment charged burglary in the first degree. When the case was called for trial, the solicitor announced that the State would not ask for a verdict of more than burglary in the second degree. The evidence, thereafter introduced, showed the house was occupied at the time of the breaking and entering. The defendant was convicted of burglary in the second degree. He was granted a new trial, the court holding that his motion for judgment as of nonsuit as to the charge of burglary in the second degree should have been granted for the reason that proof of actual occupancy precluded the trial court from submitting the case to the jury upon the charge of burglary in the second degree. The court said that the case might have been submitted to the jury on the charge of breaking or entering other than burglariously or on the charge of an attempt to commit such offense.

In *State v. Locklear, supra,* the indictment charged burglary in the first degree. When the case was called for trial, the solicitor announced that he would ask only for a verdict of guilty of second degree burglary. The evidence subsequently introduced, and uncontradicted, was that the prosecutrix was asleep in the dwelling at the time of the breaking and entering and was attacked therein by the defendant. The verdict was guilty of burglary in the second degree. On appeal it was held there was no evidence to support a milder verdict than that of burglary in the first degree and, as the result of the solicitor's announcement, "there remained no charge in the bill of indictment to support a verdict of burglary in the second degree." A new trial was granted, the court saying that the defendant might be tried upon the original charge of burglary in the first degree or on the charge of breaking and entering other than burglariously.

In *State v. Spain, supra,* upon which *State v. Locklear, supra,* relies, the court cited as authority for its decision *State v. Smith,* 201 N.C. 494, 160 S.E. 577; *State v. Ratcliff,* 199 N.C. 9, 153 S.E. 605; *State v. Allen,* 186 N.C. 302, 119 S.E. 504; *State v. Johnston,* 119 N.C. 883, 26 S.E. 163; and *State v. Alston,* 113 N.C. 666, 18 S.E. 692. These and numerous other decisions of this Court are to the effect that a conviction of the maximum de-

gree of the offense, for which the defendant was indicted and tried, will not be disturbed because of his contention that the trial court failed to instruct the jury as to a lesser degree of the offense, or failed to instruct them that they might return a verdict of guilty of such lesser degree, or expressly withheld from their consideration a verdict of guilty of such lesser degree. See also: *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545; *State v. Brown,* 227 N.C. 383, 42 S.E. 2d 402; *State v. Cox,* 201 N.C. 357, 160 S.E. 358; *State v. Spivey,* 151 N.C. 676, 65 S.E. 995.

Where, for example, as in *State v. Smith, supra,* upon a trial under an indictment for first degree burglary, there being no announcement by the solicitor of his intent to seek a milder verdict, the prosecuting witness testifies that the defendant broke and entered her dwelling house in the nighttime and assaulted and raped her therein and the defense is alibi, to instruct the jury that it might return a verdict of second degree burglary is simply to invite a compromise verdict. So, also, where the uncontradicted evidence is that the deceased was murdered by poison, there is no basis for a verdict of second degree murder or manslaughter. See *State v. Spivey, supra,* at page 685.

These decisions are not authority for the proposition that when the State, either through a bill of indictment as returned by the grand jury or through the election of its solicitor to seek a lesser verdict, brings the defendant to trial on a lesser degree of the offense charged, the case cannot be submitted to the jury if the uncontradicted evidence, as thereafter developed, shows the defendant is guilty of the more serious degree of the crime.

Insofar as the decisions in *State v. Spain, supra,* and *State v. Locklear, supra,* are in conflict with the views herein expressed, we deem them to be unsupported by the authorities therein cited and erroneous. They are, therefore, hereby overruled.

For the reasons above stated, there is no merit in the defendant's Exception No. 8. The court properly submitted to the jury the guilt or innocence of the defendant upon the charge of burglary in the second degree.

No error.

MARY ALICE BRYANT v. HAYWARD KELLY, JR., AND CLARETHA SIMMONS KELLY; LINSTER O. SIMMONS AND WIFE, BLANCHIE SIMMONS; RAYMOND C. SIMMONS AND WIFE, REATHER SIMMONS; RANDOLPH SIMMONS AND WIFE, ETHEL SIMMONS; AND KADELL SIMMONS AND WIFE, LOUISE M. SIMMONS; ROBERT H. SIMMONS AND WIFE, FANNIE SIMMONS; CLEO ROOSEVELT SIMMONS; AND CHARLIE EDWARD SIMMONS

No. 88

(Filed 10 June 1971)

1. **Trusts § 13— resulting trust — time of passage of consideration**

No resulting trust could arise where the consideration passed more than a year after the transaction in which legal title was transferred.

2. **Trusts § 13— parol trust**

Where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement.

3. **Trusts § 13— parol trust — consideration**

A parol trust does not require a consideration to support it; if the declaration is made at or before the legal estate passes, it will be valid even if in favor of a mere volunteer.

4. **Trusts § 17— proof of parol trust**

Evidence of the establishment of a parol trust must be clear, cogent and convincing; a mere preponderance of the evidence is not sufficient.

5. **Trusts § 13— parol trust**

If there was clear, cogent and convincing evidence of an agreement between plaintiff and her brother that the land in question would be purchased for the benefit of both of them, and if that agreement was made before the brother took title to the land, a valid parol trust arose, regardless of when the consideration was paid by plaintiff to her brother.

6. **Trusts § 13— parol trust — time of effectiveness**

A parol trust becomes effective and binding at the time of the declaration and not at the time of the payment of the consideration.

7. **Courts § 4— controversy exceeding $5,000 — jurisdiction of superior court**

The Superior Court Division of the General Court of Justice is the proper division for the trial of all civil cases in which the amount in controversy exceeds $5,000. G.S. 7A-243.

8. **Appeal and Error § 6— order transferring case to another trial division — appellate review**

Orders transferring or refusing to transfer from one trial division of the General Court of Justice to another are not immediately appealable, even for abuse of discretion.

9. Appeal and Error § 62— new trial — transfer of case to superior court

Where this case was improvidently transferred from the superior court to the district court, and a new trial has been granted for other reasons, the Supreme Court orders that the case be transferred to the superior court for the retrial. G.S. 7A-260.

ON *certiorari* to review decision of the Court of Appeals upholding judgment of *Roberts, Chief District Judge*, 23 March 1970 Session of CRAVEN District Court.

Plaintiff commenced this action on 9 October 1968 to establish a trust in certain lands described in the complaint.

Plaintiff alleges in her complaint that Leonard Nixon Simmons died intestate on or about 26 August 1966 and that defendants (with spouses) are all of his heirs at law; that on or about 16 November 1946 plaintiff and Leonard Nixon Simmons entered into an agreement to purchase from Craven County a certain tract of land described in the complaint; that the purchase price was $805, of which plaintiff should contribute the sum of $250, and that plaintiff should own a certain described portion of the land. Plaintiff further alleged that she paid the $250 and that Leonard, using said money, purchased the land pursuant to said agreement and took a deed in his own name, agreeing that he would hold plaintiff's interest in trust, which he did until his death on 26 August 1966; that plaintiff and her family continuously possessed, farmed, and used as their own, with the full acquiescence and consent of the said Leonard Nixon Simmons, the portion of the property which he held in trust for her; that plaintiff each year paid to Leonard that portion of real estate taxes attributable to plaintiff's portion of the land; that since Leonard's death plaintiff has demanded of defendants that they convey her portion of the lands to her, but they have refused to do so and claim the whole of said property as their own.

Defendants deny the material allegations of the complaint and affirmatively plead laches and the statute of limitations.

The parties through their counsel stipulated that Miles Simmons, father of Mary Alice Bryant and Leonard Nixon Simmons, owned the subject lands prior to 1942; that the lands were part of those which were foreclosed for taxes by Craven County and conveyed by John A. Guion, Commissioner, to Craven County by deed dated 20 April 1942, recorded in

Book 364, page 94, Craven County Registry; and that said lands were conveyed by Craven County to Leonard Simmons on 16 November 1946, for a consideration of $805, by deed recorded in Book 402 at page 149, Craven County Registry.

Plaintiff as a witness in her own behalf testified that she lived on the land in question in 1942 and was also living there in 1946; that she continued to live on the land for about fifteen years after 1946; that "after my brother and myself got the property back, I stayed up there about ten years. There was a ditch dividing the land that I contended was mine. It was the tract my house was on; . . . there was a ditch right straight through and he told me and I tended on one side the ditch, and he on the other." Plaintiff further stated that her brother Leonard came to see her about repurchasing the land "while the land was in Craven County's name." She said that from 1946 until her brother Leonard died she farmed the land and cut timber and firewood off of it, "and there were no objections made to our cutting timber or farming the land. No objections were made until after my brother Leonard died."

Plaintiff's husband, Earl Bryant, testified that he and his wife were living on the property in 1946; that he was present when Leonard Simmons discussed the repurchase of the property from Craven County; that as a result of that discussion he and his wife got together $250 and he gave that sum to Leonard Simmons to apply on the purchase price; that the wife of Leonard Simmons, at Leonard's direction, wrote a receipt for the money; that there was an agreement "between me and my wife and Leonard Simmons about her paying so much money for the land, and that was before the land was deeded to him, by the County"; that it was agreed that the ditch would be the dividing line between plaintiff's land and her brother Leonard's land; that since 1946 plaintiff has farmed the cleared lands, used the crops and made no division whatever with Leonard Simmons; that "she stayed on one side of the ditch and he stayed on the other"; that plaintiff helped pay the taxes, cut timber and sold logs off the land, grew and gathered the crops, and Leonard Simmons never objected; that plaintiff was living on the land at the time it was repurchased from Craven County.

Nathaniel Simmons, a brother of plaintiff and Leonard Simmons, testified that Leonard talked to him on several occa-

sions and "asked me to go in with him and buy it and so I told him that since I was so far [away] and lived in Pollocksville for him to get my sister Mary Alice and her husband to buy since she was living on the place." This witness further stated: "My brother Leonard told me that my sister had paid $250 on the land. I heard my brother Leonard say that the boundary line was the ditch near or opposite of the house and the part Mary Alice was supposed to have was on the right-hand side of the ditch. I heard him say this on more than one occasion, and I have seen a receipt for the $250. My sister showed me the receipt where she paid the money. I think his wife wrote it. My sister Mary Alice Bryant has been in possession of said lands on the house side of the ditch . . . until a year or so ago. I also know my brother Charlie paid part on the land. Yes, Brother Charlie paid him a hundred dollars and he gave Webster, his son, a deed. He gave my brother Charlie's son a deed for eight or ten acres."

Charity Simmons Bryant, sister of plaintiff and Leonard Simmons, testified that she had heard Leonard Simmons say that he and Mary Alice were buying the land back together and the ditch would divide them—he would be on one side of the ditch and she on the other; that Leonard said "they would buy it together and the ditch would divide it."

Romance Simmons, widow of Leonard Simmons, testified that her husband died in August 1966; that she was present when Earl Bryant came to the house with $250; that Leonard told her to write a receipt for the money and she did so; that the receipt "was supposed to be for Mary Alice's part of the land"; that she was married to Leonard Simmons at the time the receipt was written, having been married on 28 January 1947; that when she wrote the receipt she made a copy, which she still had, and the copy of the receipt reads: "November 28, 1947, received from Earl Bryant $250 for property; $250 (signed) Leonard Simmons"; that she wrote the receipt and signed it and Leonard told her to do so; that the copy of the receipt is not a carbon copy but an exact duplicate—that she wrote the receipt twice, "one for him and one to keep."

Madeline Banks, plaintiff's daughter, testified that she had heard her parents and Uncle Leonard discussing on more than one occasion the purchase of the land that formerly belonged

to her grandfather Miles Simmons; that her Uncle Leonard "asked them if they wanted to buy the land in with him, and they said that they did. And so later they got the money together and gave him the money"; that they had talked about this land a long time, a year or two or maybe more, and her mother told him that she would pay $250; that her father and mother were living on the land at the time, farming it, cutting timber, and continued to do so until a year or two ago; that she never heard Leonard Simmons voice any objection to the use of the land by her mother on her side of the ditch.

Robert Forrest testified that he lives about two miles from the land in controversy; that he is familiar with the location of the ditch referred to; that it runs in approximately a straight line; that the land lying east of the line marked on the map (Plaintiff's Exhibit A) as "A-B" has been in the possession of the Earl Bryant family since 1941.

Kadell Simmons, son of Leonard Simmons, was called by plaintiff as an adverse witness. He testified that "Mary Alice Bryant has been in possession of the land on the house side all of her lifetime. . . . She has been tending it every since I have known anything about it and I have never heard my father object to it."

Robert Simmons, son of Leonard Simmons, was called by plaintiff as an adverse witness. He testified that "Aunt Mary Alice has been tending it since about 1940 and lived right out there on it until she moved—since 1940 until my daddy died she tended the land on one side of the ditch. . . . My understanding from my daddy was that they had some kind of agreement. . . . "

At the close of plaintiff's evidence the defendants moved for a "directed verdict." The court thereupon allowed the motion, made findings of fact, conclusions of law, and entered judgment as follows:

> (a) Leonard Nixon Simmons purchased the subject lands for $805.00 on November 16, 1946, and took a deed in his name on that date, having the same recorded in Book 402, at Page 149, in the Office of the Register of Deeds of Craven County, North Carolina;

(b) Leonard Nixon Simmons married Romance Simmons on January 28, 1947;

(c) Earl Bryant paid $250.00 to Leonard Nixon Simmons on behalf of his wife, the plaintiff, after Leonard Nixon Simmons married Romance Simmons;

(d) Earl Bryant paid $250.00 'for property' to Leonard Nixon Simmons on behalf of his wife, the plaintiff, on November 28, 1947;

(e) There was no agreement between plaintiff and Leonard Nixon Simmons on the subject lands binding on Leonard Nixon Simmons unless and until plaintiff paid the sum of $250.00.

Upon the foregoing Findings of Fact, the undersigned makes the following

CONCLUSIONS OF LAW:

At the time of his death on August 26, 1966, Leonard Nixon Simmons did not hold the subject lands in trust for the plaintiff, Mary Alice Bryant, as a result of the plaintiff paying or causing to be paid a portion of the purchase price of the said lands, neither as a result of any agreement binding between the parties prior to the purchase of said subject lands by Leonard Nixon Simmons.

NOW, THEREFORE, it is ORDERED and ADJUDGED that defendants' motion for directed verdict in favor of defendants at the close of plaintiff's evidence should be and the same hereby is allowed. Plaintiff to pay the costs.

This 23rd day of March, 1970.

/s/ J. W. H. Roberts
Chief Judge

To the entry of the foregoing judgment plaintiff excepted and appealed. The Court of Appeals affirmed, 10 N.C. App. 208. We allowed *certiorari* to review that decision.

Brock & Gerrans by Donald P. Brock, Attorneys for plaintiff appellant.

Beaman & Kellum by Norman B. Kellum, Jr. and Trawick H. Stubbs, Jr., Attorneys for defendant appellees.

HUSKINS, Justice.

The Court of Appeals correctly treated defendants' motion for a directed verdict as a motion for involuntary dismissal. Directed verdicts are appropriate only in jury cases. See Rule 50(a).

The trial judge concluded as a matter of law that Leonard Nixon Simmons did not hold the subject lands in trust for the plaintiff. This conclusion apparently rests on the "finding of fact" that there was no agreement "between plaintiff and Leonard Nixon Simmons on the subject lands binding on Leonard Nixon Simmons unless and until plaintiff paid the sum of $250."

[1] We first dispose of all questions relating to purchase money resulting trusts. "It is elemental that a resulting trust arises, if at all, in the same transaction in which the legal title passes, and by virtue of consideration advanced before or at the time the legal title passes, and not from consideration thereafter paid." *Rhodes v. Raxter,* 242 N.C. 206, 87 S.E. 2d 265 (1955). It is clear from the evidence here, and it was so found by the trial judge, that the consideration passed more than a year *after* the transaction in which the legal title was transferred. Therefore, no resulting trust could arise.

[2-4] We turn to the law of parol trusts. North Carolina is one of a minority of states that has never adopted the Seventh Section of the English Statute of Frauds which requires all trusts in land to be manifested in writing. 29 Charles II, c. 3, § 7 (1676); *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418 (1945); Lord and Van Hecke, Parol Trusts in North Carolina, 8 N.C. L. Rev. 152 (1930); Bogert, Trusts and Trustees (2d Ed., 1965), § 64. Even so, this Court has consistently enforced safeguards that considerably limit the application of the parol trust doctrine. Lord and Van Hecke, *supra; Pittman v. Pittman,* 107 N.C. 159, 12 S.E. 61 (1890); *Paul v. Neece,* 244 N.C. 565, 94 S.E. 2d 596 (1956). Despite such limitations, this Court has always upheld parol trusts in land in the "A to B to hold in trust for C" situation. The rule is stated in *Paul v. Neece, supra,* in these words: "[I]t is uniformly held to be the law in this State that where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party

for whom he purchased the land, and equity will enforce such an agreement." *See also Beasley v. Wilson,* 267 N.C. 95, 147 S.E. 2d 577 (1966); *Martin v. Underhill,* 265 N.C. 669, 144 S.E. 2d 872 (1965); *Roberson v. Pruden,* 242 N.C. 632, 89 S.E. 2d 250 (1955); *Hare v. Weil,* 213 N.C. 484, 196 S.E. 869 (1938); *Owens v. Williams,* 130 N.C. 165, 41 S.E. 93 (1902); 54 Am. Jur., Trusts, §§ 47, 48; 89 C.J.S., Trusts, §§ 32(b), 34; Bogert, *supra,* § 64; 1 Scott on Trusts (3d Ed., 1967), § 40.1. Moreover, a parol trust "does not require a consideration to support it. If the declaration is made at or before the legal estate passes, it will be valid even if in favor of a mere volunteer." *Hare v. Weil, supra; Paul v. Neece, supra.* Evidence of the establishment of a parol trust is required to be clear, cogent, and convincing; a mere preponderance of the evidence is not sufficient. *Paul v. Neece, supra; Pittman v. Pittman, supra.*

[5, 6] Applying the foregoing legal principles, if there was clear, cogent, and convincing evidence of an agreement between the plaintiff and Leonard Nixon Simmons that the land in question would be repurchased from Craven County for the benefit of both of them, and if that agreement was made before Simmons took title to the land, then a valid parol trust arose, regardless of when the consideration was paid. The trial judge, sitting as judge and jury, did not find as a fact that there was or was not such a prior agreement or declaration. Instead, he found: "There was no agreement between plaintiff and Leonard Nixon Simmons on the subject lands *binding* on Leonard Nixon Simmons unless and until plaintiff paid the sum of $250.00." (Emphasis added.) This finding is not a finding of fact but a conclusion of law, and as a conclusion of law it is erroneous. A parol trust becomes effective and binding at the time of the declaration and not at the time of the payment of the consideration. *Paul v. Neece, supra.*

Since the conclusion of the trial judge was grounded upon inadequate findings of fact and upon the erroneous legal notion that the agreement between the parties, if any, was not binding unless and until a consideration was paid, the decision of the Court of Appeals must be reversed and the case remanded for a new trial at which findings may be made as to whether such an agreement existed. Judgment may then be rendered thereon according to law.

For the sake of brevity, we refrain from a detailed discussion of other assignments relating to exclusion of certain evidence plaintiff sought to elicit from Earl Bryant, Charity Simmons and Madeline Banks. Many of these exceptions are well taken. Admissibility of such evidence is governed by G.S. 8-51 as interpreted in *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542 (1951), and discussed in Stansbury, North Carolina Evidence (2d Ed., 1963), §§ 66-70, 73.

This action was commenced initially in the Superior Court of Craven County on 9 October 1968. The District Court Division of the General Court of Justice was established in the Third Judicial District on 2 December 1968. G.S. 7A-131(2). The Resident Judge of the Third Judicial District, on his own motion, transferred the cause to the district court for trial by order dated 2 December 1968. Plaintiff has filed written motion in this Court to remand the case to the Superior Court of Craven County for trial. Her motion is supported by affidavits that the lands in controversy are worth $10,000 to $15,000. Plaintiff asserts that the cause was transferred to the district court for trial on the mistaken belief that the value did not exceed $5,000.

[7] G.S. 7A-259(b) provides that when a district court is established in a district, "any superior court judge authorized to hear and determine motions to transfer may, on his own motion, subject to the requirements of subsection (a), transfer to the district court cases pending in the superior court." Subsection (a) of that statute provides in pertinent part: "Transfer is not made on the judge's own motion unless the pleadings clearly show that the case is pending in an improper division." The pleadings in this case do not reflect the value of the land and do not otherwise show the amount in controversy. The Superior Court Division of the General Court of Justice is the proper division for the trial of all civil cases in which the amount in controversy exceeds $5,000. G.S. 7A-243.

[8, 9] Orders transferring or refusing to transfer from one trial division of the General Court of Justice to another are not immediately appealable, even for abuse of discretion. "Such orders are reviewable only by the appellate division on appeal from a final judgment. If on review, such an order is found erroneous, reversal or remand is not granted unless prejudice

is shown. If, on review, a new trial or partial new trial is ordered for other reasons, the appellate division may specify the proper division for new trial and order a transfer thereto." G.S. 7A-260. In our view, the superior court is the proper division for the trial of this case. It was improvidently transferred to the district court. Since a new trial is ordered for other reasons, it is ordered that the case be transferred to the Superior Court of Craven County for the retrial.

For the reasons set out, the decision of the Court of Appeals is reversed and the case remanded to that court for appropriate entries in accord with this opinion.

Reversed and remanded.

J. R. WATKINS, EMPLOYEE v. CENTRAL MOTOR LINES, INC., EMPLOYER, AND MICHIGAN MUTUAL LIABILITY, CARRIER

No. 103

(Filed 10 June 1971)

1. **Master and Servant § 77— workmen's compensation — claim for permanent disability — change of condition**

   Plaintiff's claim for permanent partial disability involved a "change of condition" and was barred by G.S. 97-47, where the claim was made more than one year after the employee's receipt of final compensation payment for temporary disability and his execution of Industrial Commission Form 28B closing the case.

2. **Master and Servant § 69— workmen's compensation — disability defined**

   The term "disability," as used in the Workmen's Compensation Act, means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of injury. G.S. 97-2(9).

3. **Master and Servant § 69— workmen's compensation — length of disability — presumptions**

   There is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred.

4. **Master and Servant § 77— employee's claim for permanent disability — misrepresentations by employer — findings of fact**

   Employee's evidence was sufficient to require the Industrial Commission to make findings of fact as to whether the employee was misled to his prejudice when his employer's workmen's compensation agent

misrepresented to him that the signing of Form 28B closing the employee's payments for temporary disability would not affect the employee's later claim for permanent disability.

APPEAL by plaintiff as of right under G.S. 7A-30(2) from decision of the Court of Appeals upholding award of the North Carolina Industrial Commission denying further compensation, 10 N.C. App. 486.

The facts pertinent to decision of this case appear in the numbered paragraphs below.

1. On 19 May 1967 plaintiff was injured in a truck accident in Indiana under compensable circumstances.

2. On 2 June 1967 defendants admitted liability, the parties executed Industrial Commission Form 21, and the compensation carrier paid plaintiff compensation at the rate of $37.50 per week for temporary total disability from 20 May 1967 to 1 January 1968 in the total sum of $1216.08.

3. On 18 January 1968 plaintiff received the last of his weekly compensation payments and signed a final receipt on Industrial Commission Form 28B, which contains the following pertinent provisions: "14. Does This Report Close the Case—including final compensation payment? Yes—Except for med. . . . NOTICE TO EMPLOYEE: If the answer to Item No. 14 above is 'Yes,' this is to notify you that upon receipt of this form your compensation stops. If you claim further benefits, you must notify the Commission in writing within one (1) year from the date of receipt of your last compensation check."

4. Plaintiff returned to work on 2 January 1968 at the same wages he was earning when his injury occurred. At that time he was still being seen periodically by his physician and had not been released. On 19 March 1968, Dr. Richard H. Ames of Greensboro, who had been treating plaintiff during his period of temporary total disability, examined plaintiff and reported that he had not yet reached maximum improvement and that plaintiff was to return after six months for possible rating of his permanent partial disability. On 12 September 1968 Dr. Ames examined plaintiff and reported that he had improved, that no treatment was "indicated at this time," and that he planned to see plaintiff in six months for "further follow-up." (A copy of these reports was sent to the Compensa-

tion Carrier.) On 29 November 1968 Dr. Ames again examined plaintiff and reported that he planned to rate plaintiff for final disposition in March of 1969. (A copy of this report was transmitted to the employer.) On 8 May 1969 Dr. L. U. Anthony, who practiced with Dr. Ames, examined plaintiff and reported he had a twenty percent permanent partial disability of the right arm due to the injuries sustained in the Indiana accident. (A copy of this report was sent to the Compensation Carrier.) On 18 June 1969 plaintiff filed with the Industrial Commission on I.C. Form 33 a request for a hearing with respect to compensation for his permanent partial disability.

5. Defendants denied further liability to plaintiff for that more than one year had elapsed between the last payment of compensation and plaintiff's request to the Industrial Commission for further hearing. A hearing was held before Deputy Commissioner Thomas on 29 August 1969 at which plaintiff appeared without counsel. At plaintiff's request, the hearing was continued until plaintiff could arrange for representation. He employed his present counsel and a hearing was thereafter held before Deputy Commissioner Thomas on 13 February 1970. At that hearing plaintiff offered medical evidence of his permanent partial disability (Plaintiff's Exhibits 16 and 17) and then testified that in early January 1968, Al Hinnant, the log clerk for Central Motor Lines, Inc., asked him to sign an Industrial Commission form; that no one was present at the time except plaintiff, Robert Eller and Al Hinnant; that "Mr. Hinnant asked me to sign this form, said that it was—that I would receive it in my last check on weekly benefits, and I asked him if that was what it was and he said yes, that all it meant that I had a year to re-open this case if I wanted more weekly benefits; if I wanted to go back on weekly benefits. I asked him something about permanent disability payments and he said that this had really nothing to do with that because that would be left up to when the doctors released and rated me."

Robert Eller testified that during the day or evening of 18 January 1968, "Mr. Watkins and I went to the log clerk's office at which time Mr. Watkins had a conversation with Mr. Hinnant. We went down to go out and Mr. Hinnant called us in his office and he gave a paper to Mr. Watkins to sign and Mr. Watkins told him that he had not been released or rated yet on the disability, and Mr. Hinnant said, 'Well, this is just

to show the Industrial Commission that you have been receiving your weekly benefits,' so he signed it. Mr. Hinnant didn't say anything to Mr. Watkins about any permanent injury. He said if he wanted to renew his weekly benefits, why, he had a year's time to do it in. Mr. Parrish was not present during that conversation; just me and Mr. Watkins and Mr. Hinnant."

Albert C. Hinnant, a witness for defendants, testified that he was employed by Central Motor Lines in the capacity of Log Control Clerk, a position he has held since 15 July 1967. "In January, 1968, I did not have any connection with the handling of Workmen's Compensation papers for Central Motor Lines because that's before I began handling the papers. I started handling the papers some time in early spring of 1968. I would say in May because—having them signed, witnessed and seeing that the men received their payments. It is correct that I heard Mr. Watkins' testimony concerning an alleged conversation with me in January, 1968, concerning this Form 28B. I did not have any conversation with Mr. Watkins in January, of 1968, with reference to this Form 28B. Mr. Parrish was handling the Workmen's Compensation paper work at that time at the terminal; that is, Mr. George Parrish. I have had conversations with Mr. Watkins concerning a Form 28B but that was in early 1969, I'd say in February or March."

George C. Parrish, a witness for defendants, testified that he had been Chief Dispatcher for Central Motor Lines for five years; that during January of 1968 he was handling final Workmen's Compensation payments and execution of Form 28B by employees under his supervision; that he signed in the capacity of witness the Form 28B in question; that he had never witnessed a Form 28B when he did not see an employee sign it, although he does not recall specifically "what happened on the occasion when this was signed."

6. Based upon certain stipulations concerning which there is no dispute and upon the foregoing evidence, Deputy Commissioner Thomas made findings of fact and concluded as a matter of law that plaintiff's claim for further compensation for the twenty percent permanent partial disability of his arm was barred by the provisions of G.S. 97-47. Plaintiff appealed to the Full Commission assigning as errors: (1) failure of the Deputy Commissioner to make a finding of fact concerning the circumstances under which plaintiff signed Form 28B on 18

January 1968, (2) the conclusion of law that plaintiff's claim for permanent disability payments is barred and (3) denial of the claim. The Full Commission adopted the findings of fact and conclusions of law of Deputy Commissioner Thomas and affirmed the result reached by him. Plaintiff appealed to the Court of Appeals and that court affirmed the Full Commission, with Vaughn, J., dissenting. Plaintiff thereupon appealed to the Supreme Court assigning errors noted in the opinion.

Douglas, Ravenel, Hardy & Crihfield by G. S. Crihfield, for plaintiff appellant.

Robert L. Scott for defendant appellees.

HUSKINS, Justice.

Is plaintiff's permanent partial disability a "change in condition" within the meaning of G.S. 97-47? If so, are defendants estopped to plead the statute in bar of plaintiff's claim for additional compensation? Answers to these questions are determinative on this appeal.

[1] Where a claimant suffers an injury that results in temporary total disability followed by a specific disability compensable under G.S. 97-31, compensation for the specific disability is payable in addition to that awarded for temporary total disability. *Rice v. Panel Co.*, 199 N.C. 154, 154 S.E. 69 (1930). Plaintiff contends he is thus entitled to additional compensation for forty-four weeks to cover the twenty percent permanent partial disability of his right arm—a specific disability under G.S. 97-31(13). Defendants contend his claim for additional compensation is barred by G.S. 97-47 because (1) the claim arises from a change in plaintiff's condition and (2) he failed to notify the Industrial Commission and make claim for it within twelve months from the date on which he received the last payment of compensation for his temporary total disability. These conflicting contentions require us to decide whether, on the facts in this case, plaintiff's permanent partial disability is a "change in condition" within the meaning of G.S. 97-47.

G.S. 97-47, in pertinent part, provides: "Upon its own motion or upon the application of any party in interest on the grounds of a change of condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously

awarded, subject to the maximum or minimum provided in this article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article . . . . " The Commission's authority under this statute is *limited to review of prior awards,* and the statute is inapplicable in instances where there has been no previous final award. *Biddix v. Rex Mills,* 237 N.C. 660, 75 S.E. 2d 777 (1953); *Pratt v. Upholstery Co.,* 252 N.C. 716, 115 S.E. 2d 27 (1960). In such cases, jurisdiction is retained by and remains in the Commission pending a termination of the case by final award. *Branham v. Panel Co.,* 223 N.C. 233, 25 S.E. 2d 865 (1943). No statute runs against a litigant while his case is pending in court. *Hanks v. Utilities Co.,* 210 N.C. 312, 186 S.E. 252 (1936).

[2, 3] The term "disability," as used in the Workmen's Compensation Act, means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of injury. G.S. 97-2(9). If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred. *Tucker v. Lowdermilk,* 233 N.C. 185, 63 S.E. 2d 109 (1951).

[1] Here, plaintiff returned to work for the same employer on 2 January 1968 at the same wage he was receiving prior to his injury. He has worked continuously since that time and lost no wages. On 18 January 1968 he received his last weekly compensation payment for the period during which he was disabled. He signed and received a copy of Form 28B which by its terms *closed the case* (except for medical). That Form notified him that he would receive no further compensation payments and that if he claimed further benefits he must notify the Commission in writing within one year from date of receipt of his last compensation check. Form 28B was duly filed with the Commission. Thus, plaintiff's disability due to his injury presumptively ended on 18 January 1968. Nothing in the medical reports up to that time indicated any permanent partial disability. In a medical report dated 29 July 1967 (Plaintiff's Exhibit 8), Dr.

Hickman of Fort Wayne, Indiana, stated that plaintiff's accident had not resulted in any permanent disability. If any of the parties anticipated at that time that plaintiff would not fully recover and that his injury would result in permanent partial disability, such fact is not reflected in the medical reports or in the Commission's findings of fact. Hence, the case was closed. "A closing receipt purports to be a final settlement and indicates that no further compensation will be paid unless request for hearing for change of condition is made within a year from date of the receipt." *Pratt v. Upholstery Co., supra* (252 N.C. 716, 115 S.E. 2d 27). Any change in plaintiff's physical condition thereafter, entitling him to additional compensation under the Act, was a "change in condition" within the meaning of that term as used in G.S. 97-47 and required him to apply to the Industrial Commission on or before 18 January 1969 for review of its previous award. "Where the harmful consequences of an injury are unknown when the amount of compensation to be paid has been determined by agreement but subsequently develops, the amount of compensation to which the employee is entitled can be redetermined within the statutory period for reopening. It is a 'change in condition' as the term is used in the statute." *Smith v. Red Cross,* 245 N.C. 116, 95 S.E. 2d 559 (1956). "The fact that the change necessitates making an award in an entirely different category, as when an original award was one of temporary benefits for time loss and the award on reopening would be for total permanent disability, is no obstacle to reopening." Larson, Workmen's Compensation, § 81.31. So it is here. We hold that plaintiff's evidence shows a change in condition and G.S. 97-47 applies.

The agreement between the parties on Form 21, approved by the Commission on 16 June 1967, provided for payment of compensation at the rate of $37.50 per week "for necessary weeks." This constituted an award by the Commission enforceable, if necessary, by a court decree. G.S. 97-87; *Biddix v. Rex Mills, supra.* This was followed by the execution and filing of Form 28B closing the case on 18 January 1968 when plaintiff received his last payment of compensation pursuant to that award. Seventeen months elapsed before plaintiff filed Form 33 with the Commission requesting a hearing and further award of compensation on account of his permanent partial disability. This comes too late unless defendants are estopped to plead the lapse of time. *Lee v. Rose's Stores, Inc.,* 205 N.C. 310, 171 S.E.

87 (1933); *Smith v. Red Cross, supra; Ammons v. Sneeden's Sons, Inc.*, 257 N.C. 785, 127 S.E. 2d 575 (1962); *White v. Boat Corp.*, 261 N.C. 495, 135 S.E. 2d 216 (1964).

[4] We now turn to the question of estoppel. Plaintiff contends defendants are estopped to plead the lapse of time by reason of misrepresentations made to him by A. C. Hinnant, employer's agent in charge of Workmen's Compensation claims, at the time he signed Form 28B closing his case. Plaintiff argues that Hinnant's statements not only induced him to sign the form but also lulled him into believing that the lapse of time following the last payment of compensation would not affect his right to receive additional compensation for permanent partial disability—"that would be left up to when the doctors released and rated me."

"The law of estoppel applies in compensation proceedings as in all other cases." *Biddix v. Rex Mills, supra.* In *McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114 (1937), Chief Justice Stacy, speaking for the Court, said: "The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play."

Actual fraud, bad faith, or an intent to mislead or deceive is not essential to invoke the equitable doctrine of *estoppel in pais. Oliver v. Fidelity Co.*, 176 N.C. 598, 97 S.E. 490 (1918); *Waugh v. Lennard*, 69 Ariz. 214, 211 P. 2d 806 (1949). "It is sufficient for this purpose that the debtor made misrepresentations which misled the creditor, who acted upon them in good faith, to the extent that he failed to commence action within the statutory period." 51 Am. Jur. 2d, Limitation of Actions, § 433. *Accord, Schroeder v. Young*, 161 U.S. 334, 40 L. Ed. 721, 16 S. Ct. 512 (1896). Such tolling of the statute may result from the honest but entirely erroneous expression of opinion as to some significant legal fact. Larson, Workmen's Compensation, § 81.51; *Waugh v. Lennard, supra;* Annotation, Estoppel to rely on statute of limitations, 24 A.L.R. 2d 1413 (1952). Justice Higgins, speaking for the Court in *Nowell v. Tea Co.*, 250 N.C. 575, 108 S.E. 2d 889 (1959), aptly expressed the doctrine in this language: "The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount

to a breach of good faith." *Accord, Ammons v. Sneeden's Sons, Inc., supra.*

No facts were found relative to the question of estoppel. Plaintiff's evidence on that question was sufficient to require the Industrial Commission to find the facts with respect thereto and, upon such findings, to determine whether defendants are estopped to plead the lapse of time by reason of plaintiff's reliance on the employer's representations, "the repudiation of which would amount to a breach of good faith." If defendants are not estopped, the case is closed. If estopped, the Commission is required to consider the evidence in the record, and any additional pertinent evidence either party may desire to offer, and determine whether a further award is justified for change in condition, and, if so, the amount thereof.

The decision of the Court of Appeals is reversed. The case will be remanded by that court to the North Carolina Industrial Commission for disposition in accordance with this opinion.

Reversed and remanded.

C'EST BON, INC., T/A C'EST BON v. N. C. BOARD OF ALCOHOLIC CONTROL

No. 112

(Filed 10 June 1971)

1. **Intoxicating Liquor § 2— beer permit — violation of statutes or regulations**

A violation of either a statute or an ABC Board regulation is sufficient to support the suspension of a retail beer permit.

2. **Intoxicating Liquor § 2— suspension of beer permit — notice and hearing**

Before a permit can be suspended or revoked, notice must be given to the permittee of the time and place for a hearing with an opportunity for the permittee to offer evidence and to be represented by counsel, and the charges against the permittee must be specific. G.S. 18-137.

3. **Intoxicating Liquor § 2— suspension of beer permit**

Final decision as to whether a permit should be suspended or revoked is made by the ABC Board. G.S. 18-78; G.S. 18-137; G.S. 18-138.

4. Intoxicating Liquor § 2— findings of ABC Board

After a hearing to determine whether the permittee has violated the law or regulations, the findings of the ABC Board are conclusive if supported by competent, material and substantial evidence.

5. Intoxicating Liquor § 2— suspension of beer and social establishment permits — sufficiency of evidence and findings

There was substantial *competent* evidence to sustain findings by the ABC Board that petitioner (1) sold and allowed the consumption of beer on its premises during illegal hours, (2) permitted an employee to consume intoxicating beverages on the premises, (3) permitted an intoxicated person to remain on the premises for a considerable length of time, and (4) failed to give the licensed premises proper supervision on specified dates, any one of which would support the Board's suspension of petitioner's retail beer and social establishment permits. G.S. 18-51(7)b; G.S. 18-78(d).

APPEAL by petitioner from *Brewer, J.*, February 1971 Special Non-jury Civil Session of WAKE Superior Court, transferred to this Court for initial appellate review by virtue of the general transferral order of 31 July 1970.

This proceeding originated by notice dated 2 July 1970 to C'est Bon, Inc., 2316-2318 Central Avenue, Charlotte, North Carolina, to appear before the Hearing Officer of the State Board of Alcoholic Control on 14 July 1970 to show cause why its retail beer permit and alcoholic beverage social establishment permit should not be revoked or suspended. The notice specified the following violations occurred on the nights of June 26 and 27, 1970: (1) Selling and/or allowing the sale of beer and permitting the consumption of beer during illegal hours; (2) permitting and allowing B. B. Jasper, an employee, to consume intoxicating beverages (whiskey) on the premises; (3) permitting and allowing persons in an intoxicated condition to loiter on the premises; (4) failing to clear all counters and tables of beverages, bottles, cans and containers by 12 midnight; (5) failing to give the licensed premises proper supervision; and (6) no longer considered to be a suitable place for persons to hold a State retail beer and/or alcoholic beverage social establishment permit.

The hearing was postponed until 11 September 1970, at which time it was conducted before D. L. Pickard, Assistant Director and Hearing Officer. Petitioner was represented by Michael Plumides, attorney. State ABC Officers Joel E. Brewer, Jack Marion, and John Wilson were witnesses for the Board.

Officer Brewer testified that when these charges arose the C'est Bon held an on-premise beer permit and a social establishment permit.

Officer Marion testified in substance that on Friday and Saturday nights, 26 and 27 June 1970, he and Officer Wilson went to the C'est Bon as undercover agents. While there on the night of June 26, he observed B. B. Jasper, an entertainer employed by C'est Bon, drinking liquor from a fifth of whiskey between 11:15 p.m. and 3:00 a.m., three topless dancers getting a mixed drink from the C'est Bon bartender at 11:50 p.m., a waitress of the club serving four cans of Budweiser beer at 12:03 a.m. to two couples, and three staggering males at 12:20 a.m. Officer Marion further testified that on the night of June 27 he observed Jasper again drinking liquor at intervals from a fifth of whiskey and that an employee of the C'est Bon brought a pint bottle to Jasper's table at approximately 1 a.m.; that at 1:35 a.m. a drunk man came by the table where Officers Marion and Wilson were sitting and fell to the floor; that the bouncer employed by the club told this man that he would have to sit down; that the intoxicated man got up from the floor and went over to a table, and when the officers left the man was sitting at the table "passed out."

Officer Wilson corroborated Officer Marion's testimony except he testified that he could not see the bar from where he was sitting and did not see the bartender mix drinks for the three topless performers on June 26.

Mr. Richard Bonavita, bartender for the C'est Bon; Mr. Bill Moore, C'est Bon's manager; and Mr. Waban Thomas, C'est Bon's floor manager or bouncer, testified for the petitioner. Mr. Bonavita testified that it was the policy of C'est Bon to set the clock up five minutes on Saturday nights to give an additional five minutes to clear tables; that when the clock shows 11:45 p.m. he puts all beer away; that on busy nights he, Mr. Moore, and Mr. Thomas assist in clearing tables so that they can be cleared by midnight; that to the best of his knowledge the tables were cleared by midnight on the nights of 26 and 27 June 1970.

Mr. Moore testified that C'est Bon had previously been warned by the ABC Board about Jasper's on-premises drinking; that he had informed Jasper that while he was *employed* at the club he was not allowed to drink; that Jasper was fired for drinking when the notice of 2 July 1970 was served on Mr.

Moore; that it was C'est Bon's policy to evict all drunks; that the topless dancers are not permitted to bring whiskey on the premises; that if they drink, it is without his knowledge; and that the waitresses are instructed to tell him if they see one of the dancers drinking.

Mr. Thomas testified that the customer accused of being "passed out" at 1:35 a.m. on 27 June 1970 was not drunk, but only tripped over an unlighted step and sat down with his head in his hand to rest; that he assisted this particular customer to the table and would have known if he was drunk; that had the customer been drunk he would have been out of the C'est Bon in two seconds; and that he had had much experience in determining whether a person is drunk or not.

After the hearing, Hearing Officer Pickard found as a fact that C'est Bon, Inc., T/A C'est Bon, permitted and allowed B. B. Jasper, an employee, to consume intoxicating beverages (whiskey) on or about 26 and 27 June 1970 on its retail licensed premises, and further found as a fact that this permittee failed to give its retail licensed premises proper supervision by allowing B. B. Jasper, an employee, to consume intoxicating beverages (whiskey) on its retail licensed premises on those dates. The Hearing Officer then recommended that the licensee's permits be suspended for a period of 30 days.

On 19 October 1970, after reviewing the entire transcript, including the findings of fact and recommendations of Hearing Officer Pickard, and hearing the argument of Michael G. Plumides, counsel for petitioner, the State ABC Board found as facts that the permittee (1) sold and allowed the sale and consumption of beer during illegal hours on 27 June 1970; (2) permitted B. B. Jasper, an employee, to consume intoxicating beverages (whiskey) on its licensed premises on or about 26 and 27 June 1970; (3) permitted persons in an intoxicated condition to loiter on the licensed premises on or about 28 June 1970; and (4) failed to give the licensed premises proper supervision on or about 26, 27, and 28 June 1970, and the Board thereupon concluded as a matter of law that the permittee had violated G.S. 18-78 (b) (c) (d) (e) and (f), G.S. 18-78.1(3), G.S. 18-141, Board of Alcoholic Control Malt Beverage Regulations Nos. 30(6) and 30(1), and Alcoholic Beverage Social Establishment Regulation No. 8(a). The Board, based upon these conclusions, ordered that petitioner's on-premises beer and social establish-

ment permits be suspended for a period of 90 days effective 29 October 1970.

Petitioner excepted to the full Board's order and filed a petition for judicial review in Wake County Superior Court. Upon the petitioner's motion, a temporary stay of the Board's action was issued by Judge Clark on 27 October 1970 pending final judicial review.

On 8 February 1971 Judge Clark granted the motion of petitioner that it be allowed to present evidence as to prejudice and bias of a member of the ABC Board, Harold Edwards. After allowing this motion, Judge Clark set the cause for hearing before Judge Brewer. The hearing was held before Judge Brewer at the 22 February 1971 Session on the record and on additional evidence for the petitioner, consisting of an affidavit of Michael G. Plumides, attorney for petitioner. Plumides in his affidavit stated in substance that Board member Edwards refused to grant a requested continuance of the hearing originally set for 24 July 1970 (later a sixty-day continuance was granted), that Edwards made a motion to enlarge the findings of fact made by the Hearing Officer to include the other alleged charges and to extend the recommended punishment from 30 to 90 days, that Edwards had undercover men to visit C'est Bon on several occasions, and that such actions showed Edwards was biased and prejudiced against C'est Bon.

In reply to the Plumides' affidavit, the affidavits of Board member Edwards and of W. Charles Cohoon, Chairman of the Board, were introduced. The affidavit of Edwards was to the effect that he had received numerous complaints concerning the C'est Bon, as well as other premises in the city of Charlotte, and that because of these complaints, Edwards requested the supervising ABC Officer of Mecklenburg County to give special attention to these premises and to see that the law was properly enforced and that violations were not taking place. The affidavit of Cohoon stated that at the meeting of the full Board on 19 October 1970 all members of the Board concurred in the action suspending for 90 days the permits of C'est Bon, Inc.

At the conclusion of the hearing in Superior Court, Judge Brewer, after reciting in his judgment the various proceedings which had taken place in the case, found:

"The findings of fact and decision of the defendants herein are supported by competent, material and substantial evidence in view of the entire record as submitted and evidence, and affidavits submitted this date and the substantial rights of the plaintiff have not been prejudiced; that said decision is in compliance with the applicable constitutional provisions, within the statutory authority or jurisdiction of defendants and pursuant to the law and a lawful procedure, is neither arbitrary nor conspicuous [*sic*]; that there was no fraud, manifest abuse or discretion or conduct in excess of lawful authority; and upon the entire record and upon the evidence and affidavits submitted herein, the decision herein judicially reviewed, should be affirmed."

Thereupon Judge Brewer entered judgment affirming the decision of the Board and dissolving the preliminary stay order heretofore entered in the proceeding.

From this judgment the petitioner gave notice of appeal. Judge Brewer stayed the suspension of the license of the petitioner pending the determination of the appeal.

Plumides & Plumides for petitioner appellant.

Attorney General Robert Morgan and Assistant Attorney General Mrs. Christine Y. Denson for respondent appellee.

MOORE, Justice.

[1] The State Board of Alcoholic Control has the authority to regulate and supervise the sale and distribution of alcoholic beverages. Only those holding a permit from the Board may engage in the sale and distribution of beer. The permit is a privilege granted to those who meet the standards which have been established by the General Assembly or regulations adopted by the Board pursuant to the authority granted by G.S. 18-78(d), and the permit may and should be revoked if the permittee violates the laws or regulations pertaining to such permit. A violation of either a statute or a regulation is sufficient to support the suspension of the license. G.S. 18-78(d); *Keg, Inc. v. Board of Alcoholic Control,* 277 N.C. 450, 177 S.E. 2d 861; *Wholesale v. ABC Board,* 265 N.C. 679, 144 S.E. 2d 895; *Boyd v. Allen,* 246 N.C. 150, 97 S.E. 2d 864.

[2, 3] Before a permit can be suspended or revoked, G.S. 18-137 requires notice to the permittee of the time and place for

a hearing with an opportunity for the permittee to offer evidence and to be represented by counsel. The charges against the permittee must be specific. The hearing may be before the Director or a Hearing Officer. After the hearing, the Hearing Officer reviews all the evidence, records his findings of fact and conclusions of law, and makes his recommendations to the Board. The Chairman of the Board causes the record, findings, conclusions, and recommendations of the Hearing Officer to be submitted to the Board for approval, modification, or rejection as the Board may find to be justified by the record. The Board makes the final decision. G.S. 18-78; G.S. 18-137; G.S. 18-138; North Carolina Board of Alcoholic Control Inspection and Enforcement Rule 3.A.8; *Sinodis v. Board of Alcoholic Control,* 258 N.C. 282, 128 S.E. 2d 587.

[4] After a hearing to determine whether the permittee has violated the law or regulations, the findings of the Board are conclusive if supported by competent, material and substantial evidence. *Keg, Inc. v. Board of Alcoholic Control, supra; Freeman v. Board of Alcoholic Control,* 264 N.C. 320, 141 S.E. 2d 499; *Campbell v. Board of Alcoholic Control,* 263 N.C. 224, 139 S.E. 2d 197; *Thomas v. Board of Alcoholic Control,* 258 N.C. 513, 128 S.E. 2d 884.

On appeal to the court for judicial review of the Board's decision, it is the duty of the court to review the evidence and determine whether the Board had before it any material and substantial evidence sufficient to support its findings. *Wholesale v. ABC Board, supra.*

[5] In the present case the Board found as a fact, based upon the testimony of two eyewitnesses, that the permittee sold and allowed the consumption of beer on its premises at approximately 12:03 a.m. This was a violation of G.S. 18-78.1(3), which provides it is unlawful to "sell such beverages upon the licensed premises or permit such beverages to be consumed thereon, on any day or at any time when such sale or consumption is prohibited by law," and of G.S. 18-141 which provides that beer will not be sold between the hours of 11:45 p.m. and 7:30 a.m., and will not be consumed on the premises between 12 midnight and 7:30 a.m.

The Board further found as a fact, based upon testimony of the same eyewitnesses that the permittee allowed B. B. Jasper, an employee, to consume intoxicating beverages (whiskey) on

the premises on 26 and 27 June 1970. Malt Beverage Regulation No. 30 provides:

> "30. Permits authorizing the sale at retail of beverages, as defined in G.S. 18-64, and Article 5 of Chapter 18 of the General Statutes, for on or off premises consumption may be suspended or revoked upon violation of any of the following provisions upon the licensed premises:
>
> * * *
>
> "6. Any permittee or employee consuming intoxicating beverages on the premises. . . ."

The petitioner contends that Jasper was an independent contractor and was not an employee of the club. However, in an affidavit filed by Jasper, he states that he was informed by the management of C'est Bon that if he were caught drinking alcoholic beverages on the premises "my *employment* would be terminated; . . ." Again in his affidavit he indicates that his drinking under the table was done "out of the sight of my *employer*. . . ." (Emphasis added.) In addition, Moore, the manager of C'est Bon, testified that he told Jasper that he was not allowed to drink while *employed* there. We hold that the overwhelming evidence that Jasper was openly consuming alcoholic beverages (whiskey) served to him by an employee of the club, while Jasper was on the premises for the purposes of entertaining customers, amply supports the finding that an employee was permitted to consume intoxicating beverages on the premises, a violation of Malt Beverage Regulation No. 30(6).

Malt Beverage Regulation No. 30(1) and Social Establishment Regulation No. 8(2) provide that a license may be revoked or suspended for permitting intoxicated persons to loiter on the licensed premises. The evidence was sufficient to support a finding that at least one person was intoxicated to the extent that he fell down and finally "passed out" at his table where he remained for a considerable length of time. Permitting this to occur would constitute a violation of Regulations No. 30(1) and No. 8(2).

The specific findings discussed above would justify the final finding of the Board that the permittee failed to give the licensed premises proper supervision on or about 26, 27, and 28 June 1970, a violation of G.S. 18-78.

Any one of the above recited violations would support the suspension of C'est Bon's permit to sell beer at retail and C'est Bon's social establishment permit. G.S. 18-51(7)b; G.S. 18-78(d); *Keg, Inc. v. Board of Alcoholic Control, supra.*

As stated by Justice Higgins in *Freeman v. Board of Alcoholic Control, supra.*

> "'. . . Courts will not undertake to control the exercise of discretion and judgment on the part of members of a commission in performing the functions of a State agency.' *Williamston v. R. R.*, 236 N.C. 271, 72 S.E. 2d 609. 'When discretionary authority is vested in such commission, the court has no power to substitute its discretion for that of the commission; and in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene.' *Pharr v. Garibaldi,* 252 N.C. 803, 115 S.E. 2d 18. 'Hence it is that the findings of the board, when made in good faith and supported by evidence, are final.' *In re Hastings,* 252 N.C. 327, 113 S.E. 2d 433."

There is no evidence of fraud, manifest abuse of discretion, conduct in excess of lawful authority, or that the Board acted arbitrarily or capriciously.

The judgment of the Superior Court is in all respects affirmed, and the order entered by Judge Brewer staying the operation of the order entered by the State Board of Alcoholic Control on 19 October 1970 pending the appeal is vacated.

Affirmed.

STATE OF NORTH CAROLINA v. EVERETT JENNING McKNIGHT

No. 99

(Filed 10 June 1971)

1. Criminal Law § 106— motion for nonsuit — sufficiency of evidence — circumstantial evidence

The test of the sufficiency of evidence to withstand a motion for nonsuit is the same whether the evidence is circumstantial, direct, or both.

2. **Homicide § 21— second degree murder — sufficiency of evidence**

The State offered sufficient evidence to require that the issue of defendant's guilt of second degree murder be submitted to the jury, although some of the evidence introduced by the State might have been exculpatory.

3. **Criminal Law § 106— motion for nonsuit — where State's evidence is both exculpatory and inculpatory**

When the substantive evidence offered by the State is conflicting— some tending to inculpate and some tending to exculpate the defendant—it is sufficient to overrule a motion for judgment as of nonsuit.

APPEAL by defendant from *Beal, S.J.*, September 23, 1970 Session of MECKLENBURG Superior Court.

Defendant was tried for the second degree murder of Claude Blalock Bridges. From a verdict of guilty of second degree murder and sentence imposed, defendant appealed to the Court of Appeals. The case comes here under our transferral order of July 31, 1970.

Attorney General Robert Morgan and Assistant Attorney General Thomas B. Wood for the State.

E. Clayton Selvey, Jr., for defendant appellant.

MOORE, Justice.

Defendant's only assignment of error is to the refusal of the court to allow his motions for nonsuit at the close of the State's evidence and at the close of all the evidence. The State's evidence tends to show:

Everett Parker had been an employee of Mecklenburg Bonding Company for nine years. His office was located at 122 S. Davidson Street in Charlotte. This office had two rooms, one directly behind the other. The back room had two beds in it. The deceased, Claude Blalock Bridges, sometimes called Bill Bridges, had been employed by Mecklenburg Bonding Company for two years. On 6 March 1970 between 9:30 and 9:40 p.m., Parker was in his office sitting directly in front of a plate glass window when he heard three successive shots fired. The shots sounded like they were close. Ten to fifteen seconds later Parker saw somebody pull himself up by the window sill and then enter his office. This person was so bloody that he did not recognize him at first; his entire body, face, and head were covered

with blood. When this person got inside, Parker saw that it was the deceased. The deceased did not stop but went straight to the back office and fell on a bed. Russell Adams, who was in the office with Parker, followed deceased into the back room. Approximately ten to fifteen seconds after deceased came in, defendant entered. He had a .32 caliber pistol in his left hand similar to one the deceased owned, and blood on his clothing and hands. As defendant came in, he said "Where did Bill go?" Parker, who was on the telephone calling for help, told defendant "back there" and motioned toward the back room. Defendant went into the back room. After defendant came in, Parker went outside and saw no one else except some firemen who were at a fire station across the street.

About 8 p.m. on 6 March 1970 Joe Stewart saw the defendant and the deceased at the Mecklenburg County jail getting into deceased's car. When he came back to his office at 118 S. Davidson Street, he noticed that deceased's car was parked at deceased's office at 114 S. Davidson Street. He was sitting at his desk in front of a picture window shortly after 9 p.m. when he heard three shots which sounded like they came from the left of him. He stood up and saw someone go by the window, after which he went outside, looked to his left and saw no one, looked to his right and saw Parker coming out of 122 S. Davidson Street. He then went to 122 S. Davidson Street and saw deceased lying on the floor bleeding; defendant, with blood on his face, hands and clothing, was kneeling beside deceased saying, "Bill, Bill, Bill," and then he said "is he dead" a number of times. Later, Stewart got into a police patrol car with the defendant, and defendant told him he was in the back room and deceased was in the front room of deceased's office at 114 S. Davidson Street, when the deceased came running into the back room, turned around, and ran out down the street. At the police station the defendant told Stewart that he was in the back room and deceased was in the front room; that he heard shots, ran to the front room, and saw a gun lying on the floor. At the trial Stewart testified that the story defendant told him at the police station was not the same story defendant told him earlier.

Russell Adams was at 122 S. Davidson Street on 6 March 1970. He knew both the deceased and the defendant. Between 9:30 and 9:40 p.m. he heard three shots, looked through the

plate glass window, and as the last shot was fired he saw deceased getting up at the corner of the building. Deceased stumbled through the door, went to the back room and fell across the bed; he had blood all over him. Defendant came running in about five seconds later with a gun in his hand and blood on his clothing and hands. Defendant said, "Where is he at?", and Adams said "in the back." Defendant then went straight to the back room, followed by Adams. Adams left for ten or fifteen seconds, returned, helped deceased off the bed, and laid him straight out on the floor. The defendant's pants had been torn. At the trial Adams testified that the pocket of defendant's pants was "flabby when he came in the front door like it was flunked down on one side." About a week after March 6, Adams found a bloody monkey wrench weighing about eight or nine pounds under a pile of clothes near the bed on which deceased was lying. Adams had often seen the wrench at deceased's place of business.

James C. Brown, an employee of the Charlotte Fire Department, on 6 March 1970 heard two gunshots at approximately 9:30 p.m. He got up immediately from his desk, looked out the window, and saw defendant on the sidewalk walking toward the Mecklenburg Bonding Company with a gun in his hand. He also saw some other person going in the same direction in front of defendant. Brown then went across the street to 122 S. Davidson Street where he saw deceased lying on the floor at the rear of the office, and defendant, with blood on his hands and face, standing beside deceased.

Francis Wade, a member of the Charlotte Fire Department, was in the south side of the Mecklenburg Bonding Company's parking lot on 6 March 1970 when he heard three shots. After he heard the shots he walked to the sidewalk and saw someone go into the Bonding Company's office. He walked into the office, saw deceased going into the back, and saw defendant coming down the street with a gun in his hand pointed out. He observed all this about ten seconds after he heard the last shot.

Officers W. E. Burnett and R. A. Metcalf, members of the Charlotte Police Department, went to 122 S. Davidson Street at approximately 9:45 p.m. on 6 March 1970 and found the deceased lying on the floor in the center section of the office. Defendant was there with blood on his shirt, hands, and left

side of his face. When they searched the defendant, they found a .32 caliber pistol belonging to the deceased in his left front pocket, and a .25 automatic in his right rear pants pocket.

On 6 March 1970, H. R. Smith, an officer with the Charlotte Police Department's Criminal Investigation Bureau, examined the .32 caliber pistol taken from the defendant. He found one live and three spent cartridges in the chamber, and two shells lying on the floor near the right foot of the bed at 122 S. Davidson Street. Smith searched defendant and found $487.98 loose in his pocket. About 10:05 p.m. that evening he went to the deceased's address at 114 S. Davidson Street and observed blood on the sheets, on the bedroom floor, on the floor in the middle room, and drops of blood leading from there out the door of the front room and onto the front porch. An examination for bullet holes was made in the rear of the house where the bedroom is located. One .32 caliber bullet was found in the back door. Later that evening, the defendant told Smith he went to deceased's office about 7 p.m. to watch a ball game; that somewhere near the end of the second ball game he got up and went to the bathroom, and that several seconds later he heard deceased say, "Mack, help. Mack, help"; that when he looked he saw deceased lying in his room on the bed; that he helped him off the bed, and then deceased broke loose from him and went out the front door; that he followed deceased out the front door and picked deceased's gun up from the porch; that deceased started down the street; that deceased then went into the office at 122 S. Davidson Street, after which defendant followed him and asked where deceased was; that he went to the back of the office and found deceased lying on the floor. Defendant also told Smith he had some personal contact with deceased at 114 S. Davidson Street and also at 122 S. Davidson Street.

Amon Butler owns the building at 114 S. Davidson Street where deceased lived. The wrench found at 122 S. Davidson Street was one which he used the latter part of January to fix the lavatory at 114 S. Davidson Street and had not seen since.

Hobart R. Wood, Medical Examiner for Mecklenburg County, performed the autopsy on the deceased. He found that the deceased had a massive blunt force type head injury; that he had a total of twenty-one deep, or relatively deep, lacerations over the forehead, left scalp, left ear, one in the back of the scalp and one in the back of the right side of his head; that he

had a fractured skull on the left side, which extended into the base of the skull; that he had an acute hemorrhage of the brain, acute swelling of the brain as a result of the injuries; that deceased had been shot once through the body, entering the left back area, and had been stabbed twice; that deceased died as the result of massive head injuries and a gunshot wound through the left lung.

On 4 April 1970 Officer C. J. Miller of the Charlotte Police Department was examining the patrol car which Officers Burnett and Metcalf used to carry the defendant to the police station on March 6. He slid the back seat out and found deceased's wallet underneath. The wallet contained no paper money.

Defendant offered no evidence.

[1] The State's evidence is circumstantial. The test of the sufficiency to withstand a motion for nonsuit, however, is the same whether the evidence is circumstantial, direct, or both. *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329; *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. As said by Justice Higgins in *State v. Stephens, supra,* quoting from *State v. Johnson,* 199 N.C. 429, 154 S.E. 730: " 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both." Accord, *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535; *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681; *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596.

[2] Defendant contends, however, that the State in introducing its evidence brought out certain statements made by defendant to the effect that deceased was attacked by unknown third parties during the period that defendant was in an adjoining bathroom, and that after the assault deceased brushed against defendant and rushed into a nearby building where he died. Defendant's statements further tended to show that deceased dropped the gun, which defendant picked up and carried with him to the deceased's office. Defendant contends that under *State*

v. Carter, 254 N.C. 475, 119 S.E. 2d 461, these exculpatory statements should result in a dismissal of the action at the conclusion of the evidence. Defendant also cites *State v. Johnson,* 261 N.C. 727, 136 S.E. 2d 84, and *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485, as supporting his position. An examination of these cases shows factual situations entirely different from the present case. The exculpatory statements in those cases were not contradicted by other evidence.

In *State v. Carter, supra,* the State introduced as witnesses the mother and daughter of the deceased and the testimony of the investigating sheriff. The undisputed and entirely consistent testimony of these persons was all to the effect that the daughter killed the father in defense of her mother who was then being brutally attacked. No other inculpating evidence was tendered by the State. Since there was a complete lack of other substantial evidence of defendant's guilt for the jury to consider, nonsuit was properly granted.

In *State v. Gaines, supra,* the evidence presented by the State was all to the effect that the persons accompanying the actual perpetrator of the crime did not know of his intention to commit a criminal act. And in *State v. Johnson, supra,* there was a complete absence of evidence other than that introduced showing self-defense.

In the present case there is abundant evidence showing the facts to be different from defendant's statements. The State's evidence conclusively proves (1) that the deceased was brutally beaten, stabbed, and shot in the back, and that the direct cause of death was the gunshot wound; (2) that shots were heard out on the street, and the deceased was seen entering 122 S. Davidson Street closely followed by defendant with a drawn gun; (3) that deceased died in the back room at 122 S. Davidson Street; (4) that a trail of blood led from 122 S. Davidson Street to 114 S. Davidson Street where deceased and defendant had been together earlier watching television; (5) that deceased and defendant were each covered in blood when they entered the office at 122 S. Davidson Street; (6) that a .32 caliber bullet was found embedded in the wall at 114 S. Davidson Street which would fit the .32 caliber pistol of the deceased being carried by defendant; (7) that a wrench covered in blood was discovered near the spot where defendant had been standing at 122 S. Davidson Street; (8) that when defend-

ant entered the office at 122 S. Davidson Street where the wrench was later found "his pocket was flabby when he came in the front door like it was flunked down on one side. I saw his pants were all flunked down in the back"; (9) that a number of witnesses saw deceased and defendant walking toward 122 S. Davidson Street immediately after the shots were fired; defendant was behind and had the pistol pointed at deceased; no other person was seen in the vicinity at that time; and (10) that defendant had the sum of $487.98 in cash loose in his pocket, and the billfold of deceased containing no paper money was later found under the back seat in the patrol car in which defendant was taken to jail. These facts conflict in many respects with defendant's statements. In fact, the defendant's statements, as related by Joe Stewart, were conflicting themselves.

[3] *State v. Horton,* 275 N.C. 651, 658, 170 S.E. 2d 466, 471, states: " . . . [W]hen the substantive evidence offered by the State is conflicting—some tending to inculpate and some tending to exculpate the defendant—it is sufficient to overrule a motion for judgment as of nonsuit. *State v. Mitchum,* 258 N.C. 337, 128 S.E. 2d 665; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580; *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39; *State v. Tolbert,* 240 N.C. 445, 82 S.E. 2d 201."

[2] Considering the evidence in the light most favorable to the State, as we are required to do, we think the combination of facts here disclosed constitutes substantial evidence of defendant's guilt and not merely suspicious circumstances. It was for the jury to say whether the evidence established defendant's guilt beyond a reasonable doubt.

As stated by Justice Lake in *State v. Hill, supra,* at p. 444:

> " . . . To survive the motion for nonsuit, it is not necessary that the Court be of the opinion that the evidence is sufficient to establish each element of the offense beyond a reasonable doubt. It is enough that there is substantial evidence of each element of the offense. If so, the issue must be submitted to the jury, and it is a question for the jury whether the evidence establishes each element of the crime beyond a reasonable doubt. . . . When the evidence relied upon to establish an element of the offense charged is circumstantial, the court must charge the jury that it

must return a verdict of not guilty unless the evidence points unerringly to the defendant's guilt and excludes every other reasonable hypothesis. . . . It is not necessary, however, that the judge must so appraise the evidence in order to overrule the motion for judgment of nonsuit."

In a charge free from error, the trial judge instructed the jury that it should first determine what circumstances the evidence established beyond a reasonable doubt, and by considering only those facts thus established it would determine whether they were of such a nature and so related as to point unerringly to defendant's guilt and to exclude every rational hypothesis of innocence. Presumably, the jury followed these instructions. The verdict will not be disturbed.

No error.

TOWN OF HUDSON v. (69 CVS 448) CITY OF LENOIR

— AND —

ATLANTIC INVESTMENT COMPANY, INC., CONSOLIDATED FURNITURE INDUSTRIES, INC., HICKORY FIBRE COMPANY, INC., JOYCETON WATER WORKS, INC., KINCAID FURNITURE COMPANY, INCORPORATED, LENOIR MIRROR COMPANY, PRESTWOOD HARDWARE CO., INC., ROBINSON-WALSH LUMBER COMPANY, INC., TRIPLETT CARVING, INC., U. S. INDUSTRIES, INC., HAMMARY FURNITURE DIVISION v. (69 CVS 1041) TOWN OF HUDSON, A MUNICIPAL CORPORATION AND CITY OF LENOIR, A MUNICIPAL CORPORATION

No. 104

(Filed 10 June 1971)

1. **Municipal Corporations § 2— annexation proceedings by two municipalities — claims to disputed area — prior jurisdiction rule**

Municipality which instituted its original proceeding for the involuntary annexation of an industrial area prior to the date on which another municipality instituted its original proceeding for the voluntary annexation of the same area, *held* not entitled to rely on the prior jurisdiction rule in support of its claim to the disputed area, since (1) both municipalities began anew their respective annexation proceedings on the same day following the dissolution of restraining orders against them both and (2) the two annexations—voluntary and involuntary—were not "equivalent" within the meaning of the prior jurisdiction rule. G.S. 160-452; G.S. 160-453.1 *et seq.*

2. Municipal Corporations § 8— municipal resolutions

A municipal resolution, like an ordinance, is presumed prospective.

3. Statutes § 5— construction of literal language

The literal language of a statute will be interpreted to avoid an absurd result.

4. Municipal Corporations § 2— remand of annexation proceedings

Trial court was not required to remand annexation proceedings to a municipality for correction of procedural irregularities, where the land subject to annexation was to become a part of another municipality before the first municipality could make the corrections.

APPEAL by the Town of Hudson from *Thornburg, S.J.*, 12 October 1970 Civil Session, CALDWELL Superior Court.

Atlantic Investment Company, Inc., *et al.*, own an industrial area known as Joyceton, located between the Town of Hudson and the City of Lenoir in Caldwell County. These actions arise from conflicting annexation proceedings instituted by the Town of Hudson and the City of Lenoir, each seeking to annex the Joyceton industrial area.

The Town of Hudson is a municipal corporation having a population considerably less than 5,000. It sought to annex the Joyceton area by the involuntary method of annexation prescribed by G.S. 160-453.1 *et seq.* for municipalities of less than 5,000 population.

The City of Lenoir is a municipal corporation with a population considerably in excess of 5,000. Petitions for annexation, signed by the owners of all the real property located in the Joyceton area, were presented to the governing board of Lenoir, and it followed the annexation procedures set out in G.S. 160-452.

The chronology of events are narrated in the following numbered paragraphs:

1. On 4 April 1969 the Town of Hudson adopted a resolution stating its intent to consider annexation of a territory larger than, but including, the Joyceton area. Notice of this resolution was published in the Lenoir *News Topic* on April 11 and 18, 1969, together with notice of a public hearing to be held on 7 May 1969.

2. On 16 and 21 April 1969 petitions for annexation were received by the City of Lenoir from each of the owners of real property in the Joyceton area, and on 22 April 1969 the city clerk certified that the petitions were sufficient. The Lenoir City Council then ordered a public hearing for 9 a.m. on 3 May 1969, and notice thereof was duly published.

3. On 29 April 1969 the Town of Hudson commenced an action against the City of Lenoir (69 CVS 448) for temporary and permanent injunctive relief, alleging unlawful, arbitrary, and capricious conduct by the City of Lenoir. In its answer, Lenoir denied the material allegations of the complaint, sought dismissal of the action and, in the alternative, prayed that Hudson be temporarily restrained from continuing its annexation proceeding.

4. On 30 April 1969 Judge Copeland restrained both municipalities from continuing their respective annexation proceedings and ordered them to appear before Judge Bryson and show cause why the temporary order should not be continued until final hearing. On 17 June 1969, following the show cause hearing, Judge Bryson dissolved the order as to both municipalities.

5. On 17 June 1969, following dissolution of the temporary order signed by Judge Copeland, both the Town of Hudson and the City of Lenoir started annexation proceedings anew. The Town of Hudson adopted a resolution of intent to annex the disputed Joyceton territory. Lenoir investigated and determined the sufficiency of the petitions signed by the owners of the disputed area and set a public hearing for 30 June 1969. Hudson scheduled its public hearing for 21 July 1969. Each published notice of action taken and of its public hearing.

6. On 30 June 1969, following the public hearing, the City of Lenoir enacted an ordinance formally annexing the disputed area.

7. On 27 August 1969 the Town of Hudson, having completed its involuntary annexation proceeding, enacted an ordinance extending its municipal limits to include the disputed Joyceton area, effective 29 June 1970.

8. On 24 September 1969 Atlantic Investment Company, Inc., *et al.* (all the owners of the disputed Joyceton area) filed a petition and complaint in the Superior Court of Caldwell

County against the Town of Hudson and the City of Lenoir, seeking review of the actions of the governing boards of the two municipalities. (69 CVS 1041) These property owners allege that the Hudson proceeding is illegal and void and pray (1) that the Town of Hudson be permanently enjoined from taxing plaintiffs or their property and (2) that the validity of the annexation ordinance of the City of Lenoir be determined. Answer was duly filed by each defendant.

The matter came on for hearing before Judge Thornburg at the 12 October 1970 Civil Session of Caldwell Superior Court. He made findings of fact, conclusions of law, and adjudged that (1) each municipality abandoned its original annexation proceeding on 17 June 1969 and those proceedings are now null and void; (2) the issues raised in the case entitled *Town of Hudson v. City of Lenoir* (69 CVS 448), wherein each municipality sought and obtained injunctive relief, are moot; (3) the voluntary annexation of the area in dispute by the City of Lenoir on 17 June 1969 pursuant to G.S. 160-452 was completed according to law on 30 June 1969, and the property of the plaintiffs has been a part of the City of Lenoir since that date; and (4) the involuntary annexation proceeding instituted by the Town of Hudson on 17 June 1969 and the ordinance adopted 29 August 1969 (to be effective 29 June 1970) are void and of no force and effect with respect to the property of the plaintiffs which is the subject of this controversy. Judge Thornburg thereupon dismissed the action and cross action in the case entitled *Town of Hudson v. City of Lenoir* (69 CVS 448), and taxed the costs of that action against the Town of Hudson. He permanently enjoined the Town of Hudson from exercising any municipal control over the property of the plaintiffs.

The Town of Hudson appealed to the Court of Appeals assigning errors noted in the opinion. The case was transferred to the Supreme Court under its general referral order dated 31 July 1970.

West and Groome, by H. Houston Groome, Jr., Attorneys for Appellant Town of Hudson; Ervin, Horack and McCartha, by C. Eugene McCartha, Attorneys associated on the Brief for the Appellant Town of Hudson.

Norwood Robinson of the firm Hudson, Petree, Stockton, Stockton & Robinson, Attorney for Plaintiff Appellees, Atlantic Investment Company, Inc., et al.

Carpenter & Bost, by W. T. Carpenter, Jr., Attorneys for Defendant Appellee, City of Lenoir.

HUSKINS, Justice.

[1] Hudson contends it acquired prior and exclusive jurisdiction to annex the disputed area because it was first to pass a resolution of intent to annex the Joyceton area and Lenoir could not therefore proceed with voluntary annexation. Hudson relies on the majority rule stated in 2 McQuillin, Municipal Corporations (3d Ed., 1966), § 7.22a, which reads, in pertinent part, as follows:

> "The rule that among separate equivalent proceedings relating to the same subject matter, that one which is prior in time is prior in jurisdiction to the exclusion of those subsequently instituted, applies, generally speaking, to and among proceedings for the municipal incorporation, annexation, or consolidation of a particular territory; *i.e.*, in proceedings of this character, while the one first commenced is pending, jurisdiction to consider and determine others concerning the same territory is excluded. Thus, where two or more bodies or tribunals have concurrent jurisdiction over a subject matter, the one first acquiring jurisdiction may proceed, and subsequent purported assumptions of jurisdiction in the premises are a nullity."

See Landis v. City of Roseburg, 243 Ore. 44, 411 P. 2d 282 (1966); *Town of Greenfield v. Milwaukee,* 259 Wis. 77, 47 N.W. 2d 292 (1951); *Town of Clive v. Colby,* 255 Iowa 483, 123 N.W. 2d 331 (1963); *State ex rel. Harrier v. Spring Lake Park,* 245 Minn. 302, 71 N.W. 2d 812 (1955); *Daytona Beach v. Port Orange,* 165 So. 2d 768 (Fla. App., 1964); *People ex rel. Forde v. Corte Madera,* 115 Cal. App. 2d 32, 251 P. 2d 988 (1953); *Joplin v. Shoal Creek Drive,* 434 S.W. 2d 25 (Mo. App., 1968); Comment, Municipal Corporations: Prior Jurisdiction Rule, 7 Wake Forest L. Rev. 77 (1970).

[2] We hold that the prior jurisdiction rule is not applicable to the facts of this case for two reasons. The record shows that

upon dissolution of the restraining order both Hudson and Lenoir began annexation proceedings anew on the same day, June 17, 1969. Therefore, neither municipality could have gained exclusive jurisdiction under the "first to start" rule. Hudson argues, nevertheless, that its resolution of June 17 *relates back* to its original resolution passed on April 4, 1969. This contention is without merit. It is clear that all parties regarded the June proceedings as completely new and independent. In fact, Hudson's resolution on June 17 manifested the Town's intent to annex property not contained in the original resolution of April 4 and attempted to correct or supply omissions in the April proceeding. Furthermore, Hudson's Report on Annexation dated June 1969 states specifically that its procedure began on June 17, 1969, when its governing board adopted a Resolution of Intent to consider annexation of the areas described in the report. No other resolution and no other starting time is mentioned. In this posture, the resolution is similar to an ordinance: it is presumed prospective. " . . . [N]o ordinance shall be construed as having a retroactive effect unless such intention clearly appears. Thus, ordinances or by-laws operate in the future only, and are never to be given a retrospective or retroactive effect if susceptible of any other construction." 62 C.J.S., Municipal Corporations, § 443; *Smith v. Mercer*, 276 N.C. 329, 172 S.E. 2d 489 (1970). In the new resolution, there is no language indicating any intention that it is to have retroactive effect. If so intended, the intention of the Town Board should have been manifested at the time of its passage.

Aside from the fact that neither municipality was prior to the other in initiating annexation proceedings, the two proceedings were not "equivalent." The voluntary procedure initiated by the landowners and future municipal taxpayers has understandably been made simpler and quicker than the involuntary annexation procedures available to and followed by Hudson. The variations in procedural requirements with respect to voluntary and involuntary annexation make it possible for property owners in the affected area to inject an element of choice as to which municipality will govern them. *Compare* G.S. 160-452, which governs voluntary annexation, *with* G.S. 160-453.1 through G.S. 160-453.12, which governs involuntary annexation by municipalities of less than 5,000 population. It is significant here that the landowners affected preferred to be in Lenoir rather than Hudson. The applicable statutes recognize this possibility

and afford the landowners an avenue of choice if they wish to travel it. *But see Town of Clive v. Colby,* 255 Iowa 483, 123 N.W. 2d 331 (1963), where *voluntary* and *involuntary* annexation procedures were treated, by implication, as equivalent.

[3, 4] Hudson contends that the trial judge, upon finding that the record of its annexation proceedings failed to show substantial compliance with the essential provisions of the statutes under which it proceeded, was required to remand the proceeding to the governing board of the Town of Hudson for amendment with respect to such noncompliance. Ordinarily, this is so. G.S. 160-453.6(g); *Huntley v. Potter,* 255 N.C. 619, 122 S.E. 2d 681 (1961). It is well established, however, that the literal language of a statute will be interpreted to avoid an absurd result. *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2 (1968); *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970). Any new or amended proceeding by the Town of Hudson correcting all procedural irregularities would have been an exercise in futility after 30 June 1969 when the disputed area became a part of the City of Lenoir. After that date any attempt by the Town of Hudson to annex the disputed area would be in violation of G.S. 160-453.4(b)(3), which prohibits the annexation of an area already included within the boundary of another incorporated municipality. Failure to remand under such circumstance was not error.

The record discloses that on 17 June 1969, following dissolution of the temporary order signed by Judge Copeland, the City Council of Lenoir met in special session and received a petition, signed by each owner of real property in the disputed Joyceton area, requesting that the area described therein be annexed into the corporate limits of Lenoir. The petition was referred to the city clerk for checking and certification. The clerk, after reviewing the petition and checking it according to the map of the area, determined its sufficiency and so certified. The Council thereupon, by resolution, set a public hearing on the question of annexation, to be held at the Lenoir City Council Room at 9 a.m. on 30 June 1969. Notice of the public hearing was published in the Lenoir *News Topic* on Wednesday, 18 June 1969, more than ten days prior to the date of the public hearing. The Lenoir City Council then met in special session on June 30, 1969, and no one appeared at the public hearing in opposition to the annexation. The Council then determined that

the petition of the property owners met the requirements of G.S. 160-452 and adopted an ordinance annexing the territory described in the petition, effective immediately. Thus, the requirements of G.S. 160-452 were fully met, and the disputed area became a part of the City of Lenoir on 30 June 1969. It was not thereafter available for annexation by any other municipality.

In view of the foregoing conclusions, it is unnecessary to discuss or decide whether Hudson complied with the requirements of G.S. 160-453.1 *et seq.* governing involuntary annexations by municipalities of less than 5,000 population. Whether it did or not, it could in no event annex an area already within the boundary of another incorporated municipality. G.S. 160-453.4(b) (3) ; *2 McQuillin, supra,* § 7.22.

No error.

STATE OF NORTH CAROLINA v. CURTIS EUGENE SMITH

No. 10

(Filed 10 June 1971)

1. **Criminal Law § 102— abusive argument by solicitor — duty of court**

When the prosecutor becomes abusive and injects his personal views and opinions into his jury argument, he violates the rules of fair debate, and it becomes the duty of the trial judge, especially in a capital case, to intervene to stop improper argument and to instruct the jury not to consider it.

2. **Criminal Law § 102— improper jury argument by solicitor — new trial**

Defendant convicted of rape is entitled to a new trial by reason of the solicitor's inflammatory and prejudicial argument to the jury, including the solicitor's assertion that he knew when and when not to ask for conviction in a capital case, his characterization of defendant as being "lower than the bone belly of a cur dog" and a "liar," and his statements that defendant's character and reputation aren't "worth a darn" and that he "didn't believe a living word" of what defendant says about the case.

APPEAL by defendant from *Bryson, J.*, November 3, 1969 Schedule "A" Session, MECKLENBURG Superior Court.

In this criminal prosecution the defendant, Curtis Eugene Smith, was charged in the following bill of indictment:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Curtis Eugene Smith in Mecklenburg County, on or before the 8th day of May 1969, with force and arms, at and in the county aforesaid, did, unlawfully, wilfully and feloniously ravish, rape and carnally know Barbara Freeze Dobbin a female, by force and against her will against the form of the statute in such case made and provided and against the peace and dignity of the State."

After arraignment and a plea of not guilty, a jury acceptable to both parties, was empaneled. The State offered evidence tending to show the following:

On and prior to May, 1969, Barbara Freeze Dobbin, age 23, and her husband lived at 320 Riley Avenue in Charlotte. Both had daytime jobs for different employers in the city. Mrs. Dobbin worked for a motor company near her apartment. As was her custom, she went home during the lunch hour. On May 8, 1969, while she was in the apartment alone, the defendant, whom she did not know, appeared at the door and asked "Are you Jean." On being told she was not Jean and did not know anyone by that name, the defendant drove away. A few minutes thereafter he returned, knocked on the door and requested permission to use the telephone to get better directions on how to locate Jean.

The witness admitted the defendant who dialed numbers on the telephone apparently without answers. The witness became uneasy and told the defendant it was time for her to return to work. The defendant drew a knife, cautioned her not to scream or try to resist, admonishing her, "If you try to fight me, I will have to hurt you." Under threat of the open knife and at his order, she disrobed and he forced her to engage in an act of intercourse with him. Before leaving the apartment, the defendant ordered her not to leave the room until he was gone and threatened that if she made any disclosure as to what had happened, he would kill her. After the defendant left, Mrs. Dobbin, visibly agitated, returned to her place of employment and made a disclosure as to what had taken place, and had the officers notified.

The defendant testified in his own defense. He admitted being in the Dobbin apartment on May 8th and while there had intercourse with the prosecuting witness. He said the act was

with her consent. He testified he did not own or carry a knife. Members of his family testified he owned only a hunting knife which was packed in his duffel at home. Three witnesses testified to the defendant's good character.

The case was argued before the jury by defense counsel and by the solicitor. The jury returned a verdict of guilty with a recommendation that punishment be imprisonment for life. From the judgment in accordance with the verdict, the defendant gave notice of appeal. A dispute arose between the defendant and his counsel who was Court-appointed. Other counsel appointed by the Court prosecuted a belated appeal.

Robert L. Morgan, Attorney General by Eugene A. Smith, Assistant Attorney General, and Walter E. Ricks III, Associate Attorney for the State.

Craighill, Rendleman & Clarkson by John R. Ingle for defendant appellant.

HIGGINS, Justice.

As a part of the case on appeal the defendant has placed in the record what purports to be the full text of the solicitor's argument to the jury. To many portions of the argument the defendant noted exceptions. These were inserted in the record of the case on appeal. Objection seems not to have been made to the Court during the delivery of the argument.

We record here some of the quotes from the solicitor's argument: "I know when to ask for the death penalty and when not to. This isn't the first case; it's the ten thousandth for me. . . . I did . . . have in this courtroom three weeks ago a man charged with a sexual assault . . . who was as innocent of it as I. . . . I hope my reputation in this community where you elected me to this office that I try not an innocent man . . . . When I found that out about that case . . . no one was on his feet faster than I to come to his defense . . . . I wanted to tell you about that and get back to the facts of this case."

In characterizing the defendant, the solicitor said that a man who would do what this woman says this defendant did is "lower than the bone belly of a cur dog."

During the State's evidence, the investigating officer had quoted the defendant as saying that he worked for his employer,

the bus company, on May 8, 1969. The solicitor said: "Liar! No, Mr. Smith, State's Exhibit #2 says you were not working that day." Exhibit #2 introduced in evidence by the State was the bus company's work record showing that on May 8, 1969, the defendant began work at 5:43 a.m., was off duty from 9:26 a.m. until 2:22 p.m. and was checked out at 5:14 p.m.

In discussing the defendant's evidence of his good character the solicitor said: "I don't care who they bring in here . . . to say to you that his character and reputation in the community in which he lives is good. I tell you it isn't worth a darn. . . . I don't believe a living word of what he says about this case, members of the jury . . . . "

[1] The foregoing are the more flagrant of the solicitor's transgressions. Too much of his argument, however, was pitched in the same tone. When the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate and it becomes the duty of the trial judge to intervene to stop improper argument and to instruct the jury not to consider it. Especially is this true in a capital case. When it is made to appear the trial judge permitted the prosecutor to become abusive, to inject his personal experiences, his views and his opinions into the argument before the jury, it then becomes the duty of the appellate court to review the argument. "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Berger v. United States,* 295 U.S. 78, 79 L. ed. 1314, 55 S.Ct. 629. See also *State v. Smith,* 240 N.C. 631, 83 S.E. 2d 656; *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664.

In *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (also a Mecklenburg County case), Chief Justice Parker for this Court said: "It is especially proper for the court to intervene and exercise power to curb improper arguments of the solicitor when the State is prosecuting one of its citizens, and should not allow the jury to be unfairly prejudiced against him." See also *United States v. Cotter,* 425 F. 2d 450; *Hall v. United States,* 419 F. 2d 582; *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542; *State v. Correll,* 229 N.C. 640, 50 S.E. 2d 717.

Pertinent to the present inquiry is the opinion of Mr. Justice Sutherland in *Berger v. United States, supra:*

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

[2] When the solicitor's tirade before the jury is examined in the light of the foregoing rules, its inflammatory and prejudicial effect becomes manifest. The intemperance, the assertions of personal belief, the claim that the solictor knows when and when not to call for a conviction in a capital case, require this Court, in spite of its reluctance, to award the defendant an opportunity to go before another jury. The trial judge who heard the argument and failed to intervene on his own motion, was derelict in his duty.

This Court now orders that the verdict and judgment be set aside and that there be a

New trial.

STATE OF NORTH CAROLINA v. SAMUEL PARKER

No. 97

(Filed 10 June 1971)

1. **Homicide § 14— manslaughter — proof that knife was deadly weapon**

Since an unlawful killing (without malice) of a human being constitutes manslaughter, proof that the knife used to stab decedent was a deadly weapon was not prerequisite to a verdict of guilty of manslaughter.

2. **Homicide § 14— intentional use of deadly weapon causing death — presumptions**

If the State satisfied the jury from the evidence beyond a reasonable doubt that defendant stabbed decedent with a knife which constituted a deadly weapon and the stab wound so inflicted proximately caused her death, these facts would give rise to the presumptions that the killing was unlawful and with malice, the essentials of murder in the second degree.

3. **Homicide § 27— instructions — reduction of crime to manslaughter — harmless error**

Error, if any, in instructions referring to the circumstances by which defendant could reduce the crime from murder in the second degree to manslaughter by establishing to the satisfaction of the jury facts sufficient to negate malice was harmless where defendant was convicted of manslaughter.

APPEAL by defendant from *Beal, S.J.*, August 31, 1970 Special Criminal Session of MECKLENBURG Superior Court, transferred for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant was indicted, in the form prescribed by G.S. 15-144, for the murder of "Phylis *(sic)* Diane Moore" on June 3, 1970. He pleaded not guilty and, at arraignment and at trial, was represented by privately retained counsel.

Evidence was offered by the State and by defendant. The State's evidence consisted of the testimony of Mrs. Lula Zeek, Mrs. Sheila Smith, Mrs. Mary Flowe Moore and M. F. Green, the latter a member of the Charlotte Police Department. Defendant's evidence consisted solely of his own testimony.

It was stipulated: "(T)he deceased, Phyllis Diane Moore, came to her death as the result of a stab wound which entered

in the left shoulder area near the base of the left neck and passes obliquely down into the base of the neck on the left and then entered the superior mediastium. The wound being four inches in length from the skin surface down to the wound penetrating into and almost severing the left subclavian artery at its origin from the distal arch of the aorta resulting in massive hemorrhage and death on June 3, 1970."

Uncontradicted Evidence

Mrs. Phyllis Diane Moore (Diane), who was soon to become 22 years of age, was the daughter of Mrs. Lula Zeek (Lula). The fatal wound was inflicted June 3, 1970, in Apartment #3, 2416 Julian Avenue, Charlotte, N. C., when the only persons in the apartment were Diane, Lula and defendant. After the stabbing, Diane got out of the front of the apartment, fell on the sidewalk and lay there until the ambulance arrived.

Lula and her husband had been separated since February, 1969. In August, 1969, Lula and defendant had moved into this apartment. During the greater part of the four weeks preceding June 3, 1970, Diane, who lived elsewhere, had been staying in this apartment, the primary purpose of her visit to the community being to look after the sick children of her older sister.

State's Evidence

Diane returned from the house of Pat, her sister, about 5:20 p.m. For a half hour or more, Lula and Diane sat in the living room and talked and laughed about what Pat's children had been doing during the day. Defendant and David, a neighbor, were on the porch. Earlier in the afternoon they had gone for some gin. Diane turned on the stereo and Lula went to the kitchen to cook fish for supper. Defendant called to Diane in profane terms to cut off the stereo. Diane did so and then put up an ironing board and started to press her clothes. Defendant came into the house cursing and raving because Lula would not go with him to the Hi-Fi, an entertainment place. When Lula was in her bedroom, she heard a crash of glass in the living room. She ran into the living room and there saw defendant, with a kitchen knife, stab Diane twice. She "saw the blade part of the knife go into (her) daughter." Diane "turned in the door, . . . staggering back," with blood on her left shoulder.

When Lula undertook to get a towel and go to her daughter, defendant turned on Lula and struck her with the knife, then marched her, barefooted, through the back door of the apartment, across the back yard of the neighbor to the rear, and thence to the Statesville Avenue area. During this time, defendant had the knife at her back or around her neck. Over on Statesville Avenue, when defendant heard the ambulance and when two police cars began to close in on them, defendant "fipped it (the knife) in some honeysuckles." Policemen arrested defendant. Lula helped the policemen find the knife and identified it as the knife with which defendant had stabbed Diane. When defendant was stabbing her, Diane had nothing in her hands and Lula had not heard her say anything.

Defendant's Evidence

He did not stab Diane. While he was on the porch, he "heard Lula and Diane carrying on, cursing with one another." Later, he went into the house and sat down to eat in the kitchen. Lula and Diane had gone out of the kitchen into the living room. Lula was still cursing Diane. Five to ten minutes later, Lula came back into the kitchen and got something out of the cabinet. Before this he had seen a knife in Lula's hand and had taken it from her and put it on the table in front of him. He had to scuffle with Lula in order to take the knife from her. After hearing further cursing of Diane by Lula, he heard "the door bam real hard which was the screen door," and jumped up and ran to the front door. When he got there he saw Diane lying in the yard on her back. Turning around, he saw Lula with a knife in her hand. In "scrambling with her" for the knife, he broke one of the small windows in the room. He came out on the porch and at that time was talking to Lula. Lula went out the back door and he chased her to force her back into the house. He took the knife from her and put it in his back pocket. He did not actually see Lula stab Diane but "there wasn't no one in there but Lula and Diane in the living room." On their way over to Statesville Avenue, defendant was trying to get Lula to go back to the house. When the two officers (M. F. Green and another) drove up, Lula took the knife out of defendant's pocket and threw it to the place where it was later found. Defendant testified: "When the officers came up, Lula said, 'He's the one, He's the one, He's the one!' She had never said that to me before that time. She was telling me to save her and keep the police from

getting her. I told her everything will be all right and not worry about it."

As to what occurred inside the apartment, the State's case rested upon the testimony of Lula. Mrs. Sheila Smith and Mrs. Mary Flowe Moore, Lula's neighbors, testified to what occurred when Diane was lying wholly or partially on the sidewalk in front of 2416 Julian Avenue. They testified they were on the front porch of the house directly across Julian Avenue from 2416. According to Mrs. Smith, when Diane was lying on the sidewalk with blood on her collar, defendant came out on the porch, stood there with a knife in his hand, cursed and then walked back into the apartment. A short time later she saw Lula and defendant go out the back door. Defendant was holding Lula by the neck and had a knife at her back. Mrs. Moore testified substantially to the same facts. She testified she went to help Diane but turned around and went home when defendant came out on the porch with a knife. M. F. Green's testimony substantially corroborates Lula's testimony as to what occurred on or near Statesville Avenue when Lula and defendant were located and defendant was arrested.

No evidence was offered in corroboration or support of the testimony of defendant.

The court instructed the jury they could return one of three possible verdicts, that is, guilty of murder in the second degree, or guilty of manslaughter, or not guilty.

The jury returned a verdict of "guilty of voluntary manslaughter." Judgment imposing a prison sentence of not less than 16 nor more than 18 years was pronounced. Defendant excepted and appealed.

Upon finding that defendant was then an indigent, the court appointed his trial counsel to represent him in prosecuting his appeal and ordered the State of North Carolina to pay all expenses incident thereto.

Attorney General Morgan and Assistant Attorneys General Melvin and Costen for the State.

W. Herbert Brown, Jr., for defendant appellant.

BOBBITT, Chief Justice.

Defendant has abandoned the assignments of error based on his exceptions to the denial of his motions to dismiss under G.S. 15-173. Obviously, these assignments were without merit. Defendant's remaining assignments relate to three disconnected portions of the charge to the jury.

[1] The court instructed the jury that, before they could return a verdict of guilty of murder in the second degree or a verdict of guilty of manslaughter, the State had to satisfy them from the evidence beyond a reasonable doubt that defendant stabbed Diane with a knife; that the knife was a deadly weapon; that the knife passed through her upper left shoulder about the collarbone and penetrated into her body; and that the stab wound so inflicted by defendant proximately caused Diane's death. Since an unlawful killing (without malice) of a human being constitutes manslaughter, proof that the knife was a deadly weapon was not a prerequisite to a verdict of guilty of manslaughter. Suffice to say, the instruction was not unfavorable to defendant. It served to draw into focus the crucial issue, namely, whether Lula or defendant stabbed and killed Diane.

[2, 3] If the State satisfied the jury from the evidence beyond a reasonable doubt that defendant stabbed Diane intentionally with a knife which constituted a deadly weapon and the stab wound so inflicted proximately caused her death, these facts would give rise to the presumptions that the killing was unlawful and with malice, the essentials of murder in the second degree. *State v. Barrow,* 276 N.C. 381, 390, 172 S.E. 2d 512, 518 (1970), and cases cited. The court charged the jury to that effect. The challenged excerpts from the charge presuppose the jury so found and that presumptions that the killing was both unlawful and with malice had arisen. They refer to the circumstances by which defendant could reduce the crime from murder in the second degree to manslaughter by establishing to the satisfaction of the jury facts sufficient to negate malice. Since defendant was convicted of manslaughter, error, if any, in these excerpts was harmless. Principles of law relating to self-defense were not involved.

Upon sharply conflicting evidence, the jury found that defendant stabbed and killed Diane. If so, under the evidence, defendant was guilty of manslaughter at least. Hence, the verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. KATHERINE BELL

No. 106

(Filed 10 June 1971)

1. **Homicide § 15— homicide prosecution — testimony relating to position of defendant and deceased**

Witness' testimony on cross-examination relating to the location of defendant and deceased at the time of the homicide *held* admissible as testimony of common appearances, facts, and conditions; also admissible was the witness' testimony that the defendant's position could be determined by the presence of bullet holes in a porch post.

2. **Criminal Law § 75— admission of incriminating statements**

Incriminating statements made by a defendant who voluntarily went to police headquarters for the purpose of stating her side of the shooting *held* admissible.

APPEAL by defendant from *Hasty, J.*, June 3, 1970 Session, BUNCOMBE Superior Court. The appeal was docketed in the Court of Appeals and transferred to the Supreme Court for appellate review under the referral order of July 31, 1970.

In this criminal prosecution the defendant, Katherine Bell, was indicted for the murder of Clara Mae Morgan. The indictment charged the offense occurred on April 13, 1970. Upon the proper showing of indigency, the court appointed Robert L. Harrell attorney for the defendant.

At the trial, the State's witness, Mary Clyburn, testified that she and the deceased, Clara Mae Morgan, shared the same ground floor apartment at No. 141 Weaver Street in Asheville. The defendant, Katherine Bell, occupied a second story apartment, No. 144, immediately above Apartment No. 141. A daughter of the deceased occupied an apartment across the "yard" about 100-150 feet from the two apartments on Weaver Street.

Mary Clyburn further testified that on April 6, 1970, at about 11 o'clock, she was in her apartment, that she heard a gunshot, saw smoke and smelled gunpowder. The smoke drifted over the defendant's bannister into the apartment of the witness.

Officer Hensley of the police department arrived on the scene shortly after 11 o'clock. He found Clara Mae Morgan lying in the doorway of a small house near the apartment on Weaver Street. She was alive. Her clothing was bloody. He helped her

into the ambulance which carried her to the hospital. An immediate operation diclosed extensive and small pellet holes in her right lower rib cage and 18 holes in the small bowels. The following Wednesday, she started showing evidence of delirium tremens. She was never conscious thereafter. "Of course, (her death) was precipitated by the gunshot injury that made her sick in the first place."

After Officer Hensley assisted the deceased into the ambulance, he returned to police headquarters. In about thirty minutes the defendant and her husband appeared at police headquarters. Before permitting any disclosure, the officers gave the defendant the customary warnings. The defendant then made both an oral and a written statement. When the prosecution undertook to offer in evidence the defendant's admissions, defense counsel objected. Whereupon the court conducted a *voir dire* and heard the State's witnesses. The defendant waived her right to be heard or to offer evidence on the *voir dire.*

The court made detailed findings of fact and concluded that the defendant's oral and written statements were properly admissible against her as having been freely, understandingly and voluntarily made. Whereupon the oral evidence of the officer and the written statement of the defendant were offered in evidence before the jury. The written statement corresponds in substance with the oral statement. Material parts of the written statement, which was prepared by the defendant's husband, are here quoted:

> "My name is Katherine Bell and I live at 144 Weaver Street and Cara Mae Morgan lives in the basement apartment. The whole thing started on the preceding Saturday when Clara Mae's boyfriend and Mary Clyburn jumped on me and stabbed me in the side. I took out a warrant for him and went to police court on the sixth for trial and Clara Mae's boyfriend got six months. When I got back home Clara Mae started cursing me and said she was going to get me for causing her boyfriend to get that time. I was afraid of her and when she came up on my porch, I stepped in the door and picked up my husband's shotgun and it went off. I had never fired a gun before."

Defense counsel on cross-examination, asked the State's witness Clyburn this question: "Now you don't know whether she

(deceased) went over there after she was shot or before she was shot, do you?" The witness gave this answer: "All right she had to be shot over there because the bullet holes were right there against the post where she shot at her." Motion to strike the answer was overruled. Defendant's Exception No. 1.

The State introduced a section of the post taken from the house across the yard described by the witness Clyburn. The post contained lead pellets. The witness stated: "They never had been there before." The foregoing is the subject of Exception No. 2.

The defendant testified as a witness in her own defense, repeating in substance the contents of the written statement and in addition stated that she did not remember firing the gun, but did remember reaching behind the door for it. She said: ". . . (T)hat woman . . . had beat me up. They broke into my house and tore the screen door down . . . . When she came on my porch and said I'm coming to get you, that's when the gun went off. I don't know how far I was from her when the gun went off."

The jury returned a verdict of guilty of manslaughter. From that judgment imposed the defendant appealed.

Robert L. Morgan, Attorney General, by Ralph Moody, Deputy Attornel General, for the State.

Robert L. Harrell for defendant appellant.

HIGGINS, Justice.

The defendant's assignments of error involve: (1) The refusal of the court to strike the reply of the State's witness Clyburn to defense counsel's question on cross-examination as to the position of the deceased at the time the fatal shot was fired (Exceptions Nos. 1 and 2); (2) The court's finding and conclusion that defendant's admissions to the officer were freely, voluntarily and understandingly made (Exceptions Nos. 3, 4 and 5); (3) The refusal of the court to direct a verdict of not guilty at the close of the evidence (Exceptions Nos. 6 and 7).

[1] Mary Clyburn, a witness for the State, testified she heard a shot from the defendant's apartment above hers and thereafter she saw Clara Mae Morgan lying in the doorway to the apartment across the yard, approximately 100-150 feet away. The defendant testified the deceased was attempting to enter her apart-

ment at the time the gun went off. Hence the question became material whether the deceased was across the yard by the post or whether she was attempting to enter the defendant's upstairs apartment. Defense counsel sought to have the State's witness say that the witness did not know whether the deceased crossed the yard before or after the shot was fired. In reply to the questions, the witness gave the answer heretofore quoted. The fresh pellet holes in the post which were not there before the shooting, was the answer the witness gave to a question which opened the door for that answer. The answer of the witness was in explanation of and giving her reason for refusing to say that she did not know whether the deceased crossed the yard before or after the shot.

"An observer may testify to common appearances, facts and conditions in language which is descriptive of facts observed so as to enable one not an eyewitness to form an accurate judgment in regard thereto." *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469. The defendant's Assignment of Error No. 1 based on Exceptions Nos. 1 and 2 is not sustained.

[2] The evidence discloses that within thirty minutes after the investigating officer placed the wounded woman in the ambulance, the defendant and her husband appeared at police headquarters. Before they were permitted to discuss the shooting, proper and suitable warnings were given. The defendant made oral admissions the gun in her hands "went off." She and her husband entered a private room. When they returned they delivered the written statement which her husband drafted and the defendant signed. When the defendant challenged the State's right to introduce the admissions, the court conducted a thorough inquiry in the absence of the jury. The defendant elected not to offer evidence on the *voir dire.* The court concluded the admissions were freely, voluntarily and understandingly made and were admissible in evidence. In conducting the *voir dire* and in hearing evidence and making the findings, the court was extremely careful that all of the defendant's rights were properly accorded her. The defendant and her husband voluntarily went to police headquarters for the purpose of stating the defendant's side of the controversy. Her signed statement, written by her husband, was her voluntary account. Sometimes overlooked, is the following from *Miranda v. Arizona:*

"There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda v. Arizona,* 394 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3rd 974. See also *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37; *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410.

Defendant's Assignments of Error Nos. 2 and 3 based on Exceptions Nos. 3, 4 and 5 are not sustained.

The evidence in the record was ample to go to the jury and sustain the verdict. *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305; *State v. Cox,* 153 N.C. 638, 69 S.E. 419. Assignment of Error No. 3 based on Exceptions Nos. 5 and 6 is not sustained.

In the trial, judgment and sentence, we find

No error.

THE STATE OF NORTH CAROLINA v. ISAAC JAMES HARRIS

No. 96

(Filed 10 June 1971)

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

Ordinarily, when there is no assignment of error, the judgment of the trial court must be sustained unless error appears upon the face of the record.

2. **Criminal Law § 66— lineup — right to counsel — in-court identification — voir dire hearing**

An accused is constitutionally guaranteed counsel at an in-custody lineup identification, and when counsel is not present at the lineup, testimony of witnesses that they identified the accused at the lineup is rendered inadmissible, and any in-court identification is also rendered inadmissible unless the trial judge first determines on a *voir dire* hearing that the in-court identification is of independent origin and is untainted by the illegal lineup.

3. Criminal Law § 66— lineup — waiver of counsel — State's burden of proof

An accused may waive the right to counsel at lineup proceedings, the burden being on the State to show by clear and convincing evidence that such waiver was made freely, voluntarily and with full understanding.

4. Criminal Law § 66— lineup — waiver of counsel — findings by trial judge

The appellate courts are bound by the trial judge's findings of fact as to whether waiver of counsel was intelligently, knowingly and voluntarily made when the findings are based on competent evidence.

5. Criminal Law § 66— lineup — waiver of counsel — in-court identification — independent origin

In this armed robbery prosecution, the State offered clear and convincing evidence on *voir dire* which supports the trial court's findings and conclusions that defendant intelligently, understandingly and voluntarily waived his right to counsel at a pretrial lineup, and that the witnesses' in-court identifications of defendant were not based on the pretrial lineup but were based on their observations of him during the robbery.

APPEAL by defendant from *May, S.J.*, 28 September 1970 Schedule "C" Criminal Session of MECKLENBURG.

Defendant was charged in a bill of indictment with armed robbery.

The State offered testimony of Mrs. Mary McMillan, the store manager of Little General Minute Market, Charlotte, N. C., and Gail Porter, her younger sister, both of whom testified, in substance, that at about 8:00 o'clock a.m. on 8 July 1970, defendant and Ronald Cornelius came into the store. Mrs. McMillan opened the cash register under threat of a gun held by Cornelius, and defendant came behind the counter and began to place the money in a bag. The bottom of the bag gave way and at about that time a man came into the store. Cornelius held the man at gunpoint while defendant recovered approximately $53.00 from the floor. Defendant and Cornelius fled. Both Mrs. McMillan and Miss Porter identified defendant at a lineup and in court.

Police Officer J. C. Wilkins testified as to the lineup procedure supervised by him.

Defendant testified that he did not rob the "Little General Store," and that at the time of the alleged armed robbery he was

at the home of Robert Cunningham. He offered other witnesses to corroborate his testimony.

The jury returned a verdict of guilty of armed robbery, and defendant appealed from judgment imposed.

The case is before this Court pursuant to our general referral order effective 1 August 1970.

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

Michael S. Shulimson for defendant.

BRANCH, Justice.

Defendant, in lieu of assignment of error in regular form, states that he "is unable to find reversible error in the trial proceedings" and requests this Court, in the exercise of its supervisory power, to examine the record and determine if error does exist.

[1] Ordinarily, when there is no assignment of error, the judgment of the trial court must be sustained unless error appears upon the face of the record. *State v. Higgs,* 270 N.C. 111, 153 S.E. 2d 781; *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447.

Defendant excepted to the trial judge's findings of fact and conclusions of law on the question of defendant's identification by the State's witnesses, and pointed to this exception as the only exception worthy of comment by this Court. We choose, in the exercise of our supervisory discretion, to consider whether the in-court identifications were properly admitted into evidence.

[2-4] An accused person is constitutionally guaranteed counsel at an in-custody lineup identification, and when counsel is not present at the lineup, testimony of the witnesses that they identified the accused at the lineup is rendered inadmissible, and any in-court identification is also rendered inadmissible unless the trial judge first determines on a *voir dire* hearing that the in-court identification is of independent origin and is untainted by the illegal lineup. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *United States v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926; *Gilbert v. California,* 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951. However, it is well settled that an accused may waive the right to counsel at lineup proceedings. *United States v. Wade,*

supra; State v. McRae, 276 N.C. 308, 172 S.E. 2d 37. The burden is on the State to show by clear and convincing evidence that the constitutional right to counsel was waived freely, voluntarily, and with full understanding. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353; *Carnley v. Cochran,* 369 U.S. 506, 8 L. Ed. 2d 70, 82 S.Ct. 884. The appellate courts are bound by the trial judge's findings of fact as to whether waiver of counsel was intelligently, knowingly and voluntarily made when the findings are based on competent evidence. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581.

In instant case upon defendant's objection and motion to strike, the trial judge excused the jury and conducted an extensive *voir dire* hearing. On the *voir dire* Mrs. McMillan stated that she observed defendant for a period of ten minutes on the occasion of the robbery and that he was standing beside her during a portion of that time. She later identified him without hesitation in a lineup, and she testified that her in-court identification was not based on her prior lineup identification.

Gail Porter also testified, on *voir dire,* that she observed defendant for about ten minutes at the time of the robbery, and she identified defendant as one of the robbers. She stated that her identification was based on her observation of defendant at the time of the robbery, and that her in-court identification was not influenced by viewing defendant in the lineup.

On *voir dire* Police Officer J. C. Wilkins testified that on 17 July 1970 he supervised the lineups at which defendant was identified by the witnesses McMillan and Porter. He stated that on 16 July he advised defendant of his constitutional rights as prescribed by *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, and on 17 July defendant signed a waiver, for the purpose of being placed in a lineup, which waiver read as follows:

> "Waiver of right to presence of lawyer as my lawyer for pre-trial identification including presence of lawyer as my lawyer free of cost to me if I am indigent. Date: 17 July; Place: County Jail; Time: 08:48. I, Isaac James Harris, am 18 years of age and my address is 2618 Booker Ave., Apt. 2. I have been advised by J. C. Wilkins, who has identified himself as City Police Officer, who has advised me:

"That I will be shortly displayed in a lineup or by a similar identification process to one or more persons who are witnesses to the crime of armed robbery for which I am a suspect. I have been advised that I have the right to have a lawyer representing me present during the identification process and that if I cannot afford a lawyer, one will be furnished for me free before the identification process commences, if I so request.

"However, understanding that I have the right to have my own lawyer present and understanding that if I cannot afford a lawyer, one will be furnished for me free of cost to me before the identification process begins. I hereby waive and agree to proceed without having my lawyer present and without demanding a lawyer to be furnished free of cost to me knowing that I have the right to the same and knowing that any identification made of me by one or more witnesses can be repeated and used against me in court.

"I declare that my waiver of the right to have my lawyer present and the right to have a lawyer afforded to me free of cost to me is done of my own free will without anyone having promised me anything or offered out to me any hope of reward. I sign this waiver without any fear of physical harm, without anyone having offered to do me any favor and without anyone having offered leniency.

"I further state that I am able to read and write the English language and have completed 9th years of school. This waiver was signed at 08:48 M on the 17th day of July, 1970.

"Signature of person signing waiver: (s) Isaac J. Harris.

"Witnesses: D. M. Travis & J. C. Wilkins."

Officer Wilkins further testified that four persons took part in the lineup and that all four subjects were Negroes and were dressed in the same manner, each wearing a chain around his neck bearing a number. Defendant chose to wear the number "one."

Defendant testified on *voir dire* and stated that Officer Wilkins had told him that he was entitled to an attorney when he was put in the lineup, and admitted that he had signed the waiver

form, and that he could read and write. However, he denied that he understood that he was being exhibited for the purpose of identification.

[5] At the conclusion of the *voir dire,* Judge May made extensive findings of fact consistent with the State's *voir dire* evidence. He then, *inter alia,* concluded that the State had offered clear and convincing evidence that:

> ". . . before the defendant was placed in the lineup he was warned . . . that he might have a lawyer present for the purpose of advising him before the lineup took place and that the defendant intelligently, understandingly and voluntarily waived the right to counsel prior to the lineup and at the time of the lineup and that he freely, voluntarily, intelligently and understandingly agreed to stand in the identification lineup with full knowledge that he would be viewed as a possible suspect of the armed robbery case.
>
> "3. That the identification of the defendant made by the witnesses Mary McMillan and Gail Porter were based upon observation of the defendant, Isaac James Harris, in the store referred to as the Little General Minute Market at the time the robbery took place on 8 July 1970 and that the in-court identification of the defendant by the said Mary McMillan and Gail Porter did not result from an illegal out-of-court confrontation and that the lineup had nothing whatever to do with the in-court identification of the defendant by Mary McMillan and Gail Porter, and the said in-court identification of the defendant by said witnesses was not tainted by the identification by said witnesses."

The jury returned to the courtroom and both the witnesses McMillan and Porter again identified defendant as one of the robbers.

There was ample evidence to support the judge's findings of fact, and the findings of fact in turn support the conclusions of law.

The trial judge properly admitted into evidence the identification testimony.

We have carefully examined the entire record of this case, and in the trial we find

No error.

Strickland v. Powell

WILLIAM BENJAMIN STRICKLAND, JR., BY HIS NEXT FRIEND, ROLAND L. STRICKLAND v. WILLARD POWELL

— AND —

WILLIAM BENJAMIN STRICKLAND v. WILLARD POWELL

No. 87

(Filed 10 June 1971)

1. **Automobiles § 9— statute prescribing stop signals — inapplicable to accident case**

The statute prescribing the signals which a motorist shall give before starting, stopping, or turning from a direct line, *held* inapplicable where the defendant motorist had come to a complete stop in the plaintiff's lane of travel prior to the time that the plaintiff had come into view from the other side of a hill. G.S. 20-154(a).

2. **Automobiles § 56— accident case — hitting vehicle stopped on highway — sufficiency of evidence**

Plaintiff's evidence was sufficient to go to the jury on the issue of defendant's negligence in stopping his vehicle in the plaintiff's lane of travel approximately 100 feet below the crest of a hill and during a heavy rainstorm at twilight.

ON *certiorari* to the Court of Appeals to review its decision awarding new trials on the plaintiffs' appeals from judgments entered in favor of the defendant by *Gay, Judge,* February 9, 1970 Session, HALIFAX District Court.

Allsbrook, Benton, Knott, Allsbrook & Cranford by Richard B. Allsbrook for plaintiff appellants.

Charlie D. Clark, Jr., for defendant Appellee.

HIGGINS, Justice.

These cases were considered by the Court of Appeals and new trials were ordered. The decision is reported in 10 N.C. App. 225.

[1] On the review here the plaintiffs, although awarded new trials, nevertheless find fault with the opinion of the Court of Appeals for that it casts doubt on the applicability of G.S. 20-154(a) to the facts in evidence. The plaintiffs insist this court should declare the statute applicable to the end the judge will so instruct the jury when the cases are again before the trial court.

G.S. 20-154(a) provides: "The driver of any vehicle upon a highway *before starting, stopping,* or *turning from a direct line* shall first see that *such movement* can be made in safety . . . and whenever the operation of any other vehicle *may be affected by such movement,* shall give a signal . . . to the driver of such other vehicle of his *intention to make such movement.*" (Emphasis added.) The statute regulates the driver's movement of his vehicle and prescribes the signals he shall give indicating his intention to make such movement.

In this case Powell may have given a signal of his intention to stop, but at that time Strickland was on the other side of the hill and out of sight. After Powell stopped, he did not thereafter move his vehicle. Moving signals were not due until further movement was intended. Neither movement nor signals played any part in the accident involved in these cases. G.S. 20-154(a) was not applicable to the facts in evidence.

The court charged: " . . . (T)hat (if) at the time and place complained of the defendant was negligent, either by parking his car on the highway or stopping his car on the highway without giving proper signals, I instruct you that if the plaintiff has . . . proved it by the greater weight of the evidence . . . it would be your duty to answer the first issue, Yes." The charge was based on G.S. 20-154(a) and may have induced the jury to believe that the giving of a stop signal would exculpate Powell.

[2] The complaints allege and the evidence tends to show that the accident occurred on the highway approximately 100 feet east and below the crest of a hill which the officer described: "I hestitate to say it's steep but it's a pretty good drop." It was twilight, there was a downpour, and the surface of the road was covered with water. The plaintiff's traffic lane was 10 feet wide, the shoulder between the surface and the ditch was insufficient to allow passage to the right. At the place of the accident, highway traffic signs carried the warning: "No Parking at Any Time."

The plaintiff was driving 35 to 40 miles an hour in a 55 mile zone. At the first sight of the stationary Ford in his line of travel, the plaintiff applied his brakes and though his tires were new, the vehicle skidded on the surface which was covered with water and crashed into the rear of the Ford. The car was

damaged and the minor plaintiff sustained rather serious injuries leaving disfiguring scars.

The plaintiffs' evidence was sufficient to go to the jury on the theory that the defendant knew, or should have known, that to stop his vehicle and permit it to block the eastbound traffic lane under the conditions then existing created a situation of great danger likely to result in a rear end collision. *Saunders v. Warren,* 264 N.C. 200, 141 S.E. 2d 308. There was error in applying G.S. 20-154(a) to the plaintiffs' evidence.

The decision of the Court of Appeals awarding new trials is

Affirmed.

H. ALLEN WILCOX v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 95

(Filed 10 June 1971)

1. **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.

2. **Eminent Domain § 13— recovery of compensation under G.S. 136-111**

A landowner's right to recover compensation by court action under G.S. 136-111 in no way depends upon whether the Highway Commission intends to compensate him.

3. **Eminent Domain § 13— action by landowner under G.S. 136-111 — two-year statute of limitations**

Where the Highway Commission intentionally appropriated in perpetuity an easement across plaintiff's land, but filed no complaint or declaration of taking, and plaintiff had knowledge of the appropriation, action to obtain compensation for the taking instituted by plaintiff under G.S. 136-111 more than twenty-four months after the taking is barred by the statute of limitations provided in that statute.

APPEAL by plaintiff from *Martin, J. (Harry C.),* 31 August 1970 Session of MECKLENBURG, transferred from the Court of Appeals for initial appellate review by the Supreme Court under its general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

This is an action instituted against the North Carolina State Highway Commission (Commission) under G.S. 136-111 to obtain compensation for the alleged taking of plaintiff's property. The following facts are stipulated:

Plaintiff and his wife, as tenants by the entireties, own two lots of land fronting on Eastway Drive in Charlotte, North Carolina. The lots do not adjoin. The first, known as 2331 Eastway Drive, has a frontage of 180 feet; the second, known as 725 Eastway Drive, has a frontage of 65 feet. In order to widen Eastway Drive (State Highway Project No. 8.2722202), on 1 April 1969, Commission appropriated in perpetuity an easement 30 feet x 180 feet across the front of the first lot. For the same purpose, on 30 May 1969, Commission appropriated a similar easement 30 feet x 65 feet across the front of the second lot. On 23 June 1969, more than 24 months after Commission had appropriated these easements, plaintiff instituted this action to recover damages in the sum of $6,000.00 for the taking.

Inter alia, the complaint alleges that, in widening Eastway Drive "during late 1966 and early 1967," defendant reduced the area of plaintiff's property and removed valuable shade trees and underground tile; that defendant had taken plaintiff's property "without notice and without compensation . . . and that plaintiff has at no time been offered or paid any sums whatsoever for the property which was thus taken."

Answering, defendant alleged: (1) Street-widening Project No. 8.2722202 was "solely within a previously existing 100-foot wide right-of-way easement belonging to the State Highway Commission. . . . "; (2) the taking of the property described in the complaint occurred more than 24 months before the institution of this action, and "defendant specifically pleads the statute of limitations set forth in G.S. 136-111" in bar of plaintiff's right to maintain this action.

At the pretrial hearing held pursuant to G.S. 136-108, after finding facts in accordance with the parties' stipulations and the admissions in the pleadings, Judge Martin ruled that "this action is barred by the provisions of G.S. 136-111." From his judgment dismissing the suit, plaintiff appealed.

Gene H. Kendall for plaintiff appellant.

Attorney General Morgan, Deputy Attorney General White, Assistant Attorney General McDaniel for defendant appellee.

SHARP, Justice.

In pertinent part of G.S. 136-111 provides: "Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Highway Commission and no complaint and declaration of taking has been filed by said Highway Commission may, within twenty-four (24) months of the date of said taking, file a complaint in the superior court . . . for the purpose of determining all matters raised by the pleadings and the determination of just compensation." The portion omitted from the preceding quotation relates to procedural requirements.

Commission concedes that the taking of the easements across plaintiff's two lots was an intentional act and that it filed no complaint or declaration of taking. Although Commission alleges that the portion of plaintiff's property which was used to widen Eastway Drive was included within a right-of-way it had previously acquired, it now defends solely on the ground that plaintiff's action is barred by the requirement of G.S. 136-111 that the action be brought within twenty-four months of the date of the taking.

Plaintiff, unable to gainsay that he instituted this action more than two years after the taking, for the first time, asserted in his assignments of error that G.S. 136-111 is unconstitutional as applied to the facts of this case. He contends that when the State took the easements in suit it had no intention of compensating him and, in such a case, due process requires written notice to the landowner that he will receive no compensation unless he brings suit within the specified time.

[1, 2] Having failed to question the constitutionality of G.S. 136-111 in the trial court, plaintiff may not on appeal attack the statute upon that ground. "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 Commission,* 259 N.C. 371, 373, 130 S.E. 2d 544, 546. *Accord, Bland v. City of Wilmington,* 278 N.C. 657, 180, S.E. 2d 813. *See also Ramsey v. Veterans Commission,* 261 N.C. 645, 135 S.E. 2d 659; *Sheets v. Walsh,* 217 N.C. 32, 6 S.E. 2d 817. We note, however, that a landowner's right to recover compensation by court action under G.S. 136-111 in no way depends upon whether the Commission intends to compensate him. *Inter*

alia, Commission may contend, as here, that it owns the right-of-way actually appropriated, or, as it often does, that the landowner was not damaged by the taking.

[3] G.S. 136-111 was designed to limit the time within which an action such as this can be brought. Prior to 1965 the time limit for bringing such a suit was twelve months. In 1965 the time was increased to twenty-four months. N. C. Sess. Laws ch. 514, § 1½ (1965). The facts stipulated establish that plaintiff—notwithstanding he had actual knowledge that Commission had appropriated his property—did not bring this action for compensation within the time fixed by G.S. 136-111 for its commencement. Defendant's plea of the statute is a complete defense to the action. It was properly dismissed.

Affirmed.

SAM LEDFORD AND WIFE, MAGGIE R. LEDFORD v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 98

(Filed 10 June 1971)

1. **Eminent Domain § 2— obstruction of access to highway**

An owner whose access to a public road is a right-of-way over adjoining property is entitled to just compensation when the State deprives him of this easement.

2. **Eminent Domain § 13— landowner's action for compensation — statute of limitations**

Although a property owner is always entitled to just compensation when his land is taken for public use, he must pursue the prescribed remedy within the time specified.

3. **Eminent Domain §§ 2, 13— erection of fence across right-of-way — taking of property — action for compensation — statute of limitations**

A taking of plaintiffs' property occurred when the Highway Commission erected a permanent fence obstructing their right-of-way across adjoining property which gave them access to a public road, not at the time plaintiffs first sought to use the easement and were prevented from doing so by the fence; consequently, the two-year statute of limitations for instituting an action under G.S. 136-111 to obtain compensation for the taking began to run on the date the fence was erected.

APPEAL by plaintiffs from *Snepp, J.*, 7 September 1970 Session of HAYWOOD, transferred from the Court of Appeals for initial appellate review by the Supreme Court under its general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

Plaintiffs, landowners, instituted this action against the North Carolina State Highway Commission (Commission) under G.S. 136-111 to recover damages for the obstruction of a right-of-way over adjoining property which gave them access to a public road. In bar of the action Commission alleges that more than twenty-four months elapsed between the date of the taking and the institution of this action, and defendant "specifically pleads the statute of limitations set forth in General Statutes 136-111 as a complete plea-bar to the right of the plaintiffs to maintain this action."

At the pretrial hearing, held pursuant to G.S. 136-108 to determine all issues raised by the pleadings other than the issue of damages, the parties stipulated the following facts:

On 30 October 1967 plaintiffs owned the three contiguous tracts of land described in the complaint. They also owned a right-of-way which led from their Tract No. 1 over the adjoining property of Faye Leatherwood to White Oak Road, a public road known as S. R. 1338. During 1967 Commission was engaged in constructing Highway Projects 6.800959 and 8.2036301 in Haywood County, the Cataloochee Access Road from Interstate Highway 40 at Fines Creek Interchange into the Great Smoky Mountain National Park. This project was designated and built as a fully controlled-access facility with fencing along the controlled-access right-of-way line. A portion of the project was constructed over the Leatherwood land between White Oak Road and plaintiffs' Tract No. 1. On 30 October 1967, Commission erected a fence along that portion of the project's right-of-way, blocking plaintiffs' access to White Oak Road.

In a letter dated 24 February 1970 plaintiffs "suggested" to Commission that, by means of a gate with a lock, they be allowed to breach Commission's fence, which had severed their right-of-way. On 13 March 1970 Commission replied that the project was a fully controlled-access facility to which they could not permit any access. On 8 May 1970, slightly more than two years and six months after Commission's fence had severed plaintiffs' easement, plaintiffs instituted this action.

Upon the foregoing facts Judge Snepp concluded as a matter of law that plaintiffs' action is barred by G.S. 136-111. From his judgment dismissing the action plaintiffs appealed.

Millar, Alley & Killian; John I. Jay for plaintiff appellants.

Attorney General Morgan; Deputy Attorney General White; Assistant Attorney General McDaniel for defendant appellee.

SHARP, Justice.

[1, 2] Like any other person whose land is taken by the State Highway Commission for highway purposes, an owner whose access to a public road is a right-of-way over adjoining property is entitled to just compensation when the State deprives him of this easement. Ordinarily, such a taking will be accomplished by the filing of a complaint and a declaration of taking as specified in G.S. 136-103. However, G.S. 136-111 provides that "any person whose land or compensable interest therein" has been appropriated by the Highway Commission without the filing of a complaint and declaration of taking may, "within twenty-four (24) months of the date of said taking," bring an action in the superior court to recover damages for the taking. Thus, although a property owner is always entitled to just compensation when his land is taken for public use, he must pursue the prescribed remedy within the time specified. *Wilcox v. Highway Commission,* 279 N.C. 185, 181 S.E. 2d 435.

[3] In an attempt to circumvent the bar of G.S. 136-111, plaintiffs argue that their right-of-way over the Leatherwood property was not taken on 30 October 1967, the date the fence was erected across it, but on 24 February 1970, the date they allege they first sought to use the easement and were prevented from doing so by the fence. This contention, however, is untenable. The taking occurred when Commission erected the fence, severing the right-of-way and preventing its further use, and not at the time plaintiffs were first inconvenienced by it. The fence was not a temporary srtucture but a permanent and essential adjunct to a fully controlled-access highway. It was visible and incontrovertible evidence of Commission's intention to appropriate the easement permanently. " 'Taking' under the power of eminent domain may be defined generally as entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public

use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." 26 Am. Jur. 2d *Eminent Domain* § 157 (1966). The foregoing definition was adopted by this Court in *Penn v. Coastal Corporation,* 231 N.C. 481, 484, 57 S.E. 2d 817, 819.

The judgment of the Superior Court, which dismissed this action, is

Affirmed.

C. O. GORE, TRADING AS GORE GREENHOUSES
v. GEORGE J. BALL, INC.

No. 89

(Filed 30 July 1971)

1. **Uniform Commercial Code § 3— date of application**

Uniform Commercial Code is not applicable to transactions which occurred prior to the effective date of the Code. G.S. 25-10-101.

2. **Rules of Civil Procedure § 1— date of application**

The Rules of Civil Procedure held applicable to a civil action even though commenced on 3 January 1968. Session Laws of 1967, Ch. 954, § 10.

3. **Negligence § 1— violation of safety statute**

Violation of a safety statute is negligence *per se*.

4. **Agriculture § 9.5; Negligence § 1— violation of seed law— issue of negligence**

Evidence that seed dealer violated the North Carolina Seed Law is not necessarily evidence of negligence.

5. **Agriculture § 9.5— sale of mislabeled tomato seed — issue of dealer's negligence — evidence**

A seed dealer was not negligent in selling mislabeled tomato seed to the plaintiff, a farmer, where there was evidence that the dealer had purchased the seed from a reputable supplier, that the dealer received the seed already mislabeled as the variety desired by the plaintiff, and that this mislabeling could not be detected by an examination of the seed.

6. **Rules of Civil Procedure § 8— construction of complaint**

Allegations of the complaint must be liberally construed. G.S. 1A-1, Rule 8.

7. **Rules of Civil Procedure § 8— claim for relief — pleading of two or more statements**

The pleader may set forth two or more statements of a claim in the same count. G.S. 1A-1, Rule 8(e)(2).

8. **Agriculture § 9.5— sale of mislabeled tomato seed — dealer's breach of contract — sufficiency of allegations and evidence**

Plaintiff's evidence that plaintiff contracted with a seed dealer for the purchase of Heinz 1350 tomato seed, that such tomatoes are suitable for table use, and that the dealer delivered seed which produced tomatoes suitable only for making tomato paste is sufficient to support a finding by the jury of breach of contract by the dealer.

9. **Contracts § 4— failure of consideration — rights of disappointed party**

Failure of consideration gives the disappointed party a right to rescind the contract and recover what he has paid or to defend a suit

brought against him thereon, for the reason that the contract is a nullity.

10. Contracts § 21; Agriculture § 9.5— breach of contract — sale of tomato seed

A seed retailer who contracted to sell and deliver Heinz 1350 tomato seed but who delivered instead the seed of a completely different type of tomato is liable for damages for breach of contract.

11. Agriculture § 9.5; Sales § 8— sale of tomato seed — extent of dealer's warranty

A printed statement on a seed catalogue, order blanks, and seed packets, that the seed dealer warrants "to the extent of the purchase price" that the seed delivered is as described on the container, did not, as a matter of law, become a part of the contract of sale between a farmer and the dealer for tomato seed, since the statement was not in such a position as would call it to the attention of the farmer.

12. Contracts § 21— breach of contract — liability for damages

A party to a contract may not, by his unilateral declaration, extraneous to the contract, free himself from or limit his liability for damages for his breach of it.

13. Contracts § 12— construction of contract — unambiguous language — role of court and jury

While the construction of clear and unambiguous language in a contract is for the court, it is for the jury to determine whether a particular agreement was or was not part of the contract actually made by the parties.

14. Contracts § 6— violation of public policy

A provision in a contract which is against public policy will not be enforced.

15. Contracts § 6— violation of public policy — separability of provisions

When the agreement found violative of public policy is separable from the remainder of the contract, the contract will be given effect as if the provision so violative of public policy had not been included therein.

16. Sales § 22; Statutes § 5— protection against mislabeling of goods — statutory exemptions

In legislation designed for the protection of a segment of the public from the mislabeling of goods sold, exemptions are to be strictly construed.

17. Agriculture § 9.5— seed law — exemption from penalties — dealer's breach of contract

Provision of the N. C. Seed Law exempting from the penalties thereof a dealer who sells mislabeled vegetable seeds under designated circumstances does not absolve the dealer for breach of contract arising out of the sale of mislabeled seed. G.S. 106-277.10(e); G.S. 106-277.24.

18. Contracts § 29— breach of contract — limitation of damages

Ordinarily, parties to a contract are free to enter into agreements limiting the amount which may be recovered for breach of their contract; nevertheless, the law does not look with favor on provisions which relieve one from liability for his own fault or wrong.

19. Agriculture § 9.5— warranty of seed dealer — seed law — public policy

A seed dealer's limitation of his warranty of tomato seed "to the extent of the purchase price" is contrary to the public policy of the State as declared in the Seed Law and is invalid.

20. Damages § 8; Agriculture § 9.5— sale of mislabeled tomato seed — breach of contract — damages

In a farmer's action against a seed dealer for breach of contract arising out of the sale of mislabeled tomato seed, the seed having produced tomatoes suitable only for making tomato paste rather than the higher-grade tomatoes suitable for table-eating, the rule against the allowance of speculative or conjectural damages is not violated by permitting the jury to estimate, upon testimony given by experts in truck farming, the size and value of the crop which would have been produced had the seed been of the higher-grade variety.

21. Agriculture § 9.5— sale of mislabeled tomato seed — action for breach of contract — measure of damages

In a farmer's action against a seed dealer for breach of contract arising out of the sale of mislabeled tomato seed, the seed having produced tomatoes suitable only for making tomato paste rather than the higher-grade tomatoes suitable for table eating, the measure of damages is the value of the crop which the jury so finds would have been raised had the seed been of the higher-grade variety, less the value of the crop actually raised and less any additional expense plaintiff would have had to incur to produce the crop contemplated.

ON *certiorari* to the Court of Appeals to review its decision, reported in 10 N.C. App. 310, 178 S.E. 2d 237, remanding this matter to the Superior Court of COLUMBUS County on the ground of error in the direction of a verdict in favor of the defendant.

The plaintiff's evidence is to the following effect:

The plaintiff raises tomatoes for sale for table use. The defendant is a supplier of seeds, including tomato seed. The defendant published and distributed to growers, including the plaintiff, its catalogue for the year 1966. It thereby solicited orders for various types of seed, including a variety of tomato seed known as Heinz No. 1350, as to which the catalogue stated:

"No. 9638 Heinz 1350. 75 days. Fruit is slightly flattened, uniform and free of cracks. Has excellent size and is a high yielder. Resistant to fusalarium and verticillium.

One of the best of recent introductions in standard tomatoes."

The plaintiff, in the latter part of 1965, ordered from the defendant four ounces of Heinz 1350 tomato seed, for which he remitted the catalogue price of $5.00, using the order blank contained in the catalogue. Packets containing four ounces of seed were received by the plaintiff from the defendant on 6 January 1966. The catalogue, the order blank used by the plaintiff, the defendant's invoice and the several packets containing the seed delivered by the defendant each bore the following statement:

> "LIMITATION OF WARRANTY: Geo. J. Ball, Inc. warrants, to the extent of the purchase price, that seeds, plants, bulbs, growers supplies and other materials sold are as described on the container, within recognized tolerances. We give no other or further warranty, express or implied."

The plaintiff planted the seed in his plant bed in the latter part of 1966 for use in producing his 1967 crop, the delay in the use of the seed by the plaintiff not being material to this action. In due time he transplanted the tomato plants to his field, the proper preparation of which is not questioned. He first set out plants over a two-acre tract in April and then over a second two-acre tract in May, intending to make a third transplanting of another two-acre tract in June so as to provide a yield of tomatoes over the season. No question is raised as to the normality of the growth and strength of the plants produced from the seed or as to the normality of the quantity of fruit produced thereby.

When the young tomatoes first appeared on the plants, the unusual shape disclosed that they were not tomatoes of the Heinz 1350 type, but were a variety of tomato wholly unsuited for sale for table use and useful only in the production of tomato paste. The tomatoes so produced on the first two-acre planting were sold for the best price obtainable, the second two-acre planting was destroyed and replaced with plants, apparently of a different type of table tomato, purchased locally, and the resulting crop was sold for the best price obtainable, and the third two-acre tract was diverted to another crop.

Immediately upon discovery of the type of tomato so being produced, the plaintiff notified the defendant, who sent him

its check to refund the $5.00 paid by the plaintiff for the seed, which check the plaintiff did not cash.

It is not possible for either the plaintiff or the defendant to distinguish Heinz 1350 tomato seed from other varieties of tomato seed by sight. No question is raised as to the cultivation methods used by the plaintiff. The Heinz 1350 tomato has resulted in satisfactory production in the plaintiff's area and is suitable for table use.

The defendant was not the producer of the seed delivered to the plaintiff. It purchased them from the Ferry Morse Company, a well known and reputable dealer in seeds. It received in 1966 a bulk delivery of tomato seed from Ferry Morse. The seed so received by the defendant were mislabeled when it received them. The defendant broke the original package so received from Ferry Morse and repackaged and labeled the seed "Heinz 1350" and marketed them in its own name without indicating that they were produced by another. It discovered the mislabeling in August 1966, but had no record of those who had purchased the seed from it. Consequently, it did not, after discovering the mislabeling, notify the plaintiff thereof. The only test made by the defendant of seed so purchased by it for resale was with reference to germination. It could not determine the variety of the seed by examination of the seed themselves. Each packet in which the seed were so resold by the defendant bore on the front side the designation:

"TOMATO
HEINZ 1350
Red
S E E D"

The limitation of warranty appeared on the reverse side of the packet.

The plaintiff's complaint alleges two causes of action. The first is grounded upon allegations of negligence by the defendant in mislabeling the seed. The second, otherwise identical with the first, contains the following allegation instead of the allegation of negligence:

> "12. That the defendant under its sale to the plaintiff as aforesaid contracted therewith and warranted by implication or expressly, that the seeds in question were of value

to the defendant and fit for the purpose that same were designed and warranted. That on the contrary, the seeds sold by the defendant were of no value whatsoever to the plaintiff and there was a complete failure of consideration and a breach of the contractual relationship between the parties."

In its answer the defendant denied any negligence by it and denied the above quoted allegation as to failure of consideration and breach of contract. It further pleaded as an affirmative defense the above quoted provision entitled "Limitation of Warranty" and pleaded its tender to the plaintiff of the refund of the $5.00 paid by him for the seed.

At the conclusion of the plaintiff's evidence, the Superior Court granted the defendant's motion for a directed verdict and dismissed the action.

On appeal to it by the plaintiff, the Court of Appeals held that there was no error in directing the verdict for the defendant upon the cause of action grounded in tort, but the plaintiff's evidence, taken in the light most favorable to him, would justify the jury in finding a breach of contract, for which the plaintiff could recover nominal damages, at least. Consequently, the Court of Appeals remanded the matter to the Superior Court "for trial upon plaintiff's allegations of breach of contract." The defendant's petition for *certiorari* to review this decision was allowed.

Powell, Lee & Lee by J. B. Lee for plaintiff appellee.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for defendant appellant.

LAKE, Justice.

[1] This transaction having occurred prior to the effective date of the Uniform Commercial Code, the provisions of that Act are not applicable. G.S. 25-10-101.

[2] Though this action was commenced 3 January 1968, the Rules of Civil Procedure set forth in Chapter 1A of the General Statutes apply. Session Laws of 1967, ch. 954, § 10. Rule 8 provides that a pleading which sets forth a claim for relief, "shall contain (1) A short and plain statement of a claim sufficiently

particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved showing that the pleader is entitled to relief, and (2) A demand for judgment for the relief to which he deems himself entitled." It further provides, "All pleadings shall be so construed as to do substantial justice."

For his first cause of action, the plaintiff alleges in his complaint that he was damaged by his use of seed delivered to him by the defendant, in response to his order, which seed were not the variety ordered by him, but a totally different variety, mislabeled as the variety he ordered, the mislabeling being due to the negligence of the defendant, which negligence was the proximate cause of the plaintiff's damage. The complaint does not make reference to the North Carolina Seed Law, G.S. 106-277 to 106-277.28. The first cause of action rests entirely upon allegations of negligence by the defendant.

[3-5] It is well established that violation of a safety statute is negligence *per se*. *Bell v. Page,* 271 N.C. 396, 156 S.E. 2d 711. *Ratliff v. Power Co.,* 268 N.C. 605, 151 S.E. 2d 641, 21 A.L.R. 3d 360; *Byers v. Products Co.,* 268 N.C. 518, 151 S.E. 2d 38; *Carr v. Transfer Co.,* 262 N.C. 550, 138 S.E. 2d 228; *Reynolds v. Murph,* 241 N.C. 60, 84 S.E. 2d 273. The North Carolina Seed Law, *supra,* is not, however, a safety statute. Evidence of a violation of it is not, necessarily, evidence of negligence. The evidence offered by the plaintiff is not sufficient to support a finding of negligence. It shows that the defendant purchased the seed from a reputable dealer, that its supplier had labeled the seed as being of the variety ordered by the plaintiff and that this mislabeling could not be detected by an examination of the seed. We, therefore, affirm the holding by the Court of Appeals that the trial judge was correct in directing a verdict for the defendant upon the plaintiff's first cause of action.

[6-8] The statement in the complaint of the plaintiff's second cause of action is by no means a model of clarity and precision as to the theory upon which he relies. However, construing the allegation liberally, as we are required to do by Rule 8 of the Rules of Civil Procedure, it gave to the court and to the defendant notice that the plaintiff intended to prove the making of a contract of sale, a breach of that contract by failure to deliver the seed ordered, a breach of warranty of fitness of the seed for the purpose for which the plaintiff intended to use them

and a failure of consideration. Rule 8(e) (2) permits the pleader to set forth two or more statements of a claim in the same count.

In the statement of the plaintiff's second cause of action, it is alleged that, by reason "of the failure of consideration and the breach of contract by the defendant," the plaintiff has been damaged in the amount of $9,966. The allegations constituting the statement of this cause of action make it clear that the alleged damage consisted in the plaintiff's loss of the crop which he would have produced had the contract not been broken. It is quite clear from the allegations that the plaintiff is not seeking a return of the amount paid by him for the seed.

[9] Failure of consideration is a defense to an action brought upon a contract against the party who has not received the performance for which he bargained. It also entitles such party to sue to recover that which he has paid for the performance for which he bargained. *Mills v. Bonin,* 239 N.C. 498, 80 S.E. 2d 365; *Swift & Co. v. Aydlett,* 192 N.C. 330, 135 S.E. 141; *Jewelry Co. v. Stanfield,* 183 N.C. 10, 110 S.E. 585; Williston on Contracts, 3d Ed. §§ 814 and 885; Restatement of Contracts, § 399; 17 AM. JUR. 2d, Contracts, §§ 397 and 399; 17 C.J.S., Contracts, § 129. That is, as Professor Williston says in § 818 of his treatise, failure of consideration gives the disappointed party a right to rescind the contract and recover what he has paid or to defend a suit brought against him thereon, for the reason that the contract is a nullity. Obviously, while, in the statement of the second cause of action, the complaint alleges failure of consideration, the plaintiff is not seeking a refund of the price paid by him for the seed on the theory that the contract was a nullity, but is seeking damages for breach of contract by the defendant.

The plaintiff offered in evidence the defendant's catalogue from which the plaintiff selected the variety of seed desired by him, the order blank used by him in ordering these seed from the defendant, the defendant's invoice accompanying the shipment, and one of the packets in which the defendant delivered the seed to him. Each of these stated that the defendant gave no warranty, express or implied, except that "to the extent of the purchase price" the defendant warranted that the seed "are as described on the container;" that is, that the seed so delivered were Heinz 1350 tomato seed, no other descriptive matter appearing on the packet.

In *Swift & Co. v. Aydlett, supra,* this Court said, "A vendor of an article of personal property, by name and description, cannot relieve himself of the obligation arising from the warranty implied by law to deliver an article which is at least merchantable, or saleable or fit for the use for which articles of that name and description are ordinarily sold and bought." Thus, had there been no statement whatever by the defendant with respect to warranty, its acceptance of the plaintiff's order, by the shipment of seed to him, would constitute an undertaking by it to deliver to him the specified quantity of Heinz 1350 tomato seed, and no other.

[10] The defendant's statement on the above mentioned documents that it warranted the seed sold to be as described on the container, *i.e.,* to be Heinz 1350 tomato seed, added nothing to its undertaking in the contract of sale. Its statement in these several documents that it gave no other or further warranty took nothing from that undertaking. The plaintiff, in this action, does not rely upon any further warranty. He simply contends that the defendant did not perform its contract and thereby he has been damaged. One who contracts to sell to another a Jersey cow is liable for damages for breach of contract if he delivers a mule, or even an Angus cow, notwithstanding his statement, in the contract of sale, that he made no warranty as to the qualities of the cow he contracted to sell and deliver. So it is with one who contracts to sell and deliver Heinz 1350 tomato seed and delivers, instead, seed of a completely different type of tomato.

[8] The Court of Appeals was, therefore, correct in its holding that the plaintiff has alleged and has introduced evidence sufficient to permit a jury to find that the defendant committed a breach of its contract by the delivery to the plaintiff of seed not of the kind specified in his order. Failure of the plaintiff to introduce evidence to show a warranty of quality was not sufficient basis for the allowance of the defendant's motion for a directed verdict as to the plaintiff's second statement of his cause of action.

The remaining question relates to the measure of damages recoverable by the plaintiff, assuming the jury should find the defendant did not deliver to him the seed which he ordered.

In the above mentioned "Limitation of Warranty," appearing in the catalogue and upon the order blank, the invoice and the seed packet, the defendant stated that it warranted "to the extent of the purchase price" that the seed delivered were as described on the container. We think the meaning of this statement, assuming it to be part of the contract between the parties, is that the defendant will refund the amount paid by the plaintiff if the defendant delivers a kind or variety of seed different from that specified in the order and, in that event, will pay no more, irrespective of the damage suffered by the plaintiff as the result of such breach of its contract.

[11, 12] Unless the phrase, "to the extent of the purchase price," became a part of the contract of sale and is enforceable as such, it does not limit the damages recoverable by the plaintiff for the breach of that contract. A party to a contract may not, by his unilateral declaration, extraneous to the contract, free himself from or limit his liability for damages for his breach of it.

[13] This is not a formal, written contract of sale. The defendant contends that the amount of damages recoverable for its breach of the contract is limited to the purchase price of the seed. This contention is based entirely upon the fact that the defendant caused to be printed in its catalogue, upon the order blank sent out by it with the catalogue, upon its invoice accompanying the shipment of seed and upon the packet containing the seed the alleged limitation. It is not contended that this limitation of the damages recoverable was otherwise called to the attention of the plaintiff. Therefore, unless its location in and upon the above mentioned documents, the size or color of the type and other circumstances, were sufficient to call this statement to the attention of the plaintiff, as being part of the contract into which he was entering, the statement would not constitute part of that contract. See: Williston on Contracts, 3d Ed, § 90B; *Stevenson v. B. B. Kirkland Seed Co.*, 176 S.C. 345, 180 S.E. 197. While the construction of clear and unambiguous language in a contract is for the court, it is for the jury to determine whether a particular agreement was or was not part of the contract actually made by the parties. *Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829. The direction of a verdict for the defendant took this question from the jury.

[11] In the present case we, of our own motion, have directed the clerk of the trial court to transmit to us, for addition to the record on appeal, the exhibits attached to the complaint and those introduced in evidence. We observe that in all of the documents upon which the defendant relies, the phrase limiting the amount of recovery for delivery of the wrong kind or variety of seed was dropped into a paragraph dealing with what the defendant did and did not warrant with reference to the seed. The paragraph is entitled "Limitation of Warranty," not "Limitation of Damages Recoverable for Breach of Contract." This phrase, purporting to limit the amount of recovery, is not emphasized by the manner in which it appears in the paragraph. In each document the paragraph, itself, is printed in small type of the same color of ink as the other printed matter on the page, only the caption, "LIMITATION OF WARRANTY," being capitalized and printed in heavier type. In the 161 page catalogue, filled with the customary attractive color photographs of flowers, fruit and vegetables and language descriptive of their many desirable attributes, this statement appears nowhere save on the last page, where, along with much other matter, it is printed in small type and the usual black ink, with only the caption emphasized by capitalization and heavier type. Nothing whatever appears on page 71, whereon the Heinz 1350 variety of tomato is described, to suggest any limitation of the defendant's liability for delivery of a different variety in response to an order specifying Heinz 1350. Under these circumstances, we cannot say that, as a matter of law, the "LIMITATION OF WARRANTY" became part of the contract of sale so as to justify a directed verdict for the defendant.

One experienced in the analysis of legal documents can readily perceive the significance of the phrase limiting the amount of recovery, but most retail purchasers of seed are not experienced in the art of discovering such phrases in the midst of language relating to other matters. Other seed vendors apparently rely upon virtually the same language printed in their catalogues and like documents. See: *Desert Seed Co. v. Drew Farmers' Supply, Inc.*, 248 Ark. 858, 454 S.W. 2d 307; *Asgrow Seed Co. v. Gulick*, 420 S.W. 2d 438 (Tex. Civ. App.); *Nakanishi v. Foster*, 64 Wash. 2d 647, 393 P. 2d 635. If such practice is sufficiently widespread among seed vendors and is sufficient to limit the vendor's liability, the farmer will find it virtually

impossible to purchase seed with an effective right of recourse for the delivery of seed not conforming to his order.

[14, 15] Even though the jury should find that the provision entitled "Limitation of Warranty" was so located and printed in the catalogue and other documents relied upon by the defendant as to bring it to the plaintiff's attention and so make it a part of the contract, it will not avail the defendant if it is contrary to the public policy of this State. A provision in a contract which is against public policy will not be enforced. *In re Publishing Co.,* 231 N.C. 395, 57 S.E. 2d 366, 14 A.L.R. 2d 842; *Glover v. Insurance Co.,* 228 N.C. 195, 45 S.E. 2d 45; *Cauble v. Trexler,* 227 N.C. 307, 42 S.E. 2d 77; *Phosphate Co. v. Johnson,* 188 N.C. 419, 428, 124 S.E. 859; *Miller v. Howell,* 184 N.C. 119, 113 S.E. 621; *Fashion Co. v. Grant,* 165 N.C. 453, 81 S.E. 606. "[A]greements are against public policy when they tend to the violation of a statute." *Glover v. Insurance Co., supra.* "The purpose of the statute becomes a public policy." *Cauble v. Trexler, supra.* When the agreement found violative of public policy is separable from the remainder of the contract, the contract will be given effect as if the provision so violative of public policy had not been included therein. *In re Publishing Co., supra.*

In *Cauble v. Trexler, supra,* this Court reversed a judgment of nonsuit in an action to enjoin foreclosure of a second mortgage upon farm land for the reason that it was found violative of the purpose of the Emergency Farm Mortgage Act of 1933. Speaking through Justice Winborne, later Chief Justice, the Court said:

> "The primary object of the statute is relief to farmers from the load of oppressive debts, and any benefit to the creditors of the farmer is merely incidental. * * *
>
> "While this particular subject does not seem to have been treated heretofore by this Court, the courts of other jurisdictions have dealt with it in well considered opinions, and have held almost uniformly, that notes and mortgages, given by a former debtor, to his creditor to make up and secure the difference between the amount paid under a scale-down settlement pursuant to the Emergency Farm Mortgage Act of 1933, *supra,* and the amount originally owed, are contrary to public policy and void."

In *Miller v. Howell, supra,* this Court affirmed a judgment denying recovery on a note given for the purchase price of stock feed. Speaking through Justice Hoke, later Chief Justice, this Court said that, irrespective of the jury's finding of fraud in the execution of the note, no recovery could be had upon it for the reason that the note grew out of and was dependent upon a transaction, forbidden and made criminal by the statutory prohibition of any sale of such commodity in this State until the vendor registered with the Commissioner of Agriculture and filed with him a labeled package of each brand of feed. The vendor having failed to comply with the statute, the Court held the note unenforceable notwithstanding the fact that the statute did not specifically make the contract void. The Court quoted the following statement from *Courtney v. Parker,* 173 N.C. 479, 92 S.E. 324:

> "It is well established that no recovery can be had on a contract forbidden by the positive law of the State, and the principle prevails as a general rule whether it is forbidden in express terms or by implication arising from the fact that the transaction in question has been made an indictable offense or subjected to the imposition of a penalty. [Citations omitted.] In reference to an avoidance of a contract by reason of an implied prohibition, it is the rule very generally enforced that recovery is denied to the offending party when the transaction in question is in violation of a statute establishing a general police regulation to 'safeguard the public health or morals or to protect the general public from fraud or imposition.' "

The North Carolina Seed Law, G.S. 106-277 to G.S. 106-277.28, declares that its purpose is "to regulate the labeling * * * sale and offering * * * for sale of * * * vegetable seeds * * * ." Obviously, it is intended for the protection of North Carolina farmers from the disastrous consequences of the sale and delivery to them of seed falsely labeled. The Act defines "labeling" to include "all labels and other written, printed or graphic representations in any manner whatsoever accompanying and pertaining to any seed whether in bulk or in containers and includes representations on invoices." G.S. 106-277.2(18). It defines "vegetable seeds" to include "the seeds of those crops which are grown in gardens or on truck farms." G.S. 106-277.2(37). It requires each container of vegetable seeds sold in

or transported into this State for seeding purposes to bear thereon, or upon an attachment thereto, a plainly written or printed label showing the "name of kind and variety of seed." G.S. 106-277.3 and G.S. 106-277.6. Obviously, this means a correct showing of kind and variety. The immediate vendor is made responsible for the presence of the required labels. G.S. 106-277.8. It is made unlawful to transport or to sell, within this State, vegetable seed, for seeding purposes, which have a false or misleading label, or "to which there is affixed names or terms that create a misleading impression as to the kind, kind and variety, history, productivity, quality or origin of the seeds." G.S. 106-277.9. In a section entitled "Penalty for Violations," the violation of any provision of the Act is made a misdemeanor punishable by a fine of not more than $500. G.S. 106-277.24. It is further provided that seed sold or offered for sale, in this State, contrary to the provisions of the Act are subject to seizure and destruction or other disposition. G.S. 106-277.25. Under certain circumstances, the Commissioner of Agriculture is authorized to issue and enforce a "stop-sale" order. G.S. 106-277.22.

In G.S. 106-277.10, certain exemptions are provided. Paragraph (e) of this section is the only such provision which might be deemed applicable to the present case. It states: "No person shall be subject *to the penalties* of this article for having sold * * * vegetable seeds which were incorrectly labeled or represented as to origin, kind or variety when such seeds cannot be identified by examination thereof unless such person has failed to obtain an invoice or grower's declaration giving origin, kind and variety or take such other precautions as may be necessary to insure the identity to be that stated." (Emphasis added.) This paragraph clearly exempts the seller from the provisions of G.S. 106-277.24, entitled "Penalty for Violations," which, as above noted, imposes a fine upon conviction of a violation of any provision of the Act.

[16, 17] In legislation designed for the protection of a segment of the public from the mislabeling of goods sold, exemptions are to be strictly construed. Very clearly, the Seed Law is not limited in its purpose or scope to the protection of the purchaser from fraud by the immediate vendor. We, therefore, conclude that this provision exempting the vendor, under the circumstances designated, from *the penalties* imposed by the Act is

not intended to absolve him from liability to the purchaser for breach of contract.

In G.S. 106-277.11, the Seed Law provides that the use of a "disclaimer, nonwarranty or limited warranty clause in any invoice, advertising * * * or graphic matter pertaining to any seed shall not constitute a defense * * * *in any prosecution or in any proceedings for confiscation of seeds* * * *.*" (Emphasis added.) We do not construe this as having any bearing upon any other effect of such disclaimer or limitation clause.

[18] Ordinarily, parties to a contract are free to enter into agreements limiting the amount which may be recovered for breach of their contract. Williston on Contracts, 3d Ed, § 781A; Corbin on Contracts, § 1472; 17 AM. JUR. 2d, Contracts, § 188. Nevertheless, "The law does not look with favor on provisions which relieve one from liability for his own fault or wrong." 17 AM. JUR. 2d, Contracts, § 188. As the Supreme Court of New Jersey has said in *Henningsen v. Bloomfield Motors,* 32 N.J. 358, 161 A. 2d 69, 75 A.L.R. 2d 1, "[D]isclaimers or limitations of the obligations that normally attend a sale, * * * are not favored, and * * * are strictly construed against the seller."

In the Henningsen case, *supra,* the wife of a purchaser of a new automobile was injured and the automobile became a total loss when it suddenly went out of control while the purchaser's wife was driving it in a proper manner. The cause of the accident was a defect in the steering mechanism. Suits were brought by the husband and the wife against the seller and the manufacturer of the car on the theories of negligence and warranty. The negligence counts were dismissed in the trial court, but both plaintiffs recovered verdicts against both defendants on the theory of breach of warranty. The purchase contract, among many other provisions, expressly provided that the manufacturer warranted the vehicle to be free from defects in material or workmanship under normal use and service, but limited the manufacturer's liability upon such warranty to "making good at its factory any part or parts" returned to it within 90 days after delivery of the car to the original purchaser and before the vehicle had been driven 4,000 miles. With reference to this provision for limited liability, the New Jersey Court, after recognizing the general principle that, in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens said:

"It seems obvious in this instance that the motive was to avoid the warranty obligations which are normally incidental to such sales. The language gave little and withdrew much. In return for the delusive remedy of replacement of defective parts at the factory, the buyer is said to have accepted the exclusion of the maker's liability for personal injuries arising from the breach of the warranty, and to have agreed to the elimination of any other express or implied warranty. An instinctively felt sense of justice cries out against such a sharp bargain. * * *

"The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. 'The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. * * * '

"The warranty before us is a standardized form designed for mass use. It is imposed upon the automobile consumer. He takes it or leaves it, and he must take it to buy an automobile. * * *

"Although the courts, with few exceptions, have been most sensitive to problems presented by contracts resulting from gross disparity in buyer-seller bargaining positions, they have not articulated a general principle condemning, as opposed to public policy, the imposition on the buyer of a skeleton warranty as a means of limiting the responsibility of the manufacturer. * * *

"In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity."

In the present case, it is not necessary for us to go so far as the New Jersey Court did in the Henningsen case, *supra.* Here, the statute has declared the policy of North Carolina to be one of protecting the farmer from the disastrous consequences of planting seed of one kind, believing he is planting another. To permit the supplier of seed to escape all real responsibility for its breach of contract by inserting therein a skeleton warranty, such as was here used, would be to leave the farmer without any substantial recourse for his loss.

While there is no element of personal safety involved in the use of falsely labeled seed, such as there is in the case of a defective automobile, the breach of the contract of sale of seed does not, like the breach of warranty of an automobile part, *sometimes* cause disaster. It *always* causes disaster. Loss of the intended crop is inevitable. The extent of the disaster is measured only by the size of the farmer's planting. It may well, in terms of financial loss, exceed the damages flowing from a breach of warranty of quality of an automobile part.

[19] We think it clear that the phrase, "to the extent of the purchase price," as used in the "Limitation of Warranty" relied upon by the defendant, is contrary to the public policy of this State as declared in the North Carolina Seed Law, *supra,* and is invalid. See, *Klein v. Asgrow Seed Co.,* 54 Cal. Rptr. 609, 618. Such provision, therefore, even if it otherwise be deemed a part of the contract of sale, does not bar the plaintiff from a recovery in this action of the full damages which he would otherwise be entitled to recover for the breach of the contract by the defendant.

Decisions in other jurisdictions are not in agreement as to the measure of damages recoverable for the seller's breach of contract by delivering seed of a different kind or variety from that ordered by the buyer. The principal cause for this diversity of opinion lies in the respective applications of the principle that damages may not be awarded on the basis of speculation and conjecture. Many of the decisions, apparently in conflict, are distinguishable upon the facts therein with reference to the reasonable certainty of the plaintiff's proof of loss. We think the proper rule governing such cases was thus laid down in *Malone v. Hastings,* 193 F.1 (Fifth Circuit), as follows:

> "If, under the evidence in a particular case, the damages are susceptible of reasonable computation, and are

within the actual contemplation of the parties to the contract, there can be no valid reason for rejecting them merely because they are in the nature of lost profits, or depend upon the estimated value of a growing, but unmatured crop."

In *Wolcott v. Mount,* 36 N.J.L. 262, and in *White v. Miller,* 71 N.Y. 118, the courts allowed recovery of damages based upon the difference between the actual value of the crop produced with defective seed and the estimated value of a crop which would have been produced from seed according to the contract. In these cases, the courts held that evidence showing the results obtained by the cultivation of similar crops on portions of the same land or on adjoining lands, under similar conditions, furnished data sufficient to support the award.

In *Nakanishi v. Foster, supra,* the Supreme Court of Washington held that the measure of damages recoverable from a processor, who negligently mislabeled seed ultimately sold to the plaintiff, was the market value of the crop which would have been produced had the seed been as ordered, less the unincurred expense of raising, harvesting and marketing the crop and less the salvage value of the crop actually grown, the plaintiff having offered substantial evidence of all these factors. To the same effect are *Hobdy & Read v. Siddens,* 198 Ky. 195, 248 S.W. 505, and *Henderson v. Berce,* 142 Me. 242, 50 A. 2d 45, 168 A.L.R. 572, these cases being suits for damages for breach of warranty. See also: Annots., 168 A.L.R. 581, 591-594; 32 A.L.R. 1241, 1246; 16 A.L.R. 859, 887-895. In 46 AM. JUR., Sales, § 750, the rule as to the measure of damages for breach of warranty of seed is thus stated:

"The ordinary measure of damages, or the measure of general damages, for breach of a warranty as to the variety of seeds is the difference between the value of the crop raised from the seeds furnished and the value of the crop which would have been raised if the seeds furnished had been as warranted, apparently taking also into consideration the difference, if any, between the expense of raising the crop from the seeds which were furnished and the expense of raising the crop from seeds complying with the warranty."

In *Reiger v. Worth,* 127 N.C. 230, 37 S.E. 217, this Court had before it an action for breach of warranty in the sale of

seed rice, the seed sold as "good seed rice" having failed to germinate. Thus, there was a complete failure of the crop. There was evidence as to the average yield of rice on land such as the plaintiff's, prepared as his land was prepared, but the report of the decision does not show that this average related to the year in question or to land in the vicinity of the plaintiff's land. The trial court instructed the jury that they would allow the plaintiff such damages as they found from the evidence his net profit on the crop would have been had there been no breach of warranty. This Court, speaking through Justice Montgomery, said:

> "[T]he plaintiff ought not to have been allowed to recover the amount estimated as the crop of rice which might have been produced upon the land if the rice had been good seed rice. * * *
>
> "We think the true rule for the measure of the plaintiff's damage in this case is the amount which he paid the defendant for the rice, the amount which he expended in the preparation of the soil for the crop and for the planting or sowing of the seed, and because it was too late to plant another crop of rice he ought also to recover a reasonable rent for the land * * * subject to be reduced, however, by such amount as the defendant may be able to show that the plaintiff could have rented the land for, after it was too late to plant or sow rice, to be put in other crops than rice."

[20] *Reiger v. Worth, supra,* is distinguishable from the case now before us. There, the seed sown by the plaintiff did not germinate so that the plaintiff produced no crop whatever. There, the only evidence upon which the jury could estimate what the crop would have been, had the seed been as warranted, related to the average yield. Apparently, this average did not reflect only those crops grown in the immediate vicinity in the same year. In the case now before us, on the other hand, the plaintiff grew on two acres of his land a crop of paste tomatoes from the seed sold to him by the defendant. Expert witnesses viewed the crop so grown. The methods of cultivation used by the plaintiff and the prevailing weather conditions and other matters relating to the production of this crop, as compared with a crop of Heinz 1350 tomatoes, were or could have been shown in evidence. There is nothing to indicate that tomato vines of the Heinz 1350 variety would not have flourished to the

same extent as the vines which were actually produced upon this land from the seed sold by the defendant. To permit the jury to estimate the size and value of the crop which would have been produced had the vines been of the Heinz 1350 variety, based upon testimony of experts in truck farming, would not, in our opinion, violate the rule against the allowance of speculative or conjectural damages.

Similarly, the plaintiff grew upon his second two-acre tract a crop of table tomatoes, using plants of a variety other than Heinz 1350. Again, it is not unduly speculative to permit the jury to estimate the size and value of the crop which would have been produced had these vines been of the Heinz 1350 variety.

As to the third two-acre tract which the plaintiff intended to use for his late crop of Heinz 1350 tomatoes, but which he diverted to another use in view of his discovery of the defendant's breach of the contract, we again are of the opinion that the jury could reasonably estimate the amount of the crop which the plaintiff would have produced on that tract, in the light of the actual results obtained by him on the other two tracts and in the light of evidence as to the similarity or difference in weather conditions and other factors, entering into the production of tomatoes, between the harvesting of the early crop and the time at which the late crop would have been harvested.

[21] Thus, the basis for the decision in *Reiger v. Worth, supra,* is not present in this case. Consequently, we hold that, under the circumstances of the present case, the measure of damages for the breach of contract is the value of the crop which the jury so finds would have been raised had the seed been of the Heinz 1350 variety, less the value of the crops actually raised upon these six acres and less any additional expense of cultivation, harvesting and marketing which the plaintiff would have had to incur had he produced and marketed a crop upon the third of the two-acre tracts.

The judgment of the Court of Appeals is correct except insofar as its statement concerning the damages recoverable by the plaintiff is in need of amplification. To that extent it is hereby modified.

Modified and affirmed.

SUSAN DANTZIC, PETITIONER v. STATE OF NORTH CAROLINA, RESPONDENT

No. 113

(Filed 30 July 1971)

1. **Criminal Law § 180— application for writ of coram nobis — jurisdiction of superior court**

A petitioner who did not appeal from the final judgment of the superior court in a criminal case must apply directly to that court, rather than to the Supreme Court or the Court of Appeals, for permission to file a writ of *coram nobis* to attack the judgment.

2. **Criminal Law § 177— decision of Supreme Court — remand to Court of Appeals — coram nobis proceeding**

The Supreme Court, upon its decision that petitioner properly filed its application for writ of *coram nobis* in the superior court rather than in the Supreme Court or Court of Appeals, remands the case to the Court of Appeals for consideration of petitioner's appeal from the *coram nobis* proceeding in the superior court.

ON *certiorari* granted on motion of petitioner for review of the decision of the Court of Appeals reported in 10 N.C. App. 369, 178 S.E. 2d 790 (1971), or, in the alternative, for leave to file in the Superior Court of Rutherford County a petition for writ of error *coram nobis* to enable petitioner to attack the judgment pronounced against her in that court at its August 1969 Session.

Petitioner did not appeal from the judgment pronounced against her at the August 1969 Session.

This collateral attack proceeding was initiated October 13, 1969, when petitioner filed in the North Carolina Court of Appeals a petition "for leave to apply to Superior Court of Rutherford County for a writ of error *coram nobis*." In her petition, she asserted she had been brought to trial in the Superior Court of Rutherford County on a bill of indictment which charged that she, on the 19th day of June, 1969, in Rutherford County, "did unlawfully and wilfully for the purpose of gain, exhibit obscene and immoral motion pictures, to wit: 'The Ramrodder' and 'A Piece of Her Action,' to an audience in Rutherford County on the premises of Mid-Way Drive In Theatre, Inc. Said Motion picture depicting in its most lewd, lascivious and degrading form the act of sexual intercourse . . . . " She also asserted the court, after reciting she had pleaded guilty as

charged, pronounced judgment that she "be confined in the Women's Division of the State's Prison and there to be assigned to work under the supervision of the State Department of Correction as provided by law for a period of six months"; but provided that "(t)he foregoing prison sentence" was suspended for three years upon the following express terms and conditions:

"1. That the defendant pay into the office of the clerk of Superior Court of Rutherford County the sum of $1,000.00;

"2. That she at no time show any questionable picture until it has been reviewed by an agent appointed by the sheriff of Rutherford County and one appointed by her or her superiors, and if they are unable to agree as to the legality of the film, that they should select a third party to review the picture with them;

"3. That she not violate any of the criminal laws of this State for a period of three years."

Petitioner asserted her plea and sentence were void and should be set aside because: (1) Her plea of guilty was involuntary; (2) the condition of suspension of judgment set forth in the paragraph identified by the number "2" is unconstitutional and therefore a nullity; and (3) that, on grounds specified, the statute upon which her indictment was based, namely, G.S. 14-189.1, is unconstitutional on its face.

Throughout this collateral attack proceeding petitioner has been represented by counsel other than those who appeared for her at August 1969 Session of Rutherford Superior Court.

A pleading entitled "ANSWER AND MOTION TO DISMISS" was filed by the Attorney General.

Upon consideration, the Court of Appeals, on October 30, 1969, entered the following order: "It is ordered that permission be granted for leave to apply to the Superior Court of Rutherford County for a writ of error *coram nobis*. If the application be denied, findings of fact should be made as a basis therefor and petitioner will be allowed to appeal as in other proceedings. If the application is granted, the judgment will be vacated and the plea stricken out or permitted to be withdrawn and the case will be restored to the docket for trial . . . . "

Thereafter, petitioner filed in the Superior Court of Rutherford County an application dated November 10, 1969, for a writ of error *coram nobis,* in which, for the reasons previously asserted in her petition filed in the Court of Appeals, she prayed that she be granted a new trial.

At the March 9, 1970 Mixed Session of Rutherford Superior Court, The Honorable Frank W. Snepp, the judge presiding, conducted a plenary hearing on plaintiff's application. Judge Snepp heard the testimony of the following witnesses: Mrs. Susan Dantzic, petitioner; Dr. Fate J. Buchanan, chiropractor; Ervin Dantzic, petitioner's husband; George Morrow and John Mahoney, both lawyers for petitioner at August 1969 Session. After setting forth findings of fact in detail, Judge Snepp denied "petitioner's application for a new trial and other relief." In brief summary, Judge Snepp found that petitioner had been represented by able and experienced counsel; that her plea of guilty was voluntarily entered after she had been fully advised of her rights and of the consequences of her plea both by her counsel and by the court; and that petitioner's other grounds for attack on the judgment could have been but were not raised by petitioner on a direct appeal from the judgment entered at August 1969 Session.

Upon petitioner's appeal from Judge Snepp's judgment, the Court of Appeals, solely on the basis of the decision of this Court in *State v. Green,* 277 N.C. 188, 176 S.E. 2d 756 (1970), held it had no authority to entertain the petition for writ of error *coram nobis* filed with it on October 13, 1969, and that "all proceedings in the cause subsequent to our order of 30 October 1969, which we now hold to have been improperly entered, are a nullity."

Smith & Patterson, by Norman B. Smith, for petitioner appellant.

Attorney General Morgan, Assistant Attorney General Icenhour and Staff Attorney Jones for the State.

BOBBITT, Chief Justice.

We granted *certiorari* "for the sole purpose of determining whether or not the Court of Appeals has authority to issue writ of error *coram nobis.*"

In *State v. Green,* discussed below, this specific question was not presented to or considered by the Court of Appeals or by this Court. A brief resume of the factual situation and of the decisions in *Green* is appropriate.

In *State v. Green,* 8 N.C. App. 234, 174 S.E. 2d 8 (1970), the appeal to the Court of Appeals was from Judge Godwin's denial of the petition for a writ of error *coram nobis* filed by Green in the Superior Court of Rockingham County. Judge Godwin held the facts were insufficient to entitle Green to such writ. The Court of Appeals affirmed. Decision turned upon whether an indigent defendant, charged with wilful failure to support his illegitimate children, was entitled to representation by court-appointed counsel. Whether the superior court had authority to issue the writ in a different factual situation was not discussed. Nor was there any discussion as to whether it was necessary to obtain leave from the Court of Appeals or from the Supreme Court as a prerequisite for an application for such writ.

Upon Green's appeal to this Court under G.S. 7A-30, the decision of this Court, *State v. Green,* 277 N.C. 188, 176 S.E. 2d 756 (1970), is stated in the following two paragraphs of the majority opinion, *viz.:*

"We hold that defendant was charged with a petty offense and his trial without counsel did not violate his constitutional right to counsel under the Sixth and Fourteenth Amendments.

"Defendant's appeal, treated as a petition to this Court for leave to file a petition in the Recorder's Court of Reidsville for a writ of error *coram nobis,* is denied. The decision of the Court of Appeals affirming the denial order of Godwin, J., is AFFIRMED."

Our decision in *Green* was based on these propositions: (1) To obtain relief by writ of error *coram nobis,* Green was required to file his petition for such writ in the court in which the judgment had been rendered, namely, the Reidsville Recorder's Court; (2) Green was not entitled to file such petition as of right but only in the event the Supreme Court of North Carolina granted his application for permission to do so; and (3) Green could not avail himself of the procedures of our Post-Conviction Hearing Act, G.S. 15-217 *et seq.,* because he was not an "imprisoned" person.

We deem it appropriate to reconsider the decisions of this Court on which the second proposition in *Green* was based.

"A writ of error *coram nobis* is a common-law writ of ancient origin devised by the judiciary . . . . " 24 C.J.S. *Criminal Law* § 1606(1), at 662 (1961). "It lies to vacate or correct a judgment, civil or criminal, for errors of fact as distinguished from errors of law. Application for the writ is made to the court which rendered the judgment." Annot., 145 A.L.R. 818 (1943). Accord, 18 Am. Jur. 2d *Coram Nobis, etc.*, § 3 (1965); 24 C.J.S. *Criminal Law* § 1606(2) (1961). As indicated below, the writ was first recognized and applied in this jurisdiction in civil cases.

In *Roughton v. Brown*, 53 N.C. 393 (1861), Justice Battle stated: "The distinction between an ordinary writ of error and a writ of error *coram nobis* is that the former is brought for a supposed error in law apparent upon the record, and takes the case to a higher tribunal, where the question is to be decided and the judgment, sentence, or decree is to be affirmed or reversed; while the latter is brought for an alleged error of fact, not appearing upon the record, and lies to the same court, in order that it may correct the error, which it is presumed would not have been committed had the fact in the first instance been brought to its notice." Accord, 18 Am. Jur. 2d *Coram Nobis, etc.*, § 2 at 452 (1965); *Tyler v. Morris*, 20 N.C. 625 (1839); *Williams v. Edwards*, 34 N.C. 118 (1851).

As succinctly stated in the first headnote in *Roughton v. Brown, supra:* "A writ of error *coram nobis* lies from any court of record returnable to itself, and not from a superior to an inferior court."

In 5 Encyclopaedia of Pleading and Practice 27-28 (1896), it is stated that "(t)he office of the writ of *coram nobis* is to bring the attention of the court to, and obtain relief from, errors of fact," such as (1) the death of a party pending the suit and before judgment as in *Tyler v. Morris, supra;* (2) the infancy of a party who was not properly represented by guardian as in *Williams v. Edwards, supra;* or (3) coverture, where the common law disability still existed, as in *Lassiter v. Harper*, 32 N.C. 392 (1849), and in *Roughton v. Brown, supra.*

In civil cases, the writ of error became obsolete upon adoption in North Carolina of the Code of Civil Procedure. The

remedy previously available by writ of error *coram nobis* was superseded by the statutory remedy of motion in the cause. *Lynn v. Lowe,* 88 N.C. 478 (1883); *Roberts v. Pratt,* 152 N.C. 731, 68 S.E. 240 (1910); *Massie v. Hainey,* 165 N.C. 174, 177-178, 81 S.E. 135, 136-137 (1914).

Prior to the *Taylor* and *Daniels* cases, discussed below, we find no *criminal* case in which this Court considered the writ of error *coram nobis.* The cited decisions in civil actions contain no suggestion that permission from the Supreme Court was required before a motion for writ of error *coram nobis* could be filed in the court in which the judgment under attack was rendered.

The second proposition in our decision in *State v. Green, supra,* is based upon the decisions in the *Taylor* and *Daniels* cases. *In re Taylor* (I), 229 N.C. 297, 49 S.E. 2d 749 (1948); *In re Taylor* (II), 230 N.C. 566, 53 S.E. 2d 857 (1949); *State v. Daniels* (I), 231 N.C. 17, 56 S.E. 2d 2 (1949); *State v. Daniels* (II), 231 N.C. 341, 56 S.E. 2d 646 (1949); *State v. Daniels* (III), 231 N.C. 509, 57 S.E. 2d 653 (1950). It is noted here that the *Taylor* and *Daniels* cases were decided prior to our original Post-Conviction Procedure Act. Session Laws of 1951, Chapter 1083.

At January 1947 Term of Pitt Superior Court, Laurie D. Taylor, a minor, was indicted in each of seven cases. Three indictments charged the capital felony of burglary in the first degree; four charged the felony of larceny. Taylor pleaded guilty of burglary in the second degree in the burglary cases and judgments of life imprisonment were pronounced. He pleaded guilty in each of the larceny cases and judgments imposing prison sentences were pronounced.

On July 8, 1948, Taylor applied for and obtained a writ of *habeas corpus.* In his application, he asserted that, although he was unable to employ counsel and was denied the benefit of counsel, he was required to plead to the seven indictments at January 1947 Term. At a hearing conducted July 19, 1948, on return of the writ of *habeas corpus,* Taylor's application for discharge was denied.

By letter dated September 7, 1948, Taylor requested a review by this Court of the judgment entered July 19, 1948, in the *habeas corpus* proceeding. The Court treated the letter as

a petition for *certiorari.* Pending decision thereon, J. C. B. Ehringhaus, Jr., Esq., a member of the Raleigh Bar, was appointed to investigate the case and report his findings to Taylor and to the Court. In his report, Mr. Ehringhaus reviewed the allegations in Taylor's petition in the *habeas corpus* proceeding, discussed various procedural questions and suggested *inter alia* that Taylor's remedy might be by petition to the Supreme Court for permission to file a petition for writ of error *coram nobis* in the Superior Court of Pitt County. The report included the following: "If upon petitioner's verification and the record in the *Habeas Corpus* proceeding, a *prima facie* showing of substantiality is made, the Court, in the exercise of its supervisory powers over inferior courts, could grant the petition and permit petitioner to proceed as above in Pitt Superior Court."

This Court denied *certiorari. In re Taylor* (I), *supra.* The opinion of Chief Justice Stacy contained the following: "Where the defendant in a criminal prosecution, less than capital, is unable to employ counsel, the appointment of counsel for him is discretionary with the trial court. *S. v. Hedgebeth,* 228 N.C. 259, 45 S.E. (2d) 563. It is otherwise, however, in capital cases. G.S. 15-4; *S. v. Farrell,* 223 N.C. 321, 26 S.E. (2d) 322. 'In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.' *Powell v. Alabama,* 287 U.S. 45, 77 L. Ed. 158, 84 A.L.R. 527." In explanation of the denial of *certiorari,* the opinion states: "(W)hatever the merits of the matter, it could avail the petitioner naught to review the judgment of Judge Burney dismissing the writ of *habeas corpus.* Such writ is inappropriate under our procedure to obtain for the petitioner the relief which he seeks, and he has been so advised. *In re Steele,* 220 N.C. 685, 18 S.E. (2d) 132; *S. v. Dunn,* 159 N.C. 470, 74 S.E. 1014; *S. v. Burnette,* 173 N.C. 734, 91 S.E. 364. Not only is this so under the apposite decisions, but it is also provided by G. S. 17-4, that 'application to prosecute the writ shall be denied . . . (2) where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.' *In re Schenck,* 74 N.C. 607." The Ehringhaus report is set out in full in the statement

of facts. The opinion itself contains no *express* reference to a writ of error *coram nobis.*

Thereafter, Taylor sought to test the legality of his imprisonment through *habeas corpus* proceedings in the United States District Court for the Eastern District of North Carolina. The federal court dismissed his petition on the ground he had not exhausted his State remedies. Thereafter, in Chief Justice Stacy's language: "Again of his own volition and *inops consilii,* he (Taylor) filed application here for leave to apply to the Superior Court of Pitt County for writs of error *coram nobis* to determine the lawfulness of his present incarceration." Taylor's unverified application was referred to Mr. Ehringhaus with a request that he advise Taylor as to further procedures. Taylor then verified the petition. It alleged in greater detail the facts concerning Taylor's age, his inexperience, his inability to employ counsel, etc., which he had set forth in earlier petitions. The Supreme Court granted Taylor's application in respect of the capital (burglary) charges but held no sufficient showing had been made to warrant the granting of the application "in respect of the non-capital indictments." *In re Taylor* (II), *supra.*

The opinion of Chief Justice Stacy in *In re Taylor* (II), *supra,* states: "The instant application for permission to apply to the trial court for relief is addressed to the supervisory authority of this Court over 'proceedings of the inferior courts' of the State. Const. Art. IV, Sec. 8; *S. v. Lawrence,* 81 N.C. 522; *S. v. Green,* 85 N.C. 600. See, also, note to *Halford v. Alexander,* 46 Am. Dec. 253-257."

The permission granted by the Supreme Court authorized the further proceedings set forth in the following excerpt from the opinion:

"The prison authorities will afford the petitioner an opportunity to appear at the next term of the Superior Court of Pitt County to be held for the trial of criminal cases, so that he may apply for writs of error *coram nobis* in respect of the three capital indictments as sought in his petition. Before entertaining his application, however, the trial court will see to it that the petitioner is represented by counsel, either of his own choosing and employment, or by appointment of the court. If under the advice of counsel, the petitioner elect to proceed further,

the court will entertain his application and make decision thereon. If the application be denied, findings of fact should be made as a basis therefor, the petitioner returned to the Central Prison, and allowed to appeal as in other proceedings.

"If the application be granted, the judgments should be vacated, the pleas stricken out or permitted to be withdrawn, and the cases restored to the docket for trial. In this latter event, the petitioner will be afforded an opportunity to confer with counsel, prepare his defense, and appear at his trial."

In *State v. Daniels* (I), *supra,* the defendants had been convicted of first degree murder and sentenced to death at May 1949 Term of Pitt Superior Court. Upon the solicitor's motion, the trial judge struck out the defendants' purported statement of case on appeal because of their failure to prepare and serve it within the time fixed by the court. Thereupon, the defendants filed petitions for *certiorari* to enable them to perfect their appeals. After stating the grounds for denial of *certiorari,* and after restating in substance what had been stated by Chief Justice Stacy in *In re Taylor* (II) concerning writs of error *coram nobis,* Justice Seawell pointed out that the writ of error *coram nobis* was available to petitioners but only "if they can bring themselvese within the purview of such a writ."

Thereafter the defendants filed a petition in the Supreme Court for permission to apply to the Superior Court of Pitt County for a writ of error *coram nobis.* The Supreme Court, referring to the Taylor cases and the prior Daniels case, denied the petition on the ground the defendants did not make the *prima facie* showing of substance necessary to bring themselves within the purview of the writ. *State v. Daniels* (II), *supra.*

In *State v. Daniels* (III), *supra,* after brief references to the prior *Daniels* decisions, judgments of the lower court were affirmed and the appeals therefrom were dismissed.

In accord with our cited civil cases, *Taylor* and *Daniels* held that an application for a writ of error *coram nobis* to attack collaterally a final judgment of a trial court must be made to and the hearing thereon conducted by the court which rendered the judgment. The innovation introduced by the Taylor and *Daniels* decisions was the requirement that permission from the Supreme Court must be obtained before application for

such writ could be made. Decisions cited as authority for this requirement in the Ehringhaus report in *In re Taylor* (I) and in the opinion of Chief Justice Stacy in *In re Taylor* (II) are cited in the following numbered paragraphs.

1. *Hysler v. State,* 146 Fla. 593, 1 So. 2d 628 (1941), where the Supreme Court of Florida denied the petitioner's application for a rehearing of an application for leave to apply to the Circuit Court of Duval County for a writ of error *coram nobis* to review his conviction for murder in the first degree. This decision was affirmed by the Supreme Court of the United States in *Hysler v. Florida,* 315 U.S. 411, 86 L. Ed. 932, 62 S.Ct. 688 (1941).

2. *Chambers v. State,* 117 Fla. 642, 158 So. 153 (1934), where the Supreme Court of Florida reversed with directions an order of the Circuit Court of Broward County which denied a petition for a writ of error *coram nobis.*

3. *Ex Parte Taylor,* 249 Ala. 667, 32 So. 2d 659 (1947), where the Supreme Court of Alabama denied the petitioner's application for leave to apply for a writ of error *coram nobis* in the Circuit Court of Mobile County to review his conviction for rape. This decision was affirmed by the Supreme Court of the United States, *sub nom. Taylor v. Alabama,* 335 U.S. 252, 92 L. Ed. 1935, 68 S.Ct. 1415 (1947).

Further investigation of the *Hysler* case discloses: Prior to the cited decisions, the defendant's conviction and sentence had been affirmed on direct appeal in *Hysler v. State,* 132 Fla. 209, 181 So. 354 (1938), and his application for a stay order and a writ of *habeas corpus* to withhold the execution of the death penalty had been denied in *Hysler v. State,* 136 Fla. 563, 187 So. 261 (1939).

Further investigation of the *Chambers* case discloses: Prior to the cited decision, the Supreme Court of Florida in *Chambers v. State,* 113 Fla. 786, 152 So. 437 (1934), had granted the petitioner's application for leave to file a petition for writ of error *coram nobis* in the Circuit Court of Broward County. In an earlier decision, *Chambers v. State,* 111 Fla. 707, 151 So. 499 (1933), the Supreme Court of Florida had affirmed on direct appeal the petitioner's conviction and sentence for first degree murder.

This excerpt from the opinion in *Chambers v. State,* 117 Fla. 642, 158 So. 153, *supra,* is noted: "The practice has prevailed in this state that *when a judgment* in a criminal case *has been affirmed* by the Supreme Court and the convicted persons desire to attack the judgment because of the existence of a fact which had the court known would have precluded the entry of the particular judgment, application must be made to the Supreme Court for leave to file a petition for the writ in the trial court because the judgment which has been affirmed by the Supreme Court becomes the judgment of that court and no other state court can examine its proceedings and annul its judgment, therefore it has been expressly held that the Supreme Court in such case has power to review its own judgment rendered on appeal through a writ of error *coram nobis.*" (Our italics.)

Further investigation of the Alabama case of *Ex Parte Taylor* discloses: Prior to the cited decisions, the Supreme Court of Alabama in *Taylor v. State,* 249 Ala. 130, 30 So. 2d 256 (1947), had affirmed the petitioner's conviction and sentence for rape. This excerpt from the opinion of the Supreme Court of the United States in *Taylor v. Alabama* is noted: "As distinguished from the traditional writ of error enabling a superior court to review an error of law committed by a trial court, the writ of error *coram nobis* brings the error of fact directly before the trial court. However, *when the judgment of the trial court* already *has been affirmed* by the judgment of a superior court, then the trial court is bound by the mandate of that superior court. Under those circumstances, it is appropriate to require a petitioner to secure, from that superior court, permission to file his petition for writ of error *coram nobis* in the trial court where he seeks an order setting aside the judgment already affirmed by the superior court. This additional step was included in the Florida procedure which was favorably considered by this Court in *Hysler v. Florida,* 315 U.S. 411, 86 L. Ed. 932, 62 S.Ct. 688, *supra.*" (Our italics.)

There is a sharp diversity of opinion as to whether permission to apply for a writ of error *coram nobis* must be obtained from an appellate court which on direct appeal has affirmed the judgment of the lower court. See Annot., "Writ of *coram nobis* after affirmance," 145 A.L.R. 818 *et seq.,* and supplemental decisions. Florida and Alabama have answered, "Yes."

Other jurisdictions have answered, "No." In changing its answer from "Yes" to "No," the Kentucky Court of Appeals said: "Later investigation of the question has convinced us that reason, logic and justice support the theory sustained by a majority of courts that the fact of the judgment of conviction having been affirmed by an appellate court creates no obstacle to the right of the convicted accused to obtain the writ if he alleges and proves facts sufficient therefor." *Smith v. Buchanan,* 291 Ky. 44, 163 S.W. 2d 5, 145 A.L.R. 813 (1942).

We have found no decision other than *Taylor* and *Daniels* which purport to hold that application for permission to an appellate court is a prerequisite for an application for a writ of error *coram nobis* to attack a final judgment of a lower court *from which no appeal was taken.*

Although not cited in *Taylor* and *Daniels,* we take notice of the decision of this Court in *Latham v. Hodges,* 35 N.C. 267 (1852). It was there held that the superior court could not reverse a judgment against the sureties on the caveator's cost bond, which judgment had been affirmed by the Supreme Court, upon the application of the sureties for a writ of error *coram nobis* on the ground the caveator was dead when the issue *devisavit vel non* was determined in favor of the propounders. The precise question the sureties sought to present by application for writ of error *coram nobis* had been raised, considered and decided adversely to them on direct appeal to the Supreme Court. *Woolard v. Woolard,* 30 N.C. 322 (1848). See the following references to *Latham v. Hodges, supra: Dantzic v. State,* 10 N.C. App. 369, 373, 178 S.E. 2d 790, 793 (1971); Comment: The Writs of Error *Coram Nobis* and *Coram Vobis,* 2 Duke Bar J. 29, 37 (1951); Annot., 145 A.L.R. at 820; Orfield, The Writ of Error *Coram Nobis* in Civil Practice, 20 Va. L. Rev. 423, 424 n. 8 (1934).

Decisions cited in *Taylor* and *Daniels* other than those referred to in the above numbered paragraphs relate to other aspects of the writ of error *coram nobis.*

Petitioner did not appeal from the judgment of the Superior Court of Rutherford County. We perceive no sound reason why she should be required to apply either to the Court of Appeals or to the Supreme Court of North Carolina for permission to file a petition for a writ of error *coram nobis* in the Superior

Court of Rutherford County to attack a final judgment of that court. The records were in Rutherford County. No records pertinent to the case were in either of the appellate courts. No appellate court had affirmed the judgment of the Superior Court of Rutherford County.

If petitioner were presently imprisoned, she could have proceeded under our Post-Conviction Hearing Act. G.S. 15-217 *et seq.* In express terms, this procedure is available when an imprisoned person seeks relief by petition for writ of error *coram nobis.* G.S. 15-217. There is no requirement that such imprisoned person obtain leave from an appellate court even though on direct appeal the appellate court has affirmed the judgment the petitioner seeks to attack. This is because the collateral attack is based on facts not disclosed by the record on appeal. *State v. White,* 274 N.C. 220, 162 S.E. 2d 473 (1968).

"The writ of error *coram nobis* can only be granted in the court where the judgment was rendered." *State v. Daniels* (I), *supra* at 25, 56 S.E. 2d at 7. In this and other respects, the procedure and function of the writ of error *coram nobis* are substantially the same as provided by petition under the Post-Conviction Hearing Act. *State v. Merritt,* 264 N.C. 716, 142 S.E. 2d 687 (1965). We perceive no justification for a rule that would require a person who is not in prison to obtain permission from an appellate court in order to file a petition for a writ of error *coram nobis* to attack collaterally a final judgment of a trial court from which no appeal was taken. Whether he can otherwise bring himself within the purview of the writ is another matter.

The Constitution of North Carolina, Article IV, § 12(1), provides that the Supreme Court "may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts." Article IV, § 12(2), provides that "(t)he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe."

The provisions of G.S. 7A-32 relate to the jurisdiction of the Supreme Court and of the Court of Appeals *with reference to the issuance of remedial writs.* No question is presented as to distinctions between the jurisdiction of the Supreme Court and of the Court of Appeals with reference to the issuance of such writs. *Taylor* and *Daniels* are in accord with other decisions

in North Carolina and elsewhere in holding that a writ of error *coram nobis* is issued only by the court which rendered the judgment. As indicated, the *Taylor* and *Daniels* decisions imposed a new requirement upon the ancient common-law writ of error *coram nobis,* namely, a requirement that permission be first obtained from the Supreme Court, such permission to be granted under the supervisory power presently conferred upon the Supreme Court by Article IV, § 12(1), of the Constitution of North Carolina. We have concluded that such requirement is neither necessary nor desirable under present conditions with reference to a final judgment of a trial court from which there was no appeal. In this respect, *Taylor, Daniels* and *Green* are overruled. It is unnecessary to decide on this appeal whether permission should be required with reference to a judgment affirmed on appeal by the Court of Appeals or by the Supreme Court or both.

[1, 2] The foregoing leads to this conclusion: It was unnecessary for petitioner to obtain leave from the Court of Appeals or from the Supreme Court before she applied to the Superior Court of Rutherford County. She applied to the Superior Court of Rutherford County as was her right and Judge Snepp conducted a plenary hearing upon her petition. His authority to do so was in no way impaired by the order of the Court of Appeals which had approved this course. Judge Snepp conducted the plenary hearing, found the facts and denied relief. Hence, in the light of the present decision, the case was and is for hearing on the exceptions brought forward by petitioner in her appeal to the Court of Appeals. Therefore, the cause is remanded to the Court of Appeals for its consideration of the exceptions presented by petitioner's appeal from Judge Snepp's order.

Error and remanded.

DONALD GRAY JOYNER v. JOE W. GARRETT, COMMISSIONER, N. C. DEPARTMENT OF MOTOR VEHICLES

No. 75

(Filed 30 July 1971)

1. **Automobiles § 1— suspension of driver's license — jurisdiction — review**

The power to issue, suspend, or revoke a driver's license is vested exclusively in the Department of Motor Vehicles, subject to review by the superior court and, upon appeal, by the appellate division.

2. **Automobiles § 2— suspension of license — refusal to take breathalyzer test — finding of wilfulness**

With respect to the statute authorizing 60-day suspension of driver's license upon the driver's wilful refusal to take a breathalyzer test, a finding by the Department of Motor Vehicles that the driver "did refuse" to take the breathalyzer test is equivalent to a finding that the driver "wilfully refused" to take the test. G.S. 20-16.2(c) and (d).

3. **Automobiles § 2— suspension of license — administrative hearing — inadmissibility of officer's affidavit**

Arresting officer's affidavit that the petitioner wilfully refused to take a breathalyzer test is inadmissible in evidence upon objection by petitioner at an administrative hearing on the suspension of his license.

4. **Automobiles § 2— suspension of license — administrative hearing — waiver of objection**

Where petitioner in an administrative hearing on the suspension of his driver's license failed either to object to the admissibility of the arresting officer's sworn report or to demand the right to cross-examine the officer, he waived the right to assert an appeal that the report was inadmissible and that he was denied the right of cross-examination.

5. **Automobiles § 2— suspension of license — refusal to take breathalyzer test — administrative hearing — burden of proof**

At an administrative hearing on the suspension of petitioner's driver's license for refusing to take a breathalyzer test at the time of his arrest for drunken driving, the Department of Motor Vehicles had the burden to show that the petitioner wilfully refused to take the test.

6. **Automobiles § 2— suspension of license — administrative hearing — waiver of cross-examination**

Petitioner waived his right to cross-examine the arresting officer at an administrative hearing on the suspension of his driver's license when he failed to assert such right.

7. **Automobiles § 2— suspension of license — administrative hearing — hearing de novo — harmless error**

Any error occurring in the administrative hearing on the suspension of petitioner's driver's license is rendered harmless by the superior court hearing *de novo*.

8. **Automobiles § 2— suspension of license — superior court hearing — sufficiency of findings**

Superior court's finding and conclusion that the petitioner wilfully refused the arresting officer's request that he submit to a breathalyzer test was supported by the officer's own testimony.

9. **Automobiles § 2— suspension of license — superior court hearing — burden of proof**

The Department of Motor Vehicles has the burden of proof in a hearing *de novo* in the superior court on the suspension of petitioner's driver's license for wilfully refusing to take a breathalyzer test; accordingly, a ruling which placed the burden of proof on petitioner is reversible error.

10. **Trial § 34— burden of proof — substantial right**

The rule as to the burden of proof constitutes a substantial right.

11. **Trial § 34— burden of proof — nonjury trials**

The law relating to the burden of proof is equally applicable to jury and nonjury trials.

12. **Automobiles § 1— suspension of license — effect of sentence in criminal case**

The twelve-month suspension of petitioner's driver's license which was imposed upon his plea of guilty to the charge of drunken driving did not preclude the Department of Motor Vehicles from suspending petitioner's driver's license for refusing to take a breathalyzer test at the time of his arrest for drunken driving.

APPEAL by petitioner from *Clark, J.*, 27 October 1970 Session of WAKE, transferred from the Court of Appeals for initial appellate review by the Supreme Court under its general order 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

This proceeding was instituted under G.S. 20-25 to review an order of the respondent, Department of Motor Vehicles (Department), suspending petitioner's driver's license because of his refusal to take the Breathalyzer test. The allegations in petitioner's petition for review, admissions in the Department's answer, and record evidence establish the following events:

On 27 September 1969 petitioner, a resident of Wake County, was arrested in Carteret County upon a charge of operating a motor vehicle on a public highway while under the influence of an intoxicant, a violation of G.S. 20-138. He pled guilty to the charge on 9 October 1969, and his driver's license was revoked for one year with "limited driving privileges in accordance with G.S. 20-179."

On 1 October 1969, acting under G.S. 20-16.2(c) and (d), the Department notified petitioner that his driving privilege was revoked immediately for sixty days unless he requested a hearing within three days. Petitioner requested the hearing, which was held on 6 November 1969 in accordance with G.S. 20-16.2(d). The only persons present at the hearing were petitioner, his attorney, and the hearing officer.

The hearing officer's report, which petitioner attached to his petition as Exhibit A, shows that at the hearing petitioner made the following statements: "Was arrested—Was intoxicated. Plead guilty to charge on October 9, 1969 and was issued limited driving privilege by the court—Does not remember being offered breath test nor being advised of loss of license for refusing test. In fact, advised officer that no purpose would be served by taking test, inasmuch, as he was pleading guilty to charge."

The hearing officer, answering the issues to which G.S. 20-16.2 limits the scope of the administrative hearing, found (1) petitioner was driving upon the public highways of this State while under the influence of intoxicating liquor; (2) he was placed under arrest; (3) he refused to submit to a chemical test of his breath upon the request of the arresting officer; and (4) he was informed his privilege to drive would be revoked if he refused to submit to the test.

Following the hearing, on 20 November 1969, the Department notified petitioner that the revocation of his driving privilege was sustained and, beginning 28 November 1969, his driver's license was revoked for sixty days. This notice of revocation was attached to the petition as Exhibit B.

In the record on appeal, at the end of Exhibit A attached to the petition, appears the following: "Petitioner's Exceptions Nos. 1 and 2." At the end of Exhibit B and just before a notation with reference to the date of the verification of the petition, appears "Petitioner's Exception No. 3."

On 1 December 1969, pursuant to G.S. 20-25, petitioner petitioned the Superior Court of Wake County to review the ruling of the Department, and he secured from the court an order staying the revocation of his license pending the review.

Before hearing petitioner's appeal on 26 October 1970 Judge Clark ruled that the matter was before him *de novo;*

that he was not bound by the Department's findings of fact and conclusions of law; and that the burden of proof was on petitioner to show that his license had been unlawfully suspended. (These rulings are the basis for petitioner's exceptions 4 and 5.) In the prehearing colloquy between counsel and the court, petitioner's attorney asserted that in the administrative hearing the burden of proof was upon the Department. Judge Clark replied, "Well, I think the burden of proof is on the petitioner. Are you ready to proceed?" Counsel for petitioner announced his readiness and called petitioner, who testified as follows:

In September 1969, while operating his motor vehicle on the highway between Atlantic Beach and Salter Path, petitioner was arrested by Highway Patrolman Spainhour for "driving under the influence." Petitioner "was drunk enough" so that he didn't "know what was going on." He learned later that he had been arrested about 1:00 a.m. on September 27th. He remembers seeing Patrolman Spainhour and nobody else. However, he does not remember anything the officer told him. He does not know whether he was advised of his constitutional rights, asked to take the Breathalyzer test, or told the consequences of a refusal to take the test; nor does he know whether he took the test. He said: "The best I can remember I told him I was gonna plead guilty to drunken driving. . . . I think I told him that I was gonna plead guilty. I know I talked to him. I knew I was drunk and I didn't see any need of taking the test. I don't know if he asked me to even take the test. I couldn't refuse anything I didn't know." At his trial petitioner pled guilty to the drunken driving charge and his license, which has since been restored, was revoked for a year with "certain privileges to drive to and from work."

The Department's evidence consisted of the testimony of Patrolman T. H. Spainhour and tended to show:

During the early morning hours of 27 September 1969 he arrested petitioner upon a charge of operating a motor vehicle upon a public highway while under the influence of an intoxicant. At the time petitioner was drunk. Spainhour advised him of his constitutional rights, and petitioner said he understood them. The patrolman then explained to petitioner the nature of the Breathalyzer test; that it was free; that he was entitled to call an attorney and to select a witness to view the testing procedures. Spainhour also informed petitioner that if he de-

clined to take the test his operator's license would be suspended for sixty days. He then took petitioner to the patrol station where a sergeant from the Morehead City Police Department prepared to administer the Breathalyzer test. When the machine was ready petitioner refused to submit to the test. He was again advised that his license would be suspended if he did not take the test. Notwithstanding, petitioner persisted in his refusal, saying that "he was a taxpayer and he didn't have to take it." He also refused to "walk the line," to take the "turning tests," and to answer the questionnaire, which was one of the routine tests given a person charged with drunken driving. Petitioner said "he was not gonna answer any questions." Spainhour, who "doesn't know how drunks think," didn't know then and still does not know whether petitioner understood what he told him. However, petitioner obeyed his instructions to get in or out of the car, to go in the door at the patrol station, and to sit down inside. When asked "to step up and take the test," however, he refused. He could stand up, but he wobbled.

Spainhour, pursuant to G.S. 20-16.2(c), sent to the Department of Motor Vehicles the report that petitioner had refused to submit to the test.

At the conclusion of the hearing, from the evidence presented, *inter alia,* Judge Clark found: On 27 September 1969 petitioner was arrested for a violation of G.S. 20-138. He was requested by the arresting officer to submit to a chemical test of his breath to determine the alcoholic content of his blood and was fully advised of his rights in connection with it. At that time petitioner "was not unconscious or otherwise in a condition which would have rendered him incapable of refusing to take the chemical test." Petitioner "did wilfully refuse to submit to said test."

Upon the foregoing findings Judge Clark entered a judgment affirming the Department's order of 20 November 1969 revoking petitioner's driving privilege for sixty days. In the record, immediately following the judgment, appears the following: "Petitioner's exceptions Nos. 6, 7, 8, 9 and 10."

Vaughan S. Winborne for plaintiff appellant.

Attorney General Morgan, Assistant Attorneys General Melvin and Costen for respondent appellee.

SHARP, Justice.

Petitioner "prays" this Court to rescind the action of the Department and to declare his license "in good standing as it pertains to this arrest." He contends that he is entitled to this relief because (1) he was denied the right to cross-examine Patrolman Spainhour at the administrative hearing; (2) the hearing officer did not find that he *wilfully* failed to submit to the chemical test, and therefore his findings did not sustain the Department's order of revocation; (3) Judge Clark erred in ruling that the burden of proof is on petitioner; and (4) the evidence was insufficient to sustain a finding that petitioner wilfully refused to take the test.

Summarized, except when quoted, G.S. 20.16.2 provides in pertinent part: Any person arrested upon the charge of operating a motor vehicle on a public highway of this State while under the influence of intoxicating liquor shall submit to a chemical test of his breath or blood upon the request of a law-enforcement officer having reasonable grounds to believe him guilty of the charge. If the accused "wilfully refuses" the request, no test shall be given, "but the Department, upon the receipt of a sworn report of the law-enforcement officer or other witness that the arrested person had been driving a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor and that the person had wilfully refused to submit to the test upon the request of the law-enforcement officer, shall revoke his driving privilege for a period of sixty days." Upon receipt of the sworn report the Department shall notify the arrested person that "his license to drive is revoked immediately" unless he files a written request for a hearing within three days of receipt of the notice. Such a request permits the person to retain his license until after the hearing. The scope of the hearing "shall cover the issues of whether the person had been driving a motor vehicle upon the public highways of the State . . . while under the influence of intoxicating liquor, whether the person was placed under arrest, and whether he refused to submit to the test upon the request of the officer. Whether the person was informed that his privilege to drive would be revoked if he refused to submit to the test shall be an issue." The hearing shall be conducted under the conditions specified in G.S. 20-16(d).

G.S. 20-16(d), *inter alia,* empowers the duly authorized agents of the Department to administer oaths and to issue subpoenas for witnesses and the production of relevant books and papers. "Upon such hearing the Department shall either rescind its order of suspension, *or good cause appearing therefor,* may extend the suspension of such license." (Emphasis added.) If the revocation is sustained G.S. 20-25 gives the person whose driving privilege has been revoked "a right to file a petition within thirty (30) days thereafter for a hearing in the matter in the superior court. . . . " Upon the filing of such a petition for review the court has jurisdiction "to take testimony and examine into the facts of the case, and to determine whether the petitioner . . . is subject to suspension . . . of license. . . . "

[1] From the foregoing statutes it is clear that any person whose driver's license has been suspended by the Department of Motor Vehicles under the provisions of G.S. 20-16.2(d) has the right to a "full *de novo* review by a Superior Court judge." *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 476, 164 S.E. 2d 2, 5. *Accord, In re Donnelly,* 260 N.C. 375, 132 S.E. 2d 904; *In re Revocation of License of Wright,* 228 N.C. 301, 45 S.E. 2d 370; s. c. 228 N.C. 584, 46 S.E. 2d 696; Annot., 97 A.L.R. 2d 1367, 1371. This means the court must hear the matter "on its merits from beginning to end as if no trial or hearing had been held" by the Department and without any presumption in favor of its decision. *In re Hayes,* 261 N.C. 616, 622, 135 S.E. 2d 645, 649. No discretionary power is conferred upon the court in matters pertaining to the revocation of licenses. If, under the facts found by the judge, the statute requires the suspension or revocation of petitioner's license "the order of the department entered in conformity with the facts found must be affirmed." *In re Revocation of License of Wright,* 228 N.C. at 589, 46 S.E. 2d at 700. The power to issue, suspend, or revoke a driver's license is vested exclusively in the Department of Motor Vehicles, subject to review by the Superior Court and, upon appeal, by the appellate division. *Harrell v. Scheidt, Com'r of Motor Vehicles,* 243 N.C. 735, 92 S.E. 2d 182; *State v. Cooper,* 224 N.C. 100, 29 S.E. 2d 18.

In this case petitioner concedes that at the time of his arrest he was operating a motor vehicle upon a public highway while under the influence of an intoxicant and that twelve days later he pled guilty to the offense. He does not deny that

he was requested to take the Breathalyzer test, that he was told he could call an attorney and select a witness to view the test, or that he was apprised of the consequences of his refusal to take the test. His contention is that he does not remember anything the officer said to him; that he was so drunk he was incapable of *wilfully* refusing to take the test. Thus, the only issue before the Department and in the Superior Court on appeal was whether petitioner wilfully refused to submit to the test.

We note that section (c) of G.S. 20-16.2 directs that the chemical test shall not be given if the arrested person "wilfully refuses" to take it and requires the Department to revoke his license upon the law-enforcement officer's sworn report that the person had "wilfully refused" to submit to the test. However, section (d), which specifies the issues determining whether the initial suspension of petitioner's license should be sustained, states the third issue to be "whether he refused to submit to the test upon the request of the officer." In that issue the word *wilfully* is omitted. Obviously, however, when the legislature used the word *refused* in section (d) it referred back to the wilful refusal specified in section (c) and embraced the concept of a conscious choice purposely made. It is equally clear that the Department's hearing officer employed the word in that sense when he stated the issues *in the words of the statute* in his report of petitioner's hearing. In Black's Law Dictionary (4th Ed., 1951) *refusal* is defined as "the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey." *See also State v. Arnold,* 264 N.C. 348, 141 S.E. 2d 473. This is the sense of the word *refuse* as used in G.S. 20-16.2 and as used by the Department in its proceedings under that statute. Accordingly, Judge Clark specifically found as a fact that petitioner "did wilfully refuse to submit to the test."

[2] Petitioner contends the Department's finding that he "did refuse" to take the test was insufficient to sustain its order suspending his license; that a finding of *wilful* refusal was required. This contention is without merit. However, it is suggested that in future proceedings under G.S. 20-16.2, in the interest of clarity and uniformity, the Department should employ the word *wilful* or *wilfully* in its findings and orders dealing with an arrested person's refusal to take the test.

[3] Petitioner also complained in the Superior Court that at the administrative hearing he "was not afforded the right of cross-examination and the right to confront his accuser." On this appeal he says that the evidence against him at the first hearing was only "the printed form affidavit" of the arresting officer. "Rules governing the admissibility of evidence in civil proceedings generally have been applied in proceedings for the suspension or revocation of a driver's license." 60 C.J.S. *Motor Vehicles* § 164.29 (1969). G.S. 20-16.2 does not make the law-enforcement officer's sworn report *prima facie* evidence that the arrested person wilfully refused to submit to the Breathalyzer test. Therefore, if he objects to its introduction, the report cannot be used as evidence against him.

[4] The record, however, fails to show that at the hearing he either objected to the introduction of the sworn report or demanded the right to cross-examine Patrolman Spainhour. Evidence admitted without objection is properly considered by the court and, on appeal, the question of its competency cannot be presented for the first time. 4 Strong, N. C. Index *Trial* § 15 (1961). Petitioner's blanket exceptions to the hearing officer's report and to the Department's order of suspension will not sustain his assignment of error that he was denied the right to cross-examine Officer Spainhour. "An assignment of error is not a substitute for an exception." *Equipment Company v. Johnson, Comr. of Revenue,* 261 N.C. 269, 273, 134 S.E. 2d 327, 330.

[5] Upon receipt of Patrolman Spainhour's sworn report that petitioner had wilfully refused to take the Breathalyzer test, G.S. 20-16.2 required the Department to revoke his license. Petitioner's timely request for a hearing, however, temporarily suspended the revocation. After the hearing the Department could either rescind its order of suspension or "good cause appearing therefor" extend the suspension of his license. G.S. 20-16(d). Upon the hearing, therefore, the burden was upon the Department to show that petitioner had wilfully refused to take the test.

Proceedings involving the suspension or revocation of a license to operate a motor vehicle are civil and not criminal in nature, and the revocation of a license is no part of the punishment for the crime for which the licensee was arrested. *Honeycutt v. Scheidt,* 254 N.C. 607, 119 S.E. 2d 777; *Harrell v. Scheidt,*

Com'r of Motor Vehicles, supra; 1 N. C. Index 2d *Automobiles* § 1 (1967). A license to operate a motor vehicle is not a natural or unrestricted right, nor is it a contract or property right in the constitutional sense. It is a conditional privilege, and the General Assembly has full authority to prescribe the conditions upon which licenses may be issued and revoked. However, once issued, a license is of substantial value to the holder and may be revoked or suspended only in the manner and for the causes specified by statute. *Harrell v. Scheidt, Com'r of Motor Vehicles, supra; Fox v. Scheidt, Comr. of Motor Vehicles,* 241 N.C. 31, 84 S.E. 2d 259; *In re Revocation of License of Wright, supra.*

[6] At the administrative hearing, under G.S. 20-16(d), the licensee has the right to be confronted by any witness whose testimony is used against him and to cross-examine the witness if he so desires. However, this is a right which the licensee waives if he does not assert it in apt time. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652; *In re West,* 212 N.C. 189, 193 S.E. 134; 60 C.J.S. *Motor Vehicles* § 164.27 (1969); 7 Am. Jur. 2d *Automobiles and Highway Traffic* § 122 (1963). In this case, petitioner waived his right to cross-examine the arresting officer at the administrative hearing by failing to assert it. Furthermore, in the absence of a timely objection as to its introduction, Officer Spainhour's sworn report was sufficient evidence to sustain the Department's suspension of petitioner's license. The record shows no objection to its introduction.

[7] When this proceeding came on for review in the Superior Court Judge Clark correctly ruled that the hearing before him was *de novo;* and that he was not bound by the Department's findings of fact and conclusions of law. In the Superior Court the Department did not offer the arresting officer's sworn report. Patrolman Spainhour testified for the Department and was cross-examined by petitioner. Therefore, if any errors were committed in the administrative proceedings, they were rendered harmless by the hearing *de novo* on appeal.

[8] Petitioner's contention that the evidence before Judge Clark will not support his finding of fact that petitioner wilfully refused the arresting officer's request that he submit to a chemical test of his breath is without merit. Patrolman Spainhour's testimony supports the finding as does petitioner's statement that he knew he was drunk and didn't see any need of taking the test. Of course, petitioner also testified that he

didn't remember being asked to take the Breathalyzer test; that he didn't know what was going on; and that he didn't remember anything the officer told him. The credibility of conflicting evidence and the inferences to be drawn from it were for the judge, whose duty it was to determine whether petitioner had wilfully refused to take the test.

[9] Petitioner's assignment of error No. 4 presents the crucial question on this appeal: Did the judge commit prejudicial error when he ruled that the burden of proof in the *de novo* hearing in the Superior Court was on petitioner?

[10, 11] "The rule as to the burden of proof (the burden of the issue) constitutes a substantial right, for upon it many cases are made to turn, and its erroneous placing is regarded as reversible error." *Williams v. Insurance Company,* 212 N.C. 516, 518, 193 S.E. 728, 730; 4 Strong, N. C. Index *Trial* § 34 (1961). If in doubt as to any controversial issue, it is the duty of the trier of facts "to decide that issue against the party on whom the burden rests and who has failed to produce the requisite degree of conviction." Stansbury, North Carolina Evidence § 206 (2d ed. 1963); *In re Westover Canal,* 230 N.C. 91, 52 S.E. 2d 225; 4 Strong, N. C. Index *Trial* § 14 (1961). The law relating to the burden of proof is equally applicable to jury and nonjury trials. Stansbury, *supra* § 203, n. 16.

As heretofore pointed out in the administrative hearing the burden of proof was upon the Department to show "good cause" for extending the suspension of petitioner's license. Since the hearing on appeal in the Superior Court was *de novo,* if the Department had the burden of proof at the first hearing, obviously it also had the burden at the *de novo* hearing in the Superior Court. "[T]he general rule is that on the trial *de novo* on appeal to review an order of suspension or revocation the state, or its administrative agency or official, has the burden of proving the charge on which the suspension or revocation was based. . . . " 60 C.J.S. *Motor Vehicles* § 164.41 (1969).

As authority for its contention that the burden is upon petitioner, the Department relies upon a statement in *Beaver v. Scheidt, Comr. of Motor Vehicles,* 251 N.C. 671, 674, 111 S.E. 2d 881, 883. Beaver, whose license had been revoked for successive convictions of speeding, ignored the Department's order suspending his license. In consequence, he was thereafter

twice convicted for driving after his license had been revoked, and successive orders revoking his license for additional periods of time were served upon him. Contending that the first suspension was void, Beaver petitioned for the restoration of his driving privileges. In affirming the orders of revocation, Justice Rodman, speaking for the Court, said: "If petitioner had been improperly deprived of his license by the Department due to a mistake of law or fact, his remedy was to apply for a hearing as provided by G.S. 20-16(c) or by application to the Superior Court as permitted by G.S. 20-25. At a hearing held pursuant to either of these statutory provisons *he would be permitted to show that the suspension was erroneous. In re Wright,* 228 N.C. 301, 45 S.E. 2d 370; s. c., 228 N.C. 584, 46 S.E. 2d 696. Petitioner could not contemptuously ignore the quasi judicial determination made by the Department." (Emphasis added.)

Neither the foregoing statement nor the decision in *Beaver* support the Department's contention that petitioner had the burden of proof. Beaver's appeal did not raise the question of who had the burden of proof. The decision was that the Department's original order of suspension was binding and enforceable until vacated in the manner provided by law. Beaver's remedy was (1) to request a hearing before the Department and (2) to appeal an adverse administrative decision to the Superior Court, where he was entitled to a full *de novo* review by the judge.

When the judge has expressly placed the burden of proof upon the wrong party, and conflicting inferences may be drawn from the evidence, it is impossible for an appellate court to know whether the erroneous allocation of the burden dictated his findings of fact. This proceeding, therefore, must be remanded to the Superior Court for a rehearing. If, upon the rehearing, at which the burden of proof is placed upon the Department, the court finds that petitioner did not wilfuly refuse to submit to the Breathalyzer test at the time of his arrest on 27 September 1969, it will reverse the Department's order revoking petitioner's license for sixty days. If it finds that petitioner did wilfully refuse to take the test the court will sustain the Department's order suspending petitioner's license and remand the cause to the Department so that it may specify the additional sixty days' suspension.

[12] Petitioner's contention, made for the first time in his brief on appeal, that the twelve months' suspension of his license which followed his plea of guilty to the charge of drunken driving constituted his "full penalty," is untenable.

The suspension of a license for refusal to submit to a chemical test at the time of an arrest for drunken driving and a suspension which results from a plea of guilty or a conviction of that charge are separate and distinct revocations. The interpretation which petitioner seeks would render G.S. 20-16.2 superfluous and meaningless. Petitioner's guilty plea in no way exempted him from the mandatory effects of the sixty-day suspension of his license if he had wilfully refused to take a chemical test. *Hoban v. Rice,* 22 Ohio App. 2d 130, 259 N.E. 2d 136. In *Prichard v. Battle,* 178 Va. 455, 17 S.E. 2d 393, petitioner's license was revoked for leaving the scene of an accident. Thereafter the Governor pardoned him for the criminal offense. The Supreme Court of Appeals of Virginia held that the revocation of his driver's license, not being a part of the punishment for the offense, was not affected by the pardon.

Under implied consent statutes such as G.S. 20-16.2, the general rule is that neither an acquittal of a criminal charge of operating a motor vehicle while under the influence of intoxicating liquor, nor a plea of guilty, nor a conviction has any bearing upon a proceeding before the licensing agency for the revocation of a driver's license for a refusal to submit to a chemical test. 60 C.J.S. *Motor Vehicles* § 164.16 (1969). "It is well established that the same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other, and the outcome of one is of no consequence to the other." *Ziemba v. Johns,* 183 Neb. 644, 646, 163 N.W. 2d 780, 781. *Accord, Prucha v. Department of Motor Vehicles,* 172 Neb. 415, 110 N.W. 2d 75; 88 A.L.R. 2d 1055; *Marbut v. Motor Vehicle Department,* 194 Kan. 620, 400 P. 2d 982; *Gottschalk v. Sueppel,* 258 Iowa 1173, 140 N.W. 2d 866; *State v. Muzzy,* 124 Vt. 222, 202 A. 2d 267; *State v. Starnes,* 21 Ohio St. 2d 38, 254 N.E. 2d 675. Annot., 88 A.L.R. 2d 1065 (1961) and A.L.R. 2d Later Case Service collect the pertinent cases.

Serenko v. Bright, 263 Cal. App. 2d 682, 70 Cal. Rptr. 1, involves facts strikingly similar to this case. In *Serenko,* petitioner "asserted that she refused to take any of the chemical tests offered because she admittedly was intoxicated and she saw no reason to take any chemical test further to demonstrate that fact." She also asserted that she did not fully understand the penalty for failure to take the test and that the court's finding that she refused to take the test was not supported by the evidence. In sustaining the revocation the Court of Appeal said: It is "neither relevant nor material to the application of the statute whether the person charged pleads guilty or not. At the time the person arrested refuses the chemical test, there is no assurance that upon arraignment he or she will plead guilty. The arrestee by subsequent guilty plea has no power to avoid retroactively the consequences of his or her earlier refusal to cooperate." *Id.* at 688, 70 Cal. Rptr. at 5. *Accord, August v. Department of Motor Vehicles,* 264 Cal. App. 2d 52, 70 Cal. Rptr. 172.

The General Assembly has seen fit to except North Carolina from the general rule that a licensee's subsequent acquittal of a drunken driving charge has no bearing upon a proceeding to revoke his license because of his refusal to submit to the chemical test at the time of his arrest. G.S. 20-16.2(c) provides that any person arrested for drunken driving who refuses to submit to a chemical test to determine the alcoholic content of his blood *and who is thereafter acquitted of the charge* shall have his driver's license restored immediately. "Chemical tests eliminate mistakes from objective observation alone, and they disclose the truth when a driver claims he has drunk only a little and could not be intoxicated. They protect the person who has not been drinking to excess but has an accident and has the odor of alcohol on his breath. They save a person from a drunken driving charge when his conduct creates the appearance of intoxication but who actually is suffering from other causes over which he has no control. *Marbut v. Motor Vehicle Department, supra* at 623, 400 P. 2d at 985. It would seem, therefore, that one who is not under the influence of an intoxicant has scant incentive to refuse the test and that the North Carolina exception encourages those who are under the influence to refuse the test in the hope that the State might be unable to prove their guilt without it. Be that as it may, the conditions under which a driver's license may be revoked are determined

by the legislature. Petitioner was not acquitted; he pled guilty as charged. The only issue in this proceeding is whether he *wilfully* refused to take the test. If the Superior Court finds that he did, his license must be revoked for an additional sixty days; otherwise not.

Error and remanded.

NATIONWIDE MUTUAL INSURANCE COMPANY AND TUX BOWERS MOTOR COMPANY, INC. v. FIREMAN'S FUND INSURANCE COMPANY; TERRY EUGENE CARSON; DOWNIE WOODROW CARSON; CHARLES P. MICHAELS, ADMINISTRATOR OF THE ESTATE OF GERALD D. MICHAELS; BIS RAY LEWIS; BARBARA ANN LEWIS; HOMER EPLEY; LENDY JAMES EPLEY; OLIVER DODSON McKINNEY; CLARA McKINNEY; ST. PAUL FIRE & MARINE INSURANCE COMPANY; MARYLAND CASUALTY COMPANY; AND NATIONAL GRANGE MUTUAL INSURANCE COMPANY

No. 44

(Filed 30 July 1971)

1. **Insurance § 87 —automobile liability insurance — ownership of car — title in father's name — operation by son**

A father is the owner of an automobile operated exclusively by his minor son where the father registers the title in his own name and also executes the note and conditional sales contract for the balance of the purchase price. G.S. 20-279.21(9). Dicta in *Underwood v. Liability Co.*, 258 N.C. 211, are expressly disapproved.

2. **Insurance § 80— automobile insurance — purpose of safety responsibility law**

The purpose of the Motor Vehicle Safety-Responsibility Act is to provide protection to the public from damages resulting from the negligent operation of automobiles by irresponsible persons.

3. **Appeal and Error § 67— decision of Supreme Court — interpretation**

A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case.

4. **Insurance § 84— automobile insurance — temporary substitute vehicle**

A "temporary substitute automobile" is an automobile which is not owned by the insured or his spouse and which is being temporarily used for an insured automobile that has been withdrawn from normal use because of its breakdown, repair, servicing, loss, or destruction.

5. **Insurance § 84— automobile insurance — substitution provision — construction in favor of insured**

A substitution provision in a policy of automobile liability insurance is for the insured's benefit and is to be construed liberally in favor of the insured if any construction is necessary.

6. **Insurance § 84— substitution provision—immediate repair — peeling of paint**

An automobile was in need of immediate repair, within the meaning of a substitution provision, when the outside paint on the body of the car had begun to "spiderweb" and peel off, leaving the metal exposed.

7. **Insurance § 84— vehicle covered under automobile insurance policy — temporary replacement vehicle — consent of insured**

A temporary replacement automobile was being used, at the time of an accident, with the consent of the driver's father, who was the insured under an assigned risk policy containing a substitution provision, where there was evidence that the son kept the automobile at his father's home under circumstances implying the father's consent to use it; consequently, the temporary vehicle, which had replaced an automobile insured under the father's policy, was itself insured under the policy. G.S. 20-279.21(b)(2).

8. **Insurance § 84— purpose of substitution provision**

The object of a substitution clause is to afford temporary insurance which will protect the insured's operation of a borrowed vehicle while the automobile specified in the policy is being repaired and until it can be restored to normal use.

APPEAL by plaintiffs under G.S. 7A-30(2) from the decision of the Court of Appeals (reported in 9 N.C. App. 193, 175 S.E. 2d 741), which affirmed the judgment of *Ervin, J.*, entered at the November 1969 Session of BURKE. The case was docketed and argued in the Supreme Court as No. 44 at the Fall Term 1970.

Action for a declaratory judgment.

Plaintiffs are Nationwide Mutual Insurance Company (Nationwide) and its insured, Tux Bowers Motor Company (Tux). They seek to determine whether the policy of garage liability insurance Nationwide issued to Tux, or the owner's automobile liability policy Fireman's Fund Insurance Company (Fireman's) issued to Downie Woodrow Carson (Carson), covered the 1961 Oldsmobile which was involved in an accident on 25 October 1966 while being driven by Carson's son, Terry Eugene Carson (Terry). If Fireman's policy afforded such coverage Nationwide's policy excluded coverage.

In addition to Fireman's, Carson, and Terry, all persons having potential claims against Terry for damages arising out of the accident and all insurance companies having potential liability coverage to passengers in the 1961 Oldsmobile under policies containing uninsured motorist insurance were made parties-defendant.

The evidence of the parties, which was without material conflict except in the one instance hereinafter specifically noted, tended to show:

In 1966 Terry, a minor born 22 September 1949, resided in the home of his father as a member of his family. On 1 April 1966, following negotiations between Terry and the president of Tux, Mr. Tux Bowers (Bowers), Terry agreed to buy from Tux a 1965 Oldsmobile carrying a ten-months warranty. Terry made the $600.00 down payment from funds he had saved for that purpose. Because of Terry's minority, title to the vehicle was taken in the name of his father, who signed the note for the balance of the purchase price and the conditional sales contract securing it. Terry, however, bought the license, made the monthly payments on the car, and paid all the expenses of its operation and maintenance. His mother could not drive, and Carson did not drive the vehicle.

Following the purchase of the 1965 Oldsmobile, Carson secured an all purpose endorsement which added the 1965 Oldsmobile to the policy of liability insurance which Fireman's had previously issued to him under the assigned risk plan. Terry paid the $72.00 premium for this endorsement in which he was "added as driver" of the 1965 Oldsmobile. Carson's policy with Fireman's was in full force and effect on 25 October 1966.

Terry drove the 1965 Oldsmobile at his pleasure and as his own. Carson did not restrict his use of it in anyway, and Terry never asked his permission to use the car. About five months after its purchase, the paint on the 1965 Oldsmobile cracked and peeled. Without consulting Carson, Terry reported this development to Bowers. The warranty still being in effect, on 4 October 1966 Bowers agreed to have the car repainted. He and Terry arranged with Williams Paint and Body Shop to do the job, which was supposed to take four or five days. Terry, who lived fourteen miles from his employment in Morganton, requested Bowers to provide him transportation while the

1965 Oldsmobile was being repainted. Bowers agreed to lend Terry a 1961 Oldsmobile from Tux's used car lot. Tux owned this vehicle, which carried one of its dealer's license plates.

Bowers testified that he let Terry have the 1961 Oldsmobile for the purpose of driving to and from work and stipulated that he park it each morning on Tux's used car lot so that it would be available for sale; that he not drive the car at night; and that he "not run all over the country with the car." In contradiction of Bowers, Terry testified that Bowers provided the 1961 Oldsmobile in lieu of the 1965 model; that the only restriction he placed upon its use was the requirement that it be parked on Tux's lot during the day so that it would be available for sale; and that he drove the car both day and night, just as he had driven the 1965 Oldsmobile. Both Terry and Bowers testified that on each working day while Terry was using the car he returned it to Tux's lot about 8:00 a.m. and got it again between 5:00 and 5:30 p.m., and that on the weekends he kept the car with him.

Carson was not a party to Terry's arrangement with Bowers, and he knew nothing about the conditions under which Bowers let Terry have the 1961 Oldsmobile. While Terry had the car he parked it in his father's yard just as he had parked the 1965 Oldsmobile, and Carson never made any objection to his use of the car. Carson testified: Terry "used it to drive it where he wanted to and in the same manner that he had driven the 1965 Oldsmobile before it was put in the shop to be painted."

Three weeks after he got the 1961 Oldsmobile, on the night of 25 October 1966 in the town of Old Fort, Terry wrecked the vehicle in a one-car accident. With him at the time were Clara McKinney, Lendy Epley, Barbara Ann Lewis, and Gerald D. Michaels, "a carload of teenagers." Michaels died as a result of the injuries he received in the wreck. On 25 October 1966 the 1965 Oldsmobile was still at the Williams Paint and Body Shop, which had not begun repainting it. The job was not done until about two weeks later.

Admissions in the pleadings establish: (1) The administrator of the estate of Gerald D. Michaels has sued Carson, Terry, and Tux to recover damages for his wrongful death. (2) Barbara Ann Lewis, by her next friend, has brought suit against

the same three defendants to recover damages for personal injuries which she sustained in the wreck. (3) The father of Barbara Ann Lewis, Bis Ray Lewis, has likewise sued to recover the damages he sustained in consequence of her injuries. (4) Lendy James Epley, Clara McKinney, and the father of each also have potential claims for damages arising out of the accident. (5) A dispute exists between Nationwide and Fireman's as to whether Fireman's policy covered Terry's operation of the 1961 Oldsmobile on 25 October 1966.

The garage liability policy which Nationwide issued to Tux, *inter alia,* covered any automobile owned, maintained, or used by Tux "for the purpose of garage operations." It insured any person using such an automobile with Tux's permission, provided (1) such person's actual operation of the vehicle is "within the scope of such permission," and (2) "if no other valid and collectible automobile liability insurance, either primary or excess, with limits of liability at least equal to the minimum limits specified by the Financial Responsibility Law of the state in which the automobile is principally garaged, is available to such person; . . . . "

The policy which Fireman's issued to Carson covered any automobile described therein and insured any person using the automobile, "provided the actual use of the automobile is with the permission of the named insured." The policy also covers "an automobile not owned by the named insured . . . while temporarily used as a substitute for the described automobile when withdrawn from normal use because of its breakdown, repair, servicing, loss, or destruction; . . . . "

Nationwide contends: (1) At the time of the accident, on 25 October 1966, Terry was not driving the 1961 Oldsmobile "within the scope of his permission" from Bowers, and coverage under the garage liability policy is therefore excluded; (2) the policy which Fireman's issued to Carson provided "other valid and collectible automobile liability insurance" to Terry, and this coverage also excluded coverage by Nationwide.

Fireman's denied coverage on the following grounds: (1) The 1965 Oldsmobile, although named in Carson's policy, was not covered by it because Terry, not Carson, owned the vehicle; (2) even if Carson was the owner of the 1965 Oldsmobile, the 1961 Oldsmobile was not a "temporary substitute automobile"

for it within the meaning of the policy; and (3) even if the 1961 Oldsmobile was a temporary substitute automobile it was not being used with Carson's consent.

At the conclusion of all the evidence Judge Ervin held as a matter of law that (1) on 25 October 1966 Terry alone owned the 1965 Oldsmobile, and Carson had no right to control it; (2) on 25 October 1966 the vehicle had not been withdrawn from normal use due to its breakdown, repair, servicing or destruction, and Terry was not operating Tux's 1961 Oldsmobile as a temporary substitute for the 1965 Oldsmobile; (3) at the time of the accident in suit Terry was not operating the 1961 Oldsmobile with the permission, express or implied, of Carson or his spouse, neither of whom had the right of possession or the right to control it; and (4) Terry was not a named insured in the policy of liability insurance issued by Fireman's, and his operation of the 1961 Oldsmobile was not covered by the policy which Fireman's had issued to Carson. Judge Ervin submitted to the jury the following issue, which was answered No: "Was Terry Eugene Carson operating the 1961 Oldsmobile owned by Tux Bowers Motor Company, Inc., on the occasion of the accident on October 25, 1966, beyond the scope of the permission given by Tux Bowers Motor Company, Inc.?"

Upon his conclusions of law and the jury's verdict, Judge Ervin entered judgment decreeing that (1) Nationwide was obligated, under its garage liability policy issued to Tux, to defend Terry in any action instituted against him on account of his operation of the 1961 Oldsmobile on 25 October 1966 and to pay any judgments which might be entered against Terry and Tux within the policy's limitations of liability; (2) Fireman's policy did not cover Terry's use and operation of the 1961 Oldsmobile, and Fireman's has no obligation either to Carson or Terry on account of the accident on 25 October 1966; and (3) the other insurance companies made parties-defendant to the action had no liability for injuries resulting from the wreck of the 1961 Oldsmobile.

Plaintiffs appealed to the Court of Appeals, which affirmed the judgment in a two-to-one decision. Because of the dissent, plaintiffs appealed as a matter of right to the Supreme Court.

Thomas M. Starnes for plaintiff appellants.

Byrd, Byrd & Ervin for Charles P. Michaels, Administrator of the Estate of Gerald D. Michaels, defendant appellee.

Mitchell & Teele for St. Paul Fire and Marine Insurance Company, defendant appellee.

Roy Walton Davis for Barbara Lewis and Bis Ray Lewis, defendant appellees.

Uzzell and Dumont for Fireman's Fund Insurance Company, defendant appellee.

SHARP, Justice.

The verdict of the jury, which established that at the time of the accident on 25 October 1966 Terry was operating the 1961 Oldsmobile within the scope of his permission from Tux, is not challenged by any assignment of error. Therefore, plaintiffs' policy covered Terry's operation of that vehicle *unless* the assigned risk policy which Fireman's issued to Carson insuring the 1965 Oldsmobile covered Terry's operation of the 1961 Oldsmobile is as a substitute vehicle for the 1965 Oldsmobile. If it did, Nationwide's coverage is excluded; otherwise, not. Fireman's concedes that the issue submitted "was the only one raised and presented under the pleadings and evidence, and about which there was contraverting or conflicting testimony."

[1] The first question presented is: Who, within the purview of the Motor Vehicle's Safety-Responsibility Act of 1953 (N. C. Gen. Stats., ch. 20, art. 9A), was the *owner* of the 1965 Oldsmobile on 25 October 1966? As used in an owner's or operator's policy of liability insurance, the Safety-Responsibility Act (Act), G.S. 20-279.1(9) defines the word *owner* as "a person who holds the legal title of a motor vehicle, or in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purposes of this article."

Under this definition, the word *owner* embraces "the holder of title and a mortgagor, conditional vendee or lessee having

right of purchase and the right of possession." *Insurance Co. v. Hayes,* 276 N.C. 620, 630, 174 S.E. 2d 511, 517. Indubitably Carson held the legal title to the 1965 Oldsmobile, and, having given his note for the balance of the purchase price and executed a conditional sales contract securing it, he was also a conditional vendee with the right of possession. Thus he was covered by every aspect of the statutory definition of owner. Furthermore, as noted in *Insurance Co. v. Hayes, supra,* in enacting the 1963 amendment to G.S. 20-72(b) (which provides that title to a motor vehicle cannot be transferred from one owner to another until the certificate of title has been duly executed and the vehicle delivered to the transferee), the legislature "used the word 'title' as a synonym for the word 'ownership'." The opinion also pointed out that "G.S. 20-38 defines 'owner' under the Motor Vehicles Act and G.S. 20-279.1 defines 'owner' essentially the same way." *Id.* at 630, 174 S.E. 2d at 517.

[2] Legal title to the 1965 Oldsmobile being in Carson, it is immaterial to decision here that Terry may have had an equitable interest in the vehicle to the extent of the payments he had made on the purchase price. The purpose of the Act is to provide protection to the public from damages resulting from the negligent operation of automobiles by irresponsible persons. By its definition of an "owner," the legislature attempted to close all avenues of escape from its provisions. *Insurance Co. v. Hayes, supra; Harrelson v. Insurance Co.,* 272 N.C. 603, 158 S.E. 2d 812; *Indiana Lumberman's Mutual Insurance Co. v. Parton,* 147 F. Supp. 887 (M.D.N.C. 1957).

We have no statistics showing how many parents have insured an automobile to which they hold legal title for the benefit of a minor child under circumstances similar to those of this case. It is not, however, an unusual situation. *See Smith v. Simpson,* 260 N.C. 601, 133 S.E. 2d 474. When a minor's negligent operation of such a vehicle causes injury and death, were the insurer permitted to escape liability by showing that the minor was the equitable owner of the vehicle it had insured, the purpose of the Act would be thwarted and the public subjected to the risk of injury from unnumbered, uninsured minor drivers. The legislature has perpetuated no such hoax. Available statistics show that in 37% of all automobile accidents in which licensed drivers were involved in North Carolina during

the year 1970, the drivers were under the age of twenty-five years, and that half of these were in the 16-19 age group.

We hold that Carson, who had the legal title, was the owner of the 1965 Oldsmobile; that he had authority to control it; and that it was covered by his Fireman's policy, which listed it as an insured automobile and Terry "as driver." It is obvious that, in deciding otherwise, both the trial court and the Court of Appeals were misled by dicta in *Underwood v. Liability Co.*, 258 N.C. 211, 128 S.E. 2d 577.

The facts in *Underwood,* which are clearly distinguishable from those of this case, were these: Mrs. *C* purchased an automobile for her son, *J,* aged 17, and took title in her name. In her application for insurance she stated that she was the owner of the car but it would be operated by *J* "100% of the time." The risk was assigned to the defendant insurance company, which issued a policy meeting the requirement of G.S. 20-279.21. In June 1958, two months later, Mrs. *C* moved to Florida after arranging for *J* to remain in North Carolina with plaintiff. On 9 June 1958 Mrs. *C* transferred title to the automobile to the plaintiff. On 27 June 1958 Mrs. *C* canceled the liability policy which had been issued to her, and application was made for a new policy to be issued to the plaintiff. The producer of record held this application pending payment of the premium, which was to accompany it. Because of a month's delay in refunding Mrs. *C*'s unearned premium and an error in the amount of the refund, the premium for the plaintiff's policy was never paid. On 4 August 1958 the plaintiff's son was riding with *J* when the car overturned and both were killed. Plaintiff, as administrator of her son's estate, brought suit for his wrongful death against the administrator of *J*. She recovered judgment and sued the defendant insurance company when it declined to pay. In that suit, upon a waiver of jury trial, the judge found facts as detailed above. He also found that *J* was the beneficial owner of the automobile and that the producer of record had no authority from *J* or the plaintiff to surrender the policy to the defendant for cancellation. This Court reversed judgment for the plaintiff upon the ground that when Mrs. *C* transferred title to the automobile to the plaintiff, the defendant's insurance was terminated as a matter of law. The rationale was that an owner's motor vehicle liability policy is a contract between the insurance company and the owner, and there is no insurance

separate and distinct from the ownership of the car. The opinion pointed out that the Safety Responsibility Act makes no requirement that insurance follow the vehicle in case of transfer of title and that the policy expressly declared that "assignment of entry shall not bind the company (insurer) until its consent is endorsed hereon."

Following the statement of the court's decision, the opinion then said:

"It is not clear what significance the trial court placed upon its finding that Jerry Wayne Otwell (J) was the beneficial owner of the automobile. If the import is that he was the owner and had right of possession and control, there was most certainly no coverage. The insurance contract was with Mrs. Chaffin (Mrs. C) and the policy covered the named insured, Mrs. Chaffin (plaintiff), and any other person while using the automobile, provided the actual use was with the *permission* of Mrs. Chaffin. In order to grant permission, as the word 'permission' is used in the policy, there must be such ownership or control of the automobile as to confer the *legal* right to give or withhold assent. It is something apart from a general state of mind. If Jerry actually owned the automobile and had the right to possession and control, or if Mrs. Chaffin parted with the title (and it is undisputed that she assigned to Mrs. Underwood on 9 June 1958 such title as she had) then, in either event, the operation of the car by Jerry on 4 August 1958 was not with permission of Mrs. Chaffin within the purview of the omnibus clause of the policy. Insurer had no contract with or responsibility to or for Jerry apart from the ownership of the vehicle by Mrs. Chaffin." *Id.* at 219, 128 S.E. 2d at 582-583.

[3] The foregoing statement was obviously unnecessary to the decision of the case, and all suggestions therein that Jerry Wayne Otwell may have been the owner of the automobile are disapproved. "A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case." *Howard v. Boyce,* 254 N.C. 255, 265, 118 S.E. 2d 897, 905. *Accord, Insurance Co. v. Insurance Co.,* 276 N.C. 243, 172 S.E. 2d 55. In *Underwood,* at the time of the damage in suit, the holder of the legal title to the automobile involved had no liability insurance on the vehicle, and the former owner had canceled the insurance she carried on the car prior to the time

she transferred title to it. The automobile which *J* was driving was indeed an uninsured vehicle. In this case, the 1965 Oldsmobile was an insured automobile described in a policy of insurance issued to the owner, the holder of the legal title.

It is too clear for argument that at all times Terry used the 1965 Oldsmobile with his father's unqualified permission. Carson took title to the vehicle in his name, assumed responsibility for the balance of the purchase price, and procured liability insurance upon it for the sole purpose of providing his minor son with an automobile. During the six months intervening between the purchase of the 1965 Oldsmobile and the day it was delivered to Williams Paint and Body Shop to be repainted, Carson himself never drove it over twice, if he drove it at all. Had Terry been driving the 1965 Oldsmobile on the evening of 25 October 1966 he would undoubtedly have been covered by the policy which Fireman's had issued to Carson. We hold that Carson was the owner of the 1965 Oldsmobile and that it was covered by the policy which Fireman's had issued to him.

[4] The next question is whether Fireman's policy covered the 1961 Oldsmobile as a "temporary substitute automobile" for the 1965 Oldsmobile. Such an automobile is (1) one not owned by the insured or his spouse and (2) one which is being temporarily used for an insured automobile while it is "withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction." It is undisputed that neither Carson nor his wife owned the 1961 Oldsmobile which Terry was driving at the time of the accident. Tux admits its ownership of that vehicle.

[5, 6] It is equally clear that while the 1965 Oldsmobile remained in the Williams Paint and Body Shop for the removal and replacement of outside paint which had proved defective, the insured vehicle had been withdrawn from normal use "because of its . . . repair. . . . " A substitution provision in a policy of automobile liability insurance "is for the insured's benefit and is to be construed liberally in favor of the insured if any construction is necessary." 7 Am. Jur. 2d *Automobile Insurance* § 103 (1963). *See Hunnicutt v. Insurance Co.*, 255 N.C. 515, 122 S.E. 2d 74; 4 N. C. Index 2d *Insurance* § 84 (1968). As the court said in *Sanz v. Reserve Insurance Co. of Chicago*, 172 So. 2d 912, 913 (Fla. App. 1965), the terms of a substitution

provision in an automobile policy "should be defined and given their every day 'man-on-the-street' understood meaning." When the outside paint on the body of an automobile "spiderwebs" and peels off, leaving the metal exposed, the vehicle is in need of immediate repairs.

Nothing this Court said in *Ransom v. Casualty Co.*, 250 N.C. 60, 108 S.E. 2d 22, impinges upon the foregoing statement. In *Ransom,* it was held that an insured automobile, which was not used because it was "low on gas," was not "withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction," and the substitute automobile which insured borrowed for the evening was, therefore, not covered by his policy. The Court rejected the plaintiff's contention that the insured vehicle had been temporarily withdrawn for "servicing." Fireman's contention that *Ransom v. Casualty Co., supra,* is authority for the proposition that, before an insured automobile can be replaced by a temporary substitute vehicle, it must be withdrawn from use because of some *mechanical* defect cannot be sustained. We hold that on 25 October 1966 the 1965 Oldsmobile had been temporarily withdrawn from normal use for repairs and that the 1961 Oldsmobile was a temporary substitute for it.

[7] The remaining question is whether the 1961 Oldsmobile was being used with Carson's consent on the evening of 25 October 1966. If so, it became an insured automobile, temporarily replacing the 1965 Oldsmobile in Carson's policy just as it had replaced its actual use.

Fireman's first contends that permission to use one automobile does not constitute permission to obtain and use a substitute vehicle; that only Carson, the named insured, could authorize the procurement of a substitute automobile and grant permission for its use, and he did neither. This contention ignores the fact that, notwithstanding Terry procured the 1961 Oldsmobile from Tux "on his own" and without his father's knowledge, Terry forthwith took the car to his father's home and kept it there under circumstances which clearly implied his consent for Terry to use the vehicle. Carson testified that Terry "used it and drove it where he wanted to and in the same manner he had driven the 1965 Oldsmobile before it was put in the shop to be repainted." Carson's purpose in taking title to the 1965 Oldsmobile was to provide general transportation for his son. When Bowers delivered the 1961 Oldsmobile to Terry as

a temporary substitute for the 1965 Oldsmobile he was merely furthering Carson's previously permitted purpose. *See Hemphill v. Home Insurance Company,* 121 Ga. App. 323, 174 S.E. 2d 251.

Section III(a), the omnibus provision of Fireman's policy, provided in pertinent part that "the unqualified word 'insured' includes the named insured and . . . any person while using the automobile . . . . provided the actual use of the automobile is by the insured or spouse or with the permission of either. . . ." Under G.S. 20-279.21(b)(2), such permission may be either express or implied. "[T]his implication may be a product of the present or past conduct of insured. Implied permission is not confined alone to affirmative action, and is usually shown by usage and practice of the parties over a sufficient period of time prior to the day on which the insured car was being used. It may be established by a showing of a course of conduct or relationship between the parties, including lack of objection to the use by the permittee which signifies acquiescence or consent of the insured." 7 Am. Jur. 2d *Automobile Insurance* § 113 (1963). *Accord, Insurance Co. v. Insurance Co., supra;* 4 N. C. Index 2d *Insurance* § 87 (1968).

Fireman's second contention is that because Carson did not own the 1961 Oldsmobile, he could not authorize its use by another. Since a "temporary substitute automobile" within the meaning of a liability policy is a vehicle *not owned* by the insured, to adopt Fireman's contention would be to hold that such an automobile could be covered only while being operated by the named insured himself. Such a construction would defeat the purpose of the omnibus clause, and the policy will not permit it. Under Part I, Coverage A and B, and Part IV(3), a temporary substitute automobile being operated by the insured or any person with his express or implied consent is an insured automobile. *See Hardware Mutual Casualty Co. v. Hopkins,* 106 N.H. 412, 213 A. 2d 692, and *Davidson v. Fireman's Fund Indemnity Co.,* 165 N.Y.S. 2d 598.

[8] The object of the substitution clause is to afford temporary insurance which will protect the insured's operation of a borrowed vehicle while the automobile specified in the policy is being repaired and until it can be restored to normal use. "The provision is not to be unreasonably extended to materially increase the risk contemplated by the insurer. Neither is it to be narrowly applied against the insured, for the clause was

designed for his protection." *Harte v. Peerless Insurance Co.*, 123 Vt. 120, 124, 183 A. 2d 223, 226.

In *Hemphill v. Home Insurance Co., supra* at 333, 174 S.E. 2d at 259, it is said: "The purpose (of a substitution clause) is not to defeat liability but reasonably to define coverage by limiting the risk to one operating vehicle at a time for a single premium."

We have found no decision involving facts "on all fours" with those of this case, and the parties have cited none. The decisions in *Tanner v. Insurance Co.*, 226 F. 2d 498 (6th Cir. 1955) and *Grundeen v. Fidelity & Guaranty Co.*, 238 F. 2d 750 (8th Cir. 1956), cited by Fireman's, involve facts so different from those *sub judice* that they require no discussion.

[7] We hold that on 25 October 1966 Terry was operating the 1961 Oldsmobile with Carson's consent; that it was an automobile covered by Fireman's policy; and that Terry was an insured driver.

The decision of the Court of Appeals affirming the judgment of the Superior Court that Nationwide is obligated to defend the actions instituted against Terry and to pay any judgments which might be entered against him to the extent of its policy limits and that Fireman's has no obligation to Terry with respect to these actions is reversed. The cause is returned to the Court of Appeals for remand to the Superior Court for entry of judgment that Fireman's is obligated to defend the actions instituted against Terry on account of his operation of the 1961 Oldsmobile on the evening of 25 October 1966 and to pay any judgments which may be entered against him to the extent of the policy limits and that Nationwide has no obligation with reference to those actions.

Reversed and remanded.

MRS. LUCY STILL v. DALE LANCE, J. W. QUACKENBUSH, CARROLL HUNTER, EARL McELRATH, MRS. GED ROBERSON, JR., JAMES McCLURE CLARK, MRS. BEN W. DAVIS, MRS. C. G. ROBERTS, MRS. CHARLES D. OWEN AND MORRIS McGOUGH, INDIVIDUALS, AND ERWIN SCHOOL DISTRICT COMMITTEE AND BUNCOMBE COUNTY BOARD OF EDUCATION, FRANK BOWMAN, INDIVIDUALLY AND AS PRINCIPAL OF CLYDE ERWIN HIGH SCHOOL AND T. C. ROBERSON, INDIVIDUALLY AND AS SUPERINTENDENT OF BUNCOMBE COUNTY SCHOOL SYSTEM, WOODARD E. FARMER AND ZEB SHEPHARD AS SUCCESSOR MEMBERS OF BUNCOMBE COUNTY BOARD OF EDUCATION AND FRED MARTIN, AS SUCCESSOR SUPERINTENDENT OF BUNCOMBE COUNTY SCHOOL SYSTEM

No. 105

(Filed 30 July 1971)

1. **Master and Servant § 10— contract of employment — termination**

Nothing else appearing, a contract of employment which contains no provision for the duration or termination of employment is terminable at the will of either party irrespective of the quality of performance by the other party.

2. **Schools § 13— school teachers — termination of employment by county board — statement of charges — hearing**

A county board of education may terminate the employment of a teacher at the end of the school year without filing charges against the teacher, or giving its reasons for the termination, or granting the teacher an opportunity to be heard. G.S. 115-142(b).

3. **Schools § 13— school teachers — contract of employment — duration — rights conferred by statute**

A school teacher's contract of employment with a county board of education, which was entered into on 26 May 1967, gave her the right to continue her employment from year to year until the board terminated such employment at the end of the 1968-69 school year in the manner prescribed by statute. G.S. 115-142.

4. **Schools § 13— school teachers — termination of employment — discretion of school board — grounds for termination**

A county board of education acted within its discretion, which was not reviewable on appeal, when it terminated a teacher's employment contract, at the end of the school year, on the grounds that (1) the board was simultaneously terminating the employment contract with the teacher's husband, which made it likely that the teacher herself would interrupt her employment with the county the following year, and (2) the teacher was teaching a subject for which she held no teacher's certificate.

5. Schools § 13; Constitutional Law § 20— school teachers — procedures for dismissal and termination of employment — equal protection of the laws

The statutes which prescribe one procedure for the dismissal of a school teacher during the school year, on grounds of immoral or disreputable conduct, and another procedure for the termination of a teacher's employment at the end of the school year, do not deny a teacher the equal protection of the laws. U. S. Constitution, Fourteenth Amendment; N. C. Constitution, Art. I, § 17; G.S. 115-142; G.S. 115-145.

APPEAL by plaintiff from *Ervin, J.*, at the 15 February 1971 Session of BUNCOMBE, heard prior to determination by the Court of Appeals.

The plaintiff sues for damages and for injunctive relief, alleging that her contract as a public school teacher in the Buncombe County Public School System was wrongfully terminated. She alleges that she was initially employed as such teacher for the academic year 1964-1965 and served in that capacity during each succeeding academic year to and including the year 1968-1969. She then alleges that at the close of the 1968-1969 school year, the County Board of Education, acting upon the recommendation of the principal and the District School Committee, terminated her contract arbitrarily and without cause, giving her no statement of the reason for her dismissal and no hearing with reference thereto, though the plaintiff requested both, and thereby the defendants violated her rights under the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and Art. I, § 17, of the Constitution of North Carolina.

The plaintiff further contends that G.S. 115-142 provides no standard or procedure governing the termination of a public school teacher's contract at the end of a school year and, thereby, deprives her of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, since G.S. 115-145 does provide such standards and procedures governing the dismissal of teachers in the course of the school year. She further alleges that the absence of such standards and procedures in G.S. 115-142 has a chilling effect upon the exercise of constitutional rights by teachers in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of Art. I, §§ 17 and 35 of the Constitution of North Carolina.

She prays that the Court declare G.S. 115-142 unconstitutional; that an injunction issue requiring the defendants to consider the renewal of the plaintiff's contract in the good faith exercise of their statutory discretion and duties; that an injunction issue requiring the defendants to provide the plaintiff with notice of the decision to terminate her contract; that they be required to provide her with a hearing before the County Board of Education and to cause a record of such hearing to be made reflecting the evidence for and against the plaintiff and the reasons for the decision of the board; and that she recover judgment for damages in varying amounts, depending upon whether or not part or all of the requested injunctive relief be granted.

The defendants allege in their answer that the County Board of Education gave to the plaintiff full, adequate and legal notice, as required by statute, of the decision not to renew her contract, and allege that no right of the plaintiff under the Constitution or laws of the United States, or of this State, has been violated.

The parties stipulated that the plaintiff was employed as a public school teacher in the Buncombe County School System for the academic year 1964-1965 and each academic year thereafter, through the academic year 1968-1969; that she served in such employment during the year 1968-1969; that on or before the last day of the 1968-1969 academic school year, the County Board of Education determined and, through the County Superintendent of Schools, informed the plaintiff that her contract would not be renewed for the following academic school year, such notice being given by registered mail; and that the plaintiff was not given a hearing by the County Board of Education concerning the termination of the contract.

The written contract between the County Board of Education and the plaintiff, executed in May 1967, was in the prescribed form. It did not specify a termination date. It provided that it was entered into "in accordance with and subject to the provisions of the school law applicable thereto;" that the plaintiff agreed "to discharge faithfully all the duties imposed * * * by the Laws of North Carolina and by the rules and regulations of the [County] Board of Education;" that the Board of Education promised to pay the plaintiff "for services rendered during

the life of this contract;" and that "assignments to duties will be made by the superintendent of schools."

The plaintiff moved for summary judgment, asserting that there is no genuine issue of material fact between the parties, except as to the nature of the relief to which she is entitled, and that she is entitled to judgment as a matter of law. The defendants also moved for summary judgment, asserting that there is no genuine issue of any material fact and that they are entitled as a matter of law to a judgment dismissing the action.

The parties further stipulated that the defendants did not submit to the plaintiff at any time *(i.e.,* prior to the institution of this action), either orally or in writing, any statement as to the reasons for the termination of her employment; and that the plaintiff mailed to the chairman of the District School Committee a letter requesting that the reasons for such termination be given, and mailed to the chairman of the County Board of Education a letter requesting that she be granted a hearing upon the termination of her contract, the defendants not denying that these letters were received.

In response to the plaintiff's request for admissions, the defendants denied that the board had no reason for terminating the plaintiff's contract at the end of the 1968-1969 school year and denied that its sole reason for so terminating it was that she was the wife of Joseph R. Still, whose contract was also terminated. In explanation of its latter denial, the defendants asserted that the contract of the plaintiff's husband, who had been employed by the County Board of Education as a music teacher and band director at the same time and at the same school at which the plaintiff was employed as a teacher, was not renewed at the end of the 1968-1969 school year and, since the likelihood was that he would obtain employment elsewhere and the plaintiff would probably find employment within the next school year at the same place, the plaintiff's contract was not renewed so that the County Board of Education would have an opportunity to hire a replacement for the plaintiff whose employment would likely be more permanent and would not be interrupted during the next school year. In further explanation, the defendants asserted that the plaintiff was teaching outside the field for which she held a certificate, having been allowed to do so solely as a convenience to her and to her husband, thus allowing them to teach at the same school, which

reason ceased to apply when the employment of the plaintiff's husband was not continued, and that by terminating the plaintiff's employment, the board would have the opportunity to hire a replacement who held a certificate in the particular field in which such teacher would be employed.

The defendants, responding to a further request by the plaintiff for admissions, admitted that the only reasons for terminating the plaintiff's contract were that the plaintiff was the wife of Joseph R. Still and that she was teaching outside the field for which she was certified, but they denied that her contract would not have been terminated but for the fact that she was the wife of Joseph R. Still.

In response to the defendants' request for admissions, the plaintiff stated that she is and, while employed as a teacher by the County Board of Education, was the wife of Joseph R. Still; that he was employed by the County Board of Education at the same time and at the same school as the plaintiff; that the plaintiff held a North Carolina "A" teaching certificate in the field of music and needed only one two-hour course in advanced composition to be certified in the field of English; that in the school year 1964-1965 she taught four periods of music and two periods of English; that in 1965-1966 she taught music, Latin and English; thereafter, Latin having been dropped from the curriculum, she taught three classes of music and three classes of English; that at all times she taught at least one-half of her courses in music, the field of her certification; that her teaching was at Erwin High School and at feeder schools; that some of her teaching was at schools at which her husband did not teach; and that the convenience of teaching at schools wherein he taught was not a controlling consideration and was never raised as an issue at the time the plaintiff was employed or retained as a teacher in the Buncombe County School System.

Judge Ervin entered judgment denying the plaintiff's motion for summary judgment in its entirety and granting the defendants' motion for summary judgment, dismissing the plaintiff's action, "on the grounds that the statutory scheme of the North Carolina Statutes is constitutional and that as to the issue of arbitrariness and capriciousness that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law."

Smith, Moore, Smith, Schell & Hunter by McNeill Smith and Martin N. Erwin; McGuire, Baley & Wood by J. M. Baley, Jr.; and Hendon & Carson by Philip G. Carson for plaintiff.

Van Winkle, Buck, Wall, Starnes & Hyde by Herbert L. Hyde for defendants.

LAKE, Justice.

[1] The contract between the plaintiff and the County Board of Education, dated 26 May 1967, was executed in accordance with and in the form required by G.S. 115-142. It expressly incorporates within itself the provisions of the school law, including this statute. Upon its face, it contains no provision concerning the duration of the employment or the means by which it may be terminated. Nothing else appearing, such a contract of employment, even though it expressly refers to the employment as "a regular, permanent job," is terminable at the will of either party irrespective of the quality of performance by the other party. *Tuttle v. Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249; *Wilkinson v. Mills*, 250 N.C. 370, 108 S.E. 2d 673; *Long v. Gilliam*, 244 N.C. 548, 94 S.E. 2d 585; *Howell v. Credit Corp.*, 238 N.C. 442, 78 S.E. 2d 146; *Malever v. Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436; *May v. Power Co.*, 216 N.C. 439, 5 S.E. 2d 308; *Elmore v. R.R.*, 191 N.C. 182, 131 S.E. 633; 43 A.L.R. 1072; *Currier v. Lumber Co.*, 150 N.C. 694, 64 S.E. 763.

Where, however, there is a business usage, or other circumstance, appearing on the record, or of which the court may take judicial notice, which shows that, at the time the parties contracted, they intended the employment to continue through a fixed term, the contract cannot be terminated at an earlier period except for cause or by mutual consent. See: *Malever v. Jewelry Co., supra;* 53 AM. JUR. 2d, Master and Servant, § 27; Annot., 161 A.L.R. 706, 713. The nature of school operations is such that, in the absence of evidence of a contrary intent, a contract for the employment of a school teacher is presumed to be intended by the parties to continue to the end of the school year and not to be terminable by either party prior to that time and without cause and without the consent of the other party. G.S. 115-145, incorporated by reference into the contract before us, states the causes for which a teacher may be dismissed prior to the expiration of the school year for which he or she has been employed and prescribes the proceduce, includ-

ing notice and hearing, to be followed in order so to dismiss a teacher. It is not contended that this statute has application to the present controversy.

[2] The question before us relates solely to the right of the County Board of Education, having entered into a contract of employment with a teacher, to terminate the employment at the end of a school year. G.S. 115-142(b), incorporated into and made a part of the contract, on which the plaintiff relies, as completely as if set forth verbatim therein, provides:

> "All contracts now or hereafter entered into between a county or city board of education and a teacher, principal, or other professional employee shall continue from year to year *unless terminated as hereinafter set forth.* When it shall have been determined by a county or city board of education that an employee is not to be retained for the next succeeding school year it shall be the duty of the county or city superintendent to notify the employee, by registered letter deposited in mails addressed to last known address or business address of employee prior to the close of the school year, of the termination of his contract. When it shall have been determined that the services of an employee are not acceptable for the remainder of the current school year, and that the employee should be dismissed and relieved of his position immediately, the provisions and procedures of G.S. 115-67 and G.S. 115-145 shall be applicable." (Emphasis added.)

It is stipulated that the Board of Education in the present instance followed precisely the procedure prescribed in this statute. It is quite clear that this statute, and so the contract entered into by the plaintiff and upon which she relies, prescribes a procedure for terminating the employment of a teacher at the end of a school year entirely different from the procedure prescribed for the dismissal of a teacher during the school year. The statute, and so the contract before us, does not limit the right of the employer board to terminate the employment of a teacher at the end of a school year to a specified cause or circumstance. It does not, in such case, require the board to file charges against the teacher, to notify the teacher of the reason for which the board contemplates the termination of the employment or to permit the teacher to appear before the board and be heard. The statute, and so the contract on which the plaintiff

relies, expressly points to the difference between the procedures for dismissal during the school year and for termination of the employment at the end of the school year. Quite obviously, therefore, the failure to provide in this statute for the filing of charges, the statement of the reasons for the board's decision and the granting to the teacher of an opportunity to be heard was not an oversight. Consequently, G.S. 115-142(b), and so the contract upon which the plaintiff relies, can only be interpreted so as to authorize the County Board of Education to terminate the plaintiff's employment in the schools of Buncombe County as it has done.

G.S. 115-34, relied upon by the plaintiff in her brief, has no application to this case. The first part of that statute provides for an appeal from decisions of school personnel to the county or city board of education. The decision of which the plaintiff complains is the decision of the County Board of Education. The remainder of G.S. 115-34 provides for an appeal from a decision of a county or city board of education to the Superior Court when the action of the Board of Education is one "affecting one's character or right to teach." The decision of the defendant board to terminate the employment of the plaintiff does not affect her character, nor does it deprive her of the right to teach elsewhere. See, *Cafeteria Workers v. McElroy,* 367 U.S. 886, 81 S.Ct. 1743, 6 L. Ed. 2d 1230. Furthermore, the record does not indicate any attempt by the plaintiff to appeal to the Superior Court from the decision of the County Board of Education as distinguished from her present action brought in that court.

There remains for consideration the contention of the plaintiff that G.S. 115-142(b), so construed, is in excess of the authority of the General Assembly because it is a violation of a provision of the Constitution of North Carolina or a provision of the Constitution of the United States, as asserted by the plaintiff in the court below and in this Court. The plaintiff asserts that the statute is invalid and, consequently, her contract, which expressly incorporates and makes a part of it the language of the statute, does not give to the Board of Education the right so to terminate her employment at the end of the school year.

Prior to the issuance of teacher contracts for the 1967-1968 school term; that is, prior to the making of the contract

upon which the plaintiff here relies, the plaintiff was employed by the County Board of Education for three successive school years. In each of those school years, her employment was under a contract which was for one school year only. G.S. 115-142 then so provided. In 1967, the General Assembly amended the statute to provide that contracts for the employment of teachers, entered into thereafter, "shall continue from year to year *unless terminated as hereinafter set forth.*" (Emphasis added.) The plaintiff does not contend that either the Constitution of North Carolina or the Constitution of the United States forbids the State to require its county boards of education to limit teacher employment contracts to a term of one school year. There clearly would be no basis for such contention.

[3] Consequently, at the time the plaintiff entered into the contract upon which she now relies, 26 May 1967, she had no legal right to continue in the employment of the Buncombe County Board of Education beyond the end of the then current school year. That contract did not give her the absolute right to continue to occupy the status of an employed teacher until dismissed for cause specified in and pursuant to procedures specified in G.S. 115-145. It gave her the right to continue to occupy such employment status until that status was terminated as prescribed in G.S. 115-142. It has been so terminated. The defendants have not violated the contract so made with the plaintiff.

[4] In response to the plaintiff's requests for admissions, the defendants admitted that the only reasons for the termination of the plaintiff's employment at the end of the 1968-1969 school year were that her husband's employment as teacher in the Buncombe County public schools had terminated and the plaintiff was teaching a subject for which she held no teacher's certificate. The defendant denied that it would have continued the plaintiff's employment but for the fact that she was the wife of her husband. The defendants further stated, in response to the plaintiff's request for admissions, that the termination of the employment of the plaintiff's husband in the public schools of Buncombe County made it probable that he would seek employment elsewhere and, consequently, by virtue of the domestic relation, there was increased likelihood that the plaintiff's employment, if continued beyond the end of the then current school year, might be interrupted by the plaintiff before the end of the following school year.

The plaintiff asserts that these are insufficient reasons for the termination of her employment at the end of the 1968-1969 school year, asserting that she has almost completed the requirements for certification as a teacher of English, the subject which she has been teaching without being certified therein. The plaintiff does not assert that the action of the board is by way of reprisal on account of any activity of the plaintiff, or is for the purpose of compelling her to refrain from any activity in which she has previously been engaged or desires to engage or to engage in any activity foreign to her duties as a teacher. In effect, she simply contends that the reasons stated by the board, in its response to her requests for admissions, are not sound basis for its determination. That determination, however, is left by the statute in the discretion of the County Board of Education. The wisdom of its determination is not subject to review by us.

[5] There is no merit in the plaintiff's assertion in her third claim for relief that it is a denial to the plaintiff of the equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States, for the State to prescribe one procedure for the dismissal of a school teacher during the school year, on the ground of immoral or disreputable conduct or failure to perform the teacher's contract, and to prescribe a different procedure for the termination of the employment at the end of the school year. The vast difference in the consequences of these two actions, insofar as the future effect upon the teacher's professional standing and ability to obtain employment is concerned, is ample basis for classification within the limits of the Fourteenth Amendment and of Art. I, § 17, of the Constitution of North Carolina. See: *Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344, 1 L. Ed. 2d 1485; *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78, 31 S.Ct. 337, 55 L. Ed. 369; *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198.

We have carefully considered each of the numerous authorities cited by the plaintiff in her brief to support her contention that G.S. 115-142, as here interpreted and applied by us, deprives her of rights guaranteed to her by the First, Fifth and Fourteenth Amendments to the Constitution of the United States. It would serve no useful purpose to discuss these authorities individually. All of the decisions of the Supreme Court of the United States so cited by the plaintiff involved factual sit-

uations clearly distinguishable from that presented by the record before us. We find the remaining authorities so cited either obviously distinguishable or not persuasive and not binding upon this Court.

In *Hodgin v. Noland,* 435 F. 2d 859, the Court of Appeals for the Fourth Circuit held that a city librarian, discharged without notice of the cause for such action and without a hearing, was "subject to summary discharge with or without cause, so long as it was not in retribution for an exercise by him of some constitutionally protected right." As above noted, the plaintiff asserts no utterance or conduct by her, constitutionally protected or otherwise, in retaliation for which the Board of Education made its determination.

In *Freeman v. Gould Special School District,* 405 F. 2d 1153, the Court of Appeals for the Eighth Circuit, having before it the suit of public school teachers to compel the school board to renew their teaching contracts, said: "Many government employees are under civil service and some under tenure. Absent these security provisions a public employee has no right to continued public employment, except insofar as he may not be dismissed or failed *(sic)* to be rehired for impermissible constitutional reasons, such as race, religion, or the assertion of rights guaranteed by law or the Constitution."

In *Cafeteria Workers v. McElroy, supra,* at pages 896 and 898, the Supreme Court of the United States said: "It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer" and, "[T]o acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed." There is even less basis for the assertion of such right where, as here, the employing agency has merely elected not to continue the employment at the end of an employment period.

There is nothing in the record before us to suggest that the action of the County Board of Education was designed to restrict the plaintiff in the exercise of any of her constitutional rights, or as a retaliatory measure by reason of her previous exercise of any such right, or for any other reason save the

bona fide exercise by the board of the discretion vested in it by the statute for the purpose of operating within the county an effective, properly staffed system of public schools. Consequently, the plaintiff has shown no constitutional right to a notice setting forth the board's reasons for terminating her employment at the end of the school year or to a hearing upon this matter.

Affirmed.

WACHOVIA BANK AND TRUST COMPANY, N. A., JOHN C. WHITAKER AND L. D. LONG, TRUSTEES UNDER THE WILL OF MRS. KATE G. BITTING REYNOLDS, DECEASED, PETITIONERS v. ROBERT MORGAN, ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA; ST. JOSEPH'S HOSPITAL, INC.; CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY (FORMERLY CHARLOTTE MEMORIAL HOSPITAL); CITY OF WINSTON-SALEM; NORTH CAROLINA BAPTIST HOSPITALS, INC.; REX HOSPITAL; DUKE UNIVERSITY; WESLEY LONG HOSPITAL, INC.; HICKORY MEMORIAL HOSPITAL, INC.; HUGH CHATHAM MEMORIAL HOSPITAL, INC.; PASQUOTANK COUNTY; GOOD SAMARITAN HOSPITAL, INC.; SOUTHEASTERN GENERAL HOSPITAL (FORMERLY BAKER-THOMPSON MEMORIAL HOSPITAL, INC.); TRUSTEES OF LINCOLN HOSPITAL; ROCKY MOUNT SANITARIUM, INC.; S. D. McPHERSON, TRADING AS McPHERSON HOSPITAL; LEXINGTON MEMORIAL HOSPITAL, INC.; J. C. CASSTEVENS, TRADING AS CASSTEVENS CLINIC; THE ASHEVILLE ORTHOPEDIC HOME, INC.; PROVIDENCE HOSPITAL (FORMERLY PETRIE HOSPITAL, INC.); ANSON COUNTY HOSPITAL (FORMERLY THE ANSON SANITORIUM); FORSYTH COUNTY; CITY OF RALEIGH; WAKE COUNTY; CUMBERLAND COUNTY; PRESBYTERIAN HOSPITAL, INC.; WATTS HOSPITAL; SAMPSON COUNTY MEMORIAL HOSPITAL, INCORPORATED; ONSLOW MEMORIAL HOSPITAL, INCORPORATED; NEW HANOVER MEMORIAL HOSPITAL, INC.; HENDERSON COUNTY (OPERATOR OF MARGARET R. PARDEE MEMORIAL HOSPITAL); WILSON MEMORIAL HOSPITAL, INC.; MEMORIAL MISSION HOSPITAL OF WESTERN NORTH CAROLINA, INCORPORATED; C. J. HARRIS COMMUNITY HOSPITAL, INCORPORATED OF SYLVA, NORTH CAROLINA; MOREHEAD MEMORIAL HOSPITAL; NORTH CAROLINA HOSPITAL ASSOCIATION, RESPONDENTS

No. 109

(Filed 30 July 1971)

1. **Trusts § 4— modification of charitable hospital trust — cy pres statute**

The superior court had authority, under the Charitable Trusts Administration Act, to order a change in the administration of a charit-

able hospital trust which would as nearly as possible fulfill the settlor's charitable intention to provide medical and hospital services for needy patients, where payments to hospitals under the original trust provisions had been benefitting the government and the paying patient rather than the non-paying patient, and where the trust provisions contained no alternative plan for the administration of the trust. G.S. 36-23.2.

2. Trusts § 4— charitable hospital trust — creation of advisory board and staff — payment out of trust income

The superior court, upon approving the creation of an advisory board and staff to assist the trustees of a charitable hospital trust, properly determined that the reasonable expenses of the advisory board and its staff were to be paid from the trust income rather than from the trustees' commissions, where (1) the settlor of the trust had made specific provision in her will for the trustees' compensation, which amounted to $45,000 in the most recent fiscal year; (2) the reasonable expenses for the advisory board and staff will amount to $33,825 a year; (3) the payment of the advisory board's expenses out of the trustees' commissions would obviously defeat the intention of the settlor with respect to the commissions; and (4) the creation of the advisory board did not relieve the trustees of their ultimate responsibility for the proper administration of the trust. G.S. 28-170; G.S. 36-23.2.

3. Trusts § 4— charitable hospital trust — employment of skilled personnel

The trustees of a charitable hospital trust could properly employ skilled personnel to aid them in the management of the trust.

APPEAL by respondent Attorney General from *Lupton, J.*, 25 January 1971 Session FORSYTH Superior Court, transferred to this Court for initial appellate review by virtue of the general transferral order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

On 26 July 1934 Mrs. Kate G. Bitting Reynolds executed a will, Section Five of which provided in part:

"All the Rest, Residue and Remainder of my estate . . . I give, devise and bequeath:

"To my trustees hereinafter named, in trust, to pay one-fourth of the net income therefrom for the benefit of the poor and needy of the City of Winston-Salem and of the County of Forsyth, North Carolina, . . . and to pay three-fourths of the net income therefrom to the Hospitals located in the State of North Carolina, for the benefit of Charity patients, and said trustees shall pay such income quarterly to said hospitals upon the basis of the average

number of charity patients cared for therein during each day of the immediately preceding period of three months. Any hospital participating under the provisions of this Will except those benefitting from specific bequests shall make a monthly report to my trustees showing the number of charity patients cared for during each day of the month, and my trustees shall be the sole judge as to the eligibility to receive benefits hereunder of any and all hospitals, and the decision of my trustees in respect thereto shall be final."

Wachovia Bank and Trust Company, William N. Reynolds, John C. Whitaker, and L. D. Long were named trustees.

Mrs. Reynolds died in 1946, and in 1947 the trustees brought a suit for construction of Section Five of the will, and for advice and instructions concerning the rights and duties of the trustees under that section. The Superior Court of Forsyth County entered judgment defining the rights and duties of the trustees. This judgment was affirmed by the Supreme Court of North Carolina in *Trust Co. v. McMullan, Attorney General,* 229 N.C. 746, 51 S.E. 2d 473. The judgment in that case provided for the retention of the case on the inactive docket of the court, with leave granted to the trustees or other interested parties to petition the court for further orders.

The trustees continued to administer the trust in accordance with the terms of the will and the decision of the court until 18 August 1969. On that date the trustees filed a petition alleging changed circumstances and conditions and requesting that the trustees be given additional orders and instructions for the administration of the hospital trust. On 4 May 1970, after a hearing in the Superior Court of Forsyth County, judgment was entered in favor of the petitioners, granting petitioners the instructions requested. On appeal, the judgment of the Superior Court was reversed by the Court of Appeals, without prejudice to the trustees to re-apply for relief on a theory more consistent with the facts shown by the evidence. *Trust Co. v. Morgan, Attorney General,* 9 N.C. App. 460, 176 S.E. 2d 860.

After the decision of the Court of Appeals, the petitioners amended the petition for relief, specifically alleging the insignificance of the trust income when paid in accordance with the direction of the will and alleging particularly that the trust income, if properly applied, could have significant impact upon

the health and medical care of the needy people in North Carolina. The Attorney General filed an answer to the amended petition admitting that changed circumstances warranted a change in the use of the trust income, but denying that the trustees were entitled to reimbursement from trust funds for the added cost in administering the trust.

On 14 December 1970, at a hearing before Judge Lupton in the Superior Court of Forsyth County, new evidence was presented through the testimony of seven witnesses and affidavits of five affiants. Five of these witnesses and all the affiants had had extensive experience in the hospital or health care field. Their uncontradicted evidence showed that the trust had become impractical of fulfillment because of changed conditions not anticipated by the testatrix. From 26 July 1934, the date Mrs. Reynolds executed her will, the percentage of charity-patient days of hospital care had declined from 53.6 percent of the total days of hospital care to 12.4 percent, and the cost of patient care had risen from $3.03 per day to $50 per day in 1969. In 1934 approximately 24 percent of the hospital beds in the state were located in "for-profit" hospitals, whereas in 1969 only 2.4 percent of the beds were in "for-profit" hospitals. In 1969 approximately 76.8 percent of the people of the State were covered by hospitalization insurance, whereas in 1934 there was little, if any, such coverage. Increases in the extent and complexity of services available and increases in governmental assistance to hospitals and needy persons in North Carolina stood in marked contrast to the situation as it existed in 1934. Furthermore, the evidence indicated that the trust payments to hospitals were placed in the general funds of recipient hospitals and not expended exclusively for needy patients. Thus, the actual beneficiaries of the trust were the hospitals, government, and paying patients—not needy patients—and that the payments of $3.16 per charity-patient day for the most recent year were insignificant and ineffectual, and did not induce hospitals to accept needy patients.

On 25 January 1971 Judge Lupton entered judgment finding that there had been significant changes in the ratio of charity patients to paying patients, in the cost of hospital care, in the ownership of hospitals, in the establishment of hospital insurance programs, in the services provided by hospitals, and in the assumption of public responsibility for the care of charity

patients, as evidenced by the increase in direct governmental assistance to hospitals, direct subsidies to needy individuals through programs such as Medicare, Medicaid, veterans' benefits, workmen's compensation, and similar programs. The court further found that the payment of the hospital trust income under the formula prescribed in the will was impractical and did not reach or assist needy persons; that in order to effectively carry out the objectives of Mrs. Reynolds' will, it would be necessary to amend the plan or formula specified in the will and to prescribe discretionary powers for the trustees over the application of trust income so that such income could be so directed as to accomplish the charitable intent of the testatrix; and that the normal anticipated income of the hospital trust of approximately $800,000 annually, if properly applied, was sufficient to have significant impact in providing health and medical care to the needy people in North Carolina. The court further found that providing health and medical needs was a constantly changing and complex task, and that proper administration of the trust under these circumstances would require the employment of professional assistance and would impose upon the trustees substantial additional duties and responsibilities not contemplated by the testatrix at the time of executing the will, nor contemplated by the trustees at the time they entered upon the administration of the trust; that to perform these new duties the trustees should be authorized to establish an Advisory Board capable of providing informed guidance to the trustees and to employ a qualified person to seek uses for the trust income, study, evaluate, and coordinate proposed grants, and to establish and implement procedures for following up to ascertain that payment of trust income is used for the purposes intended.

Based upon these findings and conclusions, the court adjudged that the trustees of the hospital trust, by reason of the changed circumstances and conditions, were no longer required to make payments of income from the hospital trust to hospitals located in North Carolina for the benefit of charity patients, but the trustees were authorized to use the income from the hospital trust, including accumulated income, in such manner as the trustees, in their discretion, might from time to time deem best to serve the health and medical needs of needy people of North Carolina. The court further authorized the trustees

to set up an Advisory Board and to employ a person to assist in devising and executing new programs to effectuate the charitable intent of Mrs. Reynolds. The trustees were authorized to pay reasonable compensation to the members of the Advisory Board and to the person so employed, and to provide for reasonable and necessary office and travel expenses for such person out of trust income.

The trustees were directed to prepare and furnish annually to the Attorney General of the State of North Carolina a report showing receipts and disbursements of trust income. The cause was retained with leave for any interested party upon ten days' notice to apply for further orders.

On 25 January 1971 Judge Lupton entered an order authorizing the trustees to expend $33,825 for the administration of the new plan for the first year, and such sums as might be reasonable in subsequent years, with the provision that sums which did not exceed 3½ percent per annum of the gross income of the hospital trust shall be deemed reasonable expenses, chargeable against trust income.

From the judgment entered by Judge Lupton on 25 January 1971 and the supplemental order entered by Judge Lupton on the same date approving the added expenditures by the trustees from trust income, only the Attorney General appealed. The North Carolina Hospital Association, one of the respondents, filed a brief stating in conclusion: "The judge's findings of fact are supported by substantial competent evidence and the conclusions of law and judgment are supported by such findings. Therefore, the findings are conclusive on appeal and the judgment should be affirmed."

Attorney General Robert Morgan and Assistant Attorney General Mrs. Christine Y. Denson for Attorney General Robert Morgan, respondent appellant.

Hollowell and Ragsdale, by Edward E. Hollowell and Richard B. Conely, for North Carolina Hospital Association, respondent appellee.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr., for petitioner appellees.

MOORE, Justice.

Only one question is presented by this appeal: Is it proper for the trustees to take the additional cost of administration out of the trust income rather than out of the commissions allowed the trustees under the terms of the will?

[1] Although there is no appeal from the judgment of Judge Lupton dated 25 January 1971 on the question of whether *cy-pres* is proper, the Superior Court had ample authority to alter the administrative provisions of the trust to accomplish the purpose of the testatrix. The *cy-pres* doctrine is the rule which courts of equity use when a gift given for a particular charitable purpose cannot be applied according to the exact intention of the donor. In such cases, the court will direct that the gift be applied as nearly as possible in conformity with the original purpose and intent of the testator. *Cy-pres* literally means "as near as possible." See generally, IV Scott on Trusts § 399 (3d ed., 1967) [hereinafter cited as Scott].

Before 1 October 1967 North Carolina rejected the *cy-pres* doctrine as such, while upholding modification of charitable trust provisions under the court's general equitable power to supervise trust administration. *See* Note, *Cy-pres Enacted in North Carolina,* 46 N.C.L. Rev. 1020 (1968). As Justice Ervin stated in *Watts Hospital v. Comrs. of Durham,* 231 N.C. 604, 58 S.E. 2d 696:

> "Equity looks at substance, and not form. When subsequent changes in conditions not anticipated by the creator of a trust threatened the destruction of the trust and the loss of the trust estate, a court of equity has power to modify the terms of the trust to the extent necessary to preserve the trust estate and to effectuate the primary purpose of the creator of the trust. *Hospital v. Cone, ante,* 292, 56 S.E. 2d 709; *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203; *Duffy v. Duffy,* 221 N.C. 521, 20 S.E. 2d 835; *Penick v. Bank,* 218 N.C. 686, 12 S.E. 2d 253; *Cutter v. Trust Co.,* 213 N.C. 686, 197 S.E. 542; 54 Am. Jur., Trusts, Sec. 284. This equitable jurisdiction resided in the court below; for the Superior Court possesses all of the powers exercised by it as a court of equity prior to 1868. McIntosh: North Carolina Practice and Procedure in Civil Cases, section 62."

The 1967 Charitable Trusts Administration Act, now codified as G.S. 36-23.2 provides:

> "Charitable Trusts Administration Act.—(a) If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment or if a device *(sic)* or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may, on application of any trustee, executor, administrator or any interested party, or the Attorney General, order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator. In every such proceeding, the Attorney General, as representative of the public interest, shall be notified and given an opportunity to be heard. This section shall not be applicable if the settlor or testator has provided, either directly or indirectly, for an alternative plan in the event the charitable trust, devise or bequest is or becomes illegal, impossible or impracticable of fulfillment. However, if the alternative plan is also a charitable trust or devise or bequest for charity and such trust, devise or bequest for charity fails, the intention shown in the original plan shall prevail in the application of this section.
>
> "(b) The words 'charity' and 'charitable,' as used in this section shall include, but shall not be limited to, any eleemosynary, religious, benevolent, educational, scientific, or literary purpose."

This section lends statutory sanction and authority to the long-established policy adopted by this Court that gifts for charitable purposes should not fail because of unforeseen events, but that the Court should assist in carrying out charitable purposes.

In the present case the uncontradicted evidence shows that funds received by the various hospitals under the hospital trust fund in the will are used for general hospital purposes and not for charity patients, and such income has the effect of only subsidizing the government by reducing the share which the government must contribute, or of subsidizing private patients. The contribution from this trust under the present plan benefits

(1) government, and (2) the paying patient, but fails to benefit the non-paying patient. Since the trust provisions no longer serve the intended purpose of providing medical and hospital services to people who cannot afford to pay for such services, and since the will itself contained no alternative plan, the court could order an administration of the trust which would as nearly as possible fulfill the general charitable intention of the testatrix. G.S. 36-23.2; *Watts Hospital v. Comrs. of Durham, supra.*

[2] The Attorney General, as provided by G.S. 36-23.2, appeared in the proceeding as a representative of the public interest, and took no exception to the provisions of the judgment which called for an application of the *cy-pres* doctrine to Mrs. Reynolds' will, nor did he take issue with those portions of the judgment which provide that the trustees should have available an Advisory Board and an administrative staff, and that both the staff and committee should be paid reasonable salaries and expenses. The Attorney General only questions that portion of the judgment authorizing the deduction of these additional expense items from trust income.

Mrs. Reynolds' will was executed 26 July 1934. She died on 23 September 1946. Mrs. Reynolds, as well as her husband, was a person of means. The value of her trust estate as of 7 December 1970 was $24,623,941.25. In her will Mrs. Reynolds provided in Section Seven 5:

> "5. As compensation for its services as one of my trustees, the Wachovia Bank & Trust Company shall retain no commission on the principal but shall retain 5% of the gross annual income up to $10,000 and 2½% of the gross annual income in excess of $10,000. As compensation for their services, the individuals serving as trustees hereunder shall receive annually, to be divided between or among them, a sum equivalent to the compensation received and retained by the Wachovia Bank & Trust Company for its services as trustee, which compensation to said individuals shall be in addition to and not in diminution of that of the Wachovia Bank & Trust Company."

The three individual trustees named by her were her husband, William N. Reynolds; her nephew, John C. Whitaker; and her secretary, L. D. Long. The will provided in case of the

death of any individual trustee that the remaining individual trustee or trustees, together with the corporate trustee, should continue to discharge their duties. W. N. Reynolds is now dead. John C. Whitaker and L. D. Long now serve as individual trustees with Wachovia Bank and Trust Company. Upon the death of the individual trustees, Wachovia Bank and Trust Company will continue to serve as sole trustee.

G.S. 28-170 details the commissions allowable to executors, administrators, testamentary trustees, and other fiduciaries, limiting in general the compensation of such fiduciaries to 5 percent of the receipts and disbursements. The statute provides, however, that " . . . nothing in this section shall prevent the clerk allowing reasonable sums for necessary charges and disbursements incurred in the management of the estate."

In this case the trustees have received only the compensation provided for by Mrs. Reynolds. For the year ending 2 October 1970 the corporate trustee received the sum of $23,166.08; the individual trustees received $22,518.53. In addition to the hospital trust, the will provided that one-fourth of the net income from the trust was to be used for the benefit of the poor and needy of the city of Winston-Salem and the County of Forsyth, North Carolina. The trustees have devoted substantial time to the performance of their duties as trustees in disbursing this part of the trust income.

The Attorney General contends that for some 15 years or more the trustees have been handsomely rewarded for very little effort expended in connection with this trust, and, therefore, any additional cost incurred in the administration of the trust should be deducted from their commissions. The answer to this contention is, of course, that Mrs. Reynolds provided for this compensation in her will. She knew the duties imposed upon the trustees by the terms of the will and the compensation which she desired to pay for the performance of those duties. She had the right to prescribe any compensation she wished. *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151. It should be noted that the corporate trustee received only 5 percent commission on the first $10,000 of trust income and 2½ percent commission on all income above $10,000, or approximately one-half that authorized by statute. It should also be noted that her personal trustees included her husband, her nephew, and her

long-time secretary, and that it was her desire that they share in the commissions paid for life.

Ordinarily, where the will expressly stipulates the compensation to be allowed an executor, the executor, by qualifying, is deemed to have accepted a bargain and is bound thereby even though the will stipulates compensation in a sum less than the 5 percent maximum allowed by statute. *Lightner v. Boone,* 221 N.C. 78, 19 S.E. 2d 144. In the instant case, upon the death of the remaining individual trustees, Wachovia Bank and Trust Company will continue to serve as sole trustee and will then only be entitled to the commission provided in the will for the corporate trustee. None of the trustees are now asking for additional compensation. They are only asking that necessary expenses, which will be incurred due to changed conditions and changed duties, be paid from trust income rather than from commissions provided for the trustees by the terms of the will. For the year ending 2 October 1970 the trustees received commissions of approximately $45,000. The court has found that due to a change in conditions it will be necessary for the trustees to create an Advisory Board and employ an individual to assist the trustees in the administration of the trust. The court has further found that a reasonable annual allowance for the expense to be incurred by this Advisory Board and employees is $33,825. If this amount should be deducted from the approximately $45,000 annual commissions payable to the trustees under the terms of the will, the trustees, corporate and individual combined, would then receive approximately $11,175 for carrying out the duties as prescribed by the will and the additional duties and responsiblities imposed upon the trustees by the judgment of the court—far less than the amount Mrs. Reynolds provided they should receive. The judgment of the court does not relieve the trustees of their ultimate responsibility for the proper administration of the hospital trust, and the trustees should not be expected to accept the drastic reduction proposed by the Attorney General. The trial court specifically so found in Paragraph III in the judgment:

> "The Trustees shall not be required to exercise discretion in the application of trust income unless they are reimbursed for the reasonable cost of employing assistance, compensating members of an Advisory Board, and meeting other reasonable expenses in administering

the Hospital Trust in accordance with the provisions of this judgment."

The court further found that the trust income could best be applied to meet the purposes desired by Mrs. Reynolds through the advice of this Advisory Board assisted by a full-time experienced director, and that without such assistance the trust will be lacking in adequate direction. Additional expense was properly authorized to provide this direction. *Lumber Co. v. Pollock,* 139 N.C. 174, 51 S.E. 855; *Kelly v. Odum,* 139 N.C. 278, 51 S.E. 953.

G.S. 28-170, after providing for commissions allowable to trustees, provides that reasonable sums may be allowed for necessary charges and disbursements incurred in the management of the estate. Under this statute, if additional expenses are incurred in the administration of the estate which are for (1) services to the estate, (2) are reasonably necessary, and (3) not excessive, they are proper charges. *Lightner v. Boone, supra; Kelly v. Odum, supra.* Although generally a trustee cannot properly delegate to another duties he ought reasonably be expected to personally perform, he may properly delegate authority to do particular acts and consult with and take advice from others, provided he makes the final decision in the matter. *Belding v. Archer,* 131 N.C. 287, 42 S.E. 800; II Scott §§ 171 and 171.2. Under the judgment in this case, final responsibility rests upon the trustees. *See* Restatement (Second), Trusts § 171 (1959).

[3] Where special skills are required a trustee is entitled to purchase such skills at the expense of the trust estate. II Scott § 171.2; III Scott § 188.3. Certainly, the trustees in this case are not expected to be skilled hospital administrators, physicians, or medical care experts. The trustees, therefore, should be allowed to purchase such skills in these and other related fields at the expense of the trust in order to accomplish the trust purpose. *See* Restatement (Second), Trusts § 198 (1959); 90 C.J.S. Trusts § 270 (1955).

In the case of *In re Trusts Created by Butler,* 223 Minn. 196, 26 N.W. 2d 204 (1947), the Court stated:

"Whether the trustee is reasonably justified in retaining the services of an expert at the expense of the estate must be judged according to the test of reasonableness in

the light of the peculiar circumstances of each case. The leading case is that of *Hagedorn v. Arens,* 106 N.J. Eq. 377, 383, 384, 150 A. 4, 8, wherein the court, in determining that the trustee was justified in employing expert accountants for certain purposes by reason of the complicated situation involved, correctly stated the law as follows:

" 'It is true that under ordinary circumstances the commissions allowed to a trustee or other accountant are intended to cover the work and expense of keeping his books and preparing his account, and that payments made by the trustee to bookkeepers, accountants or lawyers for performing these services which the trustee is supposed to perform for himself, cannot be allowed as items of discharge in his account. * * * "if he [the fiduciary] chooses to employ others to do his work he must pay them himself."

" 'What, however, is the fiduciary's work? Certainly work which is *beyond the ordinary or reasonably to be expected skill and ability of such a fiduciary,* cannot be be deemed his work, and he will be entitled to obtain the skilled services of experts where necessary or advisable, and to have their compensation paid out of the estate; and indeed would probably be censurable, and perhaps personally liable, if he failed to do so.' "

Accord, Parkinson v. Murdock, 183 Kan. 706, 332 P. 2d 273 (1958); *In re Sellers' Estate,* 31 Del. Ch. 158, 67 A. 2d 860 (1949); *Ewing Ind. Exs. v. Wm. L. Foley, Inc.,* 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627 (1926), *reh. den.* 1926; 54 Am. Jur. Trusts § 360 (1945).

We hold that the trial court correctly allowed the trustees to employ skilled assistance in the administration of the trust created by Mrs. Reynolds, and to charge the reasonable cost for such assistance to trust income.

The judgment of the Superior Court is affirmed.

Affirmed.

ADOLPHUS JACKSON STEWART v. NATION-WIDE CHECK CORPORATION, A CORPORATION

No. 47

(Filed 30 July 1971)

1. **Libel and Slander §§ 9, 15— qualified privilege — affirmative defense**

In a defamation action qualified privilege is an affirmative defense which must be specially pleaded, and the burden is on defendant to establish facts sufficient to support such plea.

2. **Libel and Slander § 9— qualified privilege — proof of malice**

Where qualified privilege exists, plaintiff cannot recover absent actual malice, and the burden of proving malice rests on plaintiff.

3. **Libel and Slander § 2— false accusation of embezzlement**

A false and unprivileged charge of the crime of embezzlement is actionable *per se*.

4. **Libel and Slander § 2— words actionable per se — presumptions**

Defamatory charges which are actionable *per se* raise a *prima facie* presumption of malice and a conclusive presumption of legal injury and general damage, entitling plaintiff to recover nominal damages at least without specific allegations or proof of damages.

5. **Libel and Slander §16— words actionable per se — directed verdict**

Ordinarily, the court may not direct a verdict for the defendant when the evidence tends to show the publication by the defendant's agent of false statements of and concerning the plaintiff which are actionable *per se*.

6. **Libel and Slander § 9— qualified privilege — question of law**

Whether a communication is qualifiedly privileged is a question of law for the court and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact.

7. **Libel and Slander § 9— qualified privilege**

Qualified privilege extends to communications on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.

8. **Libel and Slander § 10— qualified privilege — accusation of misappropriation of employer's funds**

Statements made by defendant's agent to defendant's customer relating to an unreported payment of $100 by the customer to plaintiff to apply on the customer's debt to defendant were qualifiedly privileged; however, a statement by the agent that plaintiff "has misappropriated funds other than this amount" was not qualifiedly privileged.

9. Libel and Slander § 9— qualified privilege — statements to defamed person's relatives

Generally, communications made in good faith and without malice by a third person to relatives of the person defamed on a subject in which the person communicating has an interest, or in reference to which he has a duty, are qualifiedly privileged if made to a relative having a corresponding interest or duty; the duty need not be legal but is sufficient if it is a moral or social duty.

10. Libel and Slander § 10— qualified privilege — accusations of misappropriation of funds — statements to accused's relatives

Statements made by defendant's agent to plaintiff's uncle and first cousin accusing plaintiff of the misappropriation of funds belonging to defendant were not qualifiedly privileged, since neither the uncle nor the cousin had any interest or duty with reference to the subject of the agent's statements.

11. Libel and Slander § 16— punitive damages — proof of actual malice

Proof of actual malice (as distinguished from imputed malice) is prerequisite to the recovery of punitive damages in a defamation action.

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

Justice HIGGINS concurs in result.

ON *certiorari,* granted on motion of plaintiff, to review the decision of the Court of Appeals reported in 9 N.C. App. 172, 175 S.E. 2d 615, docketed and argued in the Supreme Court as No. 62 at Fall Term 1970.

Plaintiff, a former employee of defendant, instituted this action to recover compensatory and punitive damages allegedly caused by defamatory statements made in July, 1968, by defendant's agent, John Gormley, which falsely accused plaintiff of embezzlement.

Defendant denied plaintiff's essential allegations; and, by way of further answer, pleaded factual matters alleged "as an accord and satisfaction as to any claim the plaintiff may have had against the defendant, and in mitigation of any damage to which the plaintiff may be entitled, the defendant denying that the plaintiff is entitled to any relief in this action."

Plaintiff replied to allegations of defendant's further answer.

The case came on for trial before Bryson, J., and a jury at the January 19, 1970 Schedule "B" Civil Session of Mecklenburg Superior Court.

The evidence offered by plaintiff, summarized except where quoted, tends to show the facts narrated below.

Defendant, a Maryland corporation, is engaged in the business of issuing money orders through various representatives in several States, including North Carolina. Those authorized to issue money orders in defendant's name are provided certain supplies, including money order forms presigned by defendant's president, and a type of check-writing machine that would cut a specific amount "into the money order." The authorized representative received a commission for each order.

Plaintiff was employed by defendant as a sales representative and service man. His duties included calling on those authorized by defendant to issue money orders, providing them with necessary supplies and advice, and on occasion collecting money owed by them to defendant. Plaintiff reported his activities to Mr. Don Clark, defendant's District Supervisor for North Carolina and Virginia.

Prior to July, 1968, one of defendant's representatives, Daughety Super Market in Kinston, was in arrears in its payments to defendant, having failed to make full remittance or account to defendant for money collected from issuing defendant's money orders. Plaintiff was instructed to go to Kinston and discuss the situation with Mr. Elwood T. Daughety, the operator of Daughety Super Market, and to collect the past due account. Sometime thereafter, John Gormley, an employee of defendant, was sent to North Carolina to investigate the activities of plaintiff, to ascertain "the whereabouts" of plaintiff, and to relieve him of his credentials and of defendant's valuable equipment and supplies in his possession.

Gormley arrived in Kinston on or about July 17, 1968. He contacted Mr. Daughety and advised him that he was there to check his books. A disagreement arose between Gormley and Daughety as to the amount in arrears, Daughety contending that he owed one hundred dollars less than the amount claimed by Gormley. Thereupon, Daughety exhibited a receipt signed by plaintiff showing a payment of one hundred dollars. Daughety testified: "As to what he said with reference to Jack Stewart after that, he said well, this still doesn't get Mr. Stewart off the hook because he has misappropriated funds other than this amount."

Plaintiff is the nephew of Mrs. I. A. McQueen, the oldest son of Mrs. McQueen's brother. Mrs. McQueen testified: "Our home has been his home so to speak. My address is 543 Vista Drive, Fayetteville, North Carolina. After Jack's mother died (1948), he came to live with us. He was seventeen at that time. As to how long he lived with me, he went in service in 1949 and I signed for him to go in and then when he returned from service he came back. In other words, our home was called his home in this respect." Plaintiff was not living with Mrs. McQueen in 1968 but was living in Charlotte. He had lived in Charlotte since August of 1956. However, he stayed with Mrs. McQueen when he was in the Fayetteville area and had permission to give her telephone number to anyone seeking to get in touch with him.

On or about July 17, 1968, Mrs. McQueen received a phone call from Gormley inquiring as to the whereabouts of her nephew. Gormley told her that he had to get in touch with plaintiff and asked if he might call back later. Gormley called back twenty or thirty minutes later. As to what was said in this telephone conversation, Mrs. McQueen testified: "I said, Mr. Gormley, what seems to be the problem that you are so anxious to get in touch with Jackie. I said, where is Mr. Clark? Don Clark I was referring to because I knew that Mr. Clark was Jackie's immediate supervisor and he told me that he was on vacation. So he informed me, I asked him should there be any problem and he said well, no and yes. I said well, can I take a message just for my own that I might pass on to Jackie should he come in. So he said well, he had orders from the executive vice-president of Nation-Wide Check Corporation to get in touch with Jackie as soon as possible. I said well, Mr. Gormley, can you not give me some information. You seemed so anxious and it is such an urgent thing. I said, what seems to be the problem? I said, are you trying to tell me that Jack has a financial problem with the company? He said yes ma'am, I am afraid so. I said, Dear Lord, what status could it be, thousands or hundreds. And he said hundred, Mrs. McQueen. I said, are you sure. He said yes ma'am. I said this doesn't sound like Jackie but I shall be delighted to give Jackie the message to contact you should he come in. He said, Mrs. McQueen, I'll have to see Jack by midnight in order to save his job. He had told me prior in the conversation, I have to see Jack in order to save his job and that is when I asked him could there be a money problem be-

cause he had orders, emphatically stated, he had orders from the executive vice-president, Mr. Al Robbins of Nation-Wide Check Corporation to contact Jackie at once."

On or about July 17, 1968, Claude M. Stewart, Jr., a nephew of Mrs. McQueen and first cousin of plaintiff, was spending a few days at the McQueen home while Stewart's wife was out of town. When Mrs. McQueen went out to get her hair fixed, she requested Stewart to stay at the house in case plaintiff or Gormley called so that he could take the message. When Gormley called, Stewart asked him if there was any message, explaining that he had been asked to stay there and answer the phone for that purpose. Stewart testified: "He (Gormley) said his home office had advised him not to bother trying to contact Jack anymore or any of his family. That they were going to put out an APB or state alert and have him picked up but that he was going to try to hold them off until noon . . . . " Stewart also testified that Gormley said: "(F)or all we know, Jack might be in Mexico now with the money."

On or about July 17, 1968, Gormley called the McQueen home and talked with I. A. McQueen, plaintiff's uncle by marriage. McQueen testified that Gormley said "it was urgent that he find Jack Stewart and that he had a man in Kinston who had receipts to prove that he had paid Jackie several thousand dollars that he was short. That it was urgent that he get ahold to him at once because he had thirty thousand dollars worth of negotiable funds with him and he didn't know what amount he might have spent of that."

On July 18, 1968, plaintiff saw Gormley in Fayetteville and accounted for all property belonging to defendant. He remained in the employment of defendant until discharged on or about November 11, 1968.

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict and also for leave to amend its pleading so as to allege that the conversations in which Gormley allegedly made defamatory statements were "privileged conversations." The judge denied the motion for leave to amend as "unnecessary for a decision by the Court as to the merits" but allowed defendant's motion for a directed verdict. Judgment was entered which dismissed the action and taxed plaintiff with the costs.

Upon plaintiff's appeal, the judgment was affirmed by the Court of Appeals.

B. Kermit Caldwell for plaintiff appellant.

Lloyd C. Caudle and John G. Golding, by John G. Golding, for defendant appellee.

BOBBITT, Chief Justice.

The question of law presented by defendant's motion for a directed verdict under Rule 50(a), G.S. 1A-1, is whether plaintiff's evidence was sufficient for submission to the jury. *Kelly v. Harvester Co.,* 278 N.C. 153, 157, 179 S.E. 2d 396, 398 (1971).

"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 1969). Accord: *Kelly v. Harvester Co., supra.*

[1, 2] In a defamation action qualified privilege is an affirmative defense. Ordinarily, it must be specially pleaded. *Bouligny, Inc. v. Steelworkers,* 270 N.C. 160, 173, 154 S.E. 2d 344, 356 (1967); Annot., 51 A.L.R. 2d 552, *567 et seq.* (1957). The burden is on defendant to establish facts sufficient to support this plea. Where qualified privilege exists, plaintiff cannot recover absent actual malice; and the burden of proving actual malice rests on plaintiff. *Ponder v. Cobb,* 257 N.C. 281, 126 S.E. 2d 67 (1962), and cases cited.

Defendant did not allege qualified privilege in its answer proper or in its further answer and defense. The trial judge denied defendant's motion for leave to amend. In the Court of Appeals, defendant again moved for leave to file an amendment to its pleading and allege qualified privilege. Under authority of Rule 20(c) of its Rules of Practice, the Court of Appeals allowed defendant's motion. Although the record before us does not contain such amendment, the decision of the Court of Appeals assumes qualified privilege was properly pleaded pursuant to its allowance of defendant's motion.

In affirming the *judgment* of the superior court, the Court of Appeals held: (1) The defamatory words attributed to Gormley were actionable *per se;* (2) plaintiff's evidence established that these alleged defamatory statements were qualifiedly privileged; and (3) that plaintiff offered no evidence of actual malice.

[3, 4] According to plaintiff's evidence, Gormley, defendant's agent, in conversations with Daughety and with plaintiff's relatives, made false statements which, in effect, charged plaintiff with the crime of embezzlement. A false and unprivileged charge of the crime of embezzlement is actionable *per se.* 50 Am. Jur. 2d *Libel and Slander* § 44 (1970); 53 C.J.S. *Libel and Slander* § 68 (1948); *Beck v. Bank,* 161 N.C. 201, 206, 76 S.E. 722, 724 (1912). Defamatory charges which are actionable *per se* raise a *prima facie* presumption of malice and a conclusive presumption of legal injury and general damage, entitling plaintiff to recover nominal damages at least without specific allegations or proof of damages. *Badame v. Lampke,* 242 N.C. 755, 89 S.E. 2d 466 (1955); *Kindley v. Privette,* 241 N.C. 140, 84 S.E. 2d 660 (1954); *Roth v. News Co.,* 217 N.C. 13, 6 S.E. 2d 882 (1940); *Flake v. News Co.,* 212 N.C. 780, 195 S.E. 55 (1938); *Broadway v. Cope,* 208 N.C. 85, 179 S.E. 452 (1935).

[5] Ordinarily, the court may not direct a verdict for the defendant when the evidence tends to show the publication by the defendant's agent of false statements of and concerning the plaintiff which are actionable *per se.* See *Gillis v. Tea Co.,* 223 N.C. 470, 27 S.E. 2d 283, 150 A.L.R. 1330 (1943), where it was held that such evidence required the denial of the defendant's motion for judgment of involuntary nonsuit under the (repealed) statute formerly codified as G.S. 1-183.

[6] "Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact." *Ramsey v. Cheek,* 109 N.C. 270, 13 S.E. 775 (1891). Accord, 50 Am. Jur. 2d *Libel and Slander* § 200; *Hartsfield v. Hines,* 200 N.C. 356, 361, 157 S.E. 16, 19 (1931).

On this appeal, decision turns upon whether plaintiff's evidence discloses the defamatory statements, although action-

able *per se,* were qualifiedly privileged. The Court of Appeals answered, "Yes." We take a different view and reverse.

"Conditional or qualified privilege is based on public policy. It does not change the actionable quality of the words published, but merely rebuts the inference of malice that is imputed in the absence of privilege, and makes a showing of falsity and actual malice essential to the right of recovery.

[7] "A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. The essential elements thereof are of good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty." 50 Am. Jur. 2d *Libel and Slander* § 195 (1970). Accord: 53 C.J.S. *Libel and Slander* § 89 (1948); *Hartsfield v. Hines, supra* at 361, 157 S.E. at 19.

[8] Both Gormley and Daughety had an interest and duty with reference to the status of Daughety's indebtedness to defendant. Hence, statements by Gormley relating to an unreported payment of one hundred dollars by Daughety to plaintiff to apply on Daughety's debt to defendant were qualifiedly privileged. However, Daughety had no interest or duty with reference to what plaintiff did with funds other than those collected from him. Hence, the statement made by Gormley, according to Daughety's testimony, that "this still doesn't get Mr. Stewart off the hook because he has misappropriated funds other than this amount," was not qualifiedly privileged.

There remains for consideration the statements which, according to plaintiff's evidence, were made by Gormley to the McQueens, aunt and uncle of plaintiff, and to Claude M. Stewart, Jr., plaintiff's first cousin.

[9] Generally, communications made by a third person to relatives of the person defamed on a subject in which the person communicating has an interest, or in reference to which he has

a duty, are qualifiedly privileged if made to a relative having a corresponding interest or duty. The duty need not be legal. It is sufficient if it is a moral or social duty. This is true as long as the communications are made in good faith and without malice. 50 Am. Jur. 2d *Libel and Slander* §§ 203-204 (1970); Annot., "Libel and Slander; Defamation of one relative to another by person not related to either, as subject of qualified privilege," 25 A.L.R. 2d § 1388 (1952). Whether this general rule applies depends upon various factors, *e.g.*, the age of the person allegedly defamed, his place of residence, his relationship to the person(s) to whom the communication is made, such person's responsibility, if any, for him, etc. Suffice to say, the general rule has no application to the factual situation now under consideration.

Plaintiff went to live with his aunt and uncle in 1948. He was then seventeen years old. He did not live with them in July, 1968, but stayed overnight in their home when he was in the Fayetteville area. In July, 1968, he was approximately thirty-seven years old, married and lived in Charlotte.

It may be conceded that Gormley's statement to Mrs. McQueen, in reply to her questions, that plaintiff had a financial problem with defendant involving one hundred dollars, did not charge plaintiff with the crime of embezzlement.

In Mrs. McQueen's absence, Claude M. Stewart, Jr., plaintiff's cousin, answered the phone simply to take a message. Gormley's statements went beyond those necessary to advise Stewart that plaintiff should contact him immediately. According to Stewart, Gormley stated that "his home office had advised him not to bother trying to contact Jack anymore. . . . That they were going to put out an APB or state alert and have him picked up . . . . " This, together with his other statement that "for all we know, Jack might be in Mexico now with the money," could reasonably be interpreted as accusing plaintiff of misappropriating funds belonging to defendant.

Gormley's statement to Mr. McQueen, "that it was urgent that he find Jack Stewart and that he had a man in Kinston who had receipts to prove that he had paid Jackie several thousand dollars that he was short. That it was urgent that he get ahold to him at once because he had thirty thousand dollars worth of negotiable funds with him and he didn't know what

amount he might have spent of that," substantially charged plaintiff with the misappropriation of defendant's funds. There is no evidence that McQueen made any inquiry as to why Gormley wanted to contact plaintiff or that he persisted in questioning him in any manner.

[10] In summary, we hold that plaintiff's evidence refutes rather than supports any claim that either Claude M. Stewart, Jr., or Mr. McQueen had any interest or duty with reference to the subject of Gormley's statements which would render qualifiedly privileged Gormley's accusations that plaintiff had misappropriated funds belonging to defendant.

[11] Since plaintiff's evidence does *not* establish that the defamatory statements attributed to Gormley in his conversations with Daughety and with the relatives of plaintiff were qualifiedly privileged, proof of actual malice was unnecessary to withstand defendant's motion for a directed verdict. However, it is noted that proof of actual malice (as distinguished from imputed malice) is prerequisite to the recovery of punitive damages. *Roth v. News Co., supra* at 16, 6 S.E. 2d at 887, and cases cited; *Bouligny, Inc. v. Steelworkers, supra* at 170, 154 S.E. 2d at 354; *Woody v. Broadcasting Co.*, 272 N.C. 459, 463, 158 S.E. 2d 578, 581-582 (1968).

Reversed.

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

Justice HIGGINS concurs in result.

KENNETH W. BREWER, ADMINISTRATOR OF THE ESTATE OF FARRELL L. BREWER, PLAINTIFF v. WILLIAM P. HARRIS, ADMINISTRATOR OF THE ESTATE OF GARY RUDISILL, DEFENDANT

No. 102

(Filed 30 July 1971)

1. **Rules of Civil Procedure § 85— applicability of new rules**

The new Rules of Civil Procedure apply to actions pending on 1 January 1970 as well as to actions and proceedings commenced on and after that date.

2. **Automobiles § 43; Negligence § 7— wilful and wanton negligence — sufficiency of pleadings**

In this action for the wrongful death of a passenger in an automobile which failed to negotiate a curve, plaintiff's complaint was sufficient to raise the issue of wilful and wanton negligence on the part of the driver of the automobile. G.S. 1A-1, Rule 84, Form 4.

3. **Negligence § 7— wilful and wanton negligence**

Ordinarily, contributory negligence on the part of a plaintiff does not bar recovery when the wilful and wanton conduct of a defendant is a proximate cause of plaintiff's injuries.

4. **Automobiles §§ 91, 94; Negligence § 7— wilful and wanton negligence — sufficiency of evidence**

In an action for the wrongful death of a passenger in an automobile which failed to negotiate a curve, plaintiff's evidence was sufficient to require submission of an issue as to the wilful and wanton conduct of the driver of the automobile where it tended to show that, despite warnings by plaintiff's intestate to slow down for the approaching curve, the driver failed to slow down and entered the curve at a speed over 100 mph, and that the driver had a blood alcohol content of .31%.

5. **Automobiles § 94; Negligence § 7— wilful and wanton contributory negligence — jury verdict**

There is no merit in the contention by defendant in this wrongful death action that, based on the court's instructions, the jury found plaintiff's intestate guilty of wilful and wanton contributory negligence.

APPEAL by defendant pursuant to G.S. 7A-30(2) from decision of the North Carolina Court of Appeals (10 N.C. App. 515, 179 S.E. 2d 160), holding there was error in the trial before *Collier, J.*, at 18 May 1970 Session of GUILFORD Superior Court (High Point Division).

This is an appeal resulting from trial of a wrongful death action and an action to recover damages for personal injuries

arising out of an automobile collision which occurred on 15 September 1968 in the city limits of High Point, North Carolina. The collision involved a 1967 Pontiac operated by James Miller, and a 1968 Corvette owned and operated by Gary Gene Rudisill (Rudisill). Farrell L. Brewer (Brewer) and Danny Carroll (Carroll) were passengers in the Corvette automobile at the time of the collision. Both Brewer and Rudisill died as a result of injuries sustained in the accident, and Carroll suffered personal injuries. Brewer's administrator instituted action for wrongful death, and Carroll instituted action to recover damages for personal injuries against Rudisill's administrator. The actions were consolidated for trial, and at the close of the evidence plaintiffs, pursuant to G.S. 1A-1, Rule 49(c), demanded that the following issue be submitted:

> Issue Number Three: "If so, was the death of Farrell L. Brewer caused by wilful or wanton conduct on the part of Gary Gene Rudisill, as alleged in the Complaint?"

The trial judge denied plaintiffs' tender of issue, and issues were submitted to and answered by the jury as follows:

> 1. Was Farrell L. Brewer killed by the negligence of Gary Gene Rudisill, as alleged in the Complaint?
>
> Answer: Yes.
>
> 2. If so, did Farrell L. Brewer contribute by his own negligence to his death, as alleged in the Answer?
>
> Answer: Yes.
>
> 3. What amount, if any, is the plaintiff entitled to recover for the wrongful death of Farrell L. Brewer?
>
> Answer: ————.

Prior to the submission of the issues it was stipulated by counsel that if the jury should find from the evidence and by its greater weight that Gary Gene Rudisill was the driver of the car on this occasion, the jury might answer the first issue "Yes."

Plaintiff Brewer appealed from the judgment entered in accordance with the jury verdict, and plaintiff Carroll aban-

doned and failed to perfect his appeal. It was stipulated between plaintiff Brewer and defendant that there should be omitted from the agreed record and case on appeal all reference to the case in which Danny Carroll was plaintiff.

John Haworth, Haworth, Riggs, Kuhn and Haworth for plaintiff appellee.

Perry C. Henson and Daniel W. Donahue for defendant appellant.

BRANCH, Justice.

Defendant appellant contends that the Court of Appeals erred in holding that the complaint was sufficient to raise an issue as to whether the conduct of defendant's intestate was wilful and wanton.

Plaintiff by his complaint, *inter alia,* alleged:

> VII. Said collision occurred in the following manner and not otherwise:
>
> Gary Gene Rudisill was driving said 1968 Chevrolet Corvette automobile in a northerly direction along South Main Street. Before stopping at the intersection of South Main Street and Fairfield Road, where the electrical traffic signal was then displaying a red light for traffic on South Main Street, Gary Gene Rudisill had been driving at a lawful and reasonable rate of speed and in a normal, careful and prudent manner. When the traffic signal at the intersection of South Main Street and Fairfield Road turned green for traffic on South Main Street, Gary Gene Rudisill resumed traveling in a northerly direction along South Main Street but suddenly accelerated the speed of said automobile and began traveling at a highly dangerous and unsafe rate of speed and in an extremely careless and reckless manner. *Despite the protests of the occupants of said automobile, including the protests of Farrell L. Brewer, Gary Gene Rudisill, continued to drive at an extremely high and dangerous rate of speed* and lost control of said automobile as it entered the curve at the intersection of Fraley Road and South Main Street. Said automobile went off the west side of the road, struck two

utility poles and struck head-on a 1967 Pontiac automobile being operated by James Daniel Miller. Said 1968 Chevrolet Corvette automobile was totally demolished and its occupants, including Farrell L. Brewer, were thrown from the vehicle. Farrell L. Brewer thereby sustained severe and critical injuries from which he died at about two o'clock a.m. on September 15, 1968.

VIII. The injuries sustained by Farrell L. Brewer and his death were solely and proximately caused by the negligence of Gary Gene Rudisill. Specifically Gary Gene Rudisill was negligent in the following respects:

(a) *He drove said 1968 Chevrolet Corvette automobile upon a public highway carelessly and heedlessly, in willful and wanton disregard of the rights and safety of Farrell L. Brewer and others,* without due caution and circumspection, and at a speed and in such a manner as to endanger the person and property of Farrell L. Brewer and others, thereby violating the provisions of G.S. 20-140.

(b) He drove said 1968 Chevrolet Corvette automobile at a speed greater than was reasonable and prudent under conditions then existing, thereby violating the provisions of G.S. 20-141(a).

(c) He drove said 1968 Chevrolet Corvette automobile at a speed greatly in excess of the maximum posted speed limit of thirty-five (35) miles per hour then and there prevailing.

(d) He failed to decrease the speed of said 1968 Chevrolet Corvette automobile where special hazard existed by reason of highway and traffic conditions so as to avoid said collision in accordance with his duty to exercise due care, thereby violating the provisions of G.S. 20-141(c).

(e) He failed to keep and maintain said 1968 Chevrolet Corvette automobile under careful and proper control in violation of his legal duty to exercise due care.

(f) He failed to drive said 1968 Chevrolet Corvette automobile upon the right half of the roadway, thereby violating the provisions of 20-146(a).

(g) While meeting a vehicle proceeding in the opposite direction he failed to pass said vehicle to the right and give to the other vehicle at least one-half of the main traveled portion of the roadway as nearly as possible, thereby violating the provisions of G.S. 20-148. (Emphasis added.)

[1] The effective date of the Rules of Civil Procedure contained in Chapter 1A of the General Statutes was 1 Jauuary 1970, and the Rules apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. Session Laws of 1969, Ch. 803, § 10; *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161.

This case was tried on 18 May 1970 and is therefore governed by the "New Rules." G.S. 1A-1, Rule 8 provides:

(a) Claims for relief.—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain

(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, . . . "

In *Sutton v. Duke, supra,* this Court considered the effect of this rule and, speaking through Sharp, J., stated:

" . . . [S]ince the federal and, presumably, the New York rules are the source of NCRCP we will look to the decisions of those jurisdictions for enlightenment and guidance as we develop 'the philosophy of the new rules.'

"The attempts of the federal court to state the scope and philosophy of their rules was summarized by Mister Justice Black in *Conley v. Gibson,* 355 U.S. 41, 2 L. Ed. 2d 80, 78 S.Ct. 99, the case most frequently cited and quoted on the point we consider here. Speaking for a unanimous Court, he said: ' . . . [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.' *Id.* at 47-48. Thus, under the federal rules 'a case consists not in the pleadings, but in the evidence, for which the pleadings furnish the basis.' *DeLoach v. Crowley, Inc.*, 128 F. 2d 378 (5th Cir., 1941).

"Under the 'notice theory of pleading' a statement of claim is adequate if it gives sufficient notice of the claim asserted 'to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought . . . . ' . . . "

We find further aid in interpreting these Rules by reference to the illustrative forms approved by the legislature in G.S. 1A-1, Rule 84, where we find the following:

"The following forms are sufficient under these rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate:

. . . .

(4) Complaint for Negligence. (Where plaintiff is unable to determine definitely whether one or the other of two persons is responsible or whether both are responsible and where his evidence may justify a finding of wilfulness or of recklessness or of negligence.)

1. On ..... 19....., at ....., defendant X or defendant Y, or both defendants X and Y, wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said street.

2. Defendant X or defendant Y, or both defendants X and Y were negligent in that:

(a) Either defendant or both defendants drove at an excessive speed.

(b) Either defendant or both defendants drove through a red light.

(c) Either defendant or both defendants failed to yield the right-of-way to plaintiff in a marked crosswalk.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization [in the sum of one thousand dollars] (or) [in an amount not yet determined].

Wherefore, plaintiff demands judgment against X or against Y or against both in the sum of ..... dollars and costs."

This form approves a short statement of the basic occurrences and the use of the words "reckless" and "wilful" to describe the character of a defendant's conduct as sufficient notice of the claim "to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata,* and to show the type of case brought. . . . "

Certainly the detailed factual allegations and the description of the character of defendant's intestate's alleged conduct in instant case meets the requirement of "notice theory of pleading." Our conclusion that this complaint gave defendant fair notice of the nature of plaintiff's claim and the grounds upon which it rested draws strength from the fact that defendant's answer alleges "wilful and wanton" conduct on the part of Brewer in pleading contributory negligence.

[2] We hold that plaintiff's complaint was sufficient to raise the issue of defendant's intestate's wilful and wanton conduct.

Appellant contends that plaintiff failed to allege wilful and wanton conduct within the provisions of N.C.G.S. 1A-1, Rule 9(b) stating that conditions of mind *may* be generally averred. Since we hold that the complaint meets the requirements of G.S. 1A-1, Rule 84, Form 4, we find no merit in this contention.

We next consider appellant's contention that the evidence was not sufficient to require submission of an issue as to the wilful and wanton conduct of defendant's intestate.

The evidence pertinent to decision of this question may be summarized as follows:

Brewer and Carroll had been acquainted for several years, including association in the military service in Vietnam. Carroll had been separated from the service, and Brewer was on a weekend leave from his military station at Fort Benning, Georgia. On the night of 15 September 1968 they met at the Guilford Dairy in High Point at about 9:30 o'clock, and thereafter went for a ride in Carroll's automobile. During the evening both Carroll and Brewer had two drinks of Bourbon whiskey, and they together consumed about one-half pint. Brewer and Carroll returned to the Dairy around 11:00 o'clock p.m., and there met Rudisill. Sometime later they left in Rudisill's Corvette, with Brewer driving, Rudisill sitting on the console between the two seats, and Carroll sitting in the passenger seat. Brewer drove the automobile in a southerly direction on South Main Street through High Point to a service station in Archdale, North Carolina. There they stopped and talked a few minutes. On their return trip Rudisill drove, Carroll sat in the passenger seat, and Brewer sat on the console.

The witness Carroll testified:

"When we left the service station we traveled back down South Main Street. Gary Rudisill drove the car from the point where we had stopped below Archdale all the way back to where the wreck had happened. Describing the manner in which Gary Rudisill was operating the automobile, I'd say he was driving 35 and he got to about a 45 limit and he was running between 40 and 45. Up to the Fairfield Road intersection he was driving at all times within the speed limit and on his right side of the road. Until we arrived at the Fairfield Road intersection I did not notice anything abnormal about the way Gary Rudisill was driving. He was driving very safely then.

"When we arrived at the intersection of South Main Street and Fairfield Road there was a stop light at the intersection that was then red. Gary Rudisill pulled up to the light and stopped. We stayed stopped there, I guess 10 or 15 seconds and then the light changed to green. Describing the operation of the car after the light changed to green, we started rolling a little bit and then he just kicked it. By 'kicking it' I mean that he mashed the gas all the way to the floorboard. We just took off, just like that (demonstrating).

"I would say that the rate of speed we attained as we proceeded on toward High Point after leaving the Fairfield Road was well over a hundred. . . .

" . . . Farrell told him, said, 'Slow down,' said 'You are not going to make the curve,' and he told him that possibly two or three times before we got the curve.

" . . . The left hand side of the car struck the telephone pole. I do not know what happened after that. . . . "

Carroll also testified that he saw Rudisill drinking from a plastic glass at the Guilford Dairy, and that Rudisill was "talking to different people . . . just like everybody else around there."

C. W. Pike of the High Point Police Department, testifying for defendant, stated that he arrived at the scene of the accident about 1:35 a.m., and that he observed pressure marks beginning in the northbound lane of South Main Street. The marks continued 268 feet to a telephone pole, which apparently was severed by the impact of the Corvette automobile. The marks continued 124 feet to a second telephone pole, which was also damaged, and from there continued 70 feet to the rear of the Corvette. The Corvette's last impact was a head-on collision with the Pontiac which was traveling in a southerly direction in the southbound lane of Main Street.

Defendant also presented evidence, over plaintiffs' objection, that Rudisill had a .31% alcohol content in his blood and that Brewer had an alcohol content of .11%. Dr. Thomas Terrell testified that if the jury should find that Rudisill had .31% alcohol content in his blood, he was "highly intoxicated," and if the jury should find that Brewer had .11% alcohol content in his blood, that he was "mildly intoxicated."

The term "wilful and wanton conduct" was defined by this Court in the case of *Foster v. Hyman,* 197 N.C. 189, 148 S.E. 36. There the Court stated:

"An act is done wilfully when it is done purposely and deliberately in violation of law *(S. v. Whitner,* 93 N.C. 509; *S. v. Lumber Co.,* 153 N.C. 610 [69 S.E. 58]), or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason.

McKinney v. Patterson, supra. [174 N.C. 483, 93 S.E. 967]. 'The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.' Thompson on Negligence (2 ed.), sec. 20, quoted in *Bailey v. R. R.*, 149 N.C. 169 [62 S.E. 912].

"An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. *Everett v. Receivers,* 121 N.C. 519, [27 S.E. 991]; *Bailey v. R. R., supra.* A breach of duty may be wanton and wilful while the act is yet negligent; the idea of negligence is eliminated only when the injury or damage is intentional. *Ballew v. R. R.,* 186 N.C. 704, 706 [120 S.E. 334, 335]."

Accord: *Givens v. Sellars,* 273 N.C. 44, 159 S.E. 2d 530; *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393; *Blevins v. France,* 244 N.C. 334, 93 S.E. 2d 549.

[3] Ordinarily, contributory negligence on the part of a plaintiff does not bar recovery when the wilful and wanton conduct of a defendant is a proximate cause of plaintiff's injuries. *Pearce v. Barham,* 271 N.C. 285, 156 S.E. 2d 290; *Blevins v. France, supra; Brendle v. R. R.,* 125 N.C. 474, 34 S.E. 634.

Both plaintiff and defendant cite the case of *Pearce v. Barham, supra.* We think that this question is controlled by the decision in Pearce. In that case the Court, speaking through Bobbitt, J., now C.J., *inter alia* stated:

"There was evidence which, when considered in the light most favorable to plaintiff, tends to show: On February 19, 1964, near midnight, Calvin W. Barham (Calvin), was driving his Ford car in a northeasterly direction along Rural Paved Road No. 2224. Plaintiff, seated to Calvin's right, and Dolly Barham (Dolly), seated to plaintiff's right, were passengers. As he approached Fowler's Crossroads, the intersection of No. 2224 with Rural Paved Road No. 2308, Calvin was driving in a drizzling rain, with slick tires, upgrade, at a speed of ninety miles an hour 'or better' moving back and forth across the road; and, although confronted by the stop sign at that intersection, failed to

stop or slow down, crossed the intersection at such speed and lost control. As a result, his car left the road and overturned in a field some 288 feet from where it left the road, killing the driver and injuring the passengers. There was evidence sufficient to support a finding that Calvin's conduct was both wilful and wanton."

[4] Perhaps the facts in instant case make out an even stronger case of wilful and wanton conduct than is shown in *Pearce,* since here we have evidence of protest and warning by plaintiff's intestate concerning defendant's intestate. In any event, the evidence here presented was ample to allow the jury to find that his conduct was both wilful and wanton.

The trial court erred by not submitting the issue requested by plaintiff and the error is prejudicial, since the plaintiff's right to recover was barred upon a finding of contributory negligence.

Finally, defendant argues that, based on the court's instructions, the jury found the plaintiff's intestate guilty of wilful and wanton contributory negligence.

It is true that the trial judge referred to defendant's *allegations* of Brewer's wilful and wanton conduct and to defendant's *contention* that Brewer displayed wilful and wanton disregard for his own safety. However, in his final mandate to the jury on the issue of contributory negligence the trial judge stated:

> " . . . [A]nd that they at no time protested regarding the manner in which the car was being operated, which failure to exercise due care for their own safety concurred and cooperated with the negligence, if any, of the defendant; and I charge you that if you so find such to be the case, and if you further find that in such conduct they, or either of them, voluntarily placed themselves in such peril known to them, or either of them, or both of them, and voluntarily continued therein, and thereby failed to exercise ordinary care for their own safety, the same being that degree of care that a reasonably prudent person would exercise under the same or similar circumstances, in either of these cases, then it would be your duty to find on the Second Issue, 'Yes,' in favor of the defendant."

Further examination of the charge reveals that the trial judge undertook to define "due care" but omitted any definition of "wilful and wanton conduct"; neither did he apply "wilful and wanton conduct" to the facts of the case so that the jury would have been able to determine what act or omission on the part of plaintiff's intestate could be characterized as wilful and wanton. Thus, consistent with his refusal to submit an issue as to Rudisill's wilful and wanton conduct, the trial judge based his charge on the second issue upon the theory of ordinary contributory negligence.

[5] We do not agree with defendant's contention that, based on the court's instructions, the jury found plaintiff's intestate guilty of wilful and wanton contributory negligence.

We note, in passing, that this appeal does not require decision as to whether plaintiff could recover if both Brewer and Rudisill had been guilty of wilful and wanton conduct which was a proximate cause of Brewer's injury.

The Court of Appeals properly granted a new trial.

Affirmed.

MUTUAL SAVINGS AND LOAN ASSOCIATION v. EDWIN S. LANIER, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA

No. 72

(Filed 30 July 1971)

Taxation § 29— savings and loan association — excise tax — deductions — reserve for losses on loans

For the purpose of determining its North Carolina savings and loan excise tax, a savings and loan association may deduct from its gross income a "reserve for losses on loans." G.S. 105-228.24; 26 U.S.C.A. § 593.

APPEAL by plaintiff from *Clark, J.*, July 1970 Regular Civil Session of WAKE Superior Court, transferred for initial appellate review by the Supreme Court under General Order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4).

Civil action to recover for overpayments under protest of excise taxes for plaintiff's income years ending December 31, 1967, and December 31, 1968.

Plaintiff is a savings and loan association organized under G.S. Ch. 54, Subch. I, Art. 1. Its principal office is in Rockingham County, North Carolina. (Note: The terms "building and loan association" and "savings and loan association" are "interchangeable." G.S. 54-1.)

Plaintiff's excise tax returns for the indicated income years were filed within the prescribed times. G.S. 105-228.24; G.S. 105-228.26. It has complied with all necessary administrative procedures preliminary to the institution of this action.

Exclusive of interest, the amounts involved are $3,168.60 for 1967 and $3,412.80 for 1968.

Upon stipulated facts, the parties present this question: "For the purpose of determining its North Carolina savings and loan excise tax, may a savings and loan association deduct from its gross income a 'reserve for losses on loans'?"

The court below answered, "No," and entered judgment that plaintiff take nothing by its action and that the action be dismissed at the cost of the plaintiff.

Plaintiff excepted and appealed.

Manning, Fulton & Skinner, by Howard E. Manning and W. Gerald Thornton, for plaintiff appellant.

Attorney General Morgan and Assistant Attorney General Banks for defendant appellee.

BOBBITT, Chief Justice.

Chapter 1110, Session Laws of 1967, referred to hereafter as the 1967 Act, is effective and applicable to all taxable years beginning on or after January 1, 1967. Its provisions, discussed below, determine plaintiff's tax liability for 1967 and 1968.

Prior to the 1967 Act, building and loan and savings and loan associations organized under the laws of this State were taxed as provided in G.S. Ch. 105, Subch. I, Art. 8D, Vol. 2D, 1965 Replacement.

G.S. 105-228.23 imposed upon every building and loan association for the privilege of conducting business in this State a tax of six cents on each one hundred dollars of the liability of such association on its shares outstanding on December 31 of

the preceding year. In addition, G.S. 105-228.24 provided that every building and loan association pay annually "an excise tax equivalent to six per cent (6%) of the net taxable income, as herein defined, of *such* corporation during the income year." (Our italics.) Under G.S. 105-138(a)(2), building (savings) and loan associations "subject to taxation for capital stock tax and/or excise tax purposes under article 8D" were exempt from the income tax imposed by G.S. Ch. 105 Subch. I, Art. 4.

The 1967 Act is entitled "AN ACT TO MAKE TECHNICAL REVISIONS TO CHAPTERS 105, 119, 18 AND 53A OF THE GENERAL STATUTES PERTAINING TO THE REVENUE LAWS OF NORTH CAROLINA." Prior thereto, G.S. Ch. 105, Subch. I, Art. 4, entitled "Schedule D. Income Tax," included all statutory provisions relating to North Carolina income taxes. The 1967 Act divided Art. 4, "Schedule D. Income Tax," into "Division I. Corporation Income Tax," "Division II. Individual Income Tax," and "Division III. Income Tax—Estates, Trusts, and Beneficiaries." G.S. 105-130 provides that Division I, the pertinent portion of the 1967 Act, "shall be known and may be cited as the Corporation Income Tax Act." Division I consists of G.S. 105-130 through G.S. 105-130.21. G.S. 105-130.11(2) provides that "building and loan associations and savings and loan associations subject to capital stock tax and/or excise tax under article 8D" are exempt from the income tax imposed by the (1967) Corporation Income Tax Act.

Although such associations are not subject to income tax *eo nomine*, the amount of the annual excise tax imposed by G.S. 105-228.24 before and after the 1967 Act was "equivalent to six per cent (6%) of the net taxable income, as herein defined, of *such* corporation during the income year." (Our italics.) Too, before and after the 1967 Act, G.S. 105-228.24 provided: "For purposes of this article 'net taxable income' shall mean net income as the same is defined for purposes of the income tax levied against corporations as provided in article 4 of subchapter I of chapter 105 of the General Statutes less all dividends paid or accrued by an association during the income year on all of its outstanding shares of capital stock."

(Note: Effective July 1, 1969, Session Laws of 1969, Chapter 1075, Section 7, amended G.S. 105-228.23 by substituting "seven and one-half cents (7½¢)" for "six cents (6¢)"

and amended G.S. 105-228.24 by substituting "seven and one-half per cent (7½%)" for "six per cent (6%)."")

Prior to the 1967 Act, "Schedule D. Income Tax," G.S. Ch. 105, Subch. I, Art. 4, prescribed the procedure for determining the "net taxable income" of a corporation. The 1967 Act (G.S. 105-130.3) provided: "Every corporation doing business in this State shall pay annually an income tax equivalent to six per cent (6%) of its net income or the portion thereof allocated and apportioned to this State. The net income or net loss of such corporation shall be the same as 'taxable income' as defined in the Internal Revenue Code in effect on the effective date of this division, subject to the adjustments provided in G.S. 105-130.5." By virtue of G.S. 105-130.3, the excise tax prescribed by G.S. 105-228.24 is imposed on the amount of "taxable income" as determined in the Internal Revenue Code subject to such adjustments, if any, as may be required by G.S. 105-130.5.

In computing the net income of *a taxpayer* prior to the 1967 Act, G.S. 105-147(10) authorized the following deductions: "(10) Debts ascertained to be worthless and actually charged off within the income year, if connected with business and, if the amount has previously been included in gross income in a return under this article; *or*, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts." (Our italics.) (Note: Although authorized to do so, the Commissioner had never exercised his discretion to permit a reserve for bad debts as a deduction in lieu of debts ascertained to be worthless and actually charged off within the income year.) Under the 1967 Act, G.S. 105-147(10) provides in identical terms for a deduction for worthless debts in the computation of the net income of an individual under "Division II. Individual Income Tax" of G.S. Ch. 105, Subch. I, Art. 4. However, the 1967 Act did not include that provision or any provision for a deduction for worthless debts in computing the net income of a corporation under "Division I. Corporation Income Tax." Since the 1967 Act (G.S. 105-130.3) provided that "(t)he net income or net loss of such corporation shall be the same as 'taxable income' as defined in the Internal Revenue Code in effect on the effective date of this division, subject to the adjustments provided in G.S. 105-130.5," we look to the provisions of the Internal Revenue Code in effect on January 1, 1967.

It is here noted that building and loan associations are not exempt from the corporate income tax imposed by the Internal Revenue Code. 26 U.S.C.A. § 11.

Under the Internal Revenue Code, "taxable income" means gross income minus specified allowable deductions. 26 U.S.C.A. § 63. Itemized deductions allowable to taxpayers, corporate or individual, for "Bad debts" are set forth in detail. 26 U.S.C.A. § 166, subsections (a) through (h). Subsections (a), (c) and (h) (3) are quoted below.

"(a) General rule.—

(1) Wholly worthless debts.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

(2) Partially worthless debts.—When satisfied that a debt is recoverable only in part, the Secretary or his delegate may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction."

"(c) Reserve for bad debts.—In lieu of any deduction under subsection (a), there shall be allowed (in the discretion of the Secretary or his delegate) a deduction for a reasonable addition to a reserve for bad debts."

"(h) Cross references.—

(1) . . . .

(2) . . . .

(3) For special rule for bad debt reserves of certain mutual savings banks, domestic building and loan associations, and cooperative banks, see section 593."

26 U.S.C.A. § 593, entitled "Reserves for losses on loans," applies specifically to domestic building and loan associations and to certain mutual savings banks and cooperative banks. Subsection (b) thereof provides in detail the formula for "Addition to reserves for bad debts" of a domestic building and loan association. The setting forth of this formula in full would add nothing to the clarity of this opinion. Subsection (b) is composed of sub-subsections (1), (2), (3), (4), and (5). Subsection (b) (1) begins as follows: "In general.—For purposes of section

166(c) the reasonable addition for the taxable year to the reserve for bad debts of any taxpayer described in subsection (a) shall be an amount equal to the sum of— . . . . "

For *federal* income tax purposes, defendant concedes plaintiff was entitled to deduct the reserve for losses on loans specified in 26 U.S.C.A. § 593, referred to in the briefs as sixty per cent of plaintiff's "net income." However, defendant contends this deduction does not apply in determining the base for the excise tax imposed on plaintiff by G.S. 105-228.24.

Defendant calls attention to the report to the Governor and the 1967 General Assembly of the Tax Study Commission created by Resolution 79 of the General Assembly of 1965 for the study of North Carolina's revenue structure.

In his brief, defendant quotes the following from Page 82 of the Commission's report: "The Commissioner of Revenue by invitation submitted a number of proposals for amendments to the Revenue Laws to the Commission for its consideration. These proposals were designated as 'technical' amendments as THEY WERE NOT PROPOSED TO PROVIDE ADDITIONAL REVENUE OR TO PROVIDE TAX RELIEF TO ANY GROUP or groups." (Defendant's capitalization.) In our view, the immediately following sentence in the same paragraph should be given at least equal emphasis. It reads: "There might be some resulting effect upon revenue from various changes, but, on the whole, these amendments are *to make the Revenue Laws conform more closely to the Federal law, to clarify* provisions which are ambiguous or where problems have arisen in administering the law, to eliminate inequities, *to simplify the law,* to provide law in places where it is now lacking, to eliminate conflicts in the law, and to provide a more equitable allocation and apportionment formula." (Our italics.)

In his brief, defendant also quotes the following from Pages 82-83 of the Commission's report: "Two of the most important 'technical' amendments are A SEPARATION OF THE CORPORATION INCOME TAX LAW from the individual income tax law and the proposed new allocation law. Under the present law, the corporation income tax and the individual income tax are combined in one article and the proposed rewrite shortens and simplifies the income tax law dealing with corporations through the elimination of those provisions pertaining only to individuals.

The rewrite also provides for a closer conformity between North Carolina law and Federal law as THE TOTAL NET INCOME OF THE CORPORATION WILL BE COMPUTED WITH REFERENCE TO THE FEDERAL CODE." (Defendant's capitalization.) (Our italics.)

Clearly, the Commission considered conformity between North Carolina law and federal law a major objective in the effort to achieve the desired clarity and simplification.

Defendant contends the only deductions allowable to plaintiff for worthless debts are those formerly allowed under G.S. 105-147(10) to *all* taxpayers prior to the 1967 Act. However, as indicated above, the portion of the 1967 Act *applicable to corporation income taxes* does not contain this or any provision of similar import. Thus, whatever rights plaintiff may have with reference to bad debts in determining plaintiff's "taxable income" under the Internal Revenue Code as a base for the excise tax imposed by G.S. 105-228.24 are presently defined in the Internal Revenue Code rather than in any provision of a North Carolina statute. The question is whether 26 U.S.C.A. § 166 or 26 U.S.C.A. § 593 applies in determining plaintiff's excise taxes for 1967 and 1968 under G.S. 105-228.24.

The provisions of 26 U.S.C.A. § 166 are in accord with those of G.S. 105-147(10) prior to the 1967 Act with this exception: G.S. 105-147(10) authorized a reasonable addition to a reserve for bad debts "in the discretion of the Commissioner." 26 U.S.C.A. § 166(c) authorizes a reasonable addition to a reserve for bad debts "in the discretion of the Secretary or his delegate." Reliance upon the exercise of this discretionary power by a federal rather than a State official indicates the legislative intent to achieve simplicity and conformity when computing "taxable income" for State and federal tax purposes.

For present purposes, the inescapable fact is that 26 U.S.C.A. § 166 expressly provides in Subsection (h)(3) that a different (special) rule applies to domestic building and loan associations, namely, the rule prescribed in 26 U.S.C.A. § 593. These federal statutes were in effect when the 1967 Act was adopted and presumably the General Assembly was advertent to their provisions. Admittedly, 26 U.S.C.A. § 593 applies when computing the "taxable income" of a domestic building and loan association for federal tax purposes. To apply a different rule in computing "taxable income" of such association for State

excise tax purposes based on "taxable income" would negate rather than promote the conformity recommended in the Commission's report.

G.S. 105-228.24 provided that every building and loan association shall pay annually "an excise tax equivalent to six per cent (6%) of the net taxable income, as herein defined, of *such corporation* during the income year." (Our italics.)

Defendant contends statutes providing exemption from taxation are to be strictly construed, citing *inter alia Sale v. Johnson, Commssioner of Revenue,* 258 N.C. 749, 129 S.E. 2d 465 (1963); also, that the burden is on the taxpayer claiming an exemption to show that he falls within the statutory provisions permitting such exemption, citing *inter alia Henderson v. Gill,* 229 N.C. 313, 49 S.E. 2d 754 (1948). However, these rules of statutory construction must be considered in the light of the well-established rule expressed in *Davis v. Granite Corporation,* 259 N.C. 672, 675, 131 S.E. 2d 335, 337 (1963), as follows: "When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly." In our view, the statutory language impels the conclusion that the General Assembly intended that "taxable income" as a base for the excise tax imposed by G.S. 105-228.24 should be the same as the "taxable income" of *a building and loan association* (as distinguished from corporations generally) under Internal Revenue Code, subject to adjustments, if any, under G.S. 105-130.5. (Note: No questions are presented as to adjustments under G.S. 105-130.5.)

We hold that the base for the excise tax imposed on plaintiff for 1967 and 1968 by G.S. 105-228.24 is the "taxable income" of a domestic building and loan association under the Internal Revenue Code; and that, in the determination of such "taxable income," the provisions of 26 U.S.C.A. § 593 applied. Since no questions are presented with reference to the accuracy of plaintiff's calculations, the judgment of the court below is vacated and the cause is remanded for the entry of a judgment not inconsistent with this opinion.

Error and remanded.

STATE OF NORTH CAROLINA v. HENRY LEE HARRIS

No. 15

(Filed 30 July 1971)

Arrest and Bail § 3; Searches and Seizures § 1— arrest without warrant — probable cause — search of the person

A police officer had probable cause to arrest defendant without a warrant for the felonies of breaking and entering and larceny after defendant went to a place in the woods where stolen TV's and other goods had been concealed, looked around, and then retraced his steps out of the woods; consequently, the search of the defendant following his arrest was lawful. G.S. 15-41(2).

APPEAL by defendant under G.S. 7A-30(1) from the decision of the Court of Appeals, reported in 9 N.C. App. 649, 177 S.E. 2d 445.

Upon his trial before *Beal, J.*, at the 6 July 1970 Schedule D Criminal Session of MECKLENBURG, defendant was convicted of feloniously breaking and entering the dwelling of Arnold J. Gilleland (G.S. 14-54) and of felonious larceny therefrom (G.S. 14-72(b)(2)) on 13 March 1970. From a sentence of 7-10 years, he appealed to the Court of Appeals, which found no error in the trial.

Evidence for the State tended to show: About 3:00 p.m. on 13 March 1970 Arnold J. Gilleland locked his home at 1709 Pecan Avenue in Charlotte and left the premises. Returning about forty-five minutes later he discovered that the back door had been prized open and the house completely ransacked. Missing were two portable TV's, one radio, several guns, eight rings, cuff links, watches, a lady's beaded change purse containing $6.00-$7.00 in dimes, and a box of old coins, among which was a 1900 silver dollar, an 1897 quarter, and a half-dollar which had a gold spot on it after being in a fire. The beaded purse was identified as State's Exhibit 1. The coins, along with a ring, were collected in an envelope and identified as Exhibit 2.

A chain-link fence, five feet tall and topped by several strands of barbed wire, enclosed the Gilleland back yard. From the back of this fence to Hawthorne Lane is a distance of 400-500 feet. In this area "there is a lot of brush . . . small pine trees. . . . [I]t is not a thickly wooded area."

About 4:00 p.m. Officer D. W. Kirkpatrick arrived to make an investigation. After observing that some strands of barbed wire on top of the back fence had been mashed down, he went outside the fence and found two sets of fresh footprints in a newly plowed field between two overgrown areas. He followed the footprints, which led back toward Hawthorne Junior High School, into the woods. Beneath a tree and some bushes, about fifty feet from Hawthorne Lane, he found the two portable TV's and radio. He then crossed Hawthorne Lane and searched the ball field area around the school. After finding nothing there he got Mr. Gilleland and took him to the spot where he had found the TV's and radio. Gilleland identified them as his property, and the officer returned Gilleland to his home.

About 6:00 Kirkpatrick parked his automobile behind a church near the ball field and watched the area where he had found the televisions and radio. "At this particular point there is only about 50 feet or so of woods and an open field and some more woods before you get to Mr. Gilleland's house. It's not solid woods all the way to his house." Shortly after dark, between 7:15 and 7:30 p.m., the officer saw two men walk across the ball field into the wooded area about 100 yards from where he was sitting. They followed a path for a short distance and then "went off the path to the point where the stuff had been left." After looking around they turned and retraced their steps. When the officer intercepted them at the school they began to run. The help for which he had radioed had not arrived; so he "couldn't get but one of them"—defendant. He informed defendant that he was "under arrest for investigation of housebreaking and larceny" and searched him.

Before Kirkpatrick was permitted to disclose the results of his search defendant moved "to suppress any evidence . . . found on this subject . . . and to *voir dire* examine the officer" with respect to it. In the absence of the jury, Officer Kirkpatrick gave evidence repetitious of that detailed above. In addition, he stated that on defendant he founded the beaded bag, State's Exhibit 1, which Mr. Gilleland had previously identified as being the one taken from his home. The bag was full of coins, including a 1900 silver dollar, an 1897 quarter, and a half-dollar with a gold spot on it. It also contained a ring. These contents, which Gilleland had also identified as his missing property, were State's Exhibit 2.

Kirkpatrick testified that at the time he took defendant into custody he had not seen him commit any crime; that he arrested him because he had left the path, gone directly to the spot where the televisions and radio had been, and, after looking around, he left the woods by the same route he had entered them.

Defendant did not testify upon the *voir dire*. Upon its conclusion Judge Beal found facts in accordance with Kirkpatrick's testimony and concluded therefrom, as a matter of law, that "said officer had reasonable grounds upon which to conduct a search of the person of the defendant at the time and place of the arrest." Thereupon he denied defendant's motion to suppress the evidence. The jury returned and State's Exhibits 1 and 2 were admitted into evidence.

Continuing his testimony before the jury, Kirkpatrick said: He found the beaded purse, State's Exhibit 1, in defendant's right front pocket. The coins, Exhibit No. 2, were inside the purse. After he had searched defendant at the scene of the arrest, he took him to the police station. There he signed warrants charging defendant with felonious breaking and entering and larceny. After the warrants were read to defendant and he was "informed of his rights," Kirkpatrick talked to him "about this thing." Defendant denied any knowledge of the housebreaking. He said he had found the coins and purse on the ball field—the area Kirkpatrick had searched before dark. All of the property stolen from the Gilleland home was not recovered; some of it is still missing.

Defendant, as a witness for himself, testified: He did not break into the Gilleland house on 13 March 1970. On that day he and his sister were at the home of his brother, Walter, from noon until 6:30 p.m., when he and Walter went to the Pegram Street Poolroom. There he "shot a couple of games" and left alone to go home by way of the Purple Penguin, five or six blocks from the poolroom. His route took him through the Hawthorne School yard, across Hawthorne Lane, and into the wooded area back of the Gilleland residence. A path through the woods provided a short cut to the Purple Penguin. "It's not what you would say heavily wooded right at the path, but as you enter, it gets, you know, thick." In defendant's opinion, after he entered the woods, the officer could not have seen

him from where he said he was sitting. When defendant went into the woods he found a black glove. In it was a little beaded pouch containing coins and a ring. He wasn't surprised to find the glove full of money in the woods—"maybe astonished." Before finding the glove he "didn't have nary a nickel." After acquiring this "little change," he decided to return to the pool-room and "maybe win." He was alone when he entered the woods and alone when he found the money. The only person he ever saw out there was Officer Kirkpatrick.

Defendant had previously been convicted of storebreaking and larceny, assault with a deadly weapon, carrying a concealed weapon, and assault upon an officer. He had been out of prison since 18 February 1970.

The testimony of defendant's sister and brother, Walter, corroborated that of defendant as to his whereabouts on 13 March 1970 from 12:30 p.m. until 6:30 p.m.

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

Attorney General Morgan, Assistant Attorney General Banks, and Staff Attorney Price for the State.

James J. Caldwell for defendant appellant.

SHARP, Justice.

Defendant appeals upon the assumption that his warrantless arrest was without probable cause; that the accompanying search of his person was therefore illegal and the fruits of the search inadmissible in evidence against him. He concedes, *ex necessitate,* that if State's Exhibits 1 and 2 were admissible the case was properly submitted to the jury. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741.

"A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest . . . . In the course of such search, the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof. If such article is otherwise competent, it may properly be introduced in evidence by the State." *State v. Roberts,* 276 N.C. 98, 102, 171 S.E. 2d, 440,

443. *Accord, State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269. "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime." *Preston v. United States,* 376 U. S. 364, 367, 11 L. ed. 2d 777, 780, 84 S.Ct. 881, 883. *Accord, Chimel v. California,* 395 U.S. 752, 762-763, 23 L. ed. 2d 685, 694, 89 S.Ct. 2034, 2040.

Thus, the determinative question here is whether defendant was under lawful arrest at the time Officer Kirkpatrick searched him and found stolen property which had been recently removed from the Gilleland home. An arrest without warrant, except as authorized by statute, is illegal. *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753. G.S. 15-41(2) authorizes a peace officer without warrant to arrest a person "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."

Probable cause and "reasonable ground to believe" are substantially equivalent terms. "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant." 5 Am. Jur. 2d *Arrests* § 44 (1962)."The existence of 'probable cause,' justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved." 5 Am. Jur. 2d, *supra,* § 48. *Accord, Brinegar v. United States,* 338 U.S. 160, 175, 93 L. ed. 1879, 1890, 69 S.Ct. 1302, 1310; *State v. Roberts, supra; Carson v. Doggett and Ward v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609.

The facts, which Judge Beal found on *voir dire,* were amply supported by competent evidence in the record, and are binding

on us. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. They disclose that the following factual and practical considerations actuated Officer Kirkpatrick to arrest defendant: (1) Between 3:00 and 3:45 p.m. one or more persons feloniously broke and entered the Gilleland home and feloniously took and carried away therefrom two televisions, one radio, coins, jewelry, and other property of value. (2) Back of the Gilleland home, outside the fence, which appeared to have been "mashed down," Kirkpatrick found footprints which led into a wooded area. (3) He followed the tracks into the woods, searched the area, and found the two stolen TV's and the radio beneath a tree and some bushes. (4) About four hours later, shortly after dark, he saw defendant enter the area by a path which he followed a short distance and then went off the path to the point where Kirkpatrick had found the televisions and radio. (5) After looking around defendant retraced his steps, leaving the area the way he had come.

In our opinion these facts would warrant legal technicians, as well as reasonable and prudent laymen, in believing defendant to be guilty of the crimes of felonious breaking and entering and felonious larceny. We hold that Officer Kirkpatrick had reasonable ground upon which to believe that defendant had committed the two felonies for which he was subsequently indicted; that he would evade arrest if not immediately taken into custody; and that the search of his person (which produced positive evidence of his guilt) was legal. Defendant's contensions that the trial court erred in its findings of fact on *voir dire* and that the facts found do not support the court's conclusions are without merit. Defendant's other contentions, fully discussed in the opinion of the Court of Appeals, are likewise untenable.

In the decision of the Court of Appeals we find

No error.

C. M. COGDILL v. NORTH CAROLINA STATE HIGHWAY COMMISSION

— AND —

GEORGE G. WESTFELDT, JR. v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 100

(Filed 30 July 1971)

1. **Eminent Domain § 13— inverse condemnation — trial without jury — consideration of damages**

The trial judge in a nonjury inverse condemnation proceeding against the Highway Commission could consider evidence of damages for the limited purpose of finding that the plaintiffs had made a *prima facie* showing of substantial and measurable damages, although his finding as to damages would not be competent at the jury trial on the issue of damages. G.S. 136-108.

2. **Appeal and Error § 24— competency of evidence — necessity for objection**

Where there is no objection to the admission of evidence, the competency of the evidence is not presented.

3. **Evidence § 25— inverse condemnation proceeding — inconsistency in the evidence — duty of the trial judge**

In an inverse condemnation proceeding heard by the trial judge without a jury, any inconsistency in the testimony of plaintiffs' witnesses, the witness of the Highway Commission, and the maps introduced in evidence was a matter to be resolved by the trial court in its findings of fact.

4. **Appeal and Error § 48— nonjury trial — admission of incompetent evidence — presumption**

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.

5. **Appeal and Error § 57— findings of fact — review**

The trial court's findings of fact will not be reversed unless based only on incompetent evidence.

6. **Appeal and Error § 57— findings of fact — review on appeal**

If the findings of fact are supported by competent evidence, they are binding on the Supreme Court even though there is evidence to the contrary.

7. **Evidence § 40— opinion testimony — lay witnesses — capacity of drainage culverts to carry off flood waters**

Lay witnesses who were familiar with bottomland traversed by several creeks and who had observed the flooding of the bottomland were competent to give an opinion as to whether the drainage culverts installed on a highway project adjacent to the bottomland would be sufficient to carry off the flood waters of the creeks.

8. Evidence § 48— competency of expert witness

An expert witness is one better qualified than the jury to draw appropriate inferences from the facts.

9. Evidence § 54— expert witness — capacity of highway drainage culverts to carry off flood waters

An expert witness in the field of hydraulic engineering and design is competent to give an opinion as to the capacity of a highway drainage culvert to carry off the flood waters of creeks traversing the locality, and to give an opinion on the cause of the flooding of a rock quarry that was adjacent to the drainage culvert.

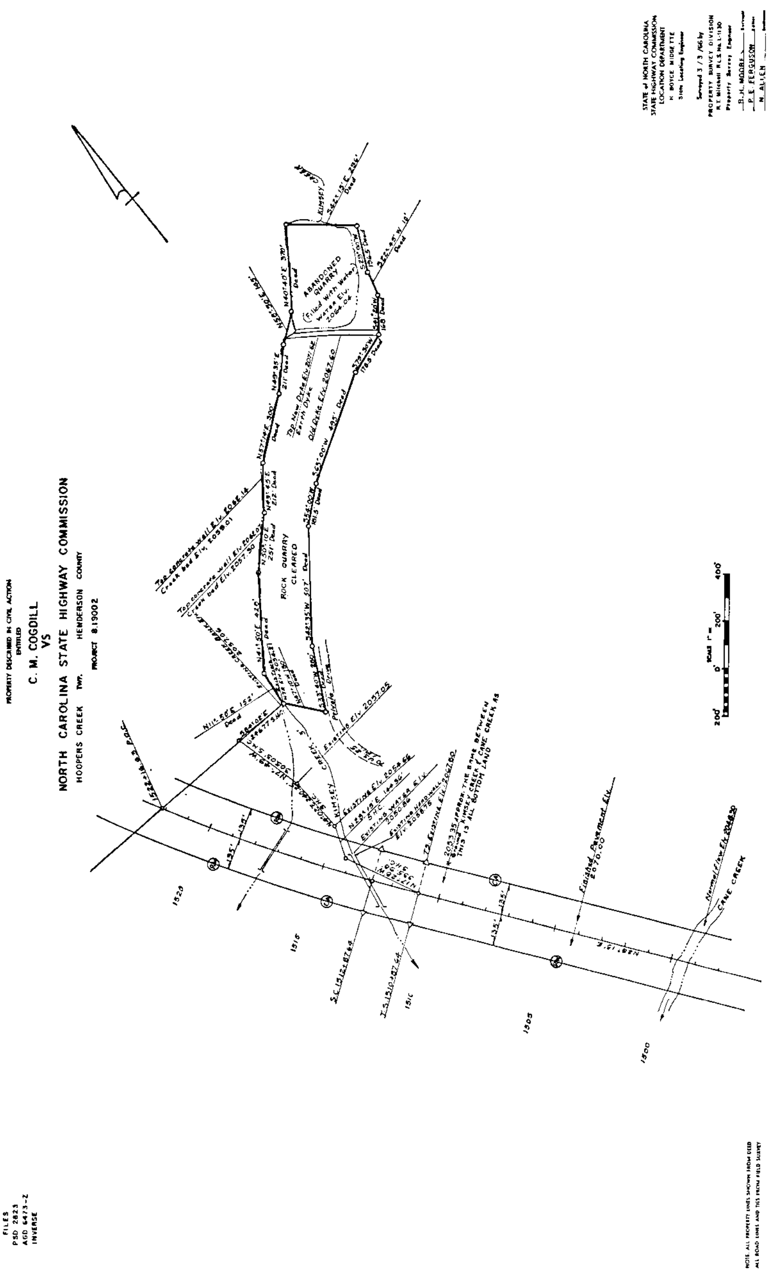
10. Evidence § 49— examination of expert witness — hearsay evidence

Generally, an expert witness cannot base his opinion on hearsay evidence.

APPEAL by defendant from *Thornburg, S.J.*, 17 August 1970 Special Session HENDERSON Superior Court, transferred to this Court for initial appellate review by virtue of the general transferral order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

These are two separate inverse condemnation actions—the Cogdill claim for relief concerns a lessee's interest and the Westfeldt claim for relief concerns a fee interest in the same property—consolidated for the purpose of hearing a joint motion of plaintiffs and defendant for a determination of all issues raised by the pleadings, other than the issue of damages, pursuant to G.S. 136-108. The Cogdill action was commenced 7 December 1965. The Westfeldt action was commenced 16 August 1967.

A 5.2 acre tract in which Westfeldt has a fee interest was leased to Cogdill for a limestone quarry operation and is a part of a 13 acre Westfeldt tract. Prior to 4 October 1964 defendant State Highway Commission constructed a segment of Interstate Highway 26 (I-26) in Henderson County across a portion of the property owned by Atled Corporation which adjoins the Westfeldt property. This section of I-26 traversed a floodplain made up of Cane Creek, Kimsey Creek, and the French Broad River. Kimsey Creek flowed from the northeast to the southwest into and out of an abandoned quarry pond, thence along the northwestern boundary of the Westfeldt property and passed through a fill for I-26 by means of a "triple 7' x 7' box culvert." Other drainage facilities for I-26 on the Atled Corporation property included the bridge opening for


PROPERTY DESCRIBED IN CIVIL ACTION ENTITLED
C. M. COGDILL
VS
NORTH CAROLINA STATE HIGHWAY COMMISSION
HOOPERS CREEK TWP. HENDERSON COUNTY
PROJECT 8.19002
ABANDONED QUARRY (Filled With Water) Water Elv. 2064.06
ROCK QUARRY CLEARED
KIMSEY CREEK
CANE CREEK
FILES
PSD 2823
AGD 6473-Z
INVERSE

Cane Creek, 24" and 36" reinforced concrete pipes, and side ditches joining the main and secondary drainage facilities.

Maps were introduced with the stipulation that the elevations shown on the maps are correct. One of these maps, Plaintiffs' Exhibit 8, is attached. This map shows that the floodplains of Cane Creek and Kimsey Creek were approximately 2,050 feet above sea level. (All elevations given herein are with reference to sea level.) The fill for I-26 constructed through the floodplain area had an elevation of 2,070 feet. The concrete headwall (top) of the triple box culvert through the fill was 2,058.75 feet. The water elevation of Kimsey Creek at its entrance to the box culvert was 2,050.86 feet. Northeast of the highway fill was an old abandoned quarry filled with water, the water elevation being 2,064.04 feet. The Westfeldt 13 acre tract was between the abandoned quarry and I-26; 7.8 acres of this tract joined the abandoned quarry and lay between the abandoned quarry and the new quarry leased and operated by Cogdill on the 5.2 acre tract. The 7.8 acre tract apparently was not being used for any purpose at the time in question. A dike with an elevation of 2,067.6 feet kept the water in the old quarry from running into the new quarry. Kimsey Creek ran out of the abandoned quarry and formed the northwestern boundary of the Westfeldt property. A concrete spillway built by plaintiffs along the boundary line prevented the water of Kimsey Creek from flowing into the new quarry. This spillway had an elevation of approximately 2,062 feet. At a point near the upper end of the new quarry, Kimsey Creek had an elevation of 2,059.1 feet.

Plaintiffs in summary contend and offered evidence tending to show that on 4 and 5 October 1964 a heavy rain—not unusual for the area—fell, causing Cane Creek to flood and back water northwest toward Kimsey Creek; that the water became so voluminous that the drainage ditches were unable to carry it, and the waters of Cane Creek and Kimsey Creek intermingled near the triple box culvert; that the combination of the waters from the two streams was too much for the culvert and the water dammed up above the culvert to a height of approximately 2,067 feet—the I-26 fill acting as a dam. As a result, the water backed up Kimsey Creek and into the old quarry, a distance of approximately 2,350 feet. The pressure from the additional water broke the dike containing the water in the

old quarry, and this water then poured into the new quarry leased and operated by Cogdill, damaging the quarry, and reducing the value of the lease and the market value of the fee interest.

The only witness offered by defendant was C. R. Edgerton, the State hydrographic engineer, who was qualified as an expert witness in the field of hydraulic engineering and design. He testified that the project was designed by a consulting engineering firm in New York, and that the plans for the drainage of this particular section were reviewed and approved by him, the engineering staff of the Highway Commission, and the engineers for the Bureau of Public Roads. He further testified that before the contract was let he went over the project foot by foot on the grounds, and that after the flooding complained of in these actions he personally went upon the grounds, directed the gathering of information, and made studies of the flooding to determine what effects, if any, the design of I-26 had on the adjacent properties. Much of Edgerton's testimony, on objection by the plaintiffs, was excluded by the court, but he was allowed to answer for the purpose of the record. His admitted testimony, and that which was included for the record, tends to show that the breakage of the dike holding the water in the old quarry and thereby flooding the new quarry was caused by the inability of the concrete spillway along the Westfeldt property to carry the water of Kimsey Creek from the old quarry to the highway fill. His testimony further tends to show that this spillway along the new quarry is at an elevation of 2,062 feet; that the dike at the old quarry is at an elevation of 2,067.6 feet, and any back water would necessarily flow into the new quarry before backing into the old quarry; and that the dike holding the water of the old quarry broke because of the volume of water in Kimsey Creek and not because of any impoundment caused by the fill for I-26.

Judge Thornburg found facts substantially as contended by the plaintiffs and concluded as a matter of law that the fill in question constituted a permanent nuisance, resulting in substantial reduction in value of Cogdill's lease and Westfeldt's ownership; that this constitutes a "taking" in the constitutional sense, and that the damages to plaintiffs were proximately caused by the erection and maintenance of the fill with insufficient drainage space and culverting. Judge Thornburg then

ordered each action calendared for trial upon the issue of damages. From this order, defendant appealed.

Attorney General Robert Morgan, Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Andrew McDaniel, for defendant appellant.

Bennett, Kelly & Long and Van Winkle, Buck, Wall, Starnes & Hyde for plaintiff appellees.

MOORE, Justice.

The parties stipulated that the hearing before Judge Thornburg was for a determination of all issues except damages, under G.S. 136-108.

G.S. 136-108 provides:

> "Determination of issues other than damages.—After the filing of the plat, the judge, upon motion and ten (10) days' notice by either the Highway Commission or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken."

[1] Defendant contends that the trial court erred in hearing evidence of damages to the quarry and in making findings that the value of Cogdill's lease and the fair market value of the fee simple reversionary interest had been substantially reduced by reason of the flooding and the probability of future flooding.

[1, 2] Much of the testimony concerning damages to plaintiffs' property was introduced without objection. Where there is no objection to the admission of evidence, the competency of the evidence is not presented. *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341; *Abbitt v. Bartlett,* 252 N.C. 40, 112 S.E. 2d 751; Stansbury, N. C. Evidence § 27 (2d ed., 1963) [hereinafter cited as Stansbury]. This Court ordinarily will not consider questions not properly presented by objections duly made. *State v. Brooks,* 275 N.C. 175, 166 S.E. 2d 70; Stansbury, *supra;* 1 Strong, N. C. Index 2d, Appeal and Error §§ 1 and 24. Some evidence as to damages, however, was allowed over defendant's objection. The trial court found that the "taking" in this case

resulted from a permanent and continuing nuisance created by the fill for I-26, and allowed the evidence as to damages and made findings of fact based upon such evidence only "for the purpose of this hearing." The trial court's findings as to damages would not be competent at the trial on the issue of damages. The evidence as to damages was competent and necessary for the limited purpose of making a *prima facie* showing that the plaintiffs had suffered substantial and measurable damages. In *Midgett v. Highway Commission,* 265 N.C. 373, 144 S.E. 2d 121, a case in which the plaintiff claimed damages to his property by flooding caused by a highway fill, the Court said:

> " . . . In an action for damages based on an alleged nuisance, the injury suffered by plaintiff must be *substantial.* [Citations omitted.] . . . One who seeks damages for the taking of property by the sovereign by reason of the alleged creation and maintenance by it of a permanent and continuing nuisance must make a *prima facie* showing of substantial and measurable damages."

This assignment of error is overruled.

[3-6] Defendant next contends that the findings of fact made by the trial court were in conflict with the stipulated and competent evidence and were based on incompetent testimony of the plaintiffs and plaintiffs' witnesses, in that the testimony of plaintiff Cogdill as to various elevations was in conflict with those shown on the map which were stipulated to be correct, defendant contending that it would appear conclusive that the flood water would have to reach an elevation of 2,067.6 feet to break over the dike at the old quarry, and that before it would do so, it would flood plaintiffs' quarry since the spillway along this quarry is 5 feet below the dike. However, the plaintiffs' witnesses, Cogdill and Lance, testified that the water did back up into the old quarry pond, broke through the dike, and then entered plaintiffs' quarry. Any inconsistency in the testimony between plaintiffs' witnesses, defendant's witness, and the maps was a matter to be resolved by the trial court in its findings of fact. *Reynolds Co. v. Highway Commission,* 271 N.C. 40, 155 S.E. 2d 473. "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." *City of Statesville v. Bowles,* 278 N.C. 497, 180 S.E.

2d 111. And the court's findings of fact will not be reversed unless based only on incompetent evidence. *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668; Stansbury § 4A; 7 Strong, N.C. Index 2d, Trial § 58. If the findings are supported by competent evidence, they are binding on this Court even though there is evidence to the contrary. *Huski-Bilt, Inc. v. Trust Co.,* 271 N.C. 662, 157 S.E. 2d 352; *Chappell v. Winslow,* 258 N.C. 617, 129 S.E. 2d 101.

[7] Defendant further contends that the court erred in admitting the testimony of Claude Lance, a witness for the plaintiff. Lance testified that he had worked on the Westfeldt property for fifteen years. He further testified:

"I am familiar with the Atled bottomlands that lie upstream from the fill before the highway was constructed. We had sufficient drainage ditches. I mean there were several ditches. I'd say there is at least four or more. These drain ditches carried off water during time of rainfall. When the fill was built by the Highway Commission they put culverts in. There were a few places that they did not. I mean the little small places, but in the main places they did. They didn't culvert all of them.

"Some of the drain ditches were eight or ten foot open ditches. I observed the culverting work taking place on the Atled property before the fill was put in.

"Q. Did you form an opinion satisfactory to yourself at that time as to whether or not the space at the Cane Creek Bridge and the three 7 x 7 box culverts and the 36 inch corrugated pipe would be sufficient to carry off the flood waters of the Kimsey Creek and those drain ditches and Cane Creek in time of high water?

"OBJECTION. OVERRULED. EXCEPTION NO. 5.

"A. I definitely did and I . . .

"MR. MCDANIEL: Wait just a minute.

"Q. You did?

"OBJECTION. OVERRULED. EXCEPTION NO. 6.

"Q. What was your opinion?

"OBJECTION. OVERRULED. EXCEPTION NO. 7.

"A. I said it would not carry it. They were not adequate."

Similar testimony by plaintiff Cogdill was introduced over defendant's objection. Defendant contends that Lance and Cogdill were not experts and that under the conditions existing it would require an expert engineer to give an opinion as to the sufficiency of the drainage provided. Lance testified that he was familiar with the floods which had occurred on this property over the years; that it had flooded before this particular occasion; that before the highway was constructed they had several ditches and these ditches carried off the water during the time of rainfall; and that he observed the culvert work taking place before the fill was put in. Cogdill testified he had been familiar with this property 52 years and had operated a quarry there 21 years.

[8] We hold the opinion testimony of Cogdill and Lance is competent because of their knowledge of the terrain and of the drainage problems involved. An expert witness is one better qualified than the jury to draw appropriate inferences from the facts. Stansbury § 132 states:

> "The question, then, in every case involving expert testimony, ought to be, Is *this witness* better qualified than *this* jury to form an opinion from *these facts?* If the answer is Yes, his opinion is admissible whether he is called a 'true expert' or is mildly disparaged by being classified as a 'witness specially qualified as to facts,' or an 'expert on the facts,' or 'not strictly an expert.' "

This is stated in *State v. Brodie,* 190 N.C. 554, 130 S.E. 205:

> "It is familiar principle that one who is called to testify is usually restricted to facts within his knowledge; but if by reason of opportunities for observation he is in a position to judge of the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion."

Or, as said in *Chappell v. Winslow, supra,* a case involving the sufficiency of a drainage system (headnote 6):

> "Persons who live and work in a locality of flat land with constant problems of drainage of surface waters may testify that the drainage of an additional specified acreage into a ditch would cause the ditch to overflow periodically, and may testify as to the size of ditches and culverts which would be necessary to carry such additional drainage, the testimony being testimony of common observers as to the results of their observation."

Accord, Stansbury § 125. This assignment is overruled.

[9] A more serious question is presented by the exclusion of the opinion evidence offered by the defendant from the witness, C. R. Edgerton. Edgerton was an admitted expert in the field of hydraulic engineering and design, who approved the plans for the drainage in this area and who went over the area on the grounds prior to construction and also after the flooding on the dates in question. A statement by Judge Sanborn in *Builders Steel Co. v. Commissioner of Internal Revenue,* 179 F. 2d 377 (8th Cir., 1950), is pertinent:

> "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. . . . [But he] can easily get his decision reversed by excluding evidence which is objected to, but which, on review, the appellate court believes should have been admitted."

The witness Edgerton was asked: "Based upon your analysis and the investigation and your qualifications as an expert witness and an expert engineer, hydrographic engineer, do you have an opinion satisfactory to yourself as to the effects of the interstate highway and culverts built for the same in the vicinity of the Westfeldt and Cogdill property with respect to the flood waters of October fourth, or fifth, 1964?" The witness answered, "Yes," but was not allowed to give his opinion. For the record, he stated: "From a study of the information obtained, it is my opinion that while some minor back water was created by the construction of the I-26 fill across the floodplains of Cane and Kimsey Creeks, it was not physically possible for it to have caused the break of the dike at the upper end of the quarry."

Mr. Edgerton also testified for the record after objection was sustained:

"From the analysis and investigation that I made and was made under my supervision, I have an opinion satisfactory to myself that water during October the fourth or fifth, 1964 did not back up from a point where the culvert carries Kimsey Creek under the interstate to a point where the dike is located.

"If you draw a line from the top of the triple barrel culvert as indicated on the plat on a straight plane back toward the Cogdill property and water was level with that line, a level line from the top or crown of the triple 7 x 7 box culvert would go upstream and intersect the bed of the creek approximately 1300 feet from the box culvert or in the area of the elevation 2,057.30 shown on the plaintiffs' map.

"Q. Now, Mr. Edgerton, do you have an opinion as to whether under such circumstances as you have just described as to how far it would go back, whether any water would have gone into that area indicated as boundaries of the Cogdill quarry?

"MR. HYDE: Objection.

"MR. BENNETT: Objection. There's no evidence that it did.

"THE COURT: Sustained.

"EXCEPTION NO. 16.

"A. No, it would not."

Another question was then asked Edgerton:

"Q. Now, Mr. Edgerton, based upon your personal investigation and investigation of your staff, made by your staff under your supervision, have you formed an opinion satisfactory to yourself as to the cause from a hydraulic standpoint of water entering the Cogdill limestone quarry property in October, 1964?

"MR. HYDE AND MR. BENNETT: Objection.

"THE COURT: Sustained. Answer for the record.

"EXCEPTION NO. 19.

"A. Yes, sir, I have.

"Q. What is that opinion?

"MR. HYDE AND MR. BENNETT: Objection.

"THE COURT: Sustained. Answer for the record.

"EXCEPTION NO. 20.

"A. In my opinion the channel along the northwest side of the quarry property was not of sufficient capacity to carry the flood flows occurring in Kimsey Creek and coming through the old quarry and that the dike between the old quarry and the limestone quarry became overtopped and failed due to overtopping.

"Q. Do you have an opinion from this same investigation mentioned previously as to whether the highway fill of interstate 26 had any effect on this?

"MR. BENNETT: Objection.

"MR. HYDE: Objection.

"THE COURT: Sustained. Answer for the record.

"EXCEPTION NO. 21.

"A. In my opinion the fill had no effect on the high water elevation in the abandoned quarry whatsoever."

Edgerton was then asked the following hypothetical question:

"Q. Mr. Edgerton, if the presiding judge should find, by the greater weight of the evidence in this case, that an excessive rainfall referred to as a flood occurred on or about October 4, 1964, on Kimsey Creek, in Henderson County; that located on Kimsey Creek in a northerly direction from U. S. Highway I-26 is a tract of land referred to as the Westfeldt Property, containing 5.2 acres, in which is located in the southern area of said tract a rock quarry which was in operation by the plaintiff on October 4, 1964, and prior thereto; that said quarry was bordered on the west by Kimsey Creek; that on the north the quarry is bordered by an area shown on the map referred to as 'Plaintiffs' Exhibit 8' as an 'abandoned quarry'; that the 'abandoned quarry' on October 4, 1964 contained a dike for

the purpose of holding water out of the rock quarry operated by the plaintiff; that the 'abandoned quarry' also contained a spillway which permitted the overflow of water from the 'abandoned quarry' to enter Kimsey Creek; that in the construction of I-26, there had been constructed a triple barrel culvert 7 foot by 7 foot, through which Kimsey Creek extended; that at the point of entrance of Kimsey Creek to said culvert the existing headwall elevation was 2,058.75; that the top of the old dike elevation existing on October 4, 1964, was 2,067.60; that on October 4th or October 5th, 1964, the water in Kimsey Creek had spread itself over an area south and west of the rock quarry lands of 5.2 acres because of the excessive rainfall; that on the morning of October 4th or 5th, 1964, the water had risen to a point approximately 12 inches below the top of the culvert and when seen at that time, the dike at the south end of the 'abandoned quarry' had already broken, having found a weak point in the dike, and the water flowing from Kimsey Creek into the 'abandoned quarry' was entering the rock quarry through the dike which had given way—if the Court should find these facts to be true, by the greater weight of the evidence, have you an opinion satisfactory to yourself as to whether or not back water created by the I-26 fill and the structures thereunder caused the breaching of the dike located at the south end of the abandoned quarry—have you an opinion based on those facts?

"A. Yes.

"Q. What is your opinion?

"MR. HYDE: Objection.

"MR. BENNETT: Objection.

"THE COURT: Sustained.

"EXCEPTION NO. 25."

The witness was allowed to answer for the record:

"A. In my opinion in order—in my opinion the back water from I-26 could not have caused the breach in the dike below the abandoned quarry. To do so would have required the water at the I-26 fill to reach an elevation at

least 8.85 feet above the top of the headwall. Since it did not reach near this elevation, it would be physically impossible for this to have been the cause.

"Q. I see. Now, if the Court should find the facts to be true, by the greater weight of the evidence, which has just been recited to you in the previous question, have you an idea—opinion, rather, have you an opinion satisfactory to yourself as to what did cause the dike to break?

"A. Yes, I have.

"Q. All right, now what is your opinion?

"MR. BENNETT: Objection.

"MR. HYDE: Objection.

"THE COURT: Sustained.

"EXCEPTION NO. 26."

The witness was allowed to answer for the record:

"A. In my opinion, the flood waters reaching the abandoned quarry were in a greater quantity than Kimsey Creek below the quarry could adequately discharge, therefore, creating an impoundment in the abandoned quarry which overtopped the dike causing it to fail."

Some of Edgerton's testimony was properly excluded because it was based upon hearsay as to the height of the flood marks on the highway fill. An engineer for defendant measured these flood marks but for some reason was not called as a witness. However, the questions set out above were based upon facts known to Edgerton, or, as in the hypothetical questions, based upon facts known to Edgerton and testimony of the plaintiffs' witness Allison. From Allison's testimony the judge could have found that the dike at the old quarry broke allowing the water to pour into the new quarry before the box culverts at the fill were full—in fact, while these culverts lacked some 12 inches being full.

[10] Where an expert witness testifies as to facts based upon his personal knowledge, he may testify directly as to his opinion. *Rubber Co. v. Tire Co.*, 270 N.C. 50, 153 S.E. 2d 737; *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9; Stansbury

§ 136; 31 Am. Jur. 2d, Expert and Opinion Evidence § 37 (1967); 3 Strong, N. C. Index 2d, Evidence § 49. Generally, however, an expert witness cannot base his opinion on hearsay evidence. *Todd v. Watts,* 269 N.C. 417, 152 S.E. 2d 448; Stansbury §§ 136 and 143; 2 Jones on Evidence § 421 (5th ed., 1958); 32 C.J.S. Evidence § 546(63) (1964). And when the facts are not within the knowledge of the witness himself, the opinion of an expert must be upon facts supported by evidence, stated in a proper hypothetical question. *Todd v. Watts, supra.* If the expert witness has personal knowledge of some of the facts, but not all, a combination of these two methods may be employed. *State v. David,* 222 N.C. 242, 22 S.E. 2d 633; Stansbury §§ 136 and 137. The questions set out above contained facts within the personal knowledge of the witness Edgerton or facts which had been testified to by other witnesses. The trial court erred in sustaining objections to these questions.

[9] Plaintiffs' witnesses, Cogdill and Lance, not engineers, were permitted by the court to give their opinion as to the sufficiency of the drainage provided for the fill in question and as to the cause of the flooding and the resulting damage to the Cogdill quarry. Edgerton, an admitted expert in the field of hydraulic engineering and design and head of the hydrographic department of the Highway Commission, who was familiar with the design of this highway project, who had been over the grounds foot by foot prior to construction, who described the drainage pattern in detail, and who after the flood went upon the grounds personally and made studies as to the effect of the fill on the flooding of plaintiffs' quarry, was prevented from expressing his opinion as to the sufficiency of the drainage or as to the cause of the flooding. By so doing the court did not permit "the witnesses for both parties to testify upon equal terms." *Rubber Co. v. Tire Co., supra.* This was error.

For the reasons stated, the cases are remanded to the Superior Court of Henderson County for a new G.S. 136-108 hearing.

Error and remanded.

DR. T. C. SMITH COMPANY, INC., A NORTH CAROLINA CORPORATION v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 107

(Filed 30 July 1971)

1. **Eminent Domain § 2— land abutting highway — landowner's right of access**

The owner of land abutting a highway has a special right of easement in the highway for access purposes which cannot be damaged or taken from him without compensation.

2. **Eminent Domain § 2— access to highway — circuity of travel**

If afforded reasonable access to the highway on which his property abuts, the owner is not entitled to compensation merely because of circuity of travel to reach a particular destination.

3. **Eminent Domain § 2— denial of abutter's rights of access — compensation for injury to entire tract**

In this inverse condemnation proceeding, plaintiff is entitled to recover compensation for injury to its entire 13-acre tract of land by reason of the denial of its abutter's rights of access to an existing highway when the highway was made a part of a controlled-access facility, not just for injury to the vacant portion of the tract directly abutting the highway which is on a level 25-30 feet lower than the remaining portion of the tract in use for a warehouse-office building and parking area.

APPEAL by defendant from *Ervin, J.*, October 19, 1970 Session of BUNCOMBE Superior Court, transferred for initial appellate review by the Supreme Court under General Order of July 31, 1970, entered pursuit to G.S. 7A-31(b)(4).

Inverse condemnation action under G.S. 136-111.

Plaintiff bases its claim for compensation on G.S. 136-89.53 (a codification of Section 6, Chapter 993, Session Laws of 1957) which, in pertinent part, provides: "The Commission may designate and establish controlled-access highways as new and additional facilities or may designate and establish an existing street or highway as included within a controlled-access facility. *When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking of or injury to their easements of access.*" (Our italics.)

On July 1, 1968, plaintiff owned in fee simple the tract of land described in Paragraph 3 of the complaint, subject to (1)

a deed of trust, and (2) a pre-existing easement for the right-of-way of Hanover Street. The location of plaintiff's property, the location of improvements thereon, the location of the pre-existing easement, the location of the controlled-access facility, and the location of the several streets referred to below, are shown on maps identified as plaintiff's Exhibit A and as defendant's Exhibit I. The portion of defendant's Exhibit I necessary to an understanding of the questions presented is reproduced on the map filed herewith.

Prior to July 1, 1968, Hanover Street, then a two-lane highway, was part of the State Highway System. It was designated N. C. Highway 191 and maintained by defendant. Plaintiff's property abutted 711 feet thereon. As an abutting property owner, plaintiff had full rights of access to and from Hanover Street.

Plaintiff acquired the property in 1962 under a deed in which it was described and conveyed as a single tract. Plaintiff constructed thereon a brick warehouse and office building, which face Hanover Street (Highway 191), and a parking area which is visible from Hanover Street. Prior to July 1, 1968, the land between the warehouse-office-parking area and Hanover Street was vacant and had not been put to any particular use. However, it had been improved by the construction of drain tiles and by filling with dirt to make it approximately on grade with Hanover Street.

On July 1, 1968, defendant, in the construction of State Highway Project 8.1904801, fully controlled the entirety of plaintiff's frontage on Hanover Street by the erection of a controlled-access chain link fence along the boundary between plaintiff's unencumbered land and the portion of plaintiff's land which was subject to the pre-existing easement for Hanover Street. The fence also blocked and dead-ended Wilmington Street at its intersection with Highway 191. Plaintiff's abutter's rights of access to Highway 191 were totally denied by the construction of the fence along the controlled-access line.

As part of the project, defendant constructed two public streets, called Seven Oaks Drive and Southwick Lane, which connect Westwood Place with Wilmington Street. Seven Oaks Drive and Southwick Lane, the newly constructed streets, and Westwood Place and Wilmington Street, are public streets of

Asheville and are maintained by Asheville. No business establishment, other than plaintiff's wholesale drug business, is located on any of these streets. Numerous residences are located thereon.

No service or frontage road was constructed by defendant across any portion of plaintiff's property. Present access to plaintiff's property requires travel in excess of five-tenths of a mile from the interchange at the intersection of Highway 191 and Haywood Road, along Asheville streets including Haywood Road, Westwood Place, Seven Oaks Drive, Southwick Lane and Wilmington Street. The distance from blocked and dead-ended Wilmington Street at its intersection with Highway 191 by way of Highway 191, ramps to Haywood Road and the route from there by way of city streets to plaintiff's property is more than a mile.

Prior to July 1, 1968, "(b)esides Hanover Street, the subject property was served almost entirely by Wilmington Street . . . . " When plaintiff's abutter's rights of access to Highway 191 were denied and Wilmington Street at its intersection with Highway 191 was blocked and dead-ended, plaintiff was forced to use what was then "a little dirt road" going back into Westwood Place as its only means of access.

"(T)here is a bank right at the edge of the paved parking area going down to the lower level . . . . " The lower level is vacant land and "is generally level with Hanover Street." The land on which the warehouse-office-parking area is situated is 25 or 30 feet higher than the vacant land. This plateau comprises approximately seven or eight acres of plaintiff's 13-acre tract, the remaining vacant land being on the level of Hanover Street and abutting thereon.

Wilmington Street extends along plaintiff's north property line. The record is silent as to the grade of Wilmington Street as it extends from the warehouse-office-parking area to where it now dead-ends at controlled-access Highway 191. Too, the record is silent as to the difference in elevation between Wilmington Street and plaintiff's property abutting thereon at different locations along plaintiff's property line.

There was no stipulation, finding or testimony as to the distance from the portion of plaintiff's property (unencumbered by pre-existing easement) which abutted former Highway 191

back to the "bank" referred to above. Defendant's Exhibit I indicates it was drawn according to a scale of one inch for each one hundred feet. Applying this scale, the distance appears to be in excess of 350 feet.

Since July 1, 1968, Highway 191 has been a controlled-access facility serving as a connector between Interstate Highways 26 and 40 and U. S. Highways 19 and 23.

The facts narrated above are based on the stipulations, findings of fact to which no exception was noted, or uncontradicted evidence.

In accord with motions therefor by plaintiff and by defendant, the court conducted a hearing pursuant to G.S. 136-108 for determination of all issues raised by the pleadings other than the issue of damages.

In its answer, defendant denied plaintiff's allegations except as "admitted in its Further Answer." In its further answer, defendant alleged facts not inconsistent with those stated above. As a basis of its denial of plaintiff's right to compensation, defendant alleged: "(T)he property described in the Complaint has abutter's rights of access to both Wilmington Street and Southwick Lane and, as aforesaid, by public roads is afforded reasonable access to the public highway systems; that the dead-ending of Wilmington Street and the control of existing abutter's access rights to previously existing Hanover Street was done in the exercise of the police power of the State Highway Commission for the safety, health and welfare of the public and no compensation is due for said exercise of the police powers nor for any circuity of travel necessary to reach a particular destination to and from the property described in the Complaint."

After hearing the court considered the pleadings; the stipulations, which incorporated the maps; interrogatories of plaintiff and defendant's answers thereto; and the testimony of Frank Stacey Smith, an officer of plaintiff. The court declined to sign the judgment tendered by defendant but noted that "some of the proposed findings of fact" set forth therein "are substantially similar to those found in the judgment tendered by plaintiff and signed by the court."

The adjudicatory portion of the judgment provides:

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

"1. That the plaintiff's property right of abutter's access to and from North Carolina Highway 191, Hanover Street, and the plaintiff's abutting property was taken by the North Carolina State Highway Commission on July 1, 1968, by the designation and inclusion of North Carolina Highway 191, an existing street and highway to which the plaintiff had full abutter's rights of access within controlled-access facility built under Project No. 8.1904801 and that the plaintiff is entitled to just compensation for the taking of and injury to said easement of access. That the only issue for a jury to pass on in a trial of said action is the difference between the fair and reasonable market value of the plaintiff's tract of land and the improvements located thereon immediately prior to the taking of the plaintiff's easement of access as heretofore set out on July 1, 1968, and the fair and reasonable market value of plaintiff's tract of land and the improvements located thereon immediately after the taking of plaintiff's easement of access to North Carolina Highway 191, Hanover Street."

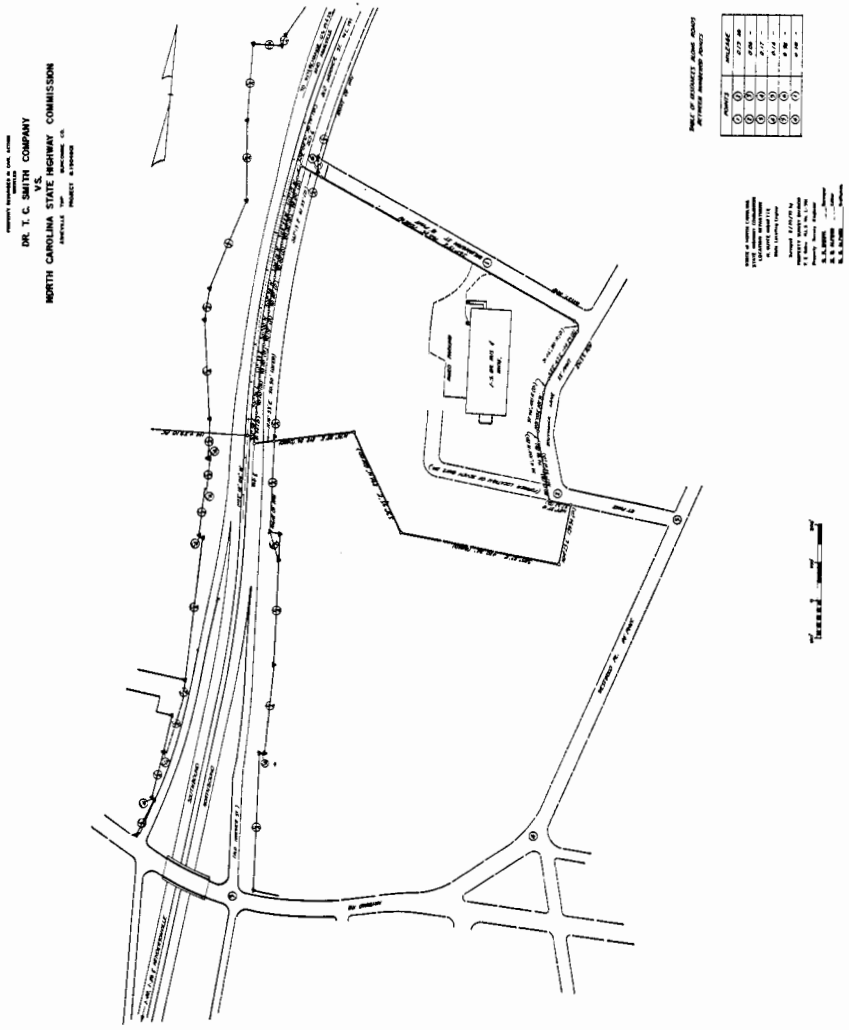
Defendant excepted and appealed.

Bennett, Kelly & Long, by Robert B. Long, Jr., for plaintiff appellee.

Attorney General Morgan, Deputy Attorney General White and Assistant Attorney General McDaniel for defendant appellant.

BOBBITT, Chief Justice.

[1] "(T)he owner of land abutting a highway has a right beyond that which is enjoyed by the general public, a special right of easement in the highway for access purposes. This right of access is an easement appurtenant which cannot be damaged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or taken from him without compensation. *Abdalla v. Highway Commission,* 261 N.C. 114, 134 S.E. 2d 81; *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129. This easement consists of the right of access to the particular highway upon which the land abuts." *Snow v. Highway Commission,* 262 N.C. 169, 173, 136 S.E. 2d 678, 682 (1964). Accord, *Highway Commission v. Farmers Market,* 263 N.C. 622, 624, 139 S.E. 2d 904, 906 (1965); *Wofford v. Highway Commission,* 263 N.C. 677, 681, 140 S.E. 2d 376, 380 (1965); *Highway Commission v. Nuckles,* 271 N.C. 1, 19, 155 S.E. 2d 772, 787 (1967).

[2] If afforded reasonable access to the highway *on which his property abuts,* the owner is not entitled to compensation merely because of circuity of travel to reach a particular destination. *Snow v. Highway Commission, supra; Highway Commission v. Farmers Market, supra; Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732 (1962); *Moses v. Highway Commission,* 261 N.C. 316, 134 S.E. 2d 664 (1964); *Wofford v. Highway Commisison, supra; Highway Commission v. Nuckles, supra.* However, defendant completely cut off and totally denied plaintiff's abutter's rights of direct access to Hanover Street by including it within controlled-access Highway 191.

Under G.S. 136-89.53, when an existing street is included within a "controlled-access facility," the owner of land abutting on such street "shall be entitled to compensation for the taking of or injury to their easements of access." In consequence of the denial of plaintiff's abutter's rights of access and the blocking and dead-ending of Wilmington Street at its intersection with Highway 191, the only available access to and from *any portion* of plaintiff's property and "controlled-access" Highway 191 is by circuitous travel over residential streets, namely, Wilmington Street, Southwick Lane, Seven Oaks Drive, and Westwood Place.

[3] In the judgment it tendered (which the court declined), defendant conceded, as it does now, that plaintiff is entitled to compensation for injury to the portion of its property between the "bank" and "controlled-access" Highway 191. It denied then, as it does now, that plaintiff is entitled to compensation for injury to the warehouse-office-parking area portion of its property. It contends this area should be treated as a separate tract to which plaintiff has reasonable access notwithstanding the blocking and dead-ending of Wilmington Street.

It may be conceded, *arguendo,* there would be merit in defendant's contention *if* the only property owned by plaintiff were the portion east of the "bank"—where the warehouse-office-parking area is situated—which does not abut Hanover Street. *In fact,* this portion is an undefined part of a 13-acre tract which abuts Hanover Street (now "controlled-access" Highway 191) along a frontage of 711 feet.

Although plaintiff used Wilmington Street for access to Hanover Street from its warehouse-office-parking area, the portion of its property which abutted Hanover Street was available as a means of access thereto in the event access thereto by Wilmington Street was denied. The availability of heavy earth-moving equipment, and present methods and practices for grading and constructing ramps, gave assurance that plaintiff could provide access from the warehouse-office-parking area portion of its property to and across the portion of its property which abutted Hanover Street. Difficulties encountered and expense required to provide such access are factors for consideration by the jury in determining what compensation plaintiff is entitled to recover for injury done to *its entire tract* by the denial of its abutter's rights of access to Hanover Street.

Defendant relies largely on *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219 (1959), and on *Highway Commission v. Farmers Market, supra.* These cases are factually distinguishable.

In *Barnes,* the area comprising Tract No. 2 (24.22 acres) was east of Knollwood Street and north of the Easement (a 40-foot private easement previously conveyed) and the area comprising Tract No. 3 (6.72 acres) was east of Knollwood Street and south of the Easement. The right-of-way of the "controlled-access" highway (Winston-Salem East-West Expressway, I-40) included a portion of Tract No. 2 but no part of Tract No. 3 or the Easement. In accordance with the Highway Commission's contention, the *decision* of this Court was that Tract No. 2 and Tract No. 3 were to be considered as a unit in the assessment of damages and *offsetting benefits.* As noted by defendant, the opinion states: "There is no single rule or principle established for determining the unity of lands for the purpose of awarding damages or offsetting benefits in eminent domain cases." The opinion includes a comprehensive re-

view of general principles pertinent to such determination. This excerpt from the opinion is pertinent: "The law will not permit a condemnor or a condemnee to 'pick and choose' segments of a tract of land, logically to be considered as a unit, so as to include parts favorable to his claim or exclude parts unfavorable." 250 N.C. at 386, 109 S.E. 2d at 226.

In *Highway Commission v. Farmers Market, supra,* the action was instituted by the Highway Commission to acquire property rights necessary for the construction of a portion of the Belt Line around Raleigh, a controlled-access highway. The north line of Farmers' 79-acre tract abutted Race Track Road which provided access to U. S. 1-A. The inclusion of Race Track Road within the controlled-access highway denied Farmers' access thereto and access to U. S. 1-A from the northern portion of its property.

The northern and southern portions of Farmers' property were separated by a spur track extending from the property of the Sunshine Biscuit Company to the right-of-way of the Seaboard Air Line Railroad. This Court held Farmers was entitled to compensation for the injury to the northern portion of its property but not to the southern portion thereof. A consideration of the factual situation dispels any impression that the decision supports defendant's contention in the present case. A general description of the 79-acre tract, referred to as having the appearance of a reversed "L," is stated below.

The 79-acre tract was bounded on the east by the right-of-way of the Seaboard Air Line Railroad; on the south by Crabtree Creek; on the west, for a distance of 1383.21 feet from its southwest corner to the property of Sunshine Biscuit Company, by *U. S. 1-A;* thence east, with the southern line of the Sunshine property, 816.36 feet; thence north, with the east lines of the properties of Sunshine and other owners, to the Race Track Road. No part of the 79-acre tract north of the southern line of the Sunshine property abutted U. S. 1-A. The only available access from the northern portion of Farmers' property to *U. S. 1-A* was by way of the southern portion of its property. Such access would require the construction of a road 3000 feet or more in length. Obviously, the southern portion of Farmers' property was not injured by the denial of access *to U. S. 1-A over former Race Track Road* for the simple reason that the

southern portion had direct abutter's access to U. S. 1-A along a frontage of 1383.21 feet.

Although each has been considered, we deem it unnecessary to discuss defendant's exceptions to portions of Judge Ervin's findings of fact. Suffice to say, the judgment is supported by the stipulated facts, findings of fact based on uncontradicted evidence and findings of fact to which no exception was noted.

For the reasons stated, the judgment entered by Judge Ervin is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. JAMES ROBERT GRANT

No. 101

(Filed 30 July 1971)

Criminal Law § 84; Searches and Seizures § 1— warrantless search of automobile — consent of owner — absence of passenger's consent — trial of passenger

No search warrant was required for the search of an automobile trunk where the owner of the automobile was present and consented to the search, and fruits of the search were properly admitted in the trial of a passenger, notwithstanding the passenger did not consent to to the search.

APPEAL by defendant from *Copeland, S.J.*, October 23, 1970, Schedule D, Criminal Session, MECKLENBURG Superior Court.

Defendant was tried upon a bill of indictment charging him with second degree burglary. The jury returned a verdict of guilty as charged and judgment imposing an active prison sentence was pronounced thereon.

The State's evidence tends to show that Mrs. Lucy Rochelle returned to her home on Cove Creek Drive in Charlotte about 10:45 p.m. on July 9, 1970. A car parked in her driveway began backing out as she pulled in behind it. She backed out to allow the car to leave. Upon reentering her driveway and getting out of her car, Mrs. Rochelle saw the defendant coming out of her house. When she yelled at him he fled around the side of the house, pausing only to fire one shot from his gun. Upon enter-

ing the house, she determined that various items had been taken, including numerous articles of her husband's clothing (four or five suits, approximately thirty-two or thirty-five shirts, one trench coat, five pairs of slacks, four or five sport coats and a hundred or more ties), a revolver, cartridges, two partially filled bottles of liquor, and a camera. The liquor, the camera and the box in which the gun was stored were found at the back of the house.

On the morning of July 10, 1970, Police Detective P. H. Aderholt investigated the incident at Mrs. Rochelle's request. She told the officer she recognized the defendant as one of the workmen from Baucom Sheet Metal Company who had been installing central air conditioning in her house.

Detective Aderholt went to Baucom Sheet Metal Company and found that they had a check made out to defendant which he was expected to pick up. He was not working that day, having reported in sick. Approximately noon, Douglas Grant, brother of the defendant, came to pick up defendant's check. After a short conversation with him, Douglas Grant was placed in the squad car. They drove one block up the street from Baucom Sheet Metal Company where Douglas Grant's automobile was parked facing the approaching police car. Inside were the defendant and one other person.

Detective Aderholt testified that as he entered this street defendant tried to drive off, but "I cut into the side of his car and knocked the car over to the curb and held it there." Detective Ballantine, who was with Detective Aderholt, told the two men in the car that they were under arrest. Detective Aderholt then asked Douglas Grant if he could look into the trunk of his car.

At this point in the trial, defendant moved to suppress for that the ensuing search and seizure was illegal. A *voir dire* examination was conducted and Detective Aderholt testified: "The defendant was under arrest at this time. Douglas Grant was in the back seat of the police car. I asked Douglas Grant's permission to search the car. He stated the stuff was in the back seat—in the trunk of the car. He did not object to our going into the trunk of the car. Whereupon I opened the trunk and found all the clothes from Mrs. Rochelle's home and the pistol and two boxes of ammunition. The defendant gave us the key to the auto-

mobile. The key was in the ignition at that time; he was sitting behind the steering wheel."

Scott Hartsell, the passenger in the car driven by defendant, testified on *voir dire* that he did not hear any of the detectives ask the defendant if they could go into the trunk. He testified that he did not hear any conversation between Douglas Grant and the detective nor did he hear the defendant object, "because he had been removed from the car and he was in the rear of the [police] car at the time."

The defendant testified on *voir dire* that Mr. Ballantine ran up, threw a pistol in his face, and told him not to move. He said Ballantine pulled him out of the car and said "shut your damn mouth." He opened the trunk. The officer "did not ask my permission to go in there." He did not hear any conversation between Douglas Grant and the officer with regard to the trunk.

Douglas Grant testified on *voir dire* that he told Detective Aderholt, upon being asked about searching the trunk, that he could not go into the trunk because he didn't have a search warrant.

At the close of the *voir dire* the trial judge found as a fact that the defendant was under arrest and that permission was given for the search of the trunk. The judge concluded as a matter of law (1) that the search of the vehicle was incident to a lawful arrest; (2) that the search was made with the consent of the owner of the vehicle, Douglas Grant; and (3) that no search warrant was required under the law. The jury was thereupon recalled and the fruits of the search were admitted in evidence over defendant's objection.

Defendant presented evidence tending to show that he was at home in bed at the time of the robbery.

From the guilty verdict and judgment pronounced thereon, defendant appealed to the Court of Appeals. The case was transferred to this Court under its general order of July 31, 1970.

William D. McNaull, Jr., Attorney for defendant appellant.

Robert Morgan, Attorney General; William W. Melvin and T. Buie Costen, Assistant Attorneys General, for the State.

HUSKINS, Justice.

Defendant contends the warrantless search of the automobile was illegal in that (1) it was not a search incident to a lawful arrest, and (2) it was not a search by consent of the defendant. Hence, defendant argues, the fruits of the search were tainted and inadmissible in evidence against him.

There was evidence to show, and the trial court found on *voir dire,* that the owner of the car consented to the search of the trunk. We are bound by this factual finding *State v. Little,* 270 N.C. 234, 154 S.E. 2d 61 (1967). With the owner present and consenting, defendant's consent was not required to validate the search. Under such circumstances, a passenger or a guest has no legal basis upon which to object to a search of the car by peace officers. *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965). See Comment, Third Party Consent to Search and Seizure, 33 U. Chi. L. Rev. 797 (1966). The fruits of the search were thus lawfully obtained and properly admitted in evidence. Under these circumstances a search warrant was not required.

Other points raised are not reached since discussion of them is not necessary to decision in the case.

In the trial below we find

No error.

Jernigan v. Lee

SUEANNE M. JERNIGAN (UNMARRIED) PLAINTIFF v. MAXINE CORE LEE AND HUSBAND, LEON LEE; WILLIAM CORE (UNMARRIED); LAURA P. ELMORE AND HUSBAND, P. W. ELMORE; FRANCES J. BARTON AND HUSBAND, WILLIAM F. BARTON; KITTIE CORE HENRY CHISM AND HUSBAND, AUBREY CHISM; CARRIE MAE P. CORE PARKER AND HUSBAND, ALVESTER PARKER; DONALD CORE (UNMARRIED); LOUISE POPE STEWART (WIDOW); ALINE S. McDONALD (UNMARRIED); BOBBIE STEWART AND WIFE, DAPHINE S. STEWART; RUBY S. TAYLOR AND HUSBAND, EARL TAYLOR; ROBERT D. STEWART AND WIFE, JACQUELINE P. STEWART; GABE STEWART AND WIFE, BETTY B. STEWART; MARIE STEWART HARDY AND HUSBAND, ROBERT M. HARDY; CHRISTINE S. HOLTON (UNMARRIED); LOIS S. MEE AND HUSBAND, ART MEE; MARGARET J. STEWART BANASZAK AND HUSBAND, ROBERT E. BANASZAK; EOMY J. STEWART THOMPSON (WIDOW); THELMA S. LEWIS AND HUSBAND, WILLARD R. LEWIS; LEAH S. HOBBS AND HUSBAND, THAD HOBBS; OLIN T. STEWART AND WIFE, JOYCE STEWART; WILLIAM ARMSTRONG AND WIFE, MARY P. ARMSTRONG; EARL ARMSTRONG AND WIFE, RUTH M. ARMSTRONG; JACK STEWART AND WIFE, ALDINE PRICE STEWART; MARSHALL STEWART, JR. AND WIFE, EVELYN D. STEWART AND JOSEPH H. LEVINSON, COMMISSIONER IN SPECIAL PROCEEDINGS 69 SP 68, OFFICE OF THE CLERK OF THE SUPERIOR COURT OF JOHNSTON COUNTY, DEFENDANTS

No. 13

(Filed 30 July 1971)

1. Wills § 36— defeasible fees — executory devises

Devise to testatrix' son and his heirs, but if he dies "without issue or heirs by him begotten," then to testatrix' daughter in fee, and if she dies without "any heir of her body living at her death," then to another *is held* to give the son a fee simple defeasible upon his death without surviving issue, and to give the daughter an executory interest contingent upon the son's death without surviving issue; and when the son died without issue, the daughter took a fee simple defeasible upon her death without surviving issue.

2. Wills § 36— defeasible fee

Devise to testatrix' brother "and his heirs, if any, otherwise to his next of kin, who may be living at his death" *is held* to give the brother a fee defeasible upon his death without surviving issue.

3. Wills § 28— intent of testator — transposition or addition of words by court

To effectuate the intention of the testator the court may transpose or supply words, phrases and clauses when the sense of the devise in question as collected from the context manifestly requires it.

4. Wills § 69— conveyance or devise of contingent interest

Contingent interests, such as contingent remainders, springing uses and executory devises may be sold, assigned, transmitted or

devised provided the identity of the persons who will take the estate upon the happening of the contingency be ascertained.

5. **Wills § 69— conveyance of future interest — conditions and contingencies**

The grantee of a future interest takes it subject to the same conditions or contingencies imposed upon his grantor.

6. **Wills § 35— time of vesting — survival of devisee to given time or event**

If the vesting of an estate is conditioned upon a devisee's survival to a given time or event, his death prior thereto will defeat his estate and any attempt he may have made to transfer.

7. **Wills §§ 36, 69— death of executory devisee prior to termination of preceding defeasible fees**

Where testatrix devised successive fees to her son, daughter and brother, each of which was defeasible upon the death of the devisee without issue, and the brother died with issue prior to the deaths of the son and daughter without issue, the fee simple absolute estate the brother would have taken had he survived the son and daughter was not defeated by his prior death, and where the brother had conveyed his interest in the estate, the heirs of his grantee took the fee simple absolute estate by substitution upon the termination of the fee defeasible estates of the son and daughter.

Justice LAKE dissents.

ON *certiorari* to review the decision of the Court of Appeals (reported in 9 N.C. App. 582, 176 S.E. 2d 899), which reversed the judgment of *Copeland, J.*, April 1970 Civil Session of JOHNSTON.

Plaintiff instituted this action to obtain a declaratory judgment construing items 2 and 4 of the will of Leacy Jernigan Stewart (testatrix) and determining the ownership of the lands therein devised.

The facts, which are not in dispute, are set forth in the judgment of Copeland, J. Except when quoted, those material to decision are summarized as follows:

Testatrix, a resident of Johnston County, died 22 June 1921. At her death she owned in fee simple the lands in controversy, a 62-acre tract which she had inherited from her mother, Susan Jernigan. Testatrix devised this land as follows:

"Item 2. I give and devise to my son, O. D. Stewart, and his heirs in fee all that tract of land in Johnston County, North Carolina. . . . (detailed description omitted).

"Item 4. I further add to paragraph 2 in this Will as follows: that if O. D. Stewart shall die without issue or heirs by him begotten, then said tract of land shall pass in fee to Meta Stewart, and if she should die without any heir of her body living at her death, then said tract of land shall pass to Berry Jernigan and his heirs, if any, otherwise to his next of kin, who may be living at his death."

O. D. Stewart, who never married, died 31 January 1946 without having had any children.

Meta Stewart (Barefoot) died on 30 July 1968 without ever having had any children.

Berry Jernigan, the brother of testatrix, died 19 September 1944, predeceasing both O. D. Stewart and Meta Stewart Barefoot. Berry Jernigan was survived by his only child and heir, the plaintiff, who was born 14 August 1927.

By warranty deed, dated 29 December 1939, Berry Jernigan conveyed his interest in the lands to O. D. Stewart. Defendants are the heirs of O. D. Stewart and claim under this deed.

Upon the foregoing facts plaintiff contends that she owns the disputed land in fee simple. Defendants, contending that they own the entire property as tenants in common, moved under G.S. 1A-1, Rule 56(b), for a summary judgment in their favor. Judge Copeland entered judgment "that the defendants are entitled to a summary judgment in this matter . . . and the motion of the defendants for summary judgment is hereby granted." From this judgment plaintiff appealed to the Court of Appeals.

The Court of Appeals, in reversing the summary judgment for defendants, held: (1) The devise to "Berry Jernigan and his heirs" created a "potential tenancy in common" between Berry and his children. (2) Plaintiff therefore owns a one-half interest in the property in her own right under testatrix' will. (3) Berry Jernigan conveyed his expectancy in the other half of the property in 1939 by his deed to O. D. Stewart, and defendants now own that one-half interest as tenants in common with plaintiff. Upon defendants' petition we allowed *certiorari.*

Britt and Ashley for plaintiff appellee.

Joseph H. Levinson for defendant appellants.

SHARP, Justice.

Title to the land in dispute depends upon the construction to be put upon items 2 and 4 of testatrix' will. In effect, this devise is to O. D. Stewart and his heirs in fee, but if he dies "without issue or heirs by him begotten," then to Meta Stewart in fee; and if she die without "any heir of her body living at her death, then to Berry Jernigan and his heirs, if any, otherwise to his next of kin, who may be living at his death."

[1] It is quite clear that by this devise O. D. took a fee simple defeasible upon his death without surviving issue, and that Meta took an executory interest contingent upon the death of O. D. without surviving issue. When O. D. died without issue in 1946 Meta took a fee simple defeasible upon her death without surviving issue. "[I]t has been held since very early after the statute of uses that a fee simple may be limited after a fee simple either by deed or will; if by deed, it is a conditional limitation; if by will, it is an executory devise." *Smith v. Brisson,* 90 N.C. 284, 289 (1884). *Accord, Scott v. Jackson,* 257 N.C. 658, 127 S.E. 2d 234; *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205; *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662; *Murdock v. Deal,* 208 N.C. 754, 182 S.E. 466; *Kirkman v. Smith,* 174 N.C. 603, 94 S.E. 423; *Burden v. Lipsitz,* 166 N.C. 523, 82 S.E. 863; *Myers v. Craig,* 44 N.C. 169; *Smith v. Brisson, supra; Garland v. Watt,* 26 N.C. 287; 7 N. C. Index 2d, *Wills* § 36 (1968); 28 Am. Jur. 2d, *Estates* § 363 (1966).

[2] Meta's estate ended in July 1968 when she died without surviving issue. At that time the devise "to Berry Jernigan and his heirs, if any, otherwise to his next of kin, who may be living at his death" became effective. What did testatrix intend by this language? We hold that she intended to devise to Berry the same estate which she had given the two preceding devisees—a fee defeasible upon death without surviving issue. Properly interpreted, this devise is to Berry and his heirs and, if none at his death, to his next of kin then living. In *Massengill v. Abell,* 192 N.C. 240, 134 S.E. 641, a practically identical devise was held to be a fee defeasible upon the death of the devisee without issue.

[3] In construing a will the court considers the entire instrument and seeks to ascertain from it the testator's intent. To effectuate the intention of the testator the court may transpose

or supply words, phrases and clauses when the sense of the devise in question "as collected from the context manifestly requires it." *Entwistle v. Covington,* 250 N.C. 315, 319, 108 S.E. 2d 603, 606; 7 N. C. Index 2d, *Wills* § 28 (1968). We can detect no intent to create "a potential tenancy in common" between Berry and his children in a devise "to Berry Jernigan and his heirs, if any, otherwise to his next of kin who may be living at his death." On the other hand, the devise to Berry of a fee, defeasible upon his death without surviving issue, completes testatrix' plan which gave to each named devisee a fee determinable upon identical condition. *See Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906; *Starnes v. Hill,* 112 N.C. 1, 16 S.E. 1011.

At the time of Berry's death his daughter, the plaintiff, survived him. Had Berry survived both O. D. and Meta there can be no doubt that, upon his death with issue surviving, his defeasible fee would have become a fee simple absolute; that his 1939 deed would have then passed the unqualified fee to the heirs of O. D. Stewart, and that plaintiff, as Berry's heir, would be estopped by his deed, *Thames v. Goode,* 217 N.C. 639, 9 S.E. 2d 485. The interest which Berry had in 1939 was at that time "alienable, devisable, and inheritable." 31 C. J. S. *Estates* § 122 (1964).

[4] "[E]xecutory devises are not considered as mere *possibilities,* but as *certain interests* and *estates.*" *Fortescue v. Satterthwaite,* 23 N.C. 566, 570 (1841). A long line of decisions by this Court establishes that contingent interests, such as contingent remainders, springing uses, and executory devises may be "sold, assigned, transmitted, or devised" provided the identity of the persons who will take the estate upon the happening of the contingency be ascertained. *Newkirk v. Hawes,* 58 N.C. 265; *Bodenhamer v. Welch,* 89 N.C. 78; *Wright v. Brown,* 116 N.C. 26, 22 S.E. 313; *Cheek v. Walker,* 138 N.C. 446, 50 S.E. 863; *Beacom v. Amos,* 161 N.C. 357, 77 S.E. 407; *Hobgood v. Hobgood,* 169 N.C. 485, 86 S.E. 189; *Lee v. Oates,* 171 N.C. 717, 88 S.E. 889; *Malloy v. Acheson,* 179 N.C. 90, 101 S.E. 606; *Woody v. Cates,* 213 N.C. 792, 197 S.E. 561; *Thames v. Goode, supra;* Simes and Smith, Future Interests § 1859 (2d ed. 1956). "They may be assigned . . . both in real and personal estate, and by any mode of conveyance by which they might be transferred had they been vested remainders." *Fortescue v. Satterthwaite, supra* at 570; 28 Am. Jur. 2d, *Estates* §§ 317, 371 (1966).

The rule established by the foregoing decisions was incorporated in G.S. 39-6.3 enacted in 1961 and applicable only to conveyances operative on or after 1 October 1961.

[7] Did Berry's death prior to the termination of the two defeasible fees which were interposed before his executory devise defeat the estate he would have taken had he survived them? In other words, was his power to convey his interest dependent upon his surviving the two preceding devisees? The answer is No.

Decisions of this Court hold that "the interest in an executory devise or bequest is transmissible to the heir or executor of one dying *before the happening of the contingency upon which it depends.*" (Emphasis added.) *Seawell v. Cheshire,* 241 N.C. 629, 637, 86 S.E. 2d 256, 261. This question was squarely decided in *Moore v. Barrow,* 24 N.C. 436, wherein Ruffin, C.J., said: "That contingent interests of this description are transmissible to executors, and are not lost by the death of the person before the event happens on which they are to vest in possession, though once doubted, has long been settled." *Id.* at 439. *Accord, Lewis v. Smith,* 23 N.C. 145; *Sanderlin v. Deford,* 47 N.C. 75; *Newkirk v. Hawes, supra; Kornegay v. Miller,* 137 N.C. 659, 50 S.E. 315.

[5, 6] Of course, the foregoing rule is dependent upon the nature of the contingency involved; and also, the grantee of a future interest takes it subject to the same conditions or contingencies imposed upon his grantor. "An executory devise can only be destroyed by a failure of the contingency upon which it is to take effect." 4A Thompson on Real Property § 2007 (1961). Thus, if the devisee of a fee with an executory devise over in the event he dies without issue conveys his interest and thereafter dies without lineal descendants, the estate of his grantee ends with his death; on the other hand, if he is survived by issue, an estate in fee simple absolute vests in his grantee. *Elmore v. Austin, supra; Kornegay v. Miller, supra; Bodenhamer v. Welch, supra;* Simes & Smith, Future Interests, § 1865 (2d ed. 1956). The determinable quality of the fee of the first taker follows any transfer he may make, and the grantee can take no greater estate than that possessed by his grantor. 4A Thompson on Real Property § 2007 (1961). It therefore follows that if the vesting of an estate is conditioned upon a devisee's survival to a given time or

event, his death prior thereto will defeat his estate and any attempt he may have made to transfer.

[7] In this case the testatrix did not condition Berry's fee upon his surviving O.D. and Meta. Berry's estate was made to depend (1) upon the prior deaths of both O. D. and Meta *without* issue and (2) upon his own death *with* issue. When Meta died without issue these two conditions were met and the estate in fee simple absolute, which would have vested in Berry had he been living, vested by substitution in the heirs of O. D. Stewart under the 1939 deed from Berry to O. D. Therefore the title to the real estate involved is adjudged to be in the defendants. *Tapley v. Dill,* 358 Mo. 824, 217 S.W. 2d 369.

The decision of the Court of Appeals is reversed with directions that the cause be returned to the Superior Court for the entry of a declaratory judgment construing the will of Leacy Jernigan Stewart in accordance with this opinion.

Reversed and remanded.

Justice LAKE dissents.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ALLTOP v. PENNEY CO.

No. 54 PC.

Case below: 10 N.C. App. 692.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

ANDERSON v. WILLIARD

No. 71 PC.

Case below: 11 N.C. App. 70.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

DANTZIC v. STATE

No. 15 PC.

Case below: 10 N.C. App. 369.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 6 April 1971 for sole purpose of determining whether or not Court of Appeals has authority to issue writ of error *coram nobis*.

DAVIS v. CAHOON

No. 83 PC.

Case below: 11 N.C. App. 395.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

HILL v. HILL

No. 72 PC.

Case below: 11 N.C. App. 1.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

HOLLAND v. WALDEN

No. 90 PC.

Case below: 11 N.C. App. 281.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

JOHNSON v. BROWN

No. 87 PC.

Case below: 11 N.C. App. 323.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

MOTORS, INC. v. ALLEN

No. 88 PC.

Case below: 11 N.C. App. 381.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 30 July 1971.

MUSSELWHITE v. HOTEL CO.

No. 86 PC.

Case below: 11 N.C. App. 361.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

STATE v. BENNETT

No. 79 PC.

Case below: 11 N.C. App. 169.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971. Appeal dismissed *ex mero motu* for lack of substantial constitutional question 30 July 1971.

STATE v. BEST

No. 84 PC.

Case below: 11 N.C. App. 286.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

STATE v. BURGESS

No. 81 PC.

Case below: 11 N.C. App. 430.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

STATE v. BUZZELLI

No. 61 PC.

Case below: 11 N.C. App. 52.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

STATE v. CUMBER

No. 73.

Case below: 11 N.C. App. 302.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

STATE v. LEWIS

No. 57.

Case below: 11 N.C. App. 226.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971. Appeal dismissed *ex mero motu* for lack of substantial constitutional question 30 July 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. MUSE

No. 80 PC.

Case below: 11 N.C. App. 389.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 30 July 1971.

STATE v. WALLER

No. 99 PC.

Case below: 11 N.C. App. 434.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

STIREWALT v. SAVINGS & LOAN ASSOC.

No. 85 PC.

Case below: 11 N.C. App. 241.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

WILLIAMS v. LEWIS

No. 89 PC.

Case below: 11 N.C. App. 306.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 July 1971.

Evans v. Everett

E. R. EVANS, PLAINTIFF v. W. B. EVERETT, EARLY & WINBORNE, INC., AND STANDARD BRANDS, INC., NATIONAL PEANUT CORPORATION, A DIVISION OF STANDARD BRANDS, ORIGINAL DEFENDANTS AND SHIRLEY PIERCE, MARION ODOM AND LEBRON MORRIS, OWNERS OF FARMERS TOBACCO WAREHOUSE, AND FARMERS COOPERATIVE EXCHANGE, ADDITIONAL DEFENDANTS

No. 111

(Filed 6 September 1971)

1. **Uniform Commercial Code § 71— security interest in farm crops — sufficiency of financial statement**

A financing statement which (1) contains the signatures and addresses of the debtor and the secured party, (2) asserts that the collateral for a 1969 crop loan consists of crops grown on five different farms during the year, (3) describes the land on which the crops are grown, and (4) concludes the description with the statement that "same securing note for advanced money to produce crops for the year 1969," *is held* sufficient to constitute a security agreement and to give the secured party a security interest in the crops. G.S. 25-9-105(1)(h); G.S. 25-9-203(1)(b); G.S. 25-9-402(1).

2. **Uniform Commercial Code § 73— financing statement serving as security agreement**

A financing statement may serve as a security agreement if it meets the requirements of G.S. 25-9-105(1)(h) and G.S. 25-9-203(1)(b).

3. **Uniform Commercial Code § 73— creation of security interest — language of the instrument**

An instrument purporting to create a security interest must contain language which leads to the logical conclusion that it was the intention of the parties that a security interest be created.

ON *certiorari* to review the decision of the Court of Appeals (reported in 10 App. 435, 179 S.E. 2d 120) affirming the judgment of *Copeland, S. J.*, July 1970 Civil Session of HERTFORD.

Action to recover from the maker the balance due on a promissory note, and from purchasers the value of crops alleged to have been collateral securing the note.

The complaint and stipulations establish the following facts:

(1) On 23 January 1969, defendant W. B. Everett, a resident of Hertford County, executed and delivered to plaintiff his promissory note under seal in the amount of $75,000.00, due 15 November 1969, with interest at six per cent per annum until

paid. The note contained the following: "This note is secured by Uniform Commercial Code financing statement of North Carolina."

(2) On the next day, 24 January 1969, there was filed in the office of the Register of Deeds in Hertford and Bertie Counties an identical financing statement. It contains the names and addresses of defendant Everett as the "debtor" and plaintiff as the "secured party." Both signed the statement. It asserts that the "statement *covers* the following types or items of collateral": The collateral is then described as all crops now growing or hereafter grown during 1969 on five certain farms in Bertie County, together with all farm machinery, implements, and equipment located on the described lands. The description of the collateral concluded with this statement: "same *securing* note for advanced money to produce crops for the year 1969." (Emphasis added.) The note and financing statement were the only documents which defendant Everett signed in connection with plaintiff's loan to him.

(3) Defendant Everett owes on the note in suit a balance of $24,418.57, with interest from 23 January 1969. Of the crops described in the financing statements defendants Early & Winborne, Inc., Standard Brands, Inc., and National Peanut Corporation purchased from defendant Everett peanuts valued in excess of $25,000.00; additional defendants Shirley Pierce, Marion Odom and Lebron Morris, trading as Farmers Tobacco Warehouse, and Farmers Cooperative Exchange of Ahoskie, North Carolina, purchased crops, the nature and value of which the record does not disclose. At the time of these purchases plaintiff's debt had not been discharged.

Plaintiff prays judgment against defendants for the sum of $24,418.57 together with interest, costs, and attorneys' fees.

All defendants except W. B. Everett and Farmers Cooperative Exchange moved to dismiss the action for the failure of the complaint to state a claim upon which relief can be granted. Copeland, J., allowed the motion and dismissed the action as to these movants. Plaintiff excepted to the judgment and appealed to the Court of Appeals, which affirmed the judgment. Upon plaintiff's petition we allowed *certiorari*.

Pritchett, Cooke & Burch for plaintiff appellant.

Revelle and Burleson for Standard Brands, Inc., and National Peanut Corporation, a division of Standard Brands, original defendant appellees.

White, Hall & Mullen for Early & Winborne, Inc., original defendant appellee.

SHARP, Justice.

This case—one of first impression—is governed by the Uniform Commercial Code (Code), G.S. 25-1-101 *et seq.*, which became effective on 1 July 1967. As of that date, the statutes which had previously governed agricultural liens for advances, G.S. 44-52 through G.S. 44-64, were expressly repealed by G.S. 25-10-102(1).

[1] The appeal presents one question: Does plaintiff have a security interest in certain 1969 crops which defendant Everett sold to the other defendants? The answer depends upon whether the financing statement executed by plaintiff and defendant Everett can also serve as a security agreement. To answer the question it is necessary to know the statutory definitions of the Code's terminology.

"*Security interest* means an interest in personal property or fixtures which secures payment or performance of an obligation." G.S. 25-1-201(37).

"*Security agreement* means an agreement which creates or provides for a security interest. . . . " G.S. 25-9-105(1)(h). In the Code the general term *security agreement* is used "in place of such terms as chattel mortgage, conditional sale, assignment of accounts receivable, trust receipt, etc." *See* the Official Comment under G.S. 25-9-105.

"*Secured party* means a lender, seller or other person in whose favor there is a security interest. . . . " G.S. 25-9-105(1)(i).

"*Debtor* means the person who owes payment or other performance of the obligation secured. . . . " G.S. 25-9-105(1)(d).

Subject to provisions of the Code not applicable to this case, "a security interest is not enforceable against the debtor or third parties unless (a) the collateral is in the possession of the secured party; or (b) the debtor has signed a security agree-

ment which contains a description of the collateral and in addition, when the security interest covers crops . . . a description of the land concerned." G.S. 25-9-203(1). *See* 44 N. C. L. Rev. 716, 723-724.

As pointed out in the Official Comment upon G.S. 25-9-203, formal requisites for a security agreement "are reduced to a minimum. The technical requirements of acknowledgment accompanying affidavits, etc. . . . are abandoned. The only requirements for the enforceability of nonpossessory security interests in cases not involving land are (a) a writing; (b) the debtor's signature; and (c) a description of the collateral or kinds of collateral. (Typically, of course, the agreement will contain much more) . . . . The formal requisites stated in this section are not only conditions to the enforceability of a security interest against third parties. They are in the nature of a Statute of Frauds." Absent a writing satisfying these formal requisites, a security interest is not enforceable even against the debtor.

In order to perfect a security interest in farm products, crops, and equipment used in farming operations from subsequently acquired rights of *third parties,* the secured party must file a financing statement in the county of the debtor's residence and also in the county where the land on which the crops are growing, or are to be grown, is located. G.S. 25-9-401(1)(a). *See* 44 N. C. L. Rev. 753, 761.

"A *financing statement* is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned and the name of the record owner or record lessees thereof. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties." G.S. 25-9-402(1).

The Official Comment accompanying G.S. 25-9-402(1) explains that this section adopts a system of notice filing. "What

is *required* to be filed is not, as under chattel mortgage and conditional sales acts, the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed *may* have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure." (Emphasis added.)

Subsection (3) of G.S. 25-9-402 sets out a form which, if substantially followed, will comply with the requirements for a financing statement. Here the parties used and substantially followed this form. They do not contend that the financing statement in suit fails to meet the requirements of the statute. It is defendants' contention that Everett signed no agreement which created or provided for a security interest in the collateral described in the financing statement, and that the financing statement cannot serve as a security agreement.

The Code distinguishes between a security agreement and a financing statement. The security agreement is a writing which (1) creates or provides for a security interest, (2) contains a description of the collateral, plus a description of the land involved "when the security interest covers crops or oil, gas or minerals to be extracted or timber to be cut," and (3) is signed by the debtor. The financing statement is a writing which (1) contains the signature and addresses of *both* the debtor and creditor and (2) a description of the collateral plus a description of the land involved "when the financing statement covers crops growing or to be grown or goods which are or are to become fixtures." The discrepancies between the formal requisites of a security agreement and a financing statement have been criticized as "confusing and unnecessary," and the failure of the two sections to mesh with respect to the description requirement called "inexcusable." 1 Gilmore, Security Interests in Personal Property, § 11.4 (1965).

[2] Although the financing statement need only be "a skeletonic statement" that the parties intend to engage in future transactions, which may never be consummated, G.S. 25-9-402(1) specifically provides that "a copy of the security agreement is sufficient as a financing statement" if it contains the

required information and is signed by both parties. We perceive no sound reason why a financing statement may not also serve as a security agreement if it meets the requirements of G.S. 25-9-105(1)(h) and G.S. 25-9-203(1)(b). This is the concensus of both opinion writers and commentators on the Code.

Although the Code contemplates the execution of two separate writings, it does not prohibit the combination of a security agreement and financing statement. In *American Card Company v. H. M. H. Company,* 97 R.I. 59, 196 A. 2d 150, a case upon which both appellant and appellees rely, the court held that *the financing statement in suit* (not reproduced in the opinion) could not qualify as a security agreement. It said: "It is not possible for a financing statement which does not contain the debtor's *grant* of a security interest to serve as a security agreement." *Id.* at 62, 196 A. 2d at 152. (Emphasis added.)

It appears that the Rhode Island court was of the opinion that technical words of conveyance from the debtor to the secured party were required to create a security interest. In criticizing *American Card,* Gilmore, a former Official Comment writer for Article 9 of the Code, in his treatise on Security Interests in Personal Property said: "Certainly, nothing in § 9-203 requires that the 'security agreement' contain a 'granting' clause. The § 9-402 financing statement contained all that was necessary to satisfy the § 9-203 statute of frauds as well as being sufficient evidence of the parties' intention to create a security interest in the tools and dies (the described collateral). No doubt the court would have upheld the security interest if the debtor had signed two pieces of paper instead of one. The § 9-402 provision that a short financing statement may be filed in place of the full security agreement was designed to simplify the operation. The Rhode Island court gives it an effect reminiscent of the worst formal requisites holding under the 19th century chattel mortgage acts." 1 Gilmore, Security Interests in Personal Property, § 11.4 at pp. 347-348 (1965).

Long before the adoption of the Code, this Court held that no particular form of words was necessary to create a lien or to constitute a chattel mortgage, and that, as between the parties, an *oral* mortgage was as good "as if it had been in writing, provided, if reduced to writing, it would have been valid." *White Co. v. Carroll,* 146 N.C. 230, 232-233, 59 S.E. 678, 679. *Accord, Kearns v. Davis,* 186 N.C. 522, 120 S.E. 52;

15 Am. Jur. 2d *Chattel Mortgages* § 38 (1964). In *Brown v. Dail,* 117 N.C. 41, 23 S.E. 45, it was held that a recorded "agreement that all logs cut, all lumber sawed, and every product of this business shall stand as security for all and any advancements made under this agreement" constituted a valid chattel mortgage. The Court said: "We think the agreement must be construed according to the manifest intent of the parties as a chattel mortgage. No particular form is essential, and the instrument has all of the constituents necessary to create a chattel mortgage."

In *Grier v. Weldon,* 205 N.C. 575, 578, 172 S.E. 200, 202, quoting Jones on Mortgages, § 24, it is said: "If a security for money is intended, that security is a mortgage, though not having on its face the form of a mortgage; it is the essence of a mortgage that it is a security." Thus, "[w]ords of conveyance are not essential to a mortgage although the absence of such words may be important in determining whether or not a transaction is a mortgage." 14 C.J.S., *Chattel Mortgages* § 50 (1939). By the same token, any written agreement signed by a debtor which recites that certain personalty is being encumbered as security for a debt ought to operate as a security agreement under Code § 25-9-105(1)(h). 18 Ark. L. Rev. 30, 34.

[3] While there are no magic words which create a security interest there must be language in the instrument which "leads to the logical conclusion that it was the intention of the parties that a security interest be created." *In re Nottingham,* 6 U.C.C. Rep. 1197, 1199 (U.S. D.C. Tenn. 1969).

A financing statement which does no more than meet the requirements of Code § 25-9-402 will *not* create a security interest in the debtor's property. *General Electric Credit Corporation v. Bankers Commercial Corporation,* 244 Ark. 984, 429 S.W. 2d 60. As the Supreme Court of Iowa said in *Kaiser Aluminum and Chemical Sales, Inc. v. Hurst,* 176 N.W. 2d 166, 167 (Iowa 1970), "The cases uniformly hold that a financing statement does not ordinarily *create* a security interest. It merely gives notice that one is or may be claimed. These same authorities hold a financing statement *may* double as a security agreement if it contains appropriate language which grants a security interest." *See* Annot, 30 A.L.R. 3d 9, 42-44, 46-48.

Our research has disclosed no case involving writings identical with the note and financing statement in this case. The

opinions in the cases on which defendants rely do not reproduce the financing statements which the creditors contended could double as security agreements. These decisions, however, are based upon the premise that the financing statement involved contained no language which could be interpreted as granting, creating, or providing for a security interest. *Mid-Eastern Electronics, Inc. v. First Nat. Bank of So. Md.*, 380 F. 2d 355 (4th Cir. 1967); *Central Arkansas Milk Producers Ass'n v. Arnold*, 239 Ark. 799, 394 S.W. 2d 126. *M. Rutkin Elect. Sup. Co., Inc. v. Burdette Elect., Inc.*, 98 N.J. Super. 378, 237 A. 2d 500; *Safe Deposit Bank & Trust Company v. Berman*, 393 F. 2d 401 (1st Cir. 1968); *Kaiser Aluminum & Chemical Sales, Inc. v. Hurst, supra.*

[1] In this case the financing statement declares that it "*covers* the following type of collateral: (all crops now growing or to be planted on 5 specified farms) *same securing note for advanced money to produce crops for the year 1969.*" The note contains the statement that it "is *secured* by Uniform Commercial Code financing statement of North Carolina." (Emphasis added.)

We harbor no doubt that the instant financing statement and the note manifest defendant Everett's intent to create in plaintiff a security interest in the described collateral and that he did, in fact, provide for such interest when he stated that the crops described therein *secure* the note for money advanced to produce these crops.

Black's Law Dictionary 1521 (4th ed. 1951) defines *secure* as "to give security; to assure payment, performance, or indemnity; to guaranty or make certain the payment of the debt or discharge of an obligation . . . one 'secures' his creditor by giving him a lien, mortgage, pledge or other security to be used in case the debtor fails to make payment."

In re Center Auto Parts, 6 U.C.C. Rep. 398 (U.S. D.C. Calif. 1968), was a case in which the bankrupt's note recited, "This note is secured by a certain financing statement." The financing statement is not set out in the opinion, but it was noted that only one financing statement had been filed with the Secretary of State. The District Court held "that the note together with the financing statement executed by the bankrupt creates in the respondent a valid security interest in the personal property (described in the statement)."

In 2 Bender's Uniform Commercial Code Service (Hart & Willier) § 91A.13 (1970) it is said: "Clearly, if the financing statement contains the elements for a security agreement in addition to those for the financing statement, it would serve as the security agreement. The additional elements would be (1) Something to indicate agreement; (2) A statement of the obligation or obligations secured; (3) Provision for or creation of the security interest."

The financing statement in this case contains language clearly manifesting the debtor's intent to grant, create, and provide for a security interest. It bears his signature; it describes the obligation secured, the collateral subject to the security interest, and the land involved. We hold, therefore, that the financing statement in question meets the requirements of an enforceable security agreement and serves the double purpose. However, we emphasize that this financing statement meets the Code's *minimum* requirements. As this case demonstrates, it is an example of draftsmanship likely to produce litigation and not to be recommended.

One writer has suggested that a security agreement should contain at least "(1) the names and addresses of both the secured party and the debtor; (2) a description of the collateral; (3) a description of the underlying obligation for which the security was given; (4) a recital of the rights and liabilities of each party on default; (5) the signature of each party; and (6) any other provisions necessary to meet the exigencies of the individual transaction." 25 U. Pitt. L. Rev. 619, 621 (1964).

The decision of the Court of Appeals is reversed with directions that it remand the cause to the Superior Court for the entry of judgment consistent with this opinion.

Reversed.

RACHEL B. HICE CREASMAN v. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF HENDERSONVILLE AND KENNETH YOUNGBLOOD, SUBSTITUTE TRUSTEE

No. 86

(Filed 6 September 1971)

1. **Rules of Civil Procedure §§ 41, 50— motion to dismiss — motion for directed verdict**

In nonjury trials, the motion for nonsuit has been replaced by the motion for a dismissal under G.S. 1A-1, Rule 41(b); in jury trials, by the motion for a directed verdict under G.S. 1A-1, Rule 50(a).

2. **Rules of Civil Procedure § 50— sufficiency of evidence — jury trial — motion for a directed verdict**

In a jury trial, the motion for a directed verdict is now the only procedure by which a party can challenge the sufficiency of his adversary's evidence to go to the jury.

3. **Rules of Civil Procedure § 50— jury trial — motion for dismissal — treatment as motion for directed verdict**

Where a motion for dismissal is made pursuant to Rule 41(b) in a jury case, it may properly be treated as a motion for a directed verdict under Rule 50(a).

4. **Cancellation of Instruments § 10; Fraud § 12— signing note and deed of trust in blank — misrepresentations by third party — action against lender — insufficiency of evidence**

Evidence that plaintiff's son secured plaintiff's signature upon a blank note and deed of trust by falsely telling her that he wanted to mortgage a trailer located on her property for $600, and that he thereafter filled in the blanks so that the note was for $6,000 and the deed of trust encumbered plaintiff's home, *held* insufficient to be submitted to the jury in plaintiffs' action against the lender to set aside the note and deed of trust, where there was no evidence that plaintiff's son acted as agent for the lender, that any agent of the lender colluded with plaintiffs' son to obtain plaintiff's signature by fraudulent misrepresentations, or that any agent of the lender had any reason to suppose plaintiff's son would obtain plaintiff's signature in such manner, since where one of two parties must suffer by the bad faith of another, the loss must fall upon the one who made it possible for the loss to occur.

5. **Principal and Agent § 4— testimony that witness "represented" lender**

Witness' statement that in January 1965 he was "representing" a savings and loan association in Buncombe County was properly stricken by the trial court, the question of agency being one of law for the court.

6. **Subrogation— money lent to pay deed of trust — subrogation of lender**

Where a savings and loan association lent plaintiff money to pay off a prior deed of trust, and the money was used to extinguish that

encumbrance, the savings and loan association is subrogated to the rights of the first creditor.

7. **Fraud § 2— fraud in the factum**

As a general rule, fraud in the *factum* arises from a want of identity or disparity between the instrument and the one intended to be executed.

8. **Fraud § 2— signing of instrument in blank — misrepresentations as to how blanks would be filled — fraud in the factum**

When one signs an instrument in blank, the plea of *non est factum* or fraud in the *factum* is not available to him, notwithstanding he may have been induced to sign by false representations that the blanks would be filled in a certain way, since he cannot say that the instrument he signed was different from what he intended to sign.

ON *certiorari* to review the decision of the Court of Appeals (reported in 10 N.C. App. 182, 177 S.E. 2d 770) affirming the judgment of *Hasty, J.*, entered at the 16 March 1970 Session of BUNCOMBE.

Action to cancel a note and deed of trust.

Plaintiff alleges: Defendant Savings & Loan Association (Association) is the holder of a note in the amount of $6,000.00, dated 29 January 1965 and secured by a recorded deed of trust on 2.85 acres owned by plaintiff in Buncombe County. Plaintiff did not sign the instruments, which were totally without any consideration to her. She neither borrowed nor received any money from the Association. If it paid out any money on the note and deed of trust it did so without plaintiff's knowledge and without any request by her. The "deed of trust is void because it was fraudulently obtained on the representation of Claude Creasman that this instrument was to encumber a trailer located on the property of the plaintiff." In procuring the deed of trust Claude Creasman acted as the agent of the Association, which accepted the note and deed of trust knowing them to have been fraudulently obtained. Plaintiff first learned of the deed of trust when the Association started foreclosure proceedings.

Defendant trustee filed no answer.

Defendant Association denied all the allegations constituting plaintiff's cause of action. As a further defense it alleged: (1) The action is barred by G.S. 1-52(9), the three-year statute of limitations. (2) When payments on the note became in arrears, defendant trustee duly foreclosed the deed of trust and

defendant Association became the last and highest bidder. It is now the owner of the lands described in the deed of trust.

At the trial before Judge Hasty and a jury plaintiff's evidence consisted of her deposition, taken 8 March 1968, and the testimony of her son, Claude M. Creasman (Creasman).

Plaintiff's testimony, summarized except when quoted, follows: Plaintiff is 88 years old; she "can't hear much," and she "can't see much either." Creasman is her son. She bought her home, the land described in the deed of trust in suit, in 1942. She has never given a mortgage on the property nor borrowed any money from anybody in her life. She neither applied to the Association for a loan nor authorized her son to do so. In January 1965 Creasman "brought in some kind of paper here on that little old house trailer out there. . . . I put my name on something. It just seems like a dream to me. No, I never intended to mortgage my house or my home. I found out there was a mortgage on my property . . . two, three, or four weeks ago (February 1968) . . . ."

On cross-examination, when presented with the deed of trust in suit (P-1), plaintiff testified, "I can't remember if I wrote my name on there. . . . It looks like my signature that I signed on the paper for Claude." She denied that she had acknowledged the deed of trust before the notary public whose certificate was attached to the instrument.

Creasman's testimony tended to show: In January 1965 he told Mr. Bob G. Sherman, the executive vice-president of the Association, that in 1964 he "had put a loan" on his mother's home without her knowledge; that the loan was due and "the holders" were threatening foreclosure; that he did not want his mother to find out what he had done and, if Sherman could get another loan for him from the Association, he "would work very hard and get that loan off very quickly." At first Mr. Sherman said he did not want to get involved. At last, however, he consented to help Creasman if he "could get his mother to sign the First Federal papers." Without plaintiff's knowledge Creasman "signed her name by him" on a loan application, paid the appraisal fee, and filled out a financial statement. Later, he also paid the title examination fee. Creasman requested a loan of $8,750.00, but "the Board of Directors wouldn't go along with it, cut it to $6,000.00."

Creasman took the Association's blank forms—note, deed of trust, and closing statement—to his mother. He told her he had to raise a small amount of money, about $600.00, and "wanted to mortgage the trailer" which was in her backyard. She was reluctant to sign but, when he told her that he badly needed the money, "she said she would do it as long as it was the trailer but not to put anything about her land and home in the deed of trust, and she signed the papers, the blank form papers. . . . " Thereafter Creasman delivered the note and deed of trust to the attorney for the Association. At the time plaintiff signed the papers there was no typewriting on any of the papers. "She signed papers in blank that consisted of a closing statement, a note, and a deed of trust."

At this point in Creasman's testimony the following exchange took place between him and the Court:

"THE COURT: You say she knew she was signing the papers in blank? Your Mother?

"A. I presume that she knew that she was signing them, yes.

"THE COURT: And she told you not to put the real estate in the papers?

"A. That is right, and she asked me how much it was going to be, and I told her that I didn't know exactly, had to figure the interest, but it would be somewhere around $600.00."

The loan proceeds ($6,000.00 less some expenses in the amount of $100.00), were turned over to the holders of the first mortgage. Plaintiff herself received no money, and she did not discover the deed of trust until early in 1969.

During the fourteen months prior to 29 January 1965, Creasman, then a licensed real estate broker, had been in contact with Mr. Sherman almost daily "about loan matters, in property and recommending loans, and getting appraisals and getting things signed and selling notes and discount and all the things you do for savings and loan." He said, "In these loans in which I received monies from First Federal, I do not contend I was on the payroll at First Federal. . . . I sold these notes to the Savings & Loan and they gave me money in exchange for them. . . . Actually it was money that would have gone to the

borrower or to the seller of the note if they had not told the Savings & Loan to pay it to (me)...."

At one point in his testimony Creasman stated that in January 1965 he "represented First Federal (defendant) in Buncombe County." Upon defendant's motion this statement was stricken from the evidence, and plaintiff excepted.

At the beginning of Creasman's testimony, after the court had sustained a number of objections to his testimony, plaintiff's counsel requested the court to permit him to examine Creasman in the absence of the jury in order to get his testimony "in the record now and see what may be competent." At the conclusion of this examination, which covers six and one-half pages of the record, Creasman summed up that testimony as follows: "I am saying that I used the First Federal as a place to get money on notes that I wanted to discount...." No part of this examination was thereafter offered in evidence.

Out of the presence of the jury Creasman stated that the prior note and deed of trust, which the Association's loan paid, were instruments he "had gotten a year previously through getting her (plaintiff) to sign some blank papers." With the exception of this statement, Creasman's testimony before the jury was substantially the same as that given in its absence.

At the conclusion of plaintiff's evidence Judge Hasty called upon plaintiff to elect between the allegation that she had not signed the note and deed of trust (paragraph 5 of the complaint) and the allegation that the deed of trust was obtained by Creasman's fraudulent misrepresentation that the instrument was to encumber a trailer located on plaintiff's property (paragraph 8 of the complaint). The response of plaintiff's counsel was: "I will proceed on the allegations of paragraph 8 because the evidence is she did sign the papers, but she signed them in blank ... grounds in fraud."

Defendant then moved for "a judgment of involuntary dismissal" upon the grounds (1) that the action was barred by the three-year statute of limitations and (2) that the evidence failed to establish fraud invalidating the instrument in the hands of defendant. Judge Hasty denied the first ground, allowed the second, and dismissed the action with prejudice.

Plaintiff appealed to the Court of Appeals, which affirmed the judgment dismissing the action with prejudice. It noted, however, that defendants' proper motion was for a directed

verdict under Rule 50 and not for a judgment of involuntary dismissal. Upon plaintiff's petition we allowed *certiorari.*

Cecil C. Jackson, Jr., for plaintiff appellant.

Prince, Youngblood, Massagee & Groce for defendant appellees.

SHARP, Justice.

[1-3] This case was tried before a jury. In nonjury trials the motion for nonsuit has been replaced by the motion for a dismissal under G.S. 1A-1, Rule 41(b); in jury trials, by the motion for a directed verdict under G.S. 1A-1, Rule 50(a). In a jury trial, the motion for a directed verdict is now the only procedure by which a party can challenge the sufficiency of his adversary's evidence to go to the jury. *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297. Defendant, therefore, mislabeled its motion when it moved "for dismissal on the grounds of insufficient evidence to go to the jury," and the judge duplicated this error in nomenclature in his judgment. However, "where a motion for dismissal is made pursuant to Rule 41(b) in a jury case, it may properly be treated as a motion for directed verdict under Rule 50(a). The trial court does not determine the facts, but simply determines whether the plaintiff has made a 'case for the jury.'" *Bragen v. Hudson County News Company,* 321 F. 2d 864, 868 (3d Cir. 1963). *Accord,* 5 Moore's Federal Practice § 50.03(1) (2d ed. 1969).

"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." *Kelly v. Harvester Co.,* 278 N.C. 153, 158, 179 S.E. 2d 396, 398.

Plaintiff's appeal presents only the question whether her evidence was sufficient to withstand defendant's motion for a directed verdict. *In re Johnson,* 277 N.C. 688, 693, 178 S.E. 2d 470, 473-474. Applying the rule enunciated in *Kelly v. Harvester Co., supra,* the answer is No.

When the court required an election between the inconsistent allegations in the complaint, plaintiff's counsel correctly and succinctly appraised her case by this statement: "[T]he evidence is she did sign the papers, but she signed them in blank."

Creasman, who testified that he fraudulently procured the signatures of his 85-year-old mother upon the note and deed of trust, stated positively and unequivocally that they were blank forms at the time she signed them—"no typewriting on any of the papers." He also testified that she knew she was signing the papers in blank; that she admonished him "not to put anything about her land and home in the deed of trust"; and that, in response to her question as to the amount of the loan, he told her he would not know the amount until the interest was figured. In this context, plaintiff's testimony that Creasman "brought in some kind of paper here on that little old trailer out there" cannot be expanded into a statement that he represented to her she was merely signing a *completed chattel mortgage* on a trailer. Furthermore, the allegation of the complaint, under which plaintiff elected to proceed, is that the instrument which she signed "was to encumber a trailer" on her property. This averment clearly implies that the description of the property to be conveyed was to be written in at a future time.

[4] The theory of plaintiff's case is that in January 1965 Creasman was the Association's agent, engaged in procuring loans for it; that, as such agent, he secured plaintiff's signature upon a blank note and deed of trust (the Association's printed forms) by falsely telling her he "wanted to mortgage the trailer that sits on her property" for an amount "somewhere around $600.00"; that he thereafter filled in the blanks so that the note was for $6,000.00 and the deed of trust encumbered her home. However, neither the evidence nor the law will sustain a finding that Creasman ever acted as agent for defendants. His testimony establishes that, in obtaining the loan which satisfied the prior mortgage on plaintiff's property, he was merely a prospective borrower applying for a loan. It likewise establishes that, in the other dealings he said he had with the Association, he was either representing a prospective borrower or acting for himself as the holder of a note seeking to discount the paper.

[5] In *Parker v. Brown,* 131 N.C. 264, 42 S.E. 605, the trial judge sustained the defendant's objection to this question: Was Spencer "the agent of Brown for the purchase of the lumber?" In upholding that ruling this Court said: "Whether the relation of principal and agent had been created depended upon the authority or power delegated. *What* that authority was is a question of fact, its effect a question of law. . . . The agency

being in dispute, the express or implied authority to act must be shown. The facts being shown, then, whether the relation of principal and agent is created becomes a question of law for the court to declare, and not for the witness." *Id.* at 265, 42 S.E. at 606. *Accord,* Stansbury, N. C. Evidence § 130 (2d Ed. 1963); 3 Am. Jur. 2d *Agency,* § 356 (1962); Annot., 90 A.L.R. 749. Clearly, therefore, Creasman's statement that in January 1965 he was "representing" the Association in Buncombe County was properly stricken.

[4, 6] There is also no evidence to support plaintiff's contention that, in order to make the loan, the executive vice-president, or any other agent of the Association, colluded with Creasman to obtain plaintiff's signature on a note and deed of trust by fraudulent misrepresentation. Nor is there evidence that they had any reason to suppose Creasman would secure his mother's signature in the manner he stated. Incidentally, we note that the Association's board of directors lent plaintiff only the amount necessary to pay off the prior deed of trust, which was then in default. According to Creasman he had obtained that deed of trust and note in the same manner as the ones in suit. If so, those instruments were valid as to innocent third parties for the same reason the note and deed of trust here involved are valid. Therefore, having extinguished that encumbrance, defendant would be subrogated to the rights of the first creditor. *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745.

The rule governing this case is specifically stated in *Mielcuszny v. Rosol,* 317 Pa. 91, 94, 176 A. 236, 237: "Where one executes a bond and mortgage in blank and places it in the hands of a third person, he assumes all the consequences of his act."

Golden Prague Bldg., *Loan & Savings Association v. Crimi,* 172 Md. 238, 190 A. 830, involved a mortgage which was signed in blank; "there was nothing on the paper but the printed matter, no script or typewriting." The mortgage, signed by Crimi, secured a loan made by the Loan & Savings Association to Magris, who was purchasing from Klecka, the attorney for the Loan & Savings Association, property owned by him. Klecka fraudulently failed to insert in the mortgage the limitation of liability upon which he, Crimi, and Magris had agreed. Upon discovery of the fraud, Crimi sued to reform and cancel the instrument. In denying relief the court held that the filling of

blanks in a printed mortgage form in a wrongful manner by a person having express or implied authority to fill them in another way is deemed merely a breach of confidence, and "when an innocent third party becomes involved in the transaction the loss must fall on those whose carelessness and neglect have occasioned this loss." *Id.* at 245, 190 A. at 833. *See* 59 C.J.S., *Mortgages* § 122 (1949); 23 Am. Jur. 2d, *Deeds* § 139 (1965).

This Court has long applied the foregoing rule to notes which were signed in blank and thereafter completed in violation of the maker's instructions. In *Phillips v. Hensley,* 175 N.C. 23, 94 S.E. 673, it is said:

"It is well settled that if the maker of an instrument intrusts it to another for use with blanks to fill up, such instrument so delivered carries on its face an implied authority to fill up the blank spaces and deliver the instrument.

"As between such party and innocent third persons, the person to whom the instrument is entrusted is deemed the agent of the party who committed the instrument to his authority. The ruling is founded upon the principle that where one of two persons must suffer by the bad faith of another, the loss must fall upon the one who first reposed the confidence and made it possible for the loss to occur." *Id.* at 25, 94 S.E. at 674. *Accord, McArthur v. McLeod,* 51 N.C. 476; *Humphreys v. Finch,* 97 N.C. 303, 1 S.E. 870; *Furst v. Merritt,* 190 N.C. 397, 130 S.E. 40.

Plaintiff argues that the foregoing doctrine is not applicable to this case because Creasman obtained her signature on the note and deed of trust "by a trick," which constituted fraud in the *factum;* that "the want of identity between the instrument she executed and the one she intended to execute" rendered the deed of trust and note void; and that no rights could be acquired thereunder even by innocent third parties. *Furst v. Merritt, supra.* This contention is untenable.

[7, 8] When one signs an instrument in blank the plea of *non est factum* or fraud in the *factum* is not available to him. "As a general rule, it may be said that fraud in the *factum* arises from a want of identity or disparity between the instrument executed and the one intended to be executed. . . . " *Furst v. Merritt, supra* at 401, 130 S.E. at 43. When a person signs a blank deed of

trust form he cannot say that the instrument he signed was different from what he intended to sign, for he intended to sign a blank form, leaving it to another to complete. In such a case, notwithstanding he may have been induced to sign by false representations that the blanks would be filled in a certain way, he knowingly executed the very instrument which he intended to execute. *See Medlin v. Buford,* 115 N.C. 260, 20 S.E. 463.

For the reasons stated, the decision of the Court of Appeals affirming the judgment of the Superior Court is

Affirmed.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1971

STATE OF NORTH CAROLINA v. MARIE HILL

No. 100

(Filed 7 September 1971)

Homicide § 31; Criminal Law § 135— first-degree murder — death sentence — remand for sentence of life imprisonment

Pursuant to the mandate of the Supreme Court of the United States, a first-degree murder case in which the defendant received the death sentence is remanded to the superior court with direction that the defendant be sentenced to life imprisonment in the State's prison.

Justices HIGGINS and LAKE dissenting.

ON remand from the Supreme Court of the United States.

BOBBITT, Chief Justice.

At the trial of defendant, Marie Hill, at December 16, 1968 Criminal Session of the Superior Court of EDGECOMBE County, North Carolina, the jury returned a verdict of guilty of murder in the first degree and thereupon the court pronounced judgment which imposed a death sentence. Upon defendant's appeal, this Court found "No error" in the trial and judgment. *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969). On June 28, 1971, upon its consideration of defendant's petition for writ of *certiorari,* the Supreme Court of the United States entered the following order: "The petition for writ of certiorari is granted. The judgment, insofar as it imposes the death sentence, is reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United*

States, 392 U.S. 651 (1968), and the case is remanded for further proceedings." *Marie Hill, Petitioner v. North Carolina* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S.Ct. 2287 (1971).

Pursuant to the mandate of the Supreme Court of the United States, this cause is remanded to the Superior Court of Edgecombe County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Edgecombe County will cause to be served on the defendant, Marie Hill, and on her attorneys of record, notice to appear during a session of said superior court at a designated time, not less than ten days from the date of the order, at which time, in open court, the defendant, Marie Hill, being present in person and being represented by her attorneys, the presiding judge, based on the verdict of guilty of murder in the first degree returned by the jury at the trial at the December 16, 1968 Criminal Session, will pronounce judgment that the defendant, Marie Hill, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Edgecombe County will issue a writ of *habeas corpus* to the official having custody of the defendant, Marie Hill, to produce her in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

Remanded for judgment.

Justice HIGGINS dissenting.

For the reasons here assigned, I am unable to join in this Court's Order directing the Superior Court to impose a sentence of life imprisonment for the offense charged.

Whatever else may be said, there is no doubt that the decision of the Supreme Court of the United States eliminates the death penalty in this case. The only question is the manner in which the State should make the substitution. May we not assume the Supreme Court of the United States will permit the State to remove the death sentence and substitute life imprisonment in the manner provided by the State's Constitution and required by its judicial decisions? The directive to this Court states "judgment insofar as it imposes the death sentence be reversed" (citing *U. S. v. Jackson* and *U. S. v. Pope)* and case remanded to the Supreme Court of North Carolina "for

further proceedings." Necessarily the further proceedings require the punishment be changed from death, as required by the trial court's judgment, to life imprisonment. Clearly the mandate to this Court contemplates "further proceedings." The mandate, therefore, is not self-executing. Otherwise there would be no necessity for "further proceedings."

In North Carolina's criminal cases the appellate court's review is limited to the determination whether errors of law were committed in the trial. When a trial has been found to be free from error, the decision so finding is certified to the trial court and relief from the judgment must be through the action of the Governor (except for certain provisions involving post-conviction review). Article III, Section 5, (6) of the North Carolina Constitution provides: "*Clemency.* The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. . . . " The Governor has constitutional authority, therefore, after conviction, to grant relief against all sentences except in cases of impeachment.

"Where the pardoning power is, by constitutional provision, vested in an executive officer, the courts have no jurisdiction in criminal cases to exercise a power to pardon, commute or reprieve; nor have they authority to grant immunity to one who has committed an offense, or to adopt a procedure to that end." 39 Am. Jur., Pardon, Reprieve and Amnesty, § 23. *Courts,* page 531, citing among others, *Sorrells v. United States,* 287 U.S. 435. " . . . (T)he power (to grant pardons, reprieves and commutations) . . . cannot, however, be restricted or limited by any act of the legislative or other branch of the government, in the absence of any grant of the power to restrict or limit in the constitutional provision conferring the power." 39 Am. Jur., Pardon, Reprieve and Amnesty, § 24. *Generally,* page 532.

Some of my associates have expressed the view that this case, now in the courts, is out of the Governor's hands. Surely this view is not correct. The Governor's power has its source in the Constitution. Neither the Legislature nor the courts can take it away. The prisoner stands convicted and is under sentence by the trial court for a violation of State law. The trial court imposed the sentence required by statute for the offense

charged. The sentence imposed is not vacated by any order from any court. This Court affirmed the sentence. True the Supreme Court of the United States said this Court committed error in approving the sentence and directed that the sentence of life imprisonment be substituted for the death sentence. Up to now the sentence of the trial court is on its record undisturbed. The Governor has power without appeal to reduce the sentence to life imprisonment, to a term of years, or to free her from it altogether. After conviction, the Governor has power to exercise clemency in all cases (except impeachment) on such conditions as he thinks proper. Should he not be permitted to exercise that power for the State and thus comply with the mandate? It seems apparent that the Supreme Court of the United States is not familiar with our constitutional provisions and our court procedures with respect to appellate review. I quote from a number of pertinent decisions:

State v. Jones, 69 N.C. 16:

"In equity cases and in civil actions the practice (of further hearing) has been common, but in criminal cases never to our knowledge. In the former cases this Court makes decrees and passes judgments, which may be reviewed. But in criminal cases we do not pass judgment. Such cases are sent up for our opinion only, which we certify to the court below, and there our jurisdiction ends."

State v. Starnes, 94 N.C. 973:

"In appeals from judgments rendered in indictments, our jurisdiction is executed in reviewing and correcting errors in law committed in the trial of the cause, and to this alone."

State v. Turner, 143 N.C. 641, 57 S.E. 158:

"But this Court has uniformly held that under the Constitution it has no power to entertain such motions in criminal cases, and has no desire to assume a function which can be more efficiently performed by the Executive."

State v. Lewis, 226 N.C. 249 (cited with approval, *In re Powell,* 241 N.C. 288):

"After a defendant has begun the service of his term, or at least when that takes place after the adjournment of the court, it is beyond the jurisdiction of the judge to alter it or interfere with it in any way. The power of pardon,

parole or discharge during the term of imprisonment is by the Constitution the exclusive prerogative of the Governor."

The Supreme Court of the United States sent us this directive: " . . . (It) was ordered and adjudged on June 28, 1971, by this Court that the judgment of the Supreme Court of North Carolina, insofar as it imposes the death sentence, be reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United States,* 392 U.S. 651 (1968) ; and that this cause be remanded to the Supreme Court of the State of North Carolina for further proceedings."

In no sense can it be said that the Supreme Court of North Carolina imposed a death sentence. The rule, as stated in the cases cited, and in many others (and none to the contrary), is that the Supreme Court of North Carolina reviews criminal cases and determines whether errors of law have been committed and when the certificate goes down that the Court finds no error, relief from the judgment becomes the responsibility of the Governor. Superior Court Judges are constitutional officers. *Their sources of authority and power are the State Constitution and the Acts of the General Assembly.* A verdict of guilty of murder in the first degree (absent a recommendation the punishment be life imprisonment) requires the imposition of the death sentence. G.S. 14-17. " . . . (M)urder in the first degree . . . shall be punished with death." North Carolina Constitution, Article XI, Section 2. No other judgment is authorized. *State v. Westbrook,* 279 N.C. 18, and cases therein cited. Neither the Supreme Court of North Carolina, nor the Supreme Court of the United States is the source of a superior court judge's power. In a proper case, either may restrain the unauthorized use of the trial court's power. In criminal cases, and in situations such as now confront us, the Governor's power of clemency takes on emphasized significance. The Constitution, the State statutes and the decided cases harmonize and support the view that the authority of this Court ends when it certifies to the superior court that it finds no error in a criminal trial. At the time these cases were decided, the Court's supervisory power was precisely the same as it is today.

In my opinion no effort whatever should be made to prevent, or to delay, compliance with the Court's mandate in this case. However, in my opinion, compliance should be by order of

the Governor who has the Constitutional power rather than by the Court which does not have it. The mandate thus is satisfied when the death sentence is effectively removed and a life sentence substituted. So long as the death sentence is effectively removed, the manner of removal may be by the agency of the State which has the power. To hold, as the Court now does, that only the Court can act for the State is to take a gimlet hole view of the mandate not required by its terms.

I have been taught to believe the State may regulate its judicial and other affairs as it deems proper so long as rights under the Constitution of the United States, the Acts of Congress and our treaties with foreign powers are not infringed. If this be so, the Governor's commutation complies with the mandate. I do not share the view that the Court has exclusive power to commute the sentence of the trial court.

This one further comment: In no event may the verdict be set aside and a new trial ordered. Error either in the trial or the verdict of guilty is not suggested by any court. If the verdict should be set aside without the defendant's procurement or approval, a plea of former jeopardy at another trial would present a grave constitutional question.

Since writing the above, it has come to my attention that on yesterday, September 6, 1971, in some manner not disclosed to me, there appeared in our Clerk's office and by him marked filed, a paper giving the names of the six capital cases with this order: "The Motions for leave to proceed in *forma pauperis* are granted. The petitions for writs of *certiorari* are granted. The judgments, insofar as they impose the death sentence, are reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United States,* 392 U.S. 651 (1968), and the cases are remanded for further proceedings."

The original order reversing our decision in the case of Marie Hill is here quoted (the orders in the other five cases are similar):

"UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the Supreme Court of the State of North Carolina,

GREETINGS:

WHEREAS, lately in the Supreme Court of the State of North Carolina, there came before you a cause between the State of North Carolina and Marie Hill, No. 2, wherein the judgment of the said Supreme Court was duly entered on the tenth day of December A. D. 1969, as appears by an inspection of the petition for writ of *certiorari* to the said Supreme Court and response thereto.

AND WHEREAS, in the October Term, 1970, the said cause having been submitted to the SUPREME COURT OF THE UNITED STATES on the said petition for writ of *certiorari* and response thereto, and the Court having granted the said petition:

ON CONSIDERATION WHEREOF, it was ordered and adjudged on June 28, 1971, by this Court that the judgment of the Supreme Court of North Carolina, insofar as it imposes the death sentence, be reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United States,* 392 U.S. 651 (1968); and that this cause be remanded to the Supreme Court of the State of North Carolina for further proceedings.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding.

Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twenty-third day of July in the year of our Lord one thousand nine hundred and seventy-one.

/s/ ROBERT SEAVER
Clerk of the Supreme Court
of the United States"

The mandate addressed to us ordered that our judgments, insofar as they impose the death sentence "be reversed." The

new paper filed yesterday (September 6, 1971) listing the six cases is not addressed to us or to any person. It lists six cases by number and name and then follows this: "The Motions for leave to proceed in *forma pauperis* are granted. The petitions for writs of *certiorari* are granted. The judgments, insofar as they impose the death sentence are reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United States,* 392 U.S. 651 (1968), and the cases are remanded for further proceedings. June 28, 1971. Mr. Justice Black dissents."

My objection is that the Court now treats this special record filed September 6, addressed to no one, as the official record rather than the separate mandate in each case addressed "To the Honorable the Judges of the Supreme Court of North Carolina." I think the unaddressed paper must give way to the duly authenticated mandate addressed to us which is that our judgment "be reversed." If I am correct, this leaves an erroneous death sentence on the records of the superior court and so long as that sentence is unexpunged, the Governor's authority to commute cannot be impinged by any court.

I dissent from the order.

Justice LAKE dissenting.

I dissent from the order directing the Superior Court of Edgecombe County to enter judgment sentencing the defendant to imprisonment for life upon the verdict heretofore entered.

The defendant appealed to this Court from a judgment of the Superior Court of Edgecombe County imposing upon her the sentence of death pursuant to a verdict finding her guilty of murder in the first degree, the jury having not recommended the imposition of a sentence of imprisonment for life. Upon her appeal the defendant sought a new trial for alleged errors of law. Among the defendant's assignments of error were these:

"1. EXCEPTIONS 7, 8 and 9 (R pp 94 and 96):

"The sentencing procedure provided by G.S., § 15-162.1 of the General Statutes of North Carolina violates the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and Article I, §§ 11, 13 and 14, of the North Carolina Constitution.

"IV. EXCEPTIONS 7 and 9 (R pp 94 and 96):

"The sentence imposed upon the defendant violates the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, § 14, of the Constitution of North Carolina."

The exceptions upon which these assignments were based were as follows:

"Defendant moves to set aside the verdict on the grounds that the verdict as returned by the jury was improper. Motion denied. Defendant excepts. DEFENDANT'S EXCEPTION # 7.

"Defendant moves for a new trial because of errors in law committed during the trial. Motion denied. Defendant excepts. DEFENDANT'S EXCEPTION # 8.

"To the signing and entry of the foregoing judgment the defendant in open court objects and excepts, and gives notice of appeal to the Supreme Court of North Carolina; further notice waived. EXCEPTION # 9."

This Court found no merit in any of the defendant's assignments of error and affirmed the judgment of the Superior Court. *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885.

The Supreme Court of the United States granted the defendant's petition for *certiorari* and remanded the matter to this Court, saying only:

"The motion for leave to proceed in *forma pauperis* is granted. The petition for writ of *certiorari is granted.* The judgment, insofar as it imposes the death sentence, is reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United States,* 392 U.S. 651 (1968), and the case is remanded for further proceedings."

The judgment of this Court, affirming the judgment of the Superior Court, has thus been reversed, "insofar as it imposes the death sentence," by the only court in all the world having authority to do so. It seems to me clear that the Supreme Court of the United States intended, by its order, to reverse, or vacate, the death sentence which had been imposed on Marie Hill by the Superior Court and affirmed by us. If so, no action by this Court is necessary to vacate that sentence, though orderly procedure would seem to indicate the entry of such judgment by us pursuant to the mandate we have received. See *D&W, Inc.*

v. Charlotte, 268 N.C. 720, 152 S.E. 2d 199. The sentence of death having been vacated by a court having jurisdiction to do so, and no other sentence having been imposed, it would seem necessarily to follow that there is no sentence presently in effect. The commutation power of the Governor under Article III, § 6, Clause (6), of the Constitution of North Carolina is the power to reduce a sentence then in effect, not the power to impose a sentence upon a person not then under sentence. Black's Law Dictionary; 15A C.J.S., Commutation; 39 AM. JUR., Pardon, Reprieve and Amnesty, § 8. Consequently, the commutation power of the Governor appears to afford no solution to the dilemma facing the State as a result of the reversal by the Supreme Court of the United States of the judgment of this Court. In any event, the Governor has not attempted to exercise the commutation power in this case, nor has he indicated any intent to do so. The case is again before us, on the order of remand, for further proceedings and it is necessary that this Court take some action upon it.

The matter has been remanded to this Court for further "proceedings" in conformity with the judgment of the Supreme Court of the United States. The question now before us is what proceedings will meet this test and also conform to the law of North Carolina, for neither this Court nor any other court of North Carolina has any authority not conferred upon it by the Constitution and laws of this State. We can derive no authority from any other source, not even a decree of the Supreme Court of the United States. That Court may, as in this case, set aside a judgment of this Court when, in its opinion, our judgment is in conflict with the Constitution or laws of the United States, but it cannot authorize this Court to enter a judgment which is not authorized by the law of North Carolina, and it has not purported to do so.

This Court is not authorized by the law of North Carolina to enter, or to authorize or direct the Superior Court of Edgecombe County to enter, any sentence upon Marie Hill for the crime of murder in the first degree except one which is pursuant to and in accord with the verdict of the jury, she having entered a plea of not guilty. The fact that a sentence, approved by us and in accord with the verdict, cannot be lawfully carried out does not authorize this Court to enter or to direct or approve the entry of a different sentence simply because it is believed

by us to be just, expedient and the next best thing to do with the defendant. *State v. Ruth,* 276 N.C. 36, 170 S.E. 2d 897.

The supervisory power conferred upon this Court by Article IV, § 12(1), of the Constitution of North Carolina is the power to enter orders directing other courts of the State to proceed in accordance with the law of this State, not the power to direct them to proceed as we, in our best judgment, deem just and right.

The statute, G.S. 14-17, fixing the possible sentences for the crime of murder in the first degree, the defendant having entered a plea of not guilty, is clear and explicit. It provides:

> "A murder which shall be * * * committed in the perpetration or attempt to perpetrate any * * * robbery * * * shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury * * * "

The Supreme Court of the United States has not declared this statute, or any part of it, unconstitutional *per se.* It has not said that if, at the time of the offense and trial, this statute stood alone, as it now stands alone, the State may not impose and carry out a sentence of death, pursuant to a verdict such as that rendered by the jury in Marie Hill's case. All it has said is that such sentence cannot be imposed lawfully when there is also in effect a statute such as G.S. 15-162.1. We are, of course, bound by that decision. At the time of the offense with which the defendant is charged, and also at the time of her trial, both G.S. 14-17 and G.S. 15-162.1 were in effect. The subsequent repeal of G.S. 15-162.1 does not have any bearing upon the validity of the sentence heretofore imposed, nor will it make a death sentence permissible at a new trial.

The jury returned a verdict of guilty of murder in the first degree without a recommendation. Apart from the provisions of the United States Constitution, as now interpreted by the Supreme Court of the United States, let us assume that the Superior Court, in the first instance, had sentenced the defendant to imprisonment for life upon this verdict and that the validity of such sentence were properly before us on appeal. Is it not clear that we would then be obliged to hold the im-

position of such a sentence was error for the reason that the sentence was not in accord with the verdict and so was not authorized by the statute? The statute makes the recommendation of the jury, at the time of rendering its verdict, that the defendant be sentenced to imprisonment for life a condition precedent to the authority of the trial judge to impose such a sentence. *State v. Ruth, supra.*

It appears to me a reasonable assumption that, had the Legislature been granted the ability to foresee how the United States Supreme Court would interpret the United States Constitution, as related to this statute and G.S. 15-162.1 in conjunction, the Legislature would have given this Court authority to direct the imposition of a sentence to life imprisonment in a case so remanded to us. However, the Legislature did not foresee such a decision by that Court and, consequently, we are left with and limited by the statute as it is.

This, then, is our dilemma upon this remand: The death sentence cannot be imposed because the United States Supreme Court has so decreed, pursuant to its interpretation of the United States Constitution as applied to the combination of G.S. 14-17 and G.S. 15-162.1. A sentence of life imprisonment cannot be imposed because the statutory condition precedent thereto has not occurred. *State v. Ruth, supra.* What now is the lawful and proper "further proceeding?"

The Supreme Court of the United States has vacated the judgment rendered in the Superior Court, and affirmed by this Court, because of what it has declared to be an error of law. That error was the result of the charge of the superior court to the jury with reference to the possible verdicts which the jury might render. Though the charge, as to the possible verdicts, was in full accord with the previous decisions of this Court, we must now regard it as an erroneous statement of the law applicable to the trial of Marie Hill on the indictment appearing in the record. When a defendant appeals to this Court from a sentence, imposed pursuant to a verdict rendered under an erroneous instruction by the trial court, and seeks a new trial, as Marie Hill did, the proper procedure is for this Court to remand the case to the superior court for a new trial.

This defendant has, in my opinion, had a fair trial. The evidence in the record before us fully supports the verdict that she is guilty of murder in the first degree. The Supreme Court of the United States has suggested nothing to the contrary. It

has, however, forbidden the State to carry out the sentence of death and has remanded the matter to us for further proceedings. This it had jurisdiction—*i.e.*, authority—to do. Therefore, its judgment is binding upon us however much we may disagree with it. So is the law of North Carolina binding upon us to the extent that it does not conflict with the Constitution and laws of the United States.

To send this case back for a new trial entails the risk of a different verdict as to guilt. The evidence at the new trial may be different, or the different jury may not believe it. That is, a new trial entails the risk of a miscarriage of justice, assuming the record now before us speaks the truth. On the other hand, if, at the new trial, another jury, properly instructed, returns a verdict of guilty of murder in the first degree with a recommendation that a sentence of life imprisonment be imposed, then it may well be said, assuming such trial is free from error, that time and expense have been wasted for no purpose except to follow the ritual of the law. I do not think this Court should take the position that to follow the mandate of the statute before imprisoning a person for life is a waste of time and money, but, if it be such, I nevertheless see no other procedure which conforms both to the decree of the United States Supreme Court and to the law of North Carolina. Being bound, in this case, to follow both, I feel compelled to dissent from the entry of an order by this Court directing the Superior Court of Edgecombe County to sentence Marie Hill to imprisonment for life upon the verdict heretofore rendered. It is my view that this case must now be remanded to the Superior Court for a new trial because of the error in instructing the jury as to the possible verdicts it might render. *State v. Ruth, supra.*

To hold that the Superior Court erred in instructing the jury that it might return a verdict of guilty of murder in the first degree without recommending that she be sentenced to imprisonment for life, in which event the Court would impose the death sentence, and to order a new trial because of this error, would not violate the constitutional prohibition against double jeopardy. The defendant, in her appeal to this Court, asked for a new trial. As Justice Sharp said in *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371:

> "All courts agree that when a defendant seeks a new trial by appealing his conviction he waives his protection

against reprosecution. '[I]t is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he has been convicted.' *Ball v. United States,* 163 U.S. 662, 672, 16 S.Ct. 1192, 1195, 41 L. Ed. 300, 303 (1896)."

This statement was quoted with approval in *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681, *cert. den.,* 396 U.S. 934. To the same effect, see: *State v. Case,* 268 N.C. 330, 150 S.E. 2d 509; *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Gainey,* 265 N.C. 437, 144 S.E. 2d 249; *State v. Anderson,* 262 N.C. 491, 137 S.E. 2d 823; *State v. White,* 262 N.C. 52, 136 S.E. 2d 205; *State v. Correll,* 229 N.C. 640, 50 S.E. 2d 717, *cert. den.,* 336 U.S. 969; *State v. Williams,* 224 N.C. 183, 29 S.E. 2d 744, aff'd, 325 U.S. 226, rehear. den., 325 U.S. 895; *State v. Stanton,* 23 N.C. 424; 21 AM. JUR. 2d, Criminal Law, § 209.

In *North Carolina v. Pearce,* 395 U.S. 711, 719, 89 S.Ct. 2072, 23 L. Ed. 2d 656, 666, the United States Supreme Court reaffirmed *Ball v. United States, supra,* saying:

"At least since 1896, when *United States v. Ball* [*supra*] was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside. 'The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence.' *United States v. Tateo,* 377 U.S. 463, 465, 12 L. Ed. 2d 448, 450, 84 S.Ct. 1587. * * *

"We think those decisions are entirely sound, and we decline to depart from the concept they reflect."

STATE OF NORTH CAROLINA v. DEE D. ATKINSON

No. 101

(Filed 7 September 1971)

Rape § 7; Criminal Law § 135— rape — death sentence — remand for sentence of life imprisonment

Pursuant to the mandate of the Supreme Court of the United States, a rape case in which the defendant received the death sentence is remanded to the superior court with direction that the defendant be sentenced to life imprisonment in the State's prison.

Justices HIGGINS and LAKE dissenting.

ON remand from the Supreme Court of the United States.

HUSKINS, Justice.

At the trial of defendant, Dee D. Atkinson, at August, 1970 Criminal Session of the Superior Court of JOHNSTON County, North Carolina, the jury returned a verdict of guilty of rape and thereupon the court pronounced judgment which imposed a death sentence. Upon defendant's appeal, this Court found "No error" in the trial and judgment, 278 N.C. 168, 179 S.E. 2d 410. On June 28, 1971, upon its consideration of defendant's petition for writ of *certiorari,* the Supreme Court of the United States entered the following order: "The petition for writ of certiorari is granted. The judgment, insofar as it imposes the death sentence, is reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United States,* 392 U.S. 651 (1968), and the case is remanded for further proceedings." *Dee D. Atkinson, Petitioner v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 861, 91 S.Ct. 2292 (1971).

Pursuant to the mandate of the Supreme Court of the United States, this cause is remanded to the Superior Court of Johnston County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Johnston County will cause to be served on the defendant, Dee D. Atkinson, and on his attorneys of record, notice to appear during a session of said superior court at a designated time, not less than ten days from the date of the order, at which time, in open court, the defendant, Dee D. Atkinson, being present in person and being represented by his attorneys, the presiding judge, based on the verdict of guilty of rape returned by the jury at

the trial at the August, 1970 Criminal Session, will pronounce judgment that the defendant, Dee D. Atkinson, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Johnston County will issue a writ of *habeas corpus* to the official having custody of the defendant, Dee D. Atkinson, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

Remanded for judgment.

HIGGINS and LAKE, Justices, dissent for the reasons stated in their separate dissenting opinions filed this day in *State v. Hill, ante* 371, 183 S.E. 2d 97 (1971).

STATE OF NORTH CAROLINA v. DEE D. ATKINSON

No. 102

(Filed 7 September 1971)

Homicide § 31; Criminal Law § 135— first-degree murder — death sentence — remand for sentence of life imprisonment

Pursuant to the mandate of the Supreme Court of the United States, a first-degree murder case in which the defendant received the death sentence is remanded to the superior court with direction that the defendant be sentenced to life imprisonment in the State's prison.

Justices HIGGINS and LAKE dissenting.

ON remand from the Supreme Court of the United States.

BOBBITT, Chief Justice.

At the trial of defendant, Dee D. Atkinson, at the July-August 1968 Criminal Session of the Superior Court of WAYNE County, North Carolina, the jury returned a verdict of guilty of murder in the first degree and thereupon the court pronounced judgment which imposed a death sentence. Upon defendant's appeal, this Court found "No error" in the trial and judgment. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969). On June 28, 1971, upon its consideration of defendant's petition for writ of *certiorari,* the Supreme Court of the United

States entered the following order: "The petition for writ of certiorari is granted. The judgment, insofar as it imposes the death sentence, is reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United States,* 392 U.S. 651 (1968), and the case is remanded for further proceedings." *Dee D. Atkinson, Petitioner v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 859, 91 S.Ct. 2283 (1971).

Pursuant to the mandate of the Supreme Court of the United States, this cause is remanded to the Superior Court of Wayne County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Wayne County will cause to be served on the defendant, Dee D. Atkinson, and on his attorneys of record, notice to appear during a session of said superior court at a designated time, not less than ten days from the date of the order, at which time, in open court, the defendant, Dee D. Atkinson, being present in person and being represented by his attorneys, the presiding judge, based on the verdict of guilty of murder in the first degree returned by the jury at the trial at the July-August 1968 Criminal Session, will pronounce judgment that the defendant, Dee D. Atkinson, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Wayne County will issue a writ of *habeas corpus* to the official having custody of the defendant, Dee D. Atkinson, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

Remanded for judgment.

Justices HIGGINS and LAKE dissent for the reasons stated in their separate dissenting opinions filed this day in *State v. Hill, ante* 371, 183 S.E. 2d 97 (1971).

STATE OF NORTH CAROLINA v. WILLIE B. WILLIAMS

No. 103

(Filed 7 September 1971)

Homicide § 31; Criminal Law § 135—first-degree murder — death sentence — remand for sentence of life imprisonment

Pursuant to the mandate of the Supreme Court of the United States, a first-degree murder case in which the defendant received the death sentence is remanded to the superior court with direction that the defendant be sentenced to life imprisonment in the State's prison.

Justices HIGGINS and LAKE dissenting.

ON remand from the Supreme Court of the United States.

SHARP, Justice.

At the trial of defendant, Willie B. Williams, at April 21, 1969 Criminal Session of the Superior Court of BLADEN County, North Carolina, the jury returned a verdict of guilty of murder in the first degree and thereupon the court pronounced judgment which imposed a death sentence. Upon defendant's appeal, this Court found "No error" in the trial and judgment. *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970). On June 28, 1971, upon its consideration of defendant's petition for writ of *certiorari,* the Supreme Court of the United States entered the following order: "The petition for writ of certiorari is granted. The judgment, insofar as it imposes the death sentence is reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United States,* 392 U.S. 651 (1968), and the case is remanded for further proceedings." *Willie B. Williams, Petitioner v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S.Ct. 2290 (1971).

Pursuant to the mandate of the Supreme Court of the United States, this cause is remanded to the Superior Court of Bladen County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Bladen County will cause to be served on the defendant, Willie B. Williams, and on his attorneys of record, notice to appear during a session of said superior court at a designated time, not less than ten days from the date of the order, at which time, in open

court, the defendant, Willie B. Williams, being present in person and being represented by his attorneys, the presiding judge, based on the verdict of guilty of murder in the first degree returned by the jury at the trial at the April 21, 1969 Criminal Session, will pronounce judgment that the defendant, Willie B. Williams, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Bladen County will issue a writ of *habeas corpus* to the official having custody of the defendant, Willie B. Williams, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

Remanded for judgment.

Justices HIGGINS and LAKE dissent for the reasons stated in their separate dissenting opinions filed this day in *State v. Hill, ante* 371, 183 S.E. 2d 97 (1971).

STATE OF NORTH CAROLINA v. PERRY SANDERS

No. 104

(Filed 7 September 1971)

Homicide § 31; Criminal Law § 135— first-degree murder — death sentence — remand for sentence of life imprisonment

Pursuant to the mandate of the Supreme Court of the United States, two first-degree murder cases in which the defendant received the death penalty in each case are remanded to the superior court with direction that the defendant be sentenced in each case to life imprisonment in the State's prison.

Justices HIGGINS and LAKE dissenting.

ON remand from the Supreme Court of the United States.

MOORE, Justice.

Defendant, Perry Sanders, was indicted on two charges of murder in the first degree. At the trial at the November 17, 1969 Criminal Session of the Superior Court of FORSYTH County, North Carolina, the cases were consolidated for trial. The jury returned a verdict of guilty of murder in the first degree in each case. Thereupon the court pronounced judgment in each case which imposed the death sentence. Upon defendant's appeal,

this Court found "No error" in the trial and judgments. *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970). On June 28, 1971, upon its consideration of defendant's petition for writ of *certiorari,* the Supreme Court of the United States entered the following order: "The petition for writ of certiorari is granted. The judgments, insofar as they impose the death sentence, are reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United States,* 392 U.S. 651 (1968), and the cases are remanded for further proceedings." *Perry Sanders, Petitioner v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S.Ct. 2290 (1971).

Pursuant to the mandate of the Supreme Court of the United States, these cases are remanded to the Superior Court of Forsyth County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Forsyth County will cause to be served on the defendant, Perry Sanders, and on his attorneys of record, notice to appear during a session of said superior court at a designated time, not less than ten days from the date of the order. At such time, in open court, the defendant, Perry Sanders, being present in person and being represented by his attorneys, the presiding judge, based on the verdicts of guilty of murder in the first degree returned by the jury at the trial at the November 17, 1969 Criminal Session, will pronounce judgment in each case that the defendant, Perry Sanders, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Forsyth County will issue a writ of *habeas corpus* to the official having custody of the defendant, Perry Sanders, to produce him in open court at the time and for the purpose of being present when the judgments imposing life imprisonment are pronounced.

Remanded for judgments.

Justices HIGGINS and LAKE dissent for the reasons stated in their separate dissenting opinions filed this day in *State v. Hill, ante* 371, 183 S.E. 2d 97 (1971).

STATE OF NORTH CAROLINA v. ROBERT LOUIS ROSEBORO

No. 105

(Filed 7 September 1971)

Homicide § 31; Criminal Law § 135— first-degree murder — death sentence — remand for sentence of life imprisonment

Pursuant to the mandate of the Supreme Court of the United States, a first-degree murder case in which the defendant received the death sentence is remanded to the superior court with direction that the defendant be sentenced to life imprisonment in the State's prison.

Justices HIGGINS and LAKE dissenting.

ON remand from the Supreme Court of the United States.

BRANCH, Justice.

At the trial of defendant, Robert Louis Roseboro, at April 28, 1969 Criminal Session of the Superior Court of CLEVELAND County, North Carolina, the jury returned a verdict of guilty of murder in the first degree and thereupon the court pronounced judgment which imposed a death sentence. Upon defendant's appeal, this Court found "No error" in the trial and judgment. *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886 (1970). On June 28, 1971, upon its consideration of defendant's petition for writ of *certiorari,* the Supreme Court of the United States entered the following order: "The petition for writ of certiorari is granted. The judgment, insofar as it imposes the death sentence, is reversed, *United States v. Jackson,* 390 U.S. 570 (1968), *Pope v. United States,* 392 U.S. 651 (1968), and the case is remanded for further proceedings." *Robert Louis Roseboro, Petitioner v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S.Ct. 2289 (1971).

Pursuant to the mandate of the Supreme Court of the United States, this cause is remanded to the Superior Court of Cleveland County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Cleveland County will cause to be served on the defendant, Robert Louis Roseboro, and on his attorneys of record, notice to appear during a session of said superior court at a designated time, not less than ten days from the date of the order, at which time, in open court, the defendant, Robert Louis Roseboro, being present

in person and being represented by his attorneys, the presiding judge, based on the verdict of guilty of murder in the first degree returned by the jury at the trial at the April 28, 1969 Criminal Session, will pronounce judgment that the defendant Robert Louis Roseboro, be imprisoned for life in the State's prison.

2. The presiding judge of the superior court of Cleveland County will issue a writ of *habeas corpus* to the official having custody of the defendant, Robert Louis Roseboro, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

Remanded for judgment.

Justices HIGGINS and LAKE dissent for the reasons stated in their separate dissenting opinions filed this day in *State v. Hill, ante* 371, 183 S.E. 2d 97 (1971).

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ADAMS v. INSURANCE CO.

No. 10 PC.

Case below: 11 N.C. App. 678.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

BANK v. CARPENTER

No. 3 PC.

Case below: 12 N.C. App. 19.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 7 September 1971.

BANK v. EASTON

No 24 PC.

Case below: 12 N.C. App. 153.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

BANK v. FURNITURE CO.

No. 111 PC.

Case below: 11 N.C. App. 530.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

CLARKE v. KERCHNER

No. 104 PC.

Case below: 11 N.C. App. 454.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

COAKLEY v. MOTOR CO.

No. 13 PC.

Case below: 11 N.C. App. 636.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

DEARMAN v. BRUNS

No. 98 PC.

Case below: 11 N.C. App. 564.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

EVANS v. EVANS

No. 112 PC.

Case below: 12 N.C. App. 17.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

EVANS v. EVANS

No. 83.

Case below: 12 N.C. App. 17.

Motion of counsel for defendant to dismiss appeal for lack of substantial constitutional question allowed 7 September 1971.

IN RE DOE

No 81.

Case below: 11 N.C. App. 560.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971. Appeal dismissed *ex mero motu* for lack of substantial constitutional question 7 September 1971.

IN RE LEWIS

No. 113 PC.

Case below: 11 N.C. App. 541.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

LANE v. FAUST

No. 19 PC.

Case below: 11 N.C. App. 717.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

LONG v. COBLE

No. 5 PC.

Case below: 11 N.C. App. 624.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

McRORIE v. SHINN

No. 110 PC.

Case below: 11 N.C. App. 475.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

MANESS v. BULLINS

No. 109 PC.

Case below: 11 N.C. App. 567.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

ROBINSON v. McMAHAN

No. 102 PC.

Case below: 11 N.C. App. 275.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

SMITH v. COACH LINES

No. 18 PC.

Case below: 12 N.C. App. 25.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

SOUTH, INC. v. MORTGAGE CORP.

No. 16 PC.

Case below: 11 N.C. App. 651.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

STATE v. BENNETT

No. 12 PC.

Case below: 12 N.C. App. 42.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 7 September 1971.

STATE v. McDONALD

No. 107 PC.

Case below: 11 N.C. App. 497.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

STATE v. MOFFITT

No. 74.

Case below: 11 N.C. App. 337.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 September 1971.

STATE v. PARKER

No. 15 PC.

Case below: 11 N.C. App. 648.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

STATE v. POWELL

No. 105 PC.

Case below: 11 N.C. App. 465.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

TIMBER CO. v. SMITH

No. 23 PC.

Case below: 12 N.C. App. 137.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

TURNER v. INSURANCE CO.

No. 8 PC.

Case below: 11 N.C. App. 699.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

WALLACE v. JOHNSON

No. 17 PC.

Case below: 11 N.C. App. 703.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 September 1971.

WEIL'S, INC. v. TRANSPORTATION CO.

No. 106 PC.

Case below: 11 N.C. App. 554.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

WIDENER v. FOX

No. 108 PC.

Case below: 11 N.C. App. 525.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 September 1971.

PETITIONS TO REHEAR

JOYNER v. GARRETT, COMR. OF MOTOR VEHICLES

No. 75.

Reported: 279 N.C. 226.

Petition to rehear by Commissioner of Motor Vehicles denied 30 August 1971.

STATE OF NORTH CAROLINA v. JAMES ALLRED

No. 47

(Filed 13 October 1971)

1. **Homicide § 21— homicide case — sufficiency of the evidence — defendant's firing of the fatal shot.**

The evidence of defendant's guilt of second-degree murder or manslaughter was insufficient to be submitted to the jury, the homicide having occurred during a Saturday night scuffle at a rural crossroads, where the State offered uncontradicted evidence that the homicide victim died from a .25 bullet fired from a .25 automatic pistol, but there was no evidence that defendant had such a pistol at the time of the homicide or that he fired any pistol on that occasion.

2. **Criminal Law § 106— motion for nonsuit — sufficiency of the evidence — question of law**

To withstand defendant's motion for judgment as of nonsuit, there must be substantial evidence against the accused of every essential element of the crime charged; whether the State has offered such substantial evidence presents a question of law for the court.

APPEAL by defendant from *Long, J.*, January 25, 1971 Session of MOORE Superior Court, transferred for initial appellate review by the Supreme Court under its general order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant was indicted, in the form prescribed by G.S. 15-144, for the murder of Thomas Steven Brown on October 19, 1969.

When the case was called for trial, the solicitor announced that the State would not seek a verdict of guilty of murder in the first degree but would ask for a verdict of guilty of murder in the second degree "or a lesser included offense."

The only evidence was that offered by the State. It consisted of stipulations; a report dated August 12, 1970, by E. B. Pearce, Special Agent of the State Bureau of Investigation; and of the testimony of the following witnesses: Jack Elkins (Elkins); Darrell McNeill (McNeill); Jerry Deaton (Deaton); James Bibey (Bibey); June Brown, father of Thomas Steven Brown (Tommy), deceased; and Deputy Sheriff Coy Warf (Warf).

Deputy Sheriff Warf arrived at the scene of the homicide at approximately 1:15 a.m. on Sunday, October 19, 1969.

Tommy's body was lying in front of the filling station-grocery store at Robbins Crossroads, the intersection of N. C. Highways Nos. 705 and 27. The area in front of the building was completely paved and extended approximately 50 feet from the building to the highway. Pumps were in this area, being approximately 10-12 feet from the building. Tommy's car was parked next to the pumps on the side toward the highway and his body was beside his car, also on the side toward the highway.

A .22 pistol was found under Tommy's body. The cylinder of this pistol held nine cartridges. At that time it contained "three spent cartridges" and "six rounds that hadn't been fired." "(A) half-box of bullets" was found in Tommy's car.

It was stipulated that Tommy died "as a result of a gunshot wound received by him" on October 19, 1969. The bullet removed from Tommy's body was fired by a ".25 automatic."

Tommy, 21, was "a little over five feet tall" and weighed 138 pounds. June Brown, Tommy's father, testified that defendant was "twice bigger than (his) son." June Brown also testified that he had known defendant "roughly eight or ten years"; that they had visited in each other's homes; that Tommy and defendant were good friends; that both were horsemen and frequently rode together; and that he had never heard of any quarrel or animosity between them.

June Brown testified to a conversation with defendant "about a month and a half" before Tommy's death in which defendant stated that he had bought a .25 automatic "blue steel" pistol. He also testified that defendant had a red and white Ford pickup truck.

On Saturday night, October 18, 1969, there was a dance in West End, some 15 miles from Robbins Crossroads.

McNeill's testimony includes the following: He and his wife, Carolyn, and another couple, Tommy and Pat Williamson, had been riding around. They had parked for 35 or 40 minutes near the dance hall at West End. When they got ready to leave, Tommy, who had been sitting in the McNeill car, got out and started toward his own car. As the McNeill car was starting to drive off, "some boys in a red and white Ford pickup told him (Tommy) he was chicken, to come to Robbins Crossroads." Williamson drove the McNeill car to Robbins

Crossroads and pulled up beside Tommy's car. An unidentified "boy" came up and talked to Williamson, "using a lot of language." When McNeill told him "to hold it down," the boy walked around the car, stuck his head in the window and pulled a knife on McNeill and put it to his throat. He put the knife down when Tommy told him to leave McNeill alone, that McNeill "was a friend of his." As directed by McNeill, Williamson drove to the police station in Robbins, some two miles away. There "wasn't any law there." McNeill told the "six or seven boys" who were there "about it" and these boys and the McNeill party went from Robbins to Robbins Crossroads. The McNeill party had been gone from Robbins Crossroads twenty to thirty minutes. Upon returning, the McNeill car pulled up beside Tommy's car. Tommy was sitting in his car, alone. A police car was parked across the road. After the police car drove off, "some more shots fired" but McNeill could not determine "where these shots came from."

Elkins, McNeill, Deaton and Bibey testified to events at Robbins Crossroads *when Tommy was shot.* Each testified in substance as narrated below.

Elkins version: He is 24 and lives in Robbins. He was Tommy's good friend and rode with him to their place of work in Siler City. A "boy" from Carthage was taking him to his home in Robbins. When he saw Tommy's car at Robbins Crossroads, he said he would get out and ride with Tommy to Robbins. As he started toward Tommy's car, three Allred boys, with whom he had had trouble, approached him in a hostile and abusive manner. Tommy was sitting under the steering wheel of his car and was loading his .22 pistol. Elkins asked Tommy for his gun and then "got it out of his hand." He went to the back of Tommy's car. The three Allred boys were coming toward him. He shot three times into the ground in front of them. They ran. After he had fired the three shots, Tommy got out of the car, came back to where he was standing, and said, "Jack, give me my gun back, I don't want no trouble," or something like that. He gave it to Tommy. When Tommy got his gun back, defendant, whom Elkins had not seen, grabbed him by his coat. Defendant had "a small handgun" in his right hand which he stuck in his (Elkin's) face. The gun "wasn't very long." He did not recall whether it was chrome-plated, "what color it was or anything about it." When he saw the gun, "it scared (him) so bad (he) just gave a big jerk" and left

defendant holding his coat. He ran through a person's yard and through a honeysuckle thicket. The three Allred boys came after him and started hitting him. One of them had a knife. He had not seen defendant earlier that evening anywhere. Nor had he had any prior difficulty with him. Nor did he see any conversation or difficulty between Tommy Brown and defendant. He heard no shooting other than the three shots he fired. When these events occurred, there "were several cars out in the yard to this store . . . more than three or four." Also, there "were right many people out in the yard of the store." He had heard that Tommy Brown and defendant were good friends. The three Allred boys who had attacked Elkins were Donald, David (Corky) and Tony.

McNeill version: Upon returning to Robbins Crossroads, McNeill told Tommy to come over and get into the McNeill car so they could leave. Tommy said, "Wait just a minute, let me reload my gun." Tommy reloaded his gun, got out of his car and walked to the front. At that time, "there was shooting," two or three shots. There were "four or five other people there at the front of Tommy Brown's car." One was a "little bitty boy" who had a pistol. McNeill's attention was diverted because he "was having trouble with (his) wife." When he next observed Tommy, Tommy and "a heavy-set fellow" came by the McNeill car, "wrestling." As they passed, McNeill observed a pistol in Tommy's hand. He observed no weapon in the hand of the "other person." After they had passed alongside of McNeill's car, McNeill heard three or four shots but could not tell whether they came from the front or back. Shortly thereafter the "other person" came back by McNeill's car. At that time, he had "a little short gun" in his hand. He proceeded to a red and white pickup truck, which was "35 to 50 feet in front" of the McNeill car. He and two or three others got into the pickup and rode away. McNeill went to the back of his car. Tommy was lying there. His pulse was not beating. When McNeill returned from Robbins, "around ten or fifteen" were there at Robbins Crossroads. "(O)ff and on," eight or ten shots were fired. McNeill could not swear to whether the "big man" who came alongside his car, scuffling with Tommy, was a person then in the courtroom.

Deaton version: He saw Tommy in the McNeill car at West End. He drove, alone, from West End, saw Tommy's car at Robbins Crossroads and stopped, parking close to and to the

rear of Tommy's car and headed toward the pumps. McNeill's white Oldsmobile was there; also, defendant's red and white Ford pickup. The pickup was about 40 feet from Tommy's car. He thought it was "between the gas pumps and the store." He did not know "any trouble (was) going on." He did not see Elkins. When he got out and walked by McNeill's car, McNeill was mad and asked to borrow his knife. He refused, seeing "there was trouble." He first saw Tommy when he and others were together "just beside the gas tanks." Defendant was in this group. He saw no fighting at that time. Soon thereafter he saw Tommy and defendant fighting. There "weren't much of a fight to it." Defendant had Tommy by the hair of his head and hit him "one or two times," knocking him "this way and this way" until Tommy fell. He (Deaton) was about ten feet from Tommy. Tommy "was unconscious or dead." He started toward Tommy to see "how bad he was hurt." When he heard somebody say Tommy had been shot, he went to his car "to go get the ambulance." The only gun he saw was "a nickel-plated, short gun, four or five inches long, and Tommy had it." "(T)wo boys" asked Tommy for the gun but he "wouldn't give it to them." He "heard them say, '(a)t least unload it.'" Earlier in the night, he (Deaton) heard "three shots," "way over to the left," but did not know where they came from. He did not see defendant fire a shot or have a gun at any time that night. When defendant was holding him, Tommy was standing up straight. When defendant hit Tommy, defendant said: "S.O.B., you hear me now."

Bibey version: He drove from Carthage to Robbins Crossroads. Elkins rode with him. Upon his arrival at Robbins Crossroads, "five or six cars" were there and probably "twelve or thirteen or fourteen people." He knew "a few of them" when he saw them but not "by name." He parked approximately 15 or 20 feet away from Tommy's car. Elkins got out of Bibey's car and went over to see if Tommy would carry him home. Elkins was talking with Tommy, standing at the door of his car, when he heard "the Allred boy" curse Elkins and also heard some discussion about getting a gun out of Tommy's car. Elkins did get the gun, and "was running the Allred boys around . . . . shooting at them or at the ground. . . . " He did not know "what Allred boys these were." At that time, defendant "was standing and backing away from the trouble." He was "quite a ways from Brown." As the Allred boy(s) ran "in

the darkness," Elkins ran over to the corner of the service station. Then Tommy came over from his car to Elkins as if to retrieve the gun, saying something about "give me the gun before someone gets hurt." Elkins did not give it to him. Then Elkins, Tommy and defendant "came together as if to retrieve the gun." Previously, three shots had been fired by Elkins. A fourth shot was fired about the time Elkins, Tommy and defendant were scuffling. Bibey did not know who fired the fourth shot. It sounded like the others. Tommy broke away from the scuffling, stepped back, walked around and leaned up against a white Oldsmobile. When the Oldsmobile started to pull off, Tommy "tumbled over on the ground." Elkins also broke away from defendant and ran. After the white Oldsmobile backed away, Tommy was lying on his back. Defendant came over to him and got "kindly on his knees" in front of Tommy. He seemed to be striking him. He was threatening to kill him, saying, "goddamn you, I'll kill you, you believe that, I'll kill you." Bibey was then backing his car around and did not know what defendant did thereafter.

Tommy was killed near midnight. The filling station-store was closed for the night. Elkins, McNeill, Deaton and Bibey differ in respect of the exact time each of them arrived at Robbins Crossroads and in respect of the extent the area was lighted.

The jury returned a verdict of guilty of manslaughter and the court pronounced judgment which imposed a prison sentence of not less than eight nor more than ten years.

Attorney General Morgan and Assistant Attorneys General Briley and Wood for the State.

Dock G. Smith, Jr., and Pittman, Staton & Betts, by William W. Staton for defendant appellant.

BOBBITT, Chief Justice.

[1] Defendant assigns as error the denial of his motion under G.S. 15-173 for judgment as of nonsuit. Decision requires consideration of the evidence in the light most favorable to the State. *State v. Vincent,* 278 N.C. 63, 64-65, 178 S.E. 2d 608, 609 (1971), and cases cited.

The evidence is uncontradicted as to this crucial fact: The death of Tommy at Robbins Crossroads on October 19,

1969, was caused by a .25 bullet fired from a .25 automatic pistol.

There is no testimony that defendant had a .25 automatic pistol at Robbins Crossroads on October 19, 1969. Nor is there testimony that defendant fired any pistol on that occasion. The State relies upon circumstantial evidence.

[2] To withstand defendant's motion for judgment as of nonsuit, there must be substantial evidence against the accused of every essential element that goes to make up the crime charged. Whether the State has offered such substantial evidence presents a question of law for the court. *State v. Stephens,* 244 N.C. 380, 383-384, 93 S.E. 2d 431, 433 (1956); *State v. Horton,* 275 N.C. 651, 657, 170 S.E. 2d 466, 471 (1969). In the present case, the crucial question is whether the State offered substantial evidence that the fatal shot was fired by defendant.

[1] The only evidence which purports to connect defendant with a .25 pistol is the testimony of Tommy's father to the effect that defendant had told him, "about a month and a half" before Tommy's death, that he (defendant) had bought a .25 automatic pistol, "blue steel." There is no evidence *such a pistol* was seen in defendant's possession at any time before or after Tommy's death.

An attempt to reconcile the conflicting testimony would be futile. Each version differs sharply from the other, particularly on the issues of whether defendant had "a gun" and, if so, what he did with it.

According to Elkins: After he fired the three shots into the ground in front of the Allred boys, Donald, Corky and Tony, and after Tommy got out of his car and called for his pistol, defendant grabbed him (Elkins) and stuck a "small handgun" in his face. He did not know what color it was or anything about it. He heard no shot other than the three shots he (Elkins) fired.

According to McNeill: A "heavy-set fellow" and Tommy scuffled as they went to the back of McNeill's car, a white Oldsmobile. When the "heavy-set fellow" returned, he had "a little short gun" in his hand. McNeill could not identify any person in the courtroom as the "heavy-set fellow."

According to Deaton: Although he saw defendant grab Tommy by the hair of his head and knock him down, the only gun he saw was the gun Tommy had, "a nickel-plated, short gun, four or five inches long." He did not see defendant fire or have a gun.

According to Bibey: After Elkins had fired three shots from Tommy's gun, Tommy, Elkins and defendant came together "to retrieve" Tommy's gun. Meanwhile, a fourth shot was fired. Tommy broke away from the scuffling and leaned against a white Oldsmobile. The white Oldsmobile started away and Tommy fell. The only gun referred to by Bibey is Tommy's .22 pistol which Elkins had fired.

There is evidence which indicates hostility between Tommy and Elkins (and perhaps others) on the one hand and Donald, Corky and Tony Allred (and perhaps others) on the other hand. There was evidence from which it may be inferred that the three Allreds who were hostile to Tommy and Elkins were being transported on October 18, 1969, in defendant's red and white pickup truck, and that occupants of that truck challenged Tommy to come to Robbins Crossroads. There was evidence that Tommy was equipped with a loaded pistol and additional bullets. There was evidence that Tommy and defendant were good friends and evidence from which it may be inferred that defendant intervened to keep Tommy from inflicting injury or death by use of his .22 pistol.

There was positive evidence that at least one unidentified person, a "little bitty boy," had a pistol. Evidence as to the number of persons present and the number of shots fired at Robbins Crossroads during a period of hostility and confusion suggests that other unidentified persons had pistols.

The threatening language attributed to defendant by Deaton and Bibey related only to what defendant *would do in the future.*

It is well established that "(c)ontradictions and discrepancies, even in the state's evidence, are for the jury to resolve, and do not warrant nonsuit." 2 Strong, N. C. Index 2d, *Criminal Law* §104. Ordinarily, such contradictions and discrepancies bear solely upon the weight to be given the testimony of a witness, a matter within the province of the jury. *State v. Satterfield,* 207 N.C. 118, 176 S.E. 466 (1934).

Here the question is whether the State has offered substantial evidence that the fatal shot was fired by defendant. The evidence on which the State relies to establish this crucial fact involves more than mere contradictions and discrepancies. The testimony of McNeill, Deaton and Bibey relate to three separate and distinct occasions, each involving different circumstances immediately preceding Tommy's death. The version on which the State relies is not disclosed. The court's charge does not review any contention of the State with reference to the occasion and circumstances of Tommy's death.

Although the evidence raises *suspicions* as to defendant's involvement and possible guilt in respect of the death of Tommy, the conclusion we reach is that the State has failed to offer substantial evidence that the bullet which caused Tommy's death was from a *.25 automatic pistol fired by defendant.* On account of the inadequacy of the evidence in respect of this essential element of the crime charged, we hold the circumstantial evidence insufficient for submission to the jury. For error in failing to allow defendant's motion for judgment as of nonsuit, the judgment of the court below is reversed.

Reversed.

STATE OF NORTH CAROLINA v. FRANK ALLEN

No. 58

(Filed 13 October 1971)

Narcotics § 4— unlawful possession of heroin — sufficiency of evidence of possession

Notwithstanding defendant's contention that he was at a race track in the state of Maryland when police officers uncovered heroin at a certain house in Fayetteville, the State's evidence was sufficient to go to the jury on the issue of defendant's unlawful possession of the heroin, where there was testimony that the public utilities for the house were listed in defendant's name; that an Army identification card and other papers bearing defendant's name were found in the bedroom where the heroin was uncovered; that a 16-year-old boy was selling heroin at the defendant's direction; and that the boy obtained the heroin from the house. G.S. 90-88.

APPEAL by defendant from *Cooper, J.,* 9 September 1970 Session of CUMBERLAND Superior Court.

Defendant was charged in Indictment No. 70 CR 21144 with unlawfully dispensing narcotics, to-wit, heroin, to a minor. He was charged in Indictment No. 70 CR 11390 with unlawfully possessing a quantity of narcotic drugs, to-wit, heroin. The bills were consolidated for trial, and defendant entered a plea of not guilty to each charge. The jury returned a verdict of guilty as to each charge, and defendant gave notice of appeal from sentences imposed on the verdicts. He failed to perfect his appeal within the time allowed, and on 9 April 1971 the Court of Appeals allowed defendant's petition for *certiorari* to perfect his appeal. The case is before this Court pursuant to the general referral order effective 1 August 1970.

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

Mitchel E. Gadsden for defendant.

BRANCH, Justice.

Defendant assigns as error only the failure of the court to allow his motions for nonsuit at the close of the State's evidence and at the close of all the evidence. Defendant's motions for nonsuit must be considered in light of all the evidence since he introduced evidence and thereby waived the motions made at the close of the State's evidence. G.S. 15-173; *State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897. Thus, the sole question for decision is whether upon a consideration of all the evidence admitted—whether competent or incompetent—in the light most favorable to the State, there is substantial evidence to support the finding that the offenses charged in the bills of indictment were committed by defendant. *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679. Determination of this question requires a review of the evidence presented.

The State offered evidence which may be substantially summarized as follows:

Detective L. L. Sonberg of the Fayetteville Police Department testified that he had information from a reliable informer that the informer had on 4 May 1970 purchased a transparent capsule containing a white powder from a person at 900 Gillis Street in Fayetteville. The capsule was delivered to the police, and tests showed that the capsule contained heroin. He had in-

formation that the person who occupied the dwelling at 900 Gillis Street was known as "Snake" and that he was a dealer in narcotics. Based upon this information, Detective Sonberg on the same day obtained a search warrant from Magistrate Julian Mills and proceeded to 900 Gillis Street with the unnamed informer, Berry Hall of the C. I. D., and other military and civilian officers. Upon arrival, Agent Hall and the informer entered the house at 900 Gillis Street, where the informer again purchased one of the capsules. The informer and Agent Hall left, and upon receiving a prearranged signal from Hall indicating the presence of narcotics in the dwelling, Sonberg and the other officers went to the door armed with the search warrant. Detective Sonberg knocked on the door, informed the occupants that they were police officers and that they had a search warrant to search the premises. Someone inside the house tried to prevent their entry, and the door was then forced open. Betty Brinkley, one of the occupants, stated that she was in charge of the house, and Officer Sonberg read the warrant to her and conducted a search of the premises. The search produced 9 capsules from the kitchen and 6 capsules under the mattress of the bed in the master bedroom. (It was later stipulated that the capsules contained heroin.) During the search a wallet containing a United States Army identification card in the name of defendant and several other items bearing defendant's name were found in the master bedroom. At the time of the search the occupants of the house were Betty Brinkley, Leslie Carl Scott, and Lonnie J. Collins. Defendant was not present at the time of the search. On the next day a check at the Public Works Commission showed that the public utility services at 900 Gillis Street were listed in the defendant's name.

Leslie Carl Scott testified that on 4 May 1970 he was 16 years of age and that previous to that date he had on five or six occasions sold "stuff" for defendant. He stated that on 3 May 1970 he received a message that defendant wanted him to come over to the house at 900 Gillis Street. He went there and was told by defendant that he (defendant) was going away for a few days and the "stuff" was under the mattress. Defendant had told him earlier that he wanted him to sell some "scagg." In testifying, Scott used the term "scagg" and heroin interchangeably. He stated that on 4 May 1970 he sold heroin to a man who was accompanied by Agent Hall, and that he had earlier on the same day sold heroin to the same man. The heroin that he sold was supplied by defendant, who had told him to sell it.

Berry Lee Hall, a U. S. Army criminal investigator, testified that the unnamed informer had previously purchased heroin at 900 Gillis Street and that he was with the informer when he made another purchase of heroin from Leslie Carl Scott just before the search took place. He further testified that as he left the dwelling he, by a prearranged signal, notified the police officers that a purchase of heroin had been made. On cross-examination he stated that he did not see defendant on any of his visits to the dwelling on Gillis Street.

The State offered further evidence tending to corroborate the witness Leslie Carl Scott in the nature of a written statement given to Narcotics Officer Cuyler L. Windham by Scott on 6 May 1970.

Defendant testified in his own behalf and stated that he did not reside at 900 Gillis Street and that when those premises were searched he was at the race tracks in Maryland. He denied having any dealings with Leslie Carl Scott, and averred that he had never dealt in "scagg" or "smack," and that he only had a hearsay knowledge of that commodity. On cross-examination he admitted that he had been convicted of several crimes, beginning with a conviction of larceny in 1952.

Betty Brinkley, testifying for defendant, stated that she did not know that Leslie Carl Scott was selling heroin for defendant. She was present when defendant left on Sunday, 3 May 1970, and that defendant said nothing to Scott about selling anything.

We quote from statutes pertinent to this decision.

G.S. 90-88: "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article."

G.S. 90-111(c): "If the offense shall consist of the sale, barter, peddling, exchange, dispensing or supplying of marijuana or a narcotic drug to a minor by an adult in violation of any provision of this article, such person shall upon conviction be punished by a term of not less than ten years nor more than life imprisonment and shall be fined not more than three thousand dollars ($3,000.00) for the first and all subsequent violations of this article, and the

imposition or execution of sentence shall not be suspended, and probation shall not be granted."

G.S. 90-87(4): "The following words and phrases as used in this article shall have the following meanings unless the context otherwise requires: . . . . (4) 'Dispense' includes distribute, leave with, give away, dispose of or deliver."

Defendant contends that the evidence offered by the State tending to show that he possessed the drugs is insufficient to repel his motion for nonsuit on the charge of unlawful possession of narcotics.

When does a person possess a narcotic drug? North Carolina authorities are sparse on this point, and the answer to the question is not susceptible to a short and general answer.

We first look to other jurisdictions for authority. In *People v. Galloway,* 28 Ill. 2d 355, 192 N.E. 2d 370, the defendant and his wife were separated and the defendant had departed from their original residence; nevertheless, defendant still received his mail at the original residence, which his wife occupied, and kept articles of personal property there. He had a small package of letters and other correspondence in a dresser drawer in the apartment occupied by his wife, and a search of the premises by the police revealed a package of heroin in the packet of correspondence. Defendant was charged with unlawful possession of narcotic drugs, and in affirming his conviction the Illinois Court stated: "Where narcotics are found on the premises under the control of the defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which may be sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts which might leave in the minds of the jury a reasonable doubt as to his guilt."

A Federal Court considered the question of constructive possession in the case of *Rodella v. United States,* (9th Cir., 1960), 286 F. 2d 306, and there the defendant was convicted for possession of narcotic drugs which were found hidden in a field not even owned by the defendant. There were other facts from which the court reasoned that the defendant had intended to return to the drugs and exercise dominion and control. In reaching this conclusion, the Court stated: "Constructive possession is that which exists without actual personal . . . dominion over a

chattel, but with an intent and capability to maintain control and dominion."

Although we have been unable to find a North Carolina case on "all fours" with the question presented by this appeal, this Court has considered constructive possession of other contraband products, possession of which was made criminal by the statute.

In the case of *State v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667, there was evidence showing that defendant's employee went from defendant's store in North Carolina across the road to a barn located in Virginia, and returned to the store with a cup, and that immediately thereafter an officer came into the store, saw the cup on the counter, and a third person picked it up and that the officer thereupon took possession of the cup and discovered that it was filled with intoxicating liquor mixed with coca-cola. The officer never saw the defendant touch the cup or otherwise do anything to control the cup. A subsequent search of the barn revealed several partially empty bottles of whiskey. The defendant was charged and convicted of illegal possession of intoxicating liquor. This Court, finding no error in defendant's conviction, said: "An accused has possession of intoxicating liquor within the meaning of the law when he has both the power and intent to control its disposition or use. The requisite power to control may reside in the accused acting alone or in combination with others."

This Court again considered the constructive possession of liquor in the case of *State v. Myers,* 190 N.C. 239, 129 S.E. 600, in which the defendant had been indicted under the Turlington Act. There the court stated: "If the liquor was within the power of the defendant, in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual. The possession may, within this statute, be either actual or constructive. . . . A person may be in the possession of the article which he has not at the moment about his person."

In support of his position, defendant relies on the authorities contained in the Annotation found at 91 A.L.R. 2d 811. He places emphasis on a statement found in this Annotation to the effect that one "must be shown to have immediate and exclusive control, or to have been placed 'within such close juxtaposition

to the narcotic drugs as to justify the jury in concluding that the same was in his possession.' " This statement is based on a single Texas case, *Hunt v. State*, 158 Tex. Crim. 618, 258 S.W. 2d 320, in which the defendant was convicted of unlawful possession of marijuana upon the testimony of two witnesses that they saw defendant at a lumber pile between two buildings, reaching down under the south end of the pile. He stood there either getting something or putting something away. The witnesses went to the lumber pile and found two tobacco cans full of something that was later determined to be marijuana. The Court of Criminal Appeals affirmed his conviction. Immediately following the above statement, the Annotation continues: "However, the prosecution is not always required to prove sole and exclusive possession. Proof of joint possession is sufficient. Nor is the prosecution always required to prove actual physical possession. Proof of constructive possession is sufficient." And on page 811 of the same Annotation it is stated: "The possession need not always be exclusive; the defendant may share it with one or more others. . . . The defendant may be shown to have had constructive possession by establishing that the drugs involved were subject to his dominion or control."

In instant case there was evidence that the premises where the heroin was found by police officers and where it was being sold were under the control of defendant Frank Allen; that the utilities at that address were listed in defendant's name, and that an Army identification card and other personal papers bearing his name were found in the bedroom. There was testimony that the heroin belonged to defendant and was being sold by the minor Leslie Carl Scott as defendant's agent and at and by his direction. Thus, there is substantial evidence to support a jury finding that the narcotic drug, to-wit, heroin, seized and purchased at 900 Gillis Street was subject to defendant's dominion and control. He had both the power and intent while acting in combination with others to control the disposition and use of the heroin so as to have it in his constructive possession.

The trial judge correctly denied defendant's motion for nonsuit on the charge of illegal possession of narcotic drugs.

Finally, we must consider whether there was evidence sufficient to withstand defendant's motion for nonsuit on the charge of unlawfully dispensing narcotic drugs, to-wit, heroin, to a minor.

Defendant, in his brief, directs his argument only to the charge of unlawful possession of narcotic drugs. He is well advised so to do. The testimony of the witness Scott, standing alone, provides substantial evidence that defendant did "leave with" or "deliver" heroin to a minor. Defendant's own evidence is sufficient to establish that he was an adult.

The trial judge correctly overruled defendant's motion for nonsuit on the charge of unlawfully dispensing narcotic drugs to a minor.

No error.

STATE OF NORTH CAROLINA v. OWEN SWANSON DOSS

No. 1

(Filed 13 October 1971)

1. **Constitutional Law § 30; Criminal Law § 135; Homicide § 31— capital crime — single verdict procedure — punishment discretion of jury**

Constitutional rights of a defendant on trial for the capital crime of first degree murder were not violated by the single verdict procedure or by the fact that the jury had unbridled discretion to determine whether to impose the death penalty.

2. **Constitutional Law § 36; Criminal Law § 135— death penalty**

The imposition of the death penalty in North Carolina is not *per se* unconstitutional.

3. **Constitutional Law § 29; Criminal Law § 135; Homicide § 31— death penalty for first degree murder**

Imposition of the death penalty for first degree murder was not rendered unconstitutional by the U. S. Supreme Court decisions of *U. S. v. Jackson*, 390 U.S. 570, and *Pope v. U. S.*, 393 U.S. 651, where the crime was committed and the trial was held subsequent to the repeal of G.S. 15-162.1, under which a person accused of first degree murder received a sentence of life imprisonment upon acceptance of his plea of guilty to that crime.

4. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of jurors who would never return death penalty**

In this prosecution for the capital crime of first degree murder, the trial court properly sustained the State's challenges for cause of 30 prospective jurors who made it clear on *voir dire* examination that, before hearing any of the evidence, each of them had already made up his mind that he would not return a verdict pursuant to which defendant might lawfully be executed, whatever the evidence might be.

5. Criminal Law § 34— testimony that defendant was escapee from work release

In this homicide prosecution, testimony that defendant was an inmate of the Correctional Department and had failed to return from his work release job the day before the crime was committed was competent as proof of the identity of defendant and as a fact in the chain of events leading up to the commission of the crime.

6. Criminal Law § 169— admission of evidence over objection — similar evidence admitted without objection

Any error in the admission, over defendant's objection, of testimony that defendant was an escapee from the work release program when the crime was committted was cured when similar testimony was given by another witness without objection.

7. Homicide § 20— photographs of homicide victim's body

The trial court did not err in the admission of photographs of the body of the homicide victim for the purpose of illustrating the testimony of a witness for the State.

8. Constitutional Law § 32; Criminal Law § 75— capital case — in-custody interrogation — indigent defendant — waiver of counsel

An indigent defendant in a capital case cannot waive his right to counsel at an in-custody interrogation. G.S. 7A-451(b)(1).

9. Criminal Law § 75— capital case — in-custody interrogation without counsel — admission of defendant's statements — harmless error

In this prosecution for the capital crime of first degree murder, the trial court erred in the admission of statements made by defendant during in-custody interrogation without counsel identifying clothes which the State contended he was wearing during commission of the crime; however, such error was harmless beyond a reasonable doubt in light of other evidence identifying the clothing and the overwhelming evidence of defendant's guilt presented by the State.

10. Criminal Law § 76— admission of in-custody statements — findings of fact — when made

The trial court should make its findings of fact concerning the admissibility of defendant's in-custody statements during the trial, preferably at the time such statements are tendered and before they are admitted, and not following completion of the trial.

11. Criminal Law §§ 75, 89— reading from transcript of tape recording — corroboration of accomplice

In this prosecution for first degree murder, the trial court did not err in permitting a deputy sheriff to read from a typed transcript of a tape recording of a statement made by defendant's accomplice for the purpose of corroborating the accomplice's testimony, where the witness testified that the typed statement was a true and correct transcript of the tape recording made by the accomplice, and that the tape recording was the voice of the accomplice and was a fair and accurate representation of the statement given by the accomplice.

12. Homicide § 21— murder during perpetration of sodomy

The State's evidence was sufficient to be submitted to the jury in this prosecution for first degree murder committed during the perpetration of the felony of sodomy.

13. Criminal Law § 118— instructions on contentions of the parties

While the record does not reflect that the court spent more time in stating the contentions of the State than in stating those for defendant, to have done so would not have been error, since the State introduced extensive evidence and defendant introduced none.

14. Criminal Law § 6; Homicide § 30— homicide in perpetration of sodomy — defense of intoxication

Where the State's evidence established a homicide committed in the perpetration of sodomy upon a 15-year-old boy under threat of gunfire and a knife, the offense is murder in the first degree irrespective of premeditation and deliberation or malice aforethought, and the court was thus not required to submit the question of second degree murder upon evidence that defendant was drinking when the crime was committed; furthermore, the evidence was insufficient to make the defense of intoxication available to defendant.

15. Crime Against Nature § 2; Homicide § 23— homicide in perpetration of crime against nature — instructions defining crime against nature

The trial court did not err in failing to give a detailed definition of crime against nature in a prosecution for a homicide committed during perpetration of a crime against nature.

16. Criminal Law § 114— instructions — expression of opinion

In this prosecution for first degree murder, the trial court's instruction that "all the inferences in connection with the evidence, insofar as the court can discern, are directly connected with this other felony of the crime against nature," was merely a statement of what the State's evidence tended to show leading to the court's further instruction that the killing of a human being while committing or attempting to commit a felony is first degree murder without anything further being shown, and did not constitute an expression of opinion on the evidence.

APPEAL by defendant from *James, J.*, at the 30 November 1970 Special Criminal Session of PITT Superior Court.

Defendant Doss was tried and convicted, on an indictment proper in form, of murder in the first degree of William Raymond Pierce, the jury making no recommendation that he be sentenced to life imprisonment. Defendant appeals from a judgment imposing the sentence of death by asphyxiation pursuant to the verdict.

The State offered evidence, summarized except when quoted, as follows: On 3 June 1970 Owen Swanson Doss and

Henry Edward Manning, both of whom were Federal prisoners assigned to a work release unit located at Sandy Ridge near Greensboro, North Carolina, failed to return to their unit, stole an automobile and drove from Greensboro to a point near Goldsboro, North Carolina. There the stolen car ran out of gas. They then stole a truck and drove to a mobile home occupied by Paul Raymond Pierce and his 15-year-old son, William Raymond Pierce, near Winterville in Pitt County.

Doss and Manning spent the night there at the invitation of the elder Pierce, who had known Manning for 10 to 12 years. The next morning Pierce left his son with Doss and Manning and went to work. Manning sent a note by Pierce to his brother, Rufus Manning, who lived near the town of Ayden in Pitt County, and about noon Rufus arrived at the mobile home with a pint of whiskey and about $13 cash. The three men drank this whiskey and most of two more pints which Rufus obtained.

Later in the afternoon, after Rufus left, Doss used a knife and a .22 rifle which he found in the home to force Manning and the Pierce boy to accompany him into the woods behind the house. There he fired the rifle between the boy's legs and ordered him to undress. Young Pierce began to cry, but removed all of his clothes except his socks. Doss then forced Manning to attempt sodomy on him. Manning was unsuccessful. Doss then attempted to commit sodomy on the unwilling boy, and apparently was successful; however, the pathologist could not confirm that there had been any penetration. No semen was found on Doss' clothing, but semen was found on the pants of Manning.

While committing or attempting to commit sodomy, Doss began cutting the boy, lightly at first and then more savagely, causing blood to get all over the clothes of Doss. To get Doss to stop cutting the boy, Manning told Doss that police officers were coming. Doss and Manning left young Pierce in the woods and started out to the road. There they were spotted by two deputy sheriffs who were looking for them because of their escape. The sheriffs ordered them to stop; Manning did so and was apprehended, but Doss escaped. At that time they were about 180 feet from where Pierce's dead body was found the next day.

When Paul Raymond Pierce returned from work that evening, he was stopped by the sheriff and told that Manning had

been captured. Pierce drove on to his home and looked for but could not find his son that night. The next morning Pierce got up early to continue his search, and about 7 a.m. he found the nude body of his dead son in a wooded area behind the mobile home. Officers were notified and a deputy sheriff arrived very quickly. Manning's billfold was found near the body.

Doss was apprehended at 11 a.m. on the same day in the attic of a nearby church. Deputies later returned to the church and found underpants and blue slacks with blood all over them. They also found a white shirt with blood stains on it in a tobacco patch near the church. The blood on the clothes was determined to be type "O"; the deceased and Doss both had type "O" blood.

The church in which Doss was captured collected clothes for the needy and kept them in the room where Doss' underpants and slacks were found. The trousers Doss was wearing when captured had been taken from the clothes stored at the church. The shirt Doss was wearing at the time of the killing had been given to Doss by Manning and had Manning's name written in the collar. This shirt was found in the tobacco field near the church. Doss was wearing a white shirt and blue pants when seen by officers near Pierce's home and in the tobacco patch near the church where he was apprehended.

Dr. West, a pathologist, after describing the various wounds found on the body of the deceased, testified: "Now, in summary of these wounds that I've just described there were twenty-one major incisional and/or puncture wounds. The wound considered to be lethal was the large wound in the left side of the neck disrupting the left internal jugular vein. The immediate cause of death was most likely massive hemorrhage."

Ernest Kornegy and Robert Miller were incarcerated in the Pitt County jail at the same time Doss and Manning were there. Kornegy testified he overheard Manning ask Doss why he killed the Pierce boy. Doss replied that the boy hit him and then he (Doss) began to stab him. Kornegy further stated that Doss said the blood on his clothes had begun to stink so he went into a church. Miller was a cellmate of Manning and testified that he overheard Doss say, "I'm going ahead and admit that I killed the boy"; that Manning then asked him why he killed the boy, and Doss said, "I don't know; just when I hit him that first time I went crazy and when I saw the blood I

guess." Miller further testified that Doss asked Manning who he was celling up with over there and if he had had sex with him. Manning said "no," he did not play that game, and then Doss said if he was over there he would have intercourse with him and would not take "no" for an answer. Miller stated Doss then said, "You know what happened to the last person that said 'no'?" Miller said "no," and Doss said, "Well, where do you think the blood on my clothes came from?" Miller did not say anything, and Doss said, "The boy that said that the last time isn't here."

The defendant did not take the stand and did not offer any testimony.

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

M. E. Cavendish and James T. Cheatham for defendant appellant.

MOORE, Justice.

The record in this case contains 101 exceptions. Defendant, however, in his brief states that the appeal presents 10 questions. These questions will be discussed separately.

Defendant's first assignment of error is the overruling of his motion to quash the bill of indictment. He does not assert that the indictment is insufficient in form or allegation. His contentions are that to subject him to trial under this indictment on the capital offense of first degree murder violates his rights in that punishment by death is a cruel and unusual punishment and in violation of the Constitution of North Carolina and the Constitution of the United States; that the statute under which this defendant is charged with the capital felony of murder is unconstitutional as the same denies the defendant the right to plead guilty to the charges against him and to offer evidence in mitigation thereof; that the statute under which this defendant is charged in the bill of indictment has been declared unconstitutional by the United States Supreme Court; that the present procedural practice of the State of North Carolina in allowing the jury unbridled discretion in sentencing procedures is a violation of the defendant's constitutional rights under the Constitution of North Carolina and the Constitution of the United States; and that the defendant's

constitutional rights under the North Carolina Single Verdict Procedure are denied him, both under the Constitution of North Carolina and the Constitution of the United States.

G.S. 14-17 provides:

> "Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison."

[1] Defendant concedes that the two issues raised by him in his motion to quash the bill of indictment as to the jury having unbridled discretion in death sentence procedures and as to his unitary trial have been decided against him. *McGautha v. State of California* and *Crampton v. State of Ohio,* 402 U.S. 183, 28 L. Ed. 2d 711, 91 S.Ct. 1454 (1971).

[2] Defendant also concedes that as the law presently stands the imposition of the death penalty in North Carolina is not *per se* unconstitutional. *Trop v. Dulles,* 356 U.S. 86, 2 L. Ed. 2d 630, 78 S.Ct. 590 (1958); *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410 (1971). This Court in numerous cases has rejected the attacks on constitutional grounds upon judgments imposing death sentences pursuant to the procedure followed in the present case. *State v. Westbrook, supra; State v. Atkinson, supra; State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886 (1970); *State v. Spence,* 274 N.C. 536, 164 S.E. 2d 593 (1968).

[3] On 23 July 1971 the Supreme Court of the United States entered memorandum decisions in six North Carolina cases reversing the death penalty imposed by the Superior Court and

affirmed by the Supreme Court of North Carolina, in *Atkinson, Sanders, Roseboro, supra,* and in *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970); *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969), and remanded these cases to the Supreme Court of North Carolina for further proceedings, *Atkinson v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 859, 91 S.Ct. 2283 (1971); *Hill v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S.Ct. 2287 (1971); *Roseboro v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S.Ct. 2289 (1971); *Williams v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S.Ct. 2290 (1971); *Sanders v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S.Ct. 2290 (1971); *Atkinson v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 861, 91 S.Ct. 2292 (1971). This Court remanded each of said cases to the Superior Court where tried, with an order that, pursuant to the mandate of the Supreme Court of the United States, the Superior Court in each case enter judgment that the defendant be imprisoned for life in the State's prison. *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106 (1971); *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97 (1971); *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108 (1971); *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106 (1971); *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107 (1971); *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105 (1971). In the decisions entered by the Supreme Court of the United States, that Court as authority for its decision in each case cited *United States v. Jackson,* 390 U.S. 570, 20 L. Ed. 2d 138, 88 S.Ct. 1209 (1968), and *Pope v. United States,* 392 U.S. 651, 20 L. Ed. 2d 1317, 88 S.Ct. 2145 (1968). Neither of these cases is controlling in the case at bar. Prior to the commission of the crime charged in this case and to the trial, G.S. 15-162.1 was repealed. Under that statute any person accused of first degree murder could have tendered in writing a plea of guilty of said crime, and the State with the approval of the court could have accepted such plea, in which case punishment was life imprisonment. G.S. 15-162.1 was similar to the Federal Kidnapping Act, 18 U.S.C. § 1201(a), the death penalty of which was condemned in *Jackson,* and the Federal Bank Robbery Act, 18 U.S.C. § 2113(e), the death penalty of which was condemned in *Pope.* With the repeal of G.S. 15-162.1, this infirmity insofar as the death penalty in the felony of murder in the first degree, or burglary in the first degree, or arson, or rape in North Carolina was removed.

There is, therefore, no merit in defendant's first assignment of error.

[4] Defendant's next assignment of error relates to the sustaining of the State's challenges for cause to 30 prospective jurors, the basis for each challenge being the prospective juror's statement on *voir dire* concerning his or her inability to return a verdict in any case which would result in the imposition of the sentence of death. The *voir dire* examination of each prospective juror is set forth in detail in the record. It discloses that no juror was excused because of his or her expression of a general objection to the death penalty or of moral or religious scruples against inflicting it. While there were variations in the answers of these prospective jurors, in each instance the answer indicated that in no case would the juror return a verdict that would result in the imposition of the death sentence. Here, as said in *State v. Sanders, supra,* at 609, 174 S.E. 2d at 495: "It is perfectly clear from these answers that each of these prospective jurors, before hearing any of the evidence, had already made up his mind that he would not return a verdict pursuant to which the defendant might lawfully be executed whatever the evidence might be."

Under *Witherspoon v. Illinois,* 391 U.S. 510, 20 L. Ed. 2d 776, 88 S.Ct. 1770 (1968), a venireman should be willing to consider all the penalties provided by State law and he should not be irreparably 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 proceeding. Accord: *Boulden v. Holman,* 394 U.S. 478, 22 L. Ed. 2d 433, 89 S.Ct. 1138 (1969); *State v. Westbrook, supra; State v. Sanders, supra.* The record here indicates that the jurors excused were committed to vote against the death penalty. The assignment of error is overruled.

[5, 6] Defendant next contends that the trial court committed reversible error in permitting witnesses to testify that defendant was an escaped prisoner. The witness D. E. Smithey was allowed to testify, over objection, that both Manning and Doss were inmates of the Correctional Department, assigned to the work release program, and that on 3 June 1970 they went out on work release and did not return to the Sandy Ridge Camp where they were supposed to spend the night. Similar evidence was given without objection by Manning. Manning's evidence

would have cured any error. 1 Strong, N. C. Index 2d, Appeal and Error § 48, and cases therein cited. Moreover, in *State v. Williams, supra* at 711-12, 174 S.E. 2d at 509, this Court said:

> " . . . The term 'work release' does not relate to any specific crime or the degree or nature of any crime. While it is undoubtedly the rule of law that evidence of a distinct substantive offense is inadmissible to prove another independent crime, this rule is subject to well-established exceptions where the two crimes are disconnected and not related to each other. Proof of the commission of other like offenses to show a chain of circumstantial evidence with respect to the matter on trial or to show the identity of the person charged is competent. *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667; *State v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322; *State v. Dail,* 191 N.C. 231, 131 S.E. 573; *State v. Simons,* 178 N.C. 679, 100 S.E. 239; *State v. Weaver,* 104 N.C. 758, 10 S.E. 486. The testimony that defendant was on 'work release' was competent as proof of the identity of defendant and as a fact in the chain of events leading up to the commission of the alleged crime."

This assignment is without merit.

[7] Defendant's next assignment of error relates to the introduction of photographs of the body of the deceased, defendant contending that it was error to allow the introduction of these photographs, that they were not necessary in the trial of the case, were highly inflammatory, were poignant and had no probative value in respect to any issue for determination by the jury in the trial of this case. The jury was properly instructed that the photographs in question were allowed in evidence for the sole purpose of illustrating the testimony of the witness Deputy Sheriff T. D. Burney, and not as substantive evidence. The photographs were competent for that purpose. *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). In *State v. Atkinson,* 275 N.C. at 311, 167 S.E. 2d at 255, this Court said:

> " . . . 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 authen-

ticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; Stansbury, North Carolina Evidence, 2d Ed., § 34. For a collection of authorities to the same effect from other jurisdictions, see Annot., 73 A.L.R. 2d 769."

[8-10] Defendant next contends that the court erred in failing to make findings of fact concerning the admissibility of statements made by defendant until approximately 17 days following the completion of the trial. Defendant further contends that defendant at the time was an indigent and that the State failed to produce and offer into evidence any written waiver signed by defendant waiving his constitutional rights and that even a written waiver could not be introduced in the trial of a capital felony case by reason of the express prohibition against such waiver provided in G.S. 7A-457(a). The witness James R. Briley testified that after defendant was arrested and placed in the county jail, he was orally advised of his constitutional rights but was not asked to sign any waiver. He was then asked to identify the white shirt, underpants, and blue pants which the State contended defendant was wearing at the time of the commission of the crime. Defendant identified these as belonging to him but refused to make further comment. The in-custody interrogation was a critical stage in the proceeding, at which time the defendant was entitled to counsel under G.S. 7A-451(b)(1). In a capital case such as this, defendant could not waive counsel. G.S. 7A-457(a). The court, therefore, erred in admitting the statement made by defendant identifying the clothing as his. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971). "The question is whether there is a possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut,* 375 U.S. 85, 11 L. Ed. 2d 171, 84 S.Ct. 229 (1963). In the present case the clothing in question had been identified as belonging to defendant by his accomplice Manning. The shirt had been identified by one of the officers as similar to one on the defendant when he was seen in a tobacco field near the church where he was arrested. The shirt was later found in that field. The underpants and pants in question were found in the church where defendant was hiding. In light of this evidence identifying the

clothing and the overwhelming evidence of defendant's guilt presented by the State, we hold that this error was clearly harmless beyond a reasonable doubt. *Harrington v. California,* 395 U.S. 250, 23 L. Ed. 2d 284, 89 S.Ct. 1726 (1969); *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824 (1967); *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970). Having determined that it was error, though harmless, to admit the statement, it is not necessary to decide whether or not it was error for the court to make its findings of fact after the trial. We note, however, it is better practice for the court to make such findings at some stage during the trial, preferably at the time the statement is tendered and before it is admitted.

[11] Defendant next contends that the court erred in allowing Deputy Sheriff Burney to testify concerning a statement made to him by Henry Edward Manning in connection with this case. The statement made by Manning to Burney was offered for the purpose of corroborating Manning, and the jury was instructed that such statement was only to be considered for that purpose. The statement was recorded on tape; however, the tape itself was not played in the presence of the jury. Instead Burney read from a written transcript of the recording which was typed by the secretary of Manning's attorney. Burney testified that he played the tape recording and read along with the written transcript to make sure that they were the same, and that they were identical. He further testified that the statement from which he read was correct, that from his independent recollection nothing was left out of the statement and nothing was added. In *State v. Godwin,* 267 N.C. 216, 147 S.E. 2d 890 (1966), citing *State v. Walker,* 251 N.C. 465, 112 S.E. 2d 61 (1960) and *Olmstead v. United States,* 277 U.S. 438, 72 L. Ed. 944, 48 S.Ct. 564 (1928), the Court permitted the prosecution to introduce tape recordings allegedly containing telephone conversations by the defendant with a witness Mrs. Wall. Mrs. Wall testified the recordings as being the voice of defendant and stated that they were a fair and accurate representation of the conversations she had had with defendant. In the instant case the witness testified that the typed statement was a true and correct transcript of the tape recording made by Manning, and that the tape recording was the voice of Manning and was a fair and accurate representation of the statement made by Manning. The court properly allowed the

witness to read from this transcript. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970). This assignment is overruled.

[12] At the close of the State's evidence defendant moved for judgment as of nonsuit, which motion was denied. Defendant rested, and renewed his motion for judgment as of nonsuit. Both motions were denied. There was ample evidence that defendant murdered the deceased while engaged in the act of sodomy. The court properly submitted the case to the jury.

[13] Defendant in apt time tendered a request for jury instructions as to the law of the case and a request for charge as to the contentions of the defendant. Some of the instructions requested by defendant were manifestly improper, and those which were proper were given by the court. Defendant contends that the court spent more time in stating the contentions of the State than in stating those for the defendant. Although the record does not so reflect, to have done so would not have been error. The State introduced extensive evidence, while defendant offered none. *State v. Roman,* 235 N.C. 627, 70 S.E. 2d 857 (1952); *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686 (1947); *State v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668 (1941). The court fully charged as to the law in the case and covered those requests for instructions submitted by defendant which were proper.

[14] Defendant specifically contends the court erred in restricting the jury to the return of one of three verdicts—guilty of murder in the first degree, or guilty of murder in the first degree with recommendation of life imprisonment, or not guilty—without including second degree murder. Defendant contends that the evidence as to his intoxication is sufficient to require the submission of the question of second degree murder and that the failure of the court to do so was error.

Speaking to the question of intoxication, in *State v. Murphy,* 157 N.C. 614, 72 S.E. 1075 (1911), Justice Hoke (later Chief Justice) said:

> " . . . It is very generally understood that voluntary drunkenness is no legal excuse for crime, and the position has been held controlling in many causes in this State and on indictments for homicide. . . . The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite specific intent be estab-

lished as an essential feature of the crime. In Clark's Criminal Law, p. 72, this limitation on the more general principle is thus succinctly stated: 'Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence.' Accordingly, since the statute dividing the crime of murder into two degrees and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the 'killing was deliberate and premeditated,' these terms contain, as an essential element of the crime of murder 'a purpose to kill previously formed after weighing the matter' . . . a mental process, embodying a specific, definite intent, and if it is shown that an offender, charged with such crime, is so drunk that he is utterly unable to form or entertain this essential purpose he should not be convicted of the higher offense. It is said in some of the cases, and the statement has our unqualified approval, that the doctrine in question should be applied with great caution. . . . "

See *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968).

In *State v. Maynard,* 247 N.C. 462, 469, 101 S.E. 2d 340, 345 (1958), Justice Parker (later Chief Justice) said:

> "Where a murder is committed in the perpetration or attempt to perpetrate a robbery from the person, G.S. 14-17 pronounces it murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. . . . "

In such cases the State is not put to the proof of premeditation and deliberation. The law presumes them. G.S. 14-17; *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970); *State v. Fox, supra; State v. Hill, supra; State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232 (1963).

The evidence in the present case tends to show that defendant was drinking heavily at the time defendant, Manning, and the Pierce boy went into the woods. There is no evidence tending to show that defendant Doss did not know what he was doing, both in the planning and the execution of the crime against nature, a crime which he consummated. Indeed, the evidence is not sufficient to make available to him the defense of intoxication. There is no prejudicial error in the court's limiting the verdicts as above indicated. *State v. Bunton,* 247 N.C. 510, 101 S.E. 2d 454 (1958).

In *State v. Streeton,* 231 N.C. 301, 305, 56 S.E. 2d 649, 652 (1949), this Court said:

> "It is evident that under this statute [G.S. 14-17] a homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not."

Without deciding whether every felony not specified in the statute must be inherently dangerous to life, surely the crime committed in the instant case where a young 15-year-old boy, under threat of gunfire and knife, was compelled to submit to an act of sodomy by the defendant was a crime as atrocious and as inherently dangerous as the specified felonies in the statute.

[15] Defendant further contends that the court failed to define crime against nature. In this connection the court charged:

> "The law in our State as set forth in the General Statutes provides that if any person shall commit the crime against nature with mankind or beast, he shall be guilty of a felony. . . . Now, our courts have held that the felony of crime against nature is sexual intercourse contrary to the order of nature. It includes all kindred acts of bestial character whereby degrading and perverted sexual desires are sought to be gratified. It includes unnatural intercourse between male and male and other forms of unnatural intercourse."

This definition was suffficient without going into details. *State v. Cox,* 272 N.C. 140, 157 S.E. 2d 717 (1967); *State v. Harward,* 264 N.C. 746, 142 S.E. 2d 691 (1965).

[16] Finally, defendant contends the court erred in charging the jury as follows:

> "The evidence in this case tends to show that whatever person or persons it was who committed this crime and all the inferences in connection with the evidence, insofar as the court can discern, are directly connected with this other felony of the crime against nature."

This portion of the charge was simply a statement of what the State's evidence tended to show and was a recapitulation of

evidence leading to the explanation by the court that the killing of a human being while committing or attempting to commit a felony is first degree murder without anything further being shown. The court next charged:

> "Now, as I have stated the law says that any killing of a human being by a person committing or attempting to commit a felony, in this case the crime against nature, is first degree murder without anything further being shown, and I charge you, therefore, that in order for you to find the defendant guilty of this offense the State must prove beyond a reasonable doubt by the evidence two things: First, that William Raymond Pierce's death was a natural and probable result of the defendant's act or acts; and second, that the defendant Doss did these acts, these murderous acts while attempting, while committing or attempting to commit the felony of crime against nature."

Taken together the quoted paragraphs were clear, could not have misled the jury, and were without prejudicial error.

This was a horrible and barbaric crime committed without excuse. Apparently the defendant, a sadist, inflicted torture and murder to satisfy his own unnatural desires.

A careful review of the record fails to disclose any prejudicial error.

No error.

STATE OF NORTH CAROLINA v. DANNY McVAY

— AND —

STATE OF NORTH CAROLINA v. WOODROW SIMMONS

No. 22

(Filed 13 October 1971)

1. Criminal Law § 66— in-court identification of defendant — competency — observations during crime

A robbery victim's in-court identification of the defendants as the perpetrators of the robbery was competent where the identification was based solely on the victim's observation of the defendants during the robbery, which lasted approximately 30 minutes and which occurred under circumstances in which the victim saw the defendants' faces 90% of the time.

2. **Criminal Law § 128— mistrial — newspaper account of the trial — harmless effect on jury**

Defendants in an armed robbery prosecution were not entitled to mistrial on the ground that, during the trial, an afternoon newspaper published an account of the trial together with the caption, "2 convicts land back in court," and a statement that the defendants were serving sentences for another armed robbery, especially where the defendants introduced no evidence that any of the jurors had read or heard about the article.

3. **Criminal Law § 122— additional instructions after retirement of jury — harmless error**

Trial court's instruction that the jury had at least three more days to deliberate on the case, which instruction was given when the jury announced an impasse after one hour and twenty minutes of deliberation, was not prejudicial to the defendants on the ground that the instruction had a coercive effect on the jurors, since the court also instructed the jury that each juror was a keeper of his own conscience and that the court would not have a juror do violence to it.

APPEAL by defendants from *McLean, J.*, 4 January 1971 Schedule "A" Criminal Session of MECKLENBURG Superior Court.

Defendants Danny McVay and Woodrow Simmons were charged in separate bills of indictment with the armed robbery of Larry Jeff Joines. The cases were consolidated for trial.

The evidence for the State tends to show that about 11 p.m. on 4 March 1970 as Larry Jeff Joines was leaving the Melody Club located on Tryon Street in Charlotte, North Carolina, he was grabbed by two men, later identified as defendants McVay and Simmons, and pulled back toward an alley. One of the defendants stuck a small caliber, silver-plated, pearl-handle pistol in Joines' side and told him that this was a robbery and that they were going to blow his brains out. Defendants then took all of Joines' money (about $200), his wrist watch, and wedding band. One of them asked him if he had a car. When he said "no," he was accused of lying. Joines then identified a Pontiac parked in the lot as his, and one of the defendants got in the driver's side, Joines was put in the passenger side, and the other defendant got in the back seat. The men attempted to start the car, but it would not start. This seemed to upset defendants, and they made Joines take his clothes off. Defendants again tried to start the car, but when it failed to start they pulled Joines out of the car back towards the alleyway. About this time two men came out of the Melody Club, and Joines ran.

The area outside the Melody Club was a private parking lot and well lighted. While the men were in the car, the inside lights of the car were on. Joines was with the defendants for about 30 minutes and was able to see their faces for about 90% of this time. Joines was later shown a number of photographs by the police officers but no photographs of defendants were included. Joines did not recognize any of the photographs shown him. Later Joines was taken to the hospital to identify McVay, one of the defendants, but he was unable to do so because McVay's face was completely covered with bandages as the result of injuries he had received in an automobile wreck which occurred after the robbery. Joines first saw the defendants after the robbery at the preliminary hearing, at which time he identified them. He again identified them at the trial.

Defendants did not offer testimony.

From verdicts of guilty as to each defendant and sentences imposed, defendants appealed to the Court of Appeals. The cases were transferred to this Court by virtue of the transferral order of 31 July 1970.

Attorney General Robert Morgan and Assistant Attorney General Millard R. Rich, Jr., for the State.

W. Herbert Brown, Jr., for defendant McVay, appellant.

James J. Caldwell for defendant Simmons, appellant.

MOORE, Justice.

[1] Each defendant excepted to and assigned as error the admission over his objection of the in-court identification by Joines of defendants as the men who robbed him. When Joines' identification testimony was proffered, each defendant objected and the jury was excused. In the absence of the jury a *voir dire* hearing was conducted. The evidence offered consisted of the testimony of Joines; Dale M. Travis, a member of the Criminal Investigation Bureau of the Charlotte Police Department; and the defendants. At the conclusion of the *voir dire* hearing, Judge McLean made the following findings of fact:

> "As to the Defendant Danny McVay, the Court finds the following facts: to wit, that Larry J. Joines, upon this evidence, was robbed on the 4th day of March, 1970, in

the vicinity of the Melody Club on Tryon Street in Charlotte, North Carolina, about 10:30 o'clock P.M.; that thereafter the Defendant Danny McVay was in an automobile accident and about the 12th day of March was in the Charlotte Memorial Hospital being treated for injuries received in the automobile accident; that the State's witness, Larry J. Joines, was taken to the hospital to view the Defendant McVay but due to the bandages about his face and the state of his treatment, was unable to make any identification; that later on at the preliminary hearing and on his evidence today, he identified the Defendant for the first time at the preliminary hearing for this cause.

"Upon the foregoing the Court finds that the identification of the Defendant McVay is not tainted by any suggestion of any police officer or otherwise at the time of his identification of the Defendant at the preliminary hearing or upon this hearing, but is based solely upon his recognition of the Defendant as one of the parties that robbed him on the night of the 4th day of March, 1970, and his viewing the Defendant at that time.

"Upon the foregoing the Court holds that the evidence of the witness Joines is competent and admissible in evidence. The objection is overruled. The Defendant excepts.

"As to the Defendant Woodrow Simmons, the Court finds the following facts, to wit: That the witness Joines did not at any time see the Defendant Simmons at the Police Station or view him through any window or see his picture or was presented his picture; that no suggestion as to the identification of Simmons has been made to Joines by any police officer or otherwise; that the identification of the Defendant Simmons is not tainted by any presuggestion of the police officers or otherwise and that the identification of the Defendant Simmons by Joines was made solely and exclusively upon his identification of the party being the one that—as being one of the parties who robbed him on the 4th day of March, 1970.

"Upon the foregoing the objection is overruled and the evidence is held competent and admissible, to which the Defendant Simmons objects and excepts."

On the *voir dire* hearing the testimony of both Joines and Travis tends to show that there was no corporeal lineup or confrontation, and that the photographs shown Joines did not include any photograph of either defendant. The testimony of both these witnesses also tends to show that Joines was taken to the hospital for the purpose of identifying McVay but that due to the bandages on McVay's face he was unable to do so. The testimony of defendant Simmons tends to show that he was viewed by Joines at police headquarters. Both Joines and Travis denied this.

There was competent, clear, and convincing evidence to support the court's positive finding that the in-court identification of the defendant McVay and the in-court identification of the defendant Simmons by witness Joines was each of independent origin, based solely on what he saw at the time of the robbery, and did not result from any out-of-court confrontation or from any photograph or from any pretrial identification procedure suggestive and conducive to mistaken identification. Such findings when supported by competent evidence are conclusive on appellate courts, both State and Federal. *State v. McVay* and *State v. Simmons,* 277 N.C. 410, 177 S.E. 2d 874 (1970); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970). The assignments of error as to the admission of the in-court identification of defendants by Joines are overruled.

[2] The trial of these cases commenced 11 January 1971 and continued through 13 January 1971. On 11 January 1971 an article appeared in the Charlotte News, an afternoon paper of general circulation, with the caption. "2 convicts land back in court." The article then stated that these two defendants, McVay and Simmons, were on trial for the robbery of Larry Joines, and that these same defendants had been convicted last summer for robbing a couple in a parking lot and were serving 15 to 20 years in prison for armed robbery. After this article appeared, defendants, in the absence of the jury, made a motion for mistrial on the basis of the prejudicial matter contained in the article. Defendants contended that this newspaper was available to the jurors that afternoon and night and placed the character of each defendant in evidence without their taking the stand.

"As a general rule, the allowance or refusal of a motion for mistrial in a criminal case less than capital rests largely

in the discretion of the trial court." 3 Strong, N. C. Index 2d, Criminal Law § 128, p. 49, and cases therein cited. There is no evidence in this record that any of the jurors had read or heard about the article in question or that defendants were in any manner prejudiced by it. Better practice would have been for the court to inquire of the jurors to see if any of them had read or heard about the article in question, and if so, had been in any manner influenced by it. However, in the absence of any showing of prejudice, no abuse of discretion is shown. Error will not be presumed. *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688 (1967); *State v. Shepherd*, 230 N.C. 605, 55 S.E. 2d 79 (1949); 3 Strong, N. C. Index 2d, Criminal Law § 167, p. 127.

[3] After the jury had deliberated for one hour and twenty minutes, the jury returned into open court and the following transpired:

"COURT: Members of the jury, I will answer any question you may ask pertaining to the law, but the evidence is a matter for you to decide. Now, what is the question?

"FOREMAN: YOUR HONOR, we have reached an impasse. Shall we continue?

"COURT: Yes, Mr. Juror. As I understand what you mean by reaching an impasse is that you have been up to this point unable to agree. Is that correct?

"FOREMAN: Correct.

"COURT: Members of the jury, you may reconcile any differences you have under the evidence and render a verdict. The Court will express the hope that you will do so. If this jury fails to render a verdict, it would then become necessary to call upon another jury to pass upon the cases. I have no reason to believe that another would have more intelligence and be better qualified than this jury to make the decisions. Even so, the Court would have the jury bear in mind that each person is a keeper of his own conscience and the Court would not have a juror to do violence to his own conscience nor [in order] to render verdict. However, we have until Friday night for you to work on this case and no reason to hurry the matter. So take your time and deliberate further, please. Please retire."

Defendants contend that this additional statement or instruction to the jury by the court had a coercive effect on the members of the jury and reasonably caused some of them to sacrifice their convictions in order to reach a unanimous verdict.

Defendants concede that in *State v. Barnes,* 243 N.C. 174, 90 S.E. 2d 321 (1955), this Court held no error in an almost identical instruction. See also *State v. Lefevers,* 216 N.C. 494, 5 S.E. 2d 552 (1939). However, defendants contend that by adding this statement, " . . . we have until Friday night for you to work on this case and no reason to hurry the matter. So take your time and deliberate further, please. Please retire," the court conveyed to the jury the impression that the court intended to keep the jury deliberating for at least three more days and possibly longer unless they yielded their convictions about the case and arrived at a unanimous verdict. As stated in *State v. Roberts,* 270 N.C. 449, 154 S.E. 2d 536, 537 (1967), quoting from *Trantham v. Furniture Co.,* 194 N.C. 615, 140 S.E. 300 (1927): "The trial judges have no right to coerce verdicts or in any manner, either directly or indirectly, intimidate a jury." In *Roberts* a new trial was granted because "the challenged instruction might reasonably be construed by the member of the jury unwilling to find the defendant guilty as charged as coercive, suggesting to him that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict." 270 N.C. at 451, 154 S.E. 2d at 537. In the present case the trial court corrected the error complained of in *Roberts* by stating that "the Court would have the jury bear in mind that each person is a keeper of his own conscience and the Court would not have a juror to do violence to his own conscience."

This is said in 3 Strong, N. C. Index 2d, Criminal Law § 122, p. 34 (citing cases):

> "Generally, where the jury have retired but are unable to reach a verdict, the court may call the jury back and instruct them as to their duty to make a diligent effort to arrive at a verdict, so long as the court's language in no way tends to coerce or in any way intimate any opinion of the court as to what the verdict should be. Thus, the court may properly instruct the jury that the trial of the cause

involved heavy expense to the county and that it was the duty of the jury to continue its deliberations and attempt to reach an agreement, but that the court was not attempting to force an agreement."

The additional statement that the jury had until Friday to work on the case was given simply to assure the jury that they need not rush their deliberations and that they had ample time in which to consider their verdict. In *State v. McKissick,* 268 N.C. 411, 413-14, 150 S.E. 2d 767, 769-70 (1966), Chief Justice Parker said for the Court:

"In *S. v. Green,* 246 N.C. 717, 100 S.E. 2d 52, the Court found no error in the following charge to a jury which had been out for some time without arriving at a verdict (We have copied the quoted part of the charge from the case on appeal on file in the office of the clerk of this Court.) :

" '. . . I might say there is not any reason to hurry in the case. This is a two weeks term, and you have until Saturday night. You don't have to hurry, but suppose you go out and try it again, and don't give up too soon.' "

We hold that the statement made by the court to the jury in the instant case was without error.

We find no reason to disturb the result of the trial.

No error.

STATE OF NORTH CAROLINA v. JAMES MASON, ALIAS JAMES DUDLEY

No. 64

(Filed 13 October 1971)

1. Criminal Law § 104— motion for nonsuit — question for court

Upon a motion for judgment of nonsuit in a criminal action, the evidence for the State must be taken as true and the question for the court is whether there is substantial evidence that the offense charged in the bill of indictment, or a lesser offense included therein, has been committed and that the defendant committed it.

2. Robbery § 4— armed robbery — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury in this prosecution for armed robbery.

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

An assignment of error to the charge as a whole that specifies no portion of the charge which the defendant deems erroneous and no additional instruction which he deems to be required is broadside and ineffectual to bring up any portion of the charge for appellate review.

4. Criminal Law § 132— motion to set aside verdict

Defendant's motion to set aside the verdict as being against the greater weight of the evidence was addressed to the discretion of the trial court and is not reviewable upon appeal.

5. Criminal Law § 161— appeal as exception to judgment

The appeal is itself an exception to the judgment and requires an examination of the record proper to determine whether error appears on the face thereof.

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

A valid indictment or warrant charging all the essential elements of a criminal offense is necessary to jurisdiction.

7. Indictment and Warrant § 7— signature of solicitor on indictment

The signature of the prosecuting officer is not essential to the validity of a bill of indictment.

8. Indictment and Warrant § 11; Robbery § 2— armed robbery indictment — failure to allege ownership of property stolen

Indictment for armed robbery is not fatally defective in failing to allege the name of the owner of the properties alleged to have been taken from a named person, the allegations of the indictment being sufficient to negative the idea that the accused was taking his own property.

APPEAL by defendant from *Jackson, J.*, at the 15 March 1971, Schedule "C" Criminal Session of MECKLENBURG, heard prior to determination by the Court of Appeals.

Upon an indictment charging him with robbery with the use of firearms, the defendant was found guilty as charged and sentenced to a term of eight to ten years, subject to certain credit. His three assignments of error are: (1) The denial of his motion for judgment of nonsuit; (2) "The court erred in instructing the jury as set forth in the record," neither the assignment nor the exception upon which it is based being directed to any specific portion of the charge and neither stating wherein the charge is deemed erroneous; and (3) the overruling of the defendant's motion to set aside the verdict as being against the greater weight of the evidence and for errors committed in the course of the trial, the record containing no exceptions to any ruling of the court other than as here shown.

Upon objection by the defendant to his in-court identification by the victim of the alleged robbery, an extensive *voir dire* examination was had in the absence of the jury. The uncontradicted evidence upon the *voir dire* was to the effect that the witness was held up and robbed at night by the defendant and another man on a street lighted by a street light; the robbery procedure took about 15 minutes, in which time the defendant struck the witness in the face with a pistol, pointed the pistol at him while facing him, and threatened "to blow his brains out," took his money and removed his outer clothing; the witness promptly notified the police and described the defendant; he did not then know the defendant's name but had seen him just a few minutes before the robbery in a house to which the witness had gone to get some tools; there was no lineup; the witness was shown a number of photographs of individuals by the police prior to the arrest, none of which was a picture of the defendant; the witness did not identify any of these as pictures of either robber; the witness did not see the defendant between the robbery and the trial, except when he went to the courthouse, first for appointment of counsel for the defendant and later for the preliminary hearing; he recognized the defendant as the robber as soon as the defendant entered the courtroom on the first of these occasions; no one told him the defendant was the man who robbed him; at the time of the robbery he looked the defendant in the face for two or three minutes; his in-court identification at the trial was positive and was not aided by the sight of the defendant at the appointment of counsel or at the preliminary hearing because he knew him when he saw him.

At the conclusion of the *voir dire* examination, the judge briefly reviewed some of the evidence thereon and "concluded" that there had been no line-up and no identification of the defendant from photographs. The jury then returned and the trial proceeded, the alleged victim of the robbery testifying in substance as follows:

On the night of the robbery he went to the home of a friend to pick up some of his tools. Entering the house, he observed therein the defendant and others, none of whom he knew by name. The witness left the house and the defendant and three other men followed him up the street, which was lighted by street lights so that one could see well. Two of these men lagged

behind, but the defendant and another continued to follow the witness and overtook him. The defendant struck the witness in the face with a pistol, put the pistol up to the witness' head and threatened to blow his brains out unless the witness gave him his money. The defendant's companion then knocked the witness down and removed his suit, shirt, hat and shoes. In the pocket of his coat was his billfold containing $250.00. Taking this and the clothing, the defendant and his companion ran back toward the house where the witness had seen them a few minutes earlier. The completion of the robbery took about ten or fifteen minutes. Immediately thereafter, he asked a person living nearby to call the police. When the officers arrived at the scene, he described the robbers and pointed out the direction in which they had gone. He did not then know the defendant's name. He did not see the defendant again until he came to court for the appointment of counsel for the defendant, at which time he did not know which of the robbers had been arrested and so did not know which of them he would see in the courtroom. On that occasion he saw and immediately recognized the defendant. There is no doubt in his mind but that the defendant was the man who held the gun on him and robbed him.

Police Officer Moore, who answered the call, testified that he then talked to the victim who told him of the robbery, described the robbers and stated that they had come from the house referred to by the victim in his testimony. After taking the victim home, the officers went to the house from which the victim had said the robbers had come. There they observed the defendant standing in the doorway. When the officers got out of their car, the defendant ran into the house, shut the door and locked it. Officer Moore had known the defendant prior to that time. Later that night, the officers again observed the defendant on the street in that vicinity. They stopped their car beside him. He told them his name was "James Dudley." Officer Moore, knowing his name was Mason, told his fellow officer to get out for this was the man for whom they were looking. Mason then threw a recorder and a radio, which he had in his hands, at the other officer and ran, outdistancing the officers.

The defendant's motion for judgment of nonsuit having been overruled, he took the stand in his own behalf. His defense was alibi. No other witnesses were called on his behalf. At the

conclusion of all the evidence, the motion for nonsuit was renewed and was again denied.

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

James J. Caldwell for defendant.

LAKE, Justice.

[1, 2] Upon a motion for judgment of nonsuit in a criminal action, the evidence for the State must be taken as true and the question for the court is whether there is substantial evidence that the offense charged in the bill of indictment, or a lesser offense included therein, has been committed and that the defendant committed it. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679. There is ample evidence in the record before us to support a finding of each element of the offense of robbery, *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525, *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194, that the offense was committed with the use of a firearm and that the defendant was one of the persons who committed it. The conflict between the testimony of the victim of the robbery, identifying the defendant as one of the perpetrators of the offense, and the testimony of the defendant, designed to establish an alibi, merely raises a question of fact for the jury. Consequently, the defendant's motion for judgment as of nonsuit was properly overruled.

[3] The defendant's second assignment of error is to the charge as a whole. It specifies no portion of the charge which the defendant deems erroneous and no additional instruction which he deems to be required. This is a broadside assignment and is ineffectual to bring up any portion of the charge for review by this Court. *State v. Baldwin,* 276 N.C. 690, 701, 174 S.E. 2d 526. "Assignments of error to the charge should quote the portion of the charge to which the appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged." *State v. Kirby,* 276 N.C. 123, 131, 171 S.E. 2d 416. Nevertheless, we have examined the charge and find it free from error. It was a clear, concise and accurate statement of the applicable principles of law, contained a fair and adequate review of the evidence and applied the law to the evidence. This assignment of error is without merit.

[4] The defendant's motion to set aside the verdict as being against the greater weight of the evidence was addressed to the discretion of the trial court and is not reviewable upon appeal. *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555; *State v. Wagstaff,* 219 N.C. 15, 12 S.E. 2d 657. The defendant's third assignment of error is, therefore, also without merit.

[5-7] In addition to the assignments of error specifically set forth, the appeal is, itself, an exception to the judgment and requires an examination of the record proper to determine whether error appears on the face thereof. *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447; *State v. Sutton,* 268 N.C. 165, 150 S.E. 2d 50; *State v. Williams,* 235 N.C. 429, 70 S.E. 2d 1. Since a valid indictment, or warrant, charging all the essential elements of a criminal offense, is necessary to jurisdiction, *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913, we turn to the indictment upon which the defendant was tried. The record indicates it was not signed by the solicitor. "It is not essential in this jurisdiction to the validity of the indictment that it should be signed by the prosecuting officer." *State v. Sellers,* 273 N.C. 641, 651, 161 S.E. 2d 15; *State v. Mace,* 86 N.C. 668.

[8] The indictment upon which the defendant was tried does not allege the ownership of the property alleged to have been taken, stolen and carried away. In *State v. Sawyer,* 224 N.C. 61, 65, 29 S.E. 2d 34, Justice Winborne, later Chief Justice, speaking for the Court, said, "[I]n an indictment for robbery the allegation of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property." In *State v. Lynch,* 266 N.C. 584, 146 S.E. 2d 677, the indictment charged that the defendant robbed one Rita Bryant of "Forty Four Dollars, the property of the said RITA BRYANT," whereas the evidence tended to show that the money taken from Miss Bryant was the property of the Towne House Bakery. Speaking through the present Chief Justice, this Court held the variance was not basis for nonsuit, saying:

> "As to the variance with reference to the ownership of the stolen money, it is noted that '[t]he gist of the offense [robbery] is not the taking, but a taking by force or the putting in fear.' *S. v. Sawyer,* 224 N.C. 61, 65, 29 S.E. 2d 34, and cases cited. * * * 'It is not essential to the crime of robbery that the property be taken from the actual holder of the legal title, a taking from one having the care, custody,

control, management, or possession of the property being sufficient.' 77 C.J.S., Robbery, § 7; 46 AM. JUR., Robbery, § 9."

In *State v. Rogers, supra,* we said, "It is not necessary that ownership of the property be laid in any particular person in order to allege and prove the crime of armed robbery." The allegation in the present indictment is that the defendant "with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously, having in his possession and with the use and threatened use of firearms, * * * whereby the life of Lee A. Blackmon was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away one suit, checkbook, shoes and hat and $250.00 in lawful moneys of the United States of the value of $350.00 from the presence, person, place of business, and residence of Lee A. Blackmon * * *." While there is authority to the contrary, see *McGinnis v. State,* 16 Wyo. 72, 91 P. 936, in our opinion this allegation sufficiently negatives any idea that the property so taken by the defendant was his own. Similar allegations were held sufficient in indictments for robbery in *State v. Brill,* 21 Idaho 269, 121 P. 79; *Owen v. Commonwealth* (Ky.), 76 S.W. 3; *Wilson v. State,* 28 Okla. Cr. 102, 228 P. 1108; *State v. Dilley,* 15 Ore. 70, 13 P. 648; and *Clemons v. State,* 92 Tenn. 282, 21 S.W. 525.

Clearly, this language is sufficient to inform the defendant of the charge against which he must defend himself, and, being convicted and sentenced under this indictment, he could not lawfully be again indicted and tried for this occurrence by merely adding to the second indictment an allegation of ownership of the properties in another person. We, therefore, hold that the failure of this indictment to allege the name of the owner of the properties taken by the defendant from Lee A. Blackmon was not a fatal defect therein, though it is the customary and better practice to so allege.

No error.

STATE OF NORTH CAROLINA v. JOSEPH WADDELL

No. 12

(Filed 13 October 1971)

1. **Indictment and Warrant §§ 14, 17— sufficiency of indictment — motion to quash — variance — motion to dismiss**

A motion to quash is proper to challenge the sufficiency of the indictment to charge a criminal offense; a motion to dismiss is proper to challenge a variance between the indictment and the evidence.

2. **Indictment and Warrant §§ 11, 17; Robbery § 4— ownership of property taken in robbery — variance**

There was no fatal variance between an indictment alleging an armed robbery in which money was taken from the 7 Day Mart where "Jesse L. Brown was in attendance, said money being the property of Jesse L. Brown, t/b/d/a 7 Day Mart," and evidence that the 7 Day Mart was not owned by Jesse L. Brown but was owned by another individual.

3. **Criminal Law § 130— motion for mistrial — statement by unidentified person to prospective juror**

The trial court did not err in the denial of defendant's motion for a mistrial on the ground that prior to the trial an unidentified person told a prospective juror, who was thereafter accepted on the trial jury, "Don't find any Black Panthers guilty," where the evidence did not disclose whether defendant was a Black Panther or was in sympathy with them, and there was no evidence from which the court could conclude that the incident had any bearing on the verdict or the juror's participation in it.

APPEAL by defendant from *Johnston, J.*, January 18, 1971 Criminal Session, GUILFORD Superior Court (High Point Division).

In this criminal prosecution the defendant was charged, arraigned, and brought to trial on the following bill of indictment:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That JOSEPH WADDELL late of the County of Guilford on the 18th day of September 1970 with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously having in possession and with the use and threatened use of a certain firearm, to-wit: a pistol, whereby the life of Jesse L. Brown was endangered and threatened, did commit an assault upon and put in bodily fear the said Jesse L. Brown and by means aforesaid and

by threats of violence and by violence did unlawfully, wilfully and feloniously take, steal and carry away personal property, to-wit, $261.21 in good and lawful money of the United States from the place of business known as 7 Day Mart where, at said time, the said Jesse L. Brown was in attendance, said money being the property of Jesse L. Brown, t/d/b/a 7 Day Mart against the form of the statute in such case made and provided and against the peace and dignity of the State."

After arraignment and plea of not guilty, Jesse Brown was examined as a witness for the State. Brown testified that he was at the 7 Day Mart, 800 East Russell Street in Greensboro, where he was in charge. He did not own the place. Don Kennedy owned it. A few minutes before 9 o'clock on the evening of September 18, 1970, the defendant entered the Mart, pointed a .45 automatic pistol at the witness and announced, "This is a holdup." The witness surrendered the contents of the cash register, about $261.00. The witness and James Marsh, a customer in the Mart, were directed by the defendant to go outside the building and to run. They did as told.

Both Brown and Marsh gave the officers a description of the robber. Police officers, based on the description, arrested the defendant on September 30, 1970. At the time of the arrest, the defendant was carrying a .45 automatic pistol. He attempted to resist arrest by the use of the weapon, but the officers had "beaten him to the draw" and he surrendered. At the trial both Brown and Marsh identified the defendant as the robber.

After the State rested, the defendant moved to quash the indictment contending there was a fatal variance between the indictment and the evidence. The court denied the motion. The defendant did not offer evidence. The jury returned a guilty verdict.

A post-verdict inquiry conducted by the court disclosed the following:

"MR. WILSON (Attorney for defendant): Yesterday, your Honor indicated there had been some information passed to your Honor concerning some possible intimidation to, or attempt to converse, or in some way contact a member of the panel . . . . I wonder, if your Honor please, if we could inquire into the matter?"

The court recalled the trial jury to the box and Mr. Hinson testified that he and the elderly gentleman who apparently was excused, were sitting together in the lounge adjoining the courtroom. " . . . (S)o we were approached by some individuals . . . but they first asked him (Hinson's companion) if he was a juror and he said 'Yes'. There was three. . . . One had a Polaroid camera . . . . (T)hey said, 'Don't find any Black Panthers guilty', . . . and that is about the extent of it, sir."

The incident occurred before Mr. Hinson was accepted as a juror in the case. He related the incident, however, to the bailiff who notified the court. The court made this inquiry of Mr. Hinson:

"THE COURT: But beyond that, you have told no one but the Court?

MR. HINSON: No, sir.

MR. WILSON: That answers our inquiry, your Honor."

The court's inquiry ascertained that no other juror had been approached. The court overruled the defendant's motion for a mistrial. The defendant excepted and appealed.

Robert Morgan, Attorney General, by Myron C. Banks, Assistant Attorney General, for the State.

Jerry C. Wilson for defendant appellant.

HIGGINS, Justice.

The defendant by exceptive assignments, presents two questions for appellate review: (1) Did the court err in refusing to allow the motion to quash the indictment because of a variance between the charge and the proof? (2) Did the court err in denying the motion for a mistrial because of an unknown party's statement to the prospective juror (Hinson) before his acceptance on the trial panel?

The indictment was drawn under G.S. 14-87 which makes it a felony for any person to take or attempt to take personal property from another, or from any place of business by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496.

[2] The defendant objected to the indictment and moved to quash on the ground of variance between the allegation in the indictment which alleged that Brown was the owner and in charge of the Mart from which the property was forcibly taken and the evidence which disclosed that Don Kennedy owned the Mart. The indictment clearly alleged the defendant by the threatened use of a pistol " . . . (W)hereby the life of Jesse L. Brown was endangered and threatened . . . by violence did unlawfully and feloniously take and carry away personal property, to-wit, $261.21 . . . from the place of business known as 7 Day Mart where . . . Jesse L. Brown was in attendance, said money being the property of Jesse L. Brown, t/d/b/a (trading and doing business as) 7 Day Mart." The defendant cites as his authority for the motion the case of *State v. Mull,* 224 N.C. 574, 31 S.E. 2d 764.

[1] A motion to quash an indictment is in order when the purpose is to challenge its sufficiency to charge a criminal offense. A motion to dismiss is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged. However, we have treated the defendant's motion made in this case as a motion to dismiss for lack of evidence to go to the jury on the charge of armed robbery. *State v. Barnes,* 253 N.C. 711, 117 S.E. 2d 849; *State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266; *State v. Vaughan, et al* 268 N.C. 105, 150 S.E. 2d 31.

Actually the Mull case on which defendant relies is good authority upon which to sustain a bill of indictment. "The gist of the offense, as thus alleged, is the accomplishment of the robbery by the use or threatened use of firearms. *S. v. Keller,* 214 N.C. 447, 199 S.E., 620. Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense. G.S. 14-87; *S. v. Sawyer, ante,* 61, 29 S.E. (2d), 34; *S. v. Burke,* 73 N.C., 83. 'In such case it is not necessary or material to describe accurately or prove the particular identity or value of the property, further than to show it was the property of the person assaulted or in his care, and had a value.' *People v. Nolan,* 250 Ill., 351, 95 N.E., 140, 34 L.R.A. (N.S.), 301, Ann. Cas. 1912 B 401; 46 Am. Jur., 154."

[2] When tested by the rules approved in the Parker and Mull cases, and others therein cited, the indictment in this case contained all essential averments required by the statute. See also *State v. Lynch,* 266 N.C. 584, 146 S.E. 2d 677. The motion to quash the indictment was properly overruled.

[3] The trial judge did not commit error in refusing to order a mistrial on defendant's motion. Mr. Hinson and another were among those summoned for jury duty. They were in the courthouse ready to be called. Three men approached. One asked, "Are you on the jury?" and on receiving an affirmative answer the speaker said, "Don't find any Black Panthers guilty." Mr. Hinson did not know either of the men and did not know any Black Panthers. However, after he was accepted on the trial jury he told the bailiff of the occurrence in the courthouse. The bailiff evidently reported the incident to the trial judge. Before the jury was selected, each juror was interrogated, including Mr. Hinson who stated he knew of no reason why he could not give the defendant a fair and impartial trial.

After the verdict, however, the court notified counsel and the post-verdict inquiry resulted. The showing was insufficient upon which to order a new trial. The general rule in this jurisdiction is succinctly stated in a number of our cases. "Generally speaking neither the common law nor statutes contemplate as ground for a new trial a conversation between a juror and a third person unless it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than *(sic)* was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial. The matter is one resting largely within the discretion of the trial judge. (Citing authorities.) Denial of such motions is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown." *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190. See also *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477; G.S. 9-14; Strong's N. C. Index 2d, Criminal Law, Vol. 3, § 130, New Trial for Misconduct of or Affecting Jury, p. 52.

It is entirely proper for the trial judge to conduct an open inquiry into an attempt to influence a prospective juror in any case. The inquiry in this case, however, did not disclose whether the defendant was or was not a Black Panther, or whether he was or was not in sympathy with them. There is no evidence

from which the court could conclude the incident before the jury was selected had any bearing on the verdict or in Mr. Hinson's participation in it. The cases cited, and others of like import, hold to the contrary. The cases relied on by the defendant do not support his contention. He cites as authority for the motion these cases: *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620; *State v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387; *State v. Manning,* 251 N.C. 1, 110 S.E. 2d 474; *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9; *State v. Wagstaff,* 235 N.C. 69, 68 S.E. 2d 858. These cases do not offer support for a motion for a mistrial. Neither the cases cited, nor any others with which we are familiar appear to justify or authorize a mistrial on a showing so flimsy and nebulous as the occurrence which is the basis for Assignment of Error No. 2.

In the trial and judgment we find

No error.

STATE OF NORTH CAROLINA v. NATHANIEL EVANS

STATE OF NORTH CAROLINA v. THOMAS ADDISON BRITTON

STATE OF NORTH CAROLINA v. HAYWOOD BERNARD HAIRSTON

No. 30

(Filed 13 October 1971)

1. Robbery § 1— armed robbery — proof that a person's life was endangered

For a conviction of robbery with firearms or other dangerous weapons, the State must show beyond a reasonable doubt that the life of a person was endangered or threatened by the defendant's, or his accomplice's, possession, use, or threatened use of a firearm or other dangerous weapon, implement or means.

2. Robbery § 1— attempted armed robbery — elements of proof

Proof of a defendant's presence in a place of business, of his possession therein of a firearm, and of his intent to commit a robbery is not sufficient to support a conviction of attempted armed robbery, for it omits the essential elements of (1) a taking or attempt to take personal property and (2) the endangering or threatening of the life of a person. G.S. 14-87.

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

On motion for judgment of nonsuit in a criminal case, the evidence of the defendant is considered only to the extent that it is favorable to the State or for the purpose of explaining or making clear the State's evidence, insofar as it is not in conflict therewith.

4. **Criminal Law §106— motion for nonsuit — sufficiency of the evidence**

There must be substantial evidence of all material elements of the offense charged in order to withstand a motion for judgment of nonsuit.

5. **Criminal Law § 106— motion for nonsuit — sufficiency of evidence raising only a suspicion or conjecture**

If the evidence is sufficient only to raise a suspicion or conjecture as to whether the offense charged was committed, the motion for nonsuit should be allowed even though the suspicion so aroused by the evidence is strong.

6. **Robbery § 4— attempted armed robbery — guilt of codefendant who made no threats — sufficiency of evidence**

In a prosecution of three defendants for attempted armed robbery, the State's evidence that one of the three defendants entered a restaurant, without a weapon, and stood at the counter on which the cash register sat, that he could not open or reach into the register standing in that position, and that he thereafter left the restaurant with his codefendants without having made any threats to or demands on the employees, *held* insufficient to support a jury finding of defendant's guilt.

7. **Robbery § 4— attempted armed robbery — guilt of defendants who did not place any life in danger**

In a prosecution of three defendants for attempted armed robbery, the State's evidence that one of the defendants walked into the kitchen area of a restaurant and said to an employee, "This is a holdup; no one's going to get hurt," and that another defendant thereafter entered the restaurant with a loaded but breeched shotgun cradled on one arm, *held* insufficient to support a jury finding of the defendants' guilt, where (1) the defendant with the shotgun, upon the remonstrance of a customer, stated that he merely wanted to settle an argument with the defendant in the kitchen; (2) the defendant then removed the shell from the gun and left the restaurant; (3) the employees who overheard the threat merely treated it as a joke and continued with their work; (4) the defendants paid for an order of chicken and left the restaurant without having made any demands on the employees; and (5) the defendants parked their car around the corner from the restaurant and were eating the chicken when the police officers arrived.

APPEALS by each of the defendants from *Crissman, J.*, at the 24 August 1970 Criminal Session of FORSYTH, heard prior to determination by the Court of Appeals.

By separate indictments, each proper in form, the defendants were charged with an attempt to commit robbery with the

use of firearms. Without objection, the cases were consolidated for trial. Each defendant was found guilty and sentenced to a term of five years in the State's Prison. Each appealed. Their assignments of error, separately stated but substantially identical, occupy 140 pages of the record. They relate to the denial of their respective motions for judgment of nonsuit, to various rulings on the admission of evidence and to portions of the charge to the jury.

In substance, the evidence for the State was as follows:

On Sunday, 26 July 1970, about 3 p.m., Mrs. Eckert was in charge of a "quick food takeout restaurant," owned by Maryland Fried Chicken, Inc., and was seated at a table in the dining area doing some book work. The only other occupants of the building were Jo Ann Douglas, who was in the serving area, and her brother, Gary Douglas, who was washing walls in the kitchen.

The three defendants came in Evans' automobile to the pickup window. After a conversation with Miss Douglas concerning various packages of chicken available, the driver asked if they might come into the building to eat and were told that they could. Thereupon, Evans and Britton came in, leaving Hairston in the car, the motor of which was left running. Britton stood at the counter upon which the cash register sat but in this position he could not open or reach into the cash register. Their order for a nine-piece box of chicken having previously been given to Miss Douglas, she began to prepare it and Evans walked into the kitchen area. Hairston then came in, carrying over one arm a breeched shotgun loaded with a shell. He was followed into the building by Mr. Benson, a regular customer from the neighborhood.

Hairston merely walked into the building and remained standing two or three paces from the door. He addressed no remark to anyone except Mr. Benson, who asked what he was doing in the building with a shotgun. Hairston replied that he had "an argument with someone in the back of the building," not specifying whom. When Mr. Benson, stating that he was just a customer, told Hairston to take the shotgun outside or unload it and "go have your argument," Hairston, saying no more, removed the shell from the gun, put it in his pocket and left the building, followed by Britton and Evans. Stopping a few paces from the building, the three discussed something

among themselves, then went to the automobile, put the shotgun in the trunk and drove out into the street.

Meanwhile, Evans, in the kitchen, said to Gary Douglas, "This is a holdup; no one's going to get hurt." Both Mrs. Eckert and Miss Douglas heard this statement but Mr. Benson did not. (Evans, who testified in his own behalf, denied making this statement, saying that his only reason for going into the kitchen was that he was looking for a rest room and that he made no statement to Gary Douglas except to communicate to him Evans' urgent need to find a rest room, in response to which Gary Douglas merely laughed.)

Following Evans' remark to Gary Douglas, whatever it was, Mrs. Eckert did nothing, Gary Douglas continued to wash the kitchen walls and Miss Douglas "kept on fixing the chicken." When Gary Douglas heard Evans' remark, he "just ignored" Evans and "didn't take it serious," but just "kind of laughed it off."

No one, either defendant or employee, made any move to open the cash register. Britton, standing in front of the counter on which the cash register stood, never said or did anything. Having completed the packing of the box of chicken, Miss Douglas walked from behind the counter and handed Evans the box of chicken. Thereupon, he handed two one-dollar bills to Mrs. Eckert. Miss Douglas told him the price was $2.58, so Evans handed her the additional 58 cents. The defendants then left the building. After they drove out into the street and there stopped, Mrs. Eckert phoned the police.

(Each defendant testified that Britton had just been picked up by the other two defendants, five or ten minutes before the entry into the building, for the purpose of giving him a ride to his destination after Evans had gotten something to eat, and that during that interval there was no conversation of consequence among them. Evans and Hairston testified that they had been together, attending a party and riding about, throughout the preceding night and morning and that the shotgun was in their possession as a pawn to secure a loan made by Hairston to its owner in the course of their nocturnal travels. Hairston testified that he, arousing himself from a short rest in the back seat of the car after Evans and Britton had entered the building, found the money which he thought he had had

in his pockets was gone, and, thereupon, took the shotgun and entered the building in search of Evans, whom he suspected of having taken his money.)

In response to Mrs. Eckert's call, police officers arrived and, being told by the occupants of the building that the three defendants, after driving out to the street in their car, had stopped and backed around the corner, went in search of them. They found the defendants parked in a shady spot "just around the corner" eating fried chicken. When the police car drove up, Evans got out of his car and, before the officers said anything, asked them if they had some "jumper cables" with which they might help him start his car which had stalled. The officers arrested the defendants, found the unloaded shotgun in the trunk of the car, by use of a key voluntarily given them by Evans, and two shells in Hairston's pocket.

Miss Douglas testified that she was not frightened by Evans' statement, that she did not see Hairston and the shotgun until he left the building and she "personally had not put any significance" upon what she had seen and heard, and that "at no time during the time that these defendants were in or about" the premises was she "apprehensive about any danger" to life or property. Gary Douglas testified, "At no time when these defendants were in our premises did I have any feeling of fear or threat to me or to my property." He also did not observe the shotgun until after the defendants left the building.

Each defendant took the witness stand in his own behalf. Their testimony and the testimony of other witnesses called by them added nothing to the strength of the case for the State.

Attorney General Morgan, Assistant Attorney General Harris and Staff Attorney Satisky for the State.

R. Lewis Ray for Defendant Nathaniel Evans.

Larry L. Eubanks for Defendant Thomas Addison Britton.

Leslie G. Frye for Defendant Haywod Bernard Hairston.

LAKE, Justice.

G.S. 14-87 provides: "Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes

or attempts to take personal property from another or from any place of business * * * or any other place where there is a person or persons in attendance * * * or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony * * * ." The offense is complete if there is either a taking or an attempt to take the personal property of another by the means and in the manner prescribed by the statute, but there must be one or the other. *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496.

[1, 2] For a conviction of robbery with firearms or other dangerous weapons, the State must further show beyond a reasonable doubt that the life of a person was endangered or threatened by the defendant's, or his accomplice's, possession, use or threatened use of a firearm or other dangerous weapon, implement or means. *State v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355. Proof of this additional element is, of course, not required for conviction of the offense of common law robbery. Proof of the defendant's presence in a place of business, his possession therein of a firearm and his intent to commit the offense of robbery is not sufficient to support a conviction of the offense described in G.S. 14-87, for it omits the essential elements of (1) a taking or attempt to take personal property, and (2) the endangering or threatening of the life of a person.

The respective indictments charge that these defendants, "having in possession and with the use and threatened use of a certain firearm, to wit, a shotgun, whereby the life of Martha Eckert was endangered and threatened, did commit an assault upon and put in bodily fear the said Martha Eckert and by the means aforesaid and by threats of violence did unlawfully, wilfully and feloniously attempt to take, steal and carry away personal property" from the place of business described.

[3] "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149; *State v. Keziah,* 258 N.C. 52, 127 S.E. 2d 784. He may, of course, be convicted of a lesser offense included therein. It is elementary that, upon a motion for judgment of nonsuit in a criminal action, the evidence must be considered in the light most favorable to the State and the State is entitled to every favorable inference reasonably to be drawn from it. *State v. Miller,* 270

N.C. 726, 154 S.E. 2d 902. The evidence offered by the State must be taken to be true and any contradictions and discrepancies therein must be resolved in its favor. *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. Clyburn*, 273 N.C. 284, 159 S.E. 2d 868; *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679. For the purpose of such motion, the evidence of the defendant is considered only to the extent that it is favorable to the State or for the purpose of explaining or making clear the State's evidence, insofar as it is not in conflict therewith. *State v. Spears*, 268 N.C. 303, 150 S.E. 2d 499.

[4, 5] There must be substantial evidence of all material elements of the offense charged in order to withstand a motion for judgment of nonsuit. *State v. Hill*, 272 N.C. 439, 158 S.E. 2d 329; *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431. If, considered in accordance with the above mentioned rule, the evidence is sufficient only to raise a suspicion or conjecture as to whether the offense charged was committed, the motion for nonsuit should be allowed even though the suspicion so aroused by the evidence is strong. *State v. Clyburn, supra; State v. Cutler, supra; State v. Harvey*, 228 N.C. 62, 44 S.E. 2d 472.

[6] With reference to the defendant Britton, the State's evidence shows only that he entered the building with Evans, stopped and, throughout the entire episode, stood at the counter upon which the cash register sat, but that he could not, in that position, open or reach into the cash register and that he left the building and the premises with Evans and Hairston. The State's evidence does not show that he addressed any remark to any occupant of the building, had any weapon, made any threat or demand or committed any other act. The testimony of all three of the defendants is that Britton had been picked up by Evans and Hairston some five minutes earlier for the sole purpose of giving him a ride to his destination, that there was no conversation of consequence between him and either of the other defendants, or between Evans and Hairston in his presence, concerning any robbery of this business establishment. Britton testified that he did not hear any statement by Evans inside the building concerning a holdup. None of this testimony is in conflict with any of the evidence offered by the State. If it be assumed that Evans, Hairston, or both of them, committed the offense charged, the mere presence of Britton at the scene of the crime and at the time of its commission does not make

him a principal in the second degree. *State v. Bruton, supra; State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5. Consequently, Britton's motion for judgment of nonsuit should have been granted.

[7] As to the defendants Evans and Hairston, the evidence for the State is simply that Evans walked into the building, went into the kitchen area and there said to Gary Douglas, "This is a holdup; no one's going to get hurt." At about that moment, Hairston walked into the building with a loaded, but breeched, shotgun cradled on one arm. Nothing else appearing, this would be evidence of an intent to perpetrate a robbery, but the State's evidence does not stop there. The State's evidence is that, upon the mere remonstrance of a single unarmed customer, Hairston stated that his purpose in coming into the building was to settle an argument with someone in the back of the building and removed the shell from the gun. Hairston's testimony, not in conflict with the State's evidence, identifies the other party to his argument as Evans. The State's evidence is that immediately upon the customer's objection to his having the loaded gun in the building, Hairston removed the shell from the gun, put it in his pocket and left the building, stopping in front of it long enough for some discussion with Evans. Hairston never pointed the gun at anyone or threatened to use it for any purpose.

As to Evans, though he denies making any statement about a holdup, the State's evidence in this respect must be taken to be true. However, the State's evidence shows that Gary Douglas, to whom the statement was made, treated it as a joke, ignored Evans and continued his work of washing the kitchen wall. Miss Douglas, hearing Evans' remark, "kept on fixing the chicken." Mrs. Eckert, having heard the remark, did nothing but receive from Evans the two dollars, promptly paid to her by him when the package of chicken was handed to him by Miss Douglas. Thereupon, Evans counted out and handed to Miss Douglas the additional 58 cents required to make up the agreed price of the container of chicken. The three men then left the building, having made no demand upon anyone for anything and having made no effort to open or to force anyone else to open the cash register. Leaving the building, the three defendants drove their car out of the parking lot into the street where it stalled. They allowed it to roll back downgrade to a shady place "just around the corner" where they parked and sat,

eating their purchased chicken, until the police officers arrived, whereupon they requested the officers to assist them to start their car.

The State's evidence completely negates the allegation in the indictment of an assault upon Mrs. Eckert, the allegation that the defendants endangered or threatened her life by the use and threatened use of the shotgun, and the allegation that they attempted to take personal property from this business establishment. The conduct of the defendants, shown by the State's evidence, is utterly inconsistent with an attempt to rob, and the motions by Evans and Hairston for judgment of nonsuit, like that of Britton, should have been allowed.

It is unnecessary to discuss the remaining assignments of error.

Reversed.

STATE OF NORTH CAROLINA v. WILLIE EDWARD MOORE

No. 71

(Filed 13 October 1971)

1. **Robbery § 1— elements of common law robbery**

Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear; it is not necessary to prove both violence and putting in fear, proof of either being sufficient.

2. **Robbery § 4— armed robbery — sufficiency of evidence — victim's life endangered or threatened**

The State's evidence was sufficient to be submitted to the jury in this prosecution for armed robbery where it tended to show that defendant demanded the victim's money and removed $1.39 from the victim's pocket with his left hand while holding an opened knife in his right hand, that defendant threatened to cut off the victim's head if he didn't surrender his billfold, that defendant struck at the victim with his knife but hit the window of the victim's truck, and that the victim then escaped from defendant, notwithstanding the victim testified that he "was not scared or in fear of (his) life," since the evidence was sufficient to support a jury finding that the victim's life was in fact endangered or threatened by defendant's possession, use or threatened use of the opened knife.

3. **Robbery § 3— armed robbery — threats and attempted stabbing after money was taken — competency**

In this trial upon an indictment charging defendant with an armed robbery of $1.39, evidence that after defendant had taken the $1.39 he threatened to cut off the victim's head unless the victim surrendered his billfold and that he attempted to stab the victim was competent, since the events referred to in the evidence occurred as part of a single transaction.

4. **Criminal Law § 132— motion to set aside verdict**

Motion to set aside the verdict as being against the weight of the evidence was addressed to the trial court's discretion.

5. **Criminal Law § 158— failure to include charge in record — presumption**

Where the court's charge was not brought forward in the record, it is presumed that the jury was charged correctly as to the law arising upon the evidence as required by G.S. 1-180.

APPEAL by defendant from *McLean, J.*, at February 1, 1971 Schedule "A" Criminal Session of MECKLENBURG Superior Court, transferred for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant was indicted for the armed robbery of Grover C. Lowery with a deadly weapon, namely, a knife, in violation of G.S. 14-87, the amount taken being $1.39.

The only evidence was that offered by the State. It tends to show the facts, summarized except where quoted, narrated below.

On July 14, 1970, between 7:15 and 7:25 a.m., Grover Coleman Lowery (Lowery), a driver of a Waldensian Bakery truck, was parked across Caldwell Street in Charlotte, North Carolina, from a grocery store, waiting for the store to open so he could make a delivery. He had been waiting a very few minutes when defendant crossed Caldwell Street, walked up to the side of the truck, and said, "Man, I want your money." Defendant reached into Lowery's pocket and removed what Lowery "later learned (to be) $1.39." As he was reaching into Lowery's pocket with his left hand, defendant had an opened knife in his right hand. Defendant said, "Man, I want your billfold." When Lowery stated that he did not have a billfold, defendant said, "I'll cut your God damn head off if you don't give it to me." Lowery had "one foot on the bottom step of the van and the other one up." As Lowery began "to pull the door to a

little bit," defendant "drew that knife back and struck but he hit the glass with the knife," the glass being right beside Lowery. Lowery managed to knock the truck out of gear. It rolled down the incline (street). Then, after driving a few blocks, Lowery located W. T. Thompson (Thompson), a Charlotte Police Officer, and reported the robbery. Thompson followed Lowery back to the scene. They observed a group of four or five persons on the sidewalk on Seventh Street, approximately 50 feet west of Caldwell Street and approximately 250 feet from the grocery store. Lowery identified defendant as the man who had robbed him. Thompson found two $1.00 bills balled up in defendant's fist, which defendant had drawn behind him on Thompson's approach. A frisk of defendant disclosed that "he had a knife in his right front pocket with the blade open." Later, at the police station, Thompson found two nickels and four pennies in defendant's possession.

The jury found defendant guilty of armed robbery as charged in the indictment. Thereupon, the court pronounced judgment that defendant be confined in the State's prison for the term of 25 years. It was ordered that this sentence commence at the expiration of a sentence imposed by Judge Bailey at the May 8, 1967 Regular "B" Session of Mecklenburg Superior Court in Case No. 49-288.

Defendant excepted and appealed.

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

Richard H. Robertson for defendant appellant.

BOBBITT, Chief Justice.

Defendant assigns as error the denial of his motion under G.S. 15-173 for judgment as of nonsuit.

Lowery's testimony includes a statement that he "was not scared or in fear of (his) life." Defendant contends Lowery's asserted absence of fear of his life negates the guilt of defendant in respect of the crime charged in the indictment. We hold this contention is without merit.

[1] Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. *State*

v. Lawrence, 262 N.C. 162, 163, 136 S.E. 2d 595, 596-597 (1964), and cases cited. It is not necessary to prove both violence and putting in fear—proof of *either* is sufficient. *State v. Sawyer,* 224 N.C. 61, 65, 29 S.E. 2d 34, 37 (1944), and cases cited.

Lowery testified the money was taken by defendant from his person without his consent and against his will; that defendant reached into Lowery's pocket with his left hand and took his money; and that defendant was holding an opened knife in his right hand. Since this testimony indicates that the money was taken *forcibly* from Lowery's person, it would have supported a conviction of guilty of common-law robbery entirely without reference to whether Lowery perceived danger to himself.

We note (1) that the word "fear" as used in the phrase, "putting him in fear," in the definition of common-law robbery is not confined to fear of death; and (2) that the use or threatened use of a firearm or other dangerous weapon is not an essential of common-law robbery.

The indictment is based on G.S. 14-87, which provides:

"Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

G.S. 14-87 bears the caption "Robbery with firearms or other dangerous weapons" and defines explicitly the essentials of the crime created thereby. With reference to the evidence in this case, the essentials consisted of the unlawful taking or attempt to take personal property from Lowery; the possession, use or threatened use of "firearms or other dangerous weapon, implement or means"; and *danger* or *threat* to the life of Lowery. *State v. Covington,* 273 N.C. 690, 699-700, 161 S.E. 2d 140, 147 (1968).

[2] With reference to nonsuit, the determinative question is whether there was evidence sufficient to support a jury finding that Lowery's life was *in fact* endangered or threatened by defendant's possession, use or threatened use of the opened knife, not whether Lowery was "scared or in fear of (his) life." The jury might infer that one who engages in the perpetration of a robbery by means of an opened knife intends to use the knife to inflict injury to the extent necessary or apparently necessary to accomplish his purpose. The verbal threat and the assault (from which Lowery was protected by the glass door) are indicative of defendant's resolution to use the knife to inflict injury. It may be inferred that the threat of use and actual use of the knife constituted a danger to Lowery's life which was averted by his agility, the protecting glass door and his escape.

The record contains no description of the knife exhibited and used by defendant. In *State v. Norris,* 264 N.C. 470, 473, 141 S.E. 2d 869, 872 (1965), it was held that evidence of the defendant's pointing of a pocketknife with opened blade at his victim was sufficient under the circumstances of that case to support a finding that the pocketknife was a dangerous weapon within the meaning of G.S. 14-87.

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 inference therefrom. *State v. Vincent,* 278 N.C. 63, 64-65, 178 S.E. 2d 608, 609 (1971), and cases cited. When tested by this well-established rule, the evidence was ample to require submission to the jury and to support a verdict of guilty as charged.

[3] The evidence tends to show that both the verbal threat made by defendant and his actual use of the knife in an attempt to stab Lowery occurred immediately after defendant had obtained the money from Lowery's pocket and while defendant was engaged in an attempt to rob him of his billfold. Seemingly, defendant contends this evidence is irrelevant since the bill of indictment contains no reference to the billfold. It is unnecessary to consider whether defendant could be found guilty under this bill of indictment of attempted robbery of Lowery's billfold. The events referred to in the evidence occurred quickly as parts of a single transaction and all facets of the evidence were for consideration in determining whether defendant was guilty of the specific charge for which he was indicted, namely, robbing Lowery of $1.39.

[4] Defendant's only other assignment of error relates to the denial of his motion to set aside the verdict as being against the weight of the evidence and for a new trial. This motion was addressed to the trial court's discretion and was without merit.

[5] It is noted that the court's charge was not brought forward in the record. Therefore, it is presumed that the jury was charged correctly as to the law arising upon the evidence as required by G.S. 1-180. *State v. Cooper,* 273 N.C. 51, 58, 159 S.E. 2d 305, 310 (1968); 3 Strong, N. C. Index 2d, *Criminal Law* § 158 (1967). Moreover, the record contains a stipulation "that the court's instructions to the jury are free of error."

No error.

STATE OF NORTH CAROLINA v. ADAM FIELDS, JR.

No. 31

(Filed 13 October 1971)

1. **Criminal Law § 154— case on appeal — reporting errors in the transcript — new trial**

   The Supreme Court awards defendant a new trial for incredible errors in the transcript and admonishes an assistant solicitor for having accepted the record as a "correct statement of case on appeal" the same day the defendant served it on him.

2. **Criminal Law § 158— conclusiveness of record on appeal**

   The record certified to the Supreme Court imports verity, and the Court is bound by it.

3. **Criminal Law § 154— case on appeal — reporting errors in transcript— duty of defense counsel**

   Defense counsel and the solicitor, as officers of the court, have an equal duty to see that reporting errors in the transcript are corrected.

4. **Criminal Law §§ 158, 159— form of transcript — reporting error — omission of comma**

   Defendant contended that the following portion of the charge, which was taken verbatim from the transcript, constituted an expression of opinion by the trial judge that he believed the testimony of the deputy sheriff: "A photograph was introduced in this case for the purpose of illustrating and explaining the testimony of the witness, I believe the deputy sheriff." *Held:* The absence of a comma after the word "believe" was obviously a reporting error in the transcript, and defendant's contention is without merit.

State v. Fields

APPEAL by defendant from *Collier, J.*, November 1970 Session of ROBESON, transferred from the Court of Appeals for initial appellate review by the Supreme Court under its general order of 31 July 1970, entered pursuant to G.S. 7A-31 (b) (4).

Defendant was tried upon a bill of indictment, in the form prescribed by G.S. 15-144, charging him with the murder of Curntis (Kernis) Lee Locklear on 28 March 1970. The solicitor, however, elected not to seek a verdict of murder in the first degree.

The evidence for the State tended to show: On the night of the homicide, defendant, deceased (Locklear), and others were at the home of a bootlegger, Robert Smith. Defendant accused Locklear of having made derogatory statements about him and pointed a pistol at Locklear, who apologized and retracted the statements. Defendant, however, said he was going to kill Locklear. Maybelle Locklear, deceased's sister, stepped between the two and then took Locklear outside, where one Brooks knocked him down five or six times with a board. As Locklear was getting up the last time defendant ran out of the house, pistol in hand, and shot him in the chest. Locklear said, "Junior, you have shot me," and defendant replied, "g. d. you, I will kill you." Witnesses at the scene immediately took Locklear to the hospital. He was dead on arrival. There were powder burns on his shirt.

Defendant's evidence tended to show: Locklear started an argument with defendant in the Smith house and drew a knife on defendant. When a third person produced a gun, Locklear went outside where he cut at Brooks and was "chasing him around." Defendant came outside and Locklear said to him, "You are the real s. o. b. I want." Knife in hand, Locklear grabbed defendant by the collar, and defendant shot him. Locklear fell with the knife in his hand. Thereafter, no one saw a knife, and defendant's witnesses "don't know what happened to the knife."

The jury returned a verdict of guilty of murder in the second degree, and the court imposed a sentence of eighteen to twenty-four years in the State's prison. Defendant immediately gave notice of appeal and, on the same day, posted an appearance bond in the sum of $18,000.00 with a professional bondsman as surety. Thereafter, defendant's trial counsel, court-appointed upon defendant's affidavit of indigency, moved the court to permit him to withdraw from the case. Braswell, J., allowed the motion and, taking note that a professional bondsman had posted an $18,000.00 appearance bond for defendant,

directed defendant to appear at the 4 January 1971 Session so that the court might determine the question of his indigency. At that time Canaday, J., appointed defendant's present counsel to perfect this appeal.

Attorney General Robert Morgan, Assistant Attorney General Isham B. Hudson, Jr., for the State.

Floyd & Floyd for defendant appellant.

SHARP, Justice.

[1] The evidence in this case was plenary to withstand defendant's motion for nonsuit and to sustain the verdict. However, the condition of the record, which the assistant solicitor "accepted as a correct statement of case on appeal" the same day it was served upon him, leaves us no alternative except to order a new trial.

Defendant assigned as error the following portions of his Honor's charge, the error and prejudice of which are apparent:

"If you find from the evidence beyond a reasonable doubt that on the 28th of March, 1970, Adam Fields, Jr. intentionally shot and killed Kernis Lee Locklear, was natural and probable result of Adam Fields, Jr.'s act, but that Adam Fields, Jr. has satisfied you he was an aggressor after retreating as far as he could, killed Kernis Lee Locklear under such circumstances as reasonably arise in your minds was necessary in order to save himself from death or great bodily harm; that circumstances did create such belief in defendant's mind, and he did not use excessive force, it would be your duty to return a verdict of not guilty; if you are not satisfied that he hadn't retreated as far as he safely could have.

". . . .

"Furthermore, if you find Adam Fields, Jr. has failed to satisfy you he was the aggressor, but has satisfied you he had no murderous intent when he entered the fight, you would find him guilty of voluntary manslaughter."

[2] We are entirely convinced that Judge Collier did not utter the foregoing gibberish. However, it is axiomatic that the record which is certified to us imports verity, and we are bound by it. *Rogers v. Rogers,* 265 N.C. 386, 144 S.E. 2d 48; 1 N. C. Index

2d, *Appeal and Error* § 42 (1967). Whether the initial responsibility for its presence in the case on appeal belongs to the court reporter we do not know. However, the final responsibility for this case on appeal rests with the solicitor, whose assistant accepted service and agreed to it "as a correct statement."

We are constrained to repeat the admonition to solicitors which we so recently gave in *State v. Fox,* 277 N.C. 1, 28-29, 175 S.E. 2d 561, 578 (1970):

"Although the primary duty of preparing and docketing a true and adequate transcript of the record and case on appeal in a criminal case rests upon defense counsel, G.S. 1-282, G.S. 15-180, it is the duty of the solicitor to scrutinize the copy which appellant serves upon him. If it contains omissions, errors, or misleading juxtapositions it is the solicitor's responsibility to file exceptions or a counter case within his allotted time. He tried the case before the jury, and he is the State's only representative who is in position to evaluate the appellant's statement of the case on appeal. The Attorney General, who must defend the case in the Appellate Division, is dependent upon the solicitor for a valid record of the trial below. When the solicitor accepts the defendant's case on appeal and it is certified to the Appellate Division, it imports verity and the appellate court is bound by the record as certified. . . . It costs the State and profits a solicitor nothing if, after spending ten days in a trial such as this, we order a new trial for an error appearing in the transcript when none actually occurred. . . . [W]e remind the solicitors that their obligation to a case does not end when the judge pronounces sentence. Their duty includes policing the case on appeal. This, of course, necessitates the expenditure of the time and effort required to make a careful and painstaking examination of it and to file exceptions or counter case if either is necessary to provide a correct record and a case on appeal which truly and intelligently sets out the proceedings as they occurred. Only upon such a record can the Attorney General and the Appellate Division do justice to the State and to the defendant."

[3, 4] We also remind defense counsel that, as officers of the court, they have an equal duty to see that reporting errors are corrected. Their duty to a client does not embrace the right to perpetuate and take advantage of such mistakes. For example, defendant assigns as error the bracketed portion of the follow-

ing excerpt from the charge as it appears in the transcript, and argues that it constituted an expression of opinion:

"A photograph was introduced in this case for the purpose of illustrating and explaining the testimony of the witness, [I believe the deputy sheriff.]"

Obviously a comma has been omitted after the word *believe*. The clear import of the quoted paragraph is that the judge thought it was the testimony of the deputy sheriff which the photograph purported to illustrate. Certainly the judge was not telling the jury that he believed the deputy sheriff's testimony. This assignment of error is without merit.

The volume of criminal appeals today threatens the judicial machinery. Every meritless appeal and every retrial adds its weight to the overload. Furthermore, since the vast majority of criminal appellants are indigent, the State pays the entire cost of most such appeals. Thus, it is the taxpayer who is penalized when solicitors and defense counsel do not perform their duties with reference to appeals.

For the error appearing in the transcript there must be a

New trial.

STATE OF NORTH CAROLINA v. SPENCER L. HARRELL

No. 4

(Filed 13 October 1971)

1. **Criminal Law § 13; Courts § 14— jurisdiction of district court judge — misdemeanor judgment**

A judge of the district court had jurisdiction to enter judgment finding a defendant not guilty of a misdemeanor. N. C. Constitution, Art. IV, § 12(4); G.S. 7A-272.

2. **Criminal Law § 149— right of State to appeal — judgment declaring statute unconstitutional and defendant not guilty**

Although the State has the right to appeal from a judgment declaring unconstitutional the criminal statute under which a defendant is charged, the State could not appeal from a judgment which both declared a statute unconstitutional and found the defendant "not guilty." G.S. 15-179.

3. Criminal Law § 18— jurisdiction of superior court — appeal by the State from the district court

Where the State had no right to appeal from the district court to the superior court in a criminal case, the superior court did not have jurisdiction of the case and its granting of defendant's motion to quash was without effect.

Justice HUSKINS dissenting.

Justices LAKE and BRANCH join in dissenting opinion.

APPEAL by the State from *Hubbard, J.*, December 1970 Session of MARTIN Superior Court.

Defendant was charged in a warrant with the violation of G.S. 44-12, which provides:

"Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor.— If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor. If any contractor shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court."

At the trial in District Court on 14 September 1970, Hallet S. Ward, Judge Presiding, entered judgment as follows:

"The Court finds that the State offered evidence sufficient to convict the defendant upon the charges set out in the warrant. The Court, however, is of the opinion that Section 44-12 of the General Statutes of North Carolina is unconstitutional, and therefore void. The defendant was found not guilty and discharged."

The State appealed and Howard H. Hubbard, Judge Presiding at the 11 December 1970 Session of the Superior Court of Martin County, allowed defendant's motion to quash. The State gave notice of appeal to the Court of Appeals.

We allowed petition for *certiorari* to the North Carolina Court of Appeals prior to determination by order entered 23 April 1971.

Attorney General Robert Morgan and Staff Attorney William Lewis Sauls for the State.

E. S. Peel, Sr., for defendant appellee.

MOORE, Justice.

[1] In the judgment entered in the District Court, Judge Ward states, "The defendant was found *not guilty and discharged.*" (Emphasis added.) A violation of G.S. 44-12 is a misdemeanor and the District Court has exclusive jurisdiction over all misdemeanors except as specified in G.S. 7A-271. None of the exceptions apply in this case. North Carolina Constitution, Article IV § 12(4); G.S. 7A-272; *State v. Wall,* 271 N.C. 675, 157 S.E. 2d 363 (1967). Judge Ward had jurisdiction to enter final judgment.

[2] Our first question is whether the judgment entered by Judge Ward is one from which an appeal may be taken. G.S. 15-179 provides:

> "When State may appeal.—An appeal to the appellate division or superior court may be taken by the State in the following cases, and no other. Where judgment has been given for the defendant—
>
> * * *
>
> "(6) Upon declaring a statute unconstitutional."

It may be that Judge Ward in the instant case only intended to declare the statute unconstitutional. However, he went further and found the defendant "not guilty" and discharged him. It is axiomatic that the record which is certified to us imports verity and we are bound by it. *State v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53 (1967); *State v. Dee,* 214 N.C. 509, 199 S.E. 730 (1938); 3 Strong, N. C. Index 2d, Criminal Law § 158, p. 107.

As said in *State v. Vaughan,* 268 N.C. 105, 108, 150 S.E. 2d 31, 33 (1966):

> " In 4 Am. Jur. 2d, Appeal and Error § 268, these statements appear: 'As a general rule the prosecution cannot appeal or bring error proceedings from a judgment in favor of the defendant in a criminal case, in the absence of a statute clearly conferring that right.' Again: 'Statutes

> authorizing an appeal by the prosecution will be strictly construed.' In 24 C.J.S., Criminal Law § 1659(a), pp. 1028-1029, this statement appears: 'While there is authority holding that statutes granting the state a right of review should be liberally construed, it is generally held that, being in derogation of the common law, they should be strictly construed, and that the authority conferred thereby should not be enlarged by construction.' "

In our view G.S. 15-179(6) gives the State the right to appeal when a criminal action is dismissed on the ground the statute purporting to create and to define the purported criminal offense on which the prosecution is based is unconstitutional and therefore affords no basis for such prosecution. It is our opinion and we so hold that this statute does not go further and give the State the right to appeal from a judgment of "not guilty" notwithstanding the finding that the judgment is based in part on a finding that the statute under which defendant is charged is unconstitutional. *State v. Vaughan, supra.*

[3] In the trial in Superior Court defendant moved to quash on the grounds that G.S. 44-12 is unconstitutional. The court granted the motion, holding that the following portion of the statute is unconstitutional:

> "If any contractor shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned or both, at the discretion of the Court."

If the Superior Court had had jurisdiction, the motion to quash would have effectively presented the question of the constitutionality of the statute, and the State could have appealed a judgment declaring it unconstitutional. G.S. 15-179. However, since the judgment in the District Court found the defendant "not guilty" and discharged him, the appeal by the State was improvidently entered and nothing was before the Superior Court. The appeal should have been dismissed. G.S. 15-179.

Having reached the conclusion that the State's appeal must be dismissed, we do not discuss whether the portion of G.S.

44-12 set out in Judge Hubbard's judgment is unconstitutional. *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129 (1955).

Appeal dismissed.

Justice HUSKINS dissenting.

It is perfectly apparent, to me at least, that Judge Ward found defendant "not guilty" and discharged him on the ground that G.S. 44-12 was unconstitutional. This conclusion is buttressed by the wording of the judgment itself which states: "The Court finds that the State offered evidence sufficient to convict the defendant upon the charges set out in the warrant. The Court, however, is of the opinion that Section 44.12 of the General Statutes of North Carolina is unconstitutional, and therefore void." But for the judge's notion that the statute was unconstitutional, Judge Ward would have found defendant guilty. G.S. 15-179(6) authorizes the State to appeal where judgment has been given for the defendant "upon declaring a statute unconstitutional." I would therefore hold that the case was properly before Judge Hubbard on appeal by the State to the superior court and that Judge Hubbard's judgment is properly before this Court for review since he also held the quoted portion of G.S. 44-12 unconstitutional.

The guilt or innocence of this defendant has not been decided on the merits in either the district court or the superior court. The majority opinion gives him the benefit of an acquittal to which he is not entitled.

In my view the penalty provisions in G.S. 44-12 are constitutional. The sums due the contractor, when paid to him by the owner, constitute a fund which is held in trust by the contractor for the materialmen and laborers to the extent of their claims and until their claims are paid. As to them, the contractor stands in the relationship of trustee; and when he converts the money to his own use without paying the persons performing labor or furnishing material, he commits a fraud for which he may be prosecuted. This view is supported in principle by *Foundry Co. v. Aluminum Co.,* 172 N.C. 704, 90 S.E. 923 (1916); *State v. Harris,* 134 Minn. 35, 158 N.W. 829 (1916); and *Overstreet v. Commonwealth,* 193 Va. 104, 67

S.E. 2d 875 (1951). *See* Note, Mechanics' Liens in North Carolina, 41 N.C. L. Rev. 173 (1963).

The penalty provisions of G.S. 44-12 do not provide for imprisonment for debt. The contractor is not being punished for his indebtedness to the laborers and materialmen. Rather, he is being punished for his fraud for (1) failing to furnish the owner an itemized statement of the sums due for labor and material before receiving any part of the contract price and (2) then receiving the contract price, failing to apply it to the payment of bills for labor and material, and converting it to his own use. It is the fraudulent conduct and not the indebtedness which is made the basis of guilt under this statute. Thus, the constitutional prohibition against imprisonment for debt has no application.

Rather than dismiss this appeal on the ground stated in the majority opinion and leave the penalty provisions of G.S. 44-12 constitutionally suspect, I would hold that the case is properly here on the State's appeal and uphold the constitutionality of G.S. 44-12 in its entirety. I therefore respectfully dissent.

I am authorized to say that Justices LAKE and BRANCH join in this dissent.

STATE OF NORTH CAROLINA v. WALTER S. McILWAIN

No. 67

(Filed 13 October 1971)

1. **Criminal Law § 161— appeal as an exception to the judgment — question presented**

   An appeal itself is an exception to the judgment of the court and presents the question whether error appears on the face of the record proper.

2. **Criminal Law § 161— record proper on its face — requisites**

   The Supreme Court holds that no error appeared on the face of the record in a homicide case, where the indictment was in proper form, the court was properly constituted, and the sentence was supported by the verdict and was within the limits authorized by statute.

3. **Homicide § 14— homicide case — presumption of unlawful killing and malice**

   Evidence that the proximate cause of death was a wound in the victim's head from a pistol bullet intentionally fired at the victim

by the defendant raises a presumption of an unlawful killing and a presumption of malice sufficient to support a conviction of murder in the second degree.

APPEAL by defendant from *Hasty, J.*, at the 15 February 1971 Session of HENDERSON, heard prior to determination by the Court of Appeals.

By an indictment, proper in form, the defendant was charged with the murder of Marshall Walker. Before the trial commenced, the solicitor announced in open court that he would not seek a conviction of murder in the first degree, but would place the defendant on trial for murder in the second degree or manslaughter as the evidence might warrant. The defendant entered a plea of not guilty. The jury returned a verdict of guilty of murder in the second degree and the defendant was sentenced to a term of 18 to 20 years in the State prison.

The defendant gave notice of appeal but the case on appeal contains no assignment of error, and the record shows no objection and no exception to any ruling of the trial court. The judge's charge to the jury is not set forth in the record, which contains the following statement:

> "The Judge proceeded to charge the jury. The charge was adequate, fair to the defendant, and complied with the law insofar as counsel is able to ascertain and inasmuch as no exception was taken to the charge of the Judge, the charge is not summarized herein, but the record is submitted with the case on appeal for the court's information."

The direct evidence for the State consisted of the testimony of the brother of the deceased and Dr. Kenneth LaTourette, who performed an autopsy. The brother's testimony was to the effect that he went into a pool hall in the City of Hendersonville at about 8 p.m. on 1 August 1970. There he saw his brother (the deceased), the defendant, the defendant's wife and Melvin Bangor, who subsequently testified that he is the brother (presumably the half-brother) of the defendant. There were numerous other people in the pool hall. As the witness entered, the deceased and Bangor suddenly started "fighting with their bare hands." The defendant "all of a sudden" came out of a small room in the back of the building, walked toward the deceased, pulled out a pistol and began shooting at the deceased, whose

back was turned to the defendant. The deceased fell to the floor. Bangor, who was not shot, fell on top of the deceased. The defendant then came around the pool table, stooped over the deceased and shot him two more times. The deceased was then lying on the floor and Bangor was holding him down. The first two bullets, fired from a distance of eight to ten feet, entered his back. The third bullet entered his head at the temple. The witness saw no knife, gun or other weapon anywhere about his brother's body. He heard no words between the deceased and Bangor and knows of no argument between them, or between the deceased and the defendant prior to the commencement of the fight. Dr. LaTourette testified that the deceased had four gunshot wounds, two in the back, one in the head and one in the left hand. The cause of death was the bullet wound in the head.

The defendant testified in his own behalf and Bangor was also a witness for him. Their testimony was to the effect that, as Bangor was dancing with the wife of the defendant, the deceased came over to them and pushed Bangor, who thereupon told the defendant's wife to go get the defendant so that they could leave. The deceased then pushed Bangor up against the wall, pulled out a gun and struck Bangor in the face with it. When the defendant entered the room, pursuant to his wife's request, he saw his brother and the deceased fighting. He could not then see what the deceased had in his hand. In the course of the struggle, the defendant and his wife were kicked by the deceased, the wife trying to pull Bangor back from the fight. The defendant shot the deceased three or four times when they were "real close together," having tried to get his brother and his wife out of the pool room, which he was unable to do because the deceased would not let them go. The deceased was not on the floor when the defendant shot him. The defendant had had a number of beers to drink that day but was not drunk. He told SBI Agent Crisco "what happened down there to the best of his knowledge," his constitutional rights having been explained to him.

The State called in rebuttal Chief of Police Powers, SBI Agent Crisco and Eugene Logan, who was playing pool at a nearby table at the time of the occurrence. Logan testified that he heard two shots fired after the deceased fell and while the defendant was kneeling over him. He paid little attention to the fight between the deceased and Bangor as "he had an im-

portant game going on" at the time, but the deceased and Bangor were pushing each other and he saw "some fists flying from both parties."

The testimony of the police officers was to the effect that the defendant having left the pool hall in a taxi, an officer went to his home and arrested him without a warrant on the charge of assault with a deadly weapon with intent to kill. The arresting officer did not talk to him and the defendant made no statement to that officer. The defendant had a swollen and bleeding eye and was taken to the hospital where he received medical attention at the emergency room and was brought to the jail at approximately 2 a.m. on the morning of 2 August. At his request he was permitted to talk for 35 to 40 minutes to some individual by telephone. Thereafter, he was "warned of his rights and asked if he understood them," which he said that he did. He then talked to the officers without objection, telling them that he had gone over to where the deceased and Bangor were fighting, heard the deceased threaten to kick his wife, saw him kick her and was kicked in the eye himself, whereupon he pulled his gun and shot the deceased four times while they were only inches apart. He said he had heard a shot before going out into the room where the struggle was in progress. Bangor also told the officers that the deceased had fired a pistol at him but missed.

Attorney General Morgan and Staff Attorney Blackburn for the State.

Crowell & Crowell by O. B. Crowell, Jr., for defendant.

LAKE, Justice.

[1, 2] The defendant having assigned no error and having stated in his brief that he is aware of none, the only question presented by his appeal, which, itself, is an exception to the judgment of the court, *State v. Sutton,* 268 N.C. 165, 150 S.E. 2d 50; *State v. Williams,* 235 N.C. 429, 70 S.E. 2d 1, is whether error appears on the face of the record proper. *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476; *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447. No such error appears, the indictment being in proper form, the court being properly constituted and the sentence being supported by the verdict and being within the limits authorized by the statute. G.S. 14-17. It is conceded that the charge of the court to the jury, which is not brought for-

ward in the record, was correct. "Error may not be predicated on the possibility of error in a charge which was not reported and as to which no error is now assigned. The presumption is that the court charged the jury properly as to the law applicable to all phases of the evidence." *State v. Cruse*, 238 N.C. 53, 59, 76 S.E. 2d 320.

[3] The evidence is ample to show the proximate cause of death was a wound in the head from a pistol bullet intentionally fired at the deceased by the defendant. Upon this evidence the law raises a presumption of an unlawful killing and a presumption of malice sufficient to support a conviction of murder in the second degree. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393; *State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322.

No error.

STATE OF NORTH CAROLINA v. RONALD E. HOPKINS

No. 51

(Filed 13 October 1971)

1. **Constitutional Law §§ 34, 37— double jeopardy — waiver of the right**

   The constitutional right not to be placed in jeopardy twice for the same offense may be waived by the defendant, and such waiver is usually implied from his action or inaction when brought to trial in the subsequent proceeding.

2. **Constitutional Law §§ 34, 37; Criminal Law § 26— waiver of double jeopardy plea**

   A defendant who entered a plea of guilty after his previously entered plea of former jeopardy was overruled thereby waived any right to dismissal of the charge on the ground of former jeopardy.

APPEAL by defendant from the Court of Appeals which found no error in the judgment of *Rouse, J.*, at the January 1971 Criminal Session of BEAUFORT, sentencing the defendant to imprisonment in the county jail for not less than 18 nor more than 24 months upon his plea of guilty to nonfelonious breaking and entering.

The defendant was brought to trial under an indictment, proper in form, charging him with burglary in the first degree. In the superior court, at the call of the calendar for

the term, the defendant entered a plea of former jeopardy and moved to dismiss. The court heard evidence offered by the defendant in support of this plea. The plea was overruled and the motion to dismiss was denied. When the case was called for trial, later in the term, the solicitor announced in open court that he would seek a verdict of nonfelonious breaking and entering only. The defendant reasserted his plea of former jeopardy and renewed his motion to dismiss. The plea and motion being again denied, the defendant entered a plea of guilty to nonfelonious breaking and entering. Thereupon, the court entered judgment imposing sentence. The defendant appealed therefrom to the Court of Appeals, his only assignment of error being the denial of his plea of former jeopardy. From the judgment of the Court of Appeals, he appealed to this Court upon the same ground.

Following the entry of judgment in the superior court and the giving of his notice of appeal, the defendant filed an affidavit of indigency. Thereupon, the same counsel who represented him in the superior court, as privately employed counsel, was appointed to represent him upon his appeal, and the cost of printing the record and his brief was ordered to be paid by the State.

The record on appeal shows that, at the hearing of his plea of former jeopardy in the superior court, the defendant introduced in evidence a warrant issued 7 December 1970 charging him with: (1) Assaulting Francis *(sic)* G. Foster by intentionally pointing a shotgun without legal cause; (2) assaulting the said Francis G. Foster, a female person, by striking her about the body; and (3) breaking and entering, other than burglariously, the dwelling house of the said Francis G. Foster.

The record further shows that, on 15 December 1970, the warrant was amended in the district court so as to charge first degree burglary and, on the same date, the district court found probable cause and bound the defendant over to the superior court on that charge, following a preliminary hearing. The indictment was thereafter returned by the grand jury.

The record does not show the disposition made of the charges of assault. The judgment of the superior court, imposing sentence for the nonfelonious breaking and entering, provides that the sentence so imposed shall begin at the expiration of

sentence imposed on 15 December 1970 in the district court "in cases 70-CR-5683 and 70-CR-5684," but it appears that these involved other, unrelated charges.

At the hearing of his plea of former jeopardy in the superior court, the defendant also introduced the oral testimony of Delaine Congleton, Assistant Clerk of the Superior Court, who, as part of her duties in that office, serves as clerk in the district court when that court sits for the disposition of criminal matters. She testified:

She so acted in the district court on 15 December 1970 and recalls that there were five cases against the defendant tried in the district court on that date, including the three charges specified in the above warrant. The above noted amendment to the warrant was not attached thereto at the time these matters came on for trial in the district court. The three charges contained in the above warrant were consolidated for trial in the district court and the defendant entered a plea of guilty to all of them. This plea was received by the court. Thereafter, the State introduced evidence concerning these charges, the defendant offering none. The district court thereupon pronounced judgment upon the three charges so consolidated, the judgment being that the defendant be confined for a term of five months. The defendant thereupon took a seat on the prisoner's bench. The solicitor of the district court then conferred with the witnesses and thereafter the defendant was brought "in front of the Bar," and the district judge announced he was finding probable cause as to first degree burglary. She does not remember whether the solicitor moved to amend the warrant, so as to charge first degree burglary, prior to the defendant's being brought back "to the Bar," or when the change in the judgment of the district court was made.

Attorney General Morgan and Staff Attorney League for the State.

Wilkinson & Vosburgh by James R. Vosburgh for defendant.

LAKE, Justice.

[1] The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived by the defendant and such waiver is usually implied

from his action or inaction when brought to trial in the subsequent proceeding. *Harris v. United States,* 237 F. 2d 274; *Brady v. United States,* 24 F. 2d 405; 22 C.J.S., Criminal Law, § 277. In *State v. Gainey,* 265 N.C. 437, 144 S.E. 2d 249, speaking through Chief Justice Denny, this Court said: "A subsequent plea of guilty constitutes a waiver of the plea of former jeopardy. 14 Am. Jur., Criminal Law, § 280, page 958." The Supreme Court of Kansas said in *Cox v. State,* 197 Kan. 395, 416 P. 2d 741, 747, "Even if double jeopardy is raised as a defense it is abandoned by a subsequent plea of guilty." In *Berg v. United States,* 176 F. 2d 122, *cert. den.,* 338 U.S. 876, 70 S.Ct. 137, 94 L. Ed. 537, the Court of Appeals for the Ninth Circuit said, "Double jeopardy is a personal defense and is waived by plea of guilty." See also, 22 C.J.S., Criminal Law, § 277.

[2] The present defendant, through his then privately employed counsel, entered a plea of guilty to the charge of nonfelonious breaking and entering after his previously entered plea of former jeopardy was overruled. He having thereby waived his right, if any, to dismissal of the charge on the ground of former jeopardy, it is not necessary for us to determine whether the Court of Appeals was correct in holding that the evidence offered by him, in the superior court, in support of his plea of former jeopardy, was incompetent for the reason that parol testimony is not admissible to establish, explain or contradict a judgment of a court of record, *i.e.,* the district court. For the same reason it is not necessary for us to determine whether the evidence, if admissible, would be sufficient to show that by the proceeding in the superior court he was unlawfully placed in jeopardy a second time for the same offense. We, therefore, express no opinion on either of those questions.

No error.

STATE OF NORTH CAROLINA v. CLAYTON DeVONNE MORRIS

No. 10

(Filed 13 October 1971)

1. **Criminal Law § 66— pretrial photographic identification**

Pretrial photographic identification procedure was not impermissibly suggestive where a robbery victim viewed 8-12 photographs from which he recognized the face of the defendant, prior to the robbery the witness had seen defendant a number of times at a home across the street from the site of the robbery and in the store where the robbery occurred, the victim told investigating officers that he knew defendant but did not know his name, and defendant testified at the trial that he knew the victim but not by name and that victim had waited on him when he went in the store.

2. **Criminal Law § 66— in-court identification — pretrial photographic identification**

In this armed robbery prosecution, the State presented clear and convincing proof that the victim's in-court identification of defendant was of independent origin from a pretrial photographic identification and was based on observations made by the victim at the scene of the robbery and on occasions prior to the robbery.

3. **Robbery § 4— armed robbery — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury in this prosecution for the armed robbery of a cashier and clerk of a Little General Store.

APPEAL by defendant from *Hasty, J.*, at 30 November 1970 Schedule "A" Criminal Session, MECKLENBURG Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging armed robbery of one John Rohrer on 10 June 1970.

John Rohrer testified that he was a cashier and clerk at the Little General Store located on The Plaza in the City of Charlotte. He was preparing to close the store about 11:45 p.m. on 10 June 1970 and was placing the key in the burglar alarm when a man came up behind him, pulled his head back and put a knife to his throat. Defendant then walked up and Rohrer recognized him although he did not know his name. Rohrer said, "All right you've had your fun now, let me go." Defendant replied: "Open that damn door and open the safe." Defendant then pulled a pair of men's silk hose over his hands. Rohrer was forced to open the front door, pushed down the aisle to the location of the safe, and defendant demanded the combination.

Rohrer refused to open the safe or reveal the combination whereupon he was pushed to the floor with the knife still at his throat. The robbers again demanded the combination and Rohrer said he didn't have it. Defendant said: "Give us the combination to this safe or we will cut you until you do." At that time Rohrer was lying flat on the floor, facedown. The unidentified man with the knife then stabbed and cut Rohrer in the back twenty or twenty-five times. Defendant said: "Puncture his eardrums," and Rohrer immediately felt two knife blades go into his ears. The unidentified robber said, "He is still breathing," and defendant replied, "We will take care of that." The robbers then began cutting Rohrer on his back again. He felt blood streaming from his ears and from a gash over his right eye. A cut on the back of his head severed a nerve so that part of his skull now has no feeling. His left lung was punctured by a stab from the back. Finally, defendant said: "Hold his head up. I will cut his eye out." Mr. Rohrer felt a sharp pain, saw a flash of light, and that was all. He dropped his head to the floor and felt the blood pouring out. He prayed for his life. Shortly thereafter he felt one of the robbers step on his back and heard footsteps going away. The robbers took his wristwatch and his wallet containing $50 in cash.

Mr. Rohrer crawled to the front of the store, staggered out the door and a passing motorist called an ambulance and the police. He spent a week in the hospital and was released. He now wears a glass eye and numerous scars—over fifty stitches were taken in his left arm alone.

Upon timely objection to the in-court identification of defendant, the jury was excused and a *voir dire* conducted. Mr. Rohrer testified on *voir dire* that while he was in the hospital two detectives came to show him some pictures but he was unable to look at them and identified no one at that time. At a later time, Officer Travis showed him eight, ten or twelve pictures from which he recognized the face of the defendant. He has never been able to identify the other robber. He stated that he already knew defendant but didn't know his name and that he was in nowise influenced by the fact that he picked defendant from among the pictures. "I knew him without looking at those pictures." He further stated that prior to June 10 he had seen defendant in the yard of a

home across the street from the Little General Store a number of times; that defendant had been in the Little General Store between five and ten times making purchases; that he did not know defendant by name but gave the officers a facial description the night of the robbery, told them he had seen the defendant before, and described the clothing he was wearing.

Defendant offered no evidence on *voir dire*. The court found facts substantially in accord with the foregoing narration and concluded (1) there was nothing suggestive in the photographic identification procedure likely to give rise to misidentification and (2) the State had established by clear and convincing proof that the in-court identification of defendant was of independent origin, based on observations made by Rohrer at the scene of the robbery and on his previous knowledge of the defendant. Defendant's motion to suppress was denied and the in-court identification was admitted before the jury over objection.

Defendant's motion for nonsuit at the close of the State's evidence was denied. Defendant then offered evidence in the nature of alibi. He testified that he was nineteen years of age; that at the time of the robbery he was employed, making $115 a week; that he had been convicted of auto theft and armed robbery, was on parole on the date of the robbery in question, and was not permitted to hang around places at night; that he was not allowed to carry a knife; that on 10 June 1970 he went to his sister's home about 10:00 or 10:15 p.m. where he stayed until 12 o'clock midnight when his brother-in-law came in from work, awoke defendant and carried him home; that he was not at the Little General Store and did not assault and rob Mr. Rohrer. He stated that Mr. Rohrer had waited on him when he was in the Little General Store as a customer from time to time but denied having anything to do with the robbery. His testimony was corroborated by his sister Kathleen Mason and her husband Donald Mason.

Defendant's motion for nonsuit, renewed at the close of all the evidence, was denied. The jury convicted him of armed robbery, and he was sentenced to State Prison for a term of thirty years. He appealed to the Court of Appeals and the case was transferred to the Supreme Court for initial appellate review pursuant to the Court's general order dated 31 July 1970.

Henry E. Fisher, Attorney for defendant appellant.

Robert Morgan, Attorney General; Eugene Hafer, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

Defendant's first assignment of error is based on the contention that his in-court identification by the witness Rohrer was tainted by a pretrial photographic identification. He argues that the findings and conclusions of the trial judge to the contrary are erroneous and that his motion to suppress the in-court identification should have been allowed.

In *Simmons v. United States,* 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S.Ct. 967 (1968), identification by photograph was expressly approved and the Court held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

[1] The test laid down in *Simmons* has been applied by this Court in many cases, including *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744 (1970); *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970), and *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970). When applied to the facts in this case, there is small chance that the photographs viewed by the witness Rohrer led to misidentification of defendant. The record shows that the witness viewed eight, ten or twelve pictures from which he recognized the face of the defendant. Prior to the robbery the witness had seen the defendant a number of times on the lawn of a home across the street from the site of the robbery. Defendant had been in the Little General Store five to ten times making purchases and had been observed by the witness on those occasions. The witness told investigating officers that he knew defendant but did not know his name. Defendant himself testified at the trial: "Yes, I knew Mr. Rohrer but not by name. I did not know his name until the hearing. Yes, Mr. Rohrer waited on me when I went in the store." There is nothing in the record to support the contention that imper-

missibly suggestive procedures were employed by the officers when the photographs were exhibited to the witness. Therefore, had the in-court identification been based on the pretrial photographic identification, it would have been competent anyway.

[2] The trial judge found as a fact on *voir dire,* however, that the State had established by clear and convincing proof that the in-court identification of defendant by the witness Rohrer was independent in origin, based on observations made by the witness at the scene of the robbery and on his previous observations of defendant. The evidence overwhelmingly supports this finding. "Such findings of fact, so made by the trial judge, are conclusive if they are supported by competent evidence in the record." *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970); *State v. McVay and Simmons,* 277 N.C. 410, 177 S.E. 2d 874 (1970); *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971). We hold that defendant's motion to suppress the in-court identification was properly denied and the evidence properly admitted.

[3] Defendant assigns as error the denial of his motion for nonsuit at the close of all the evidence. Such motion draws into question the sufficiency of all of the evidence to go to the jury, and 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. *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969). "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. Vincent,* 278 N.C. 63, 178 S.E. 2d 608 (1971), and cases cited. Applying this well-established rule, there was ample evidence to require its submission to the jury and to support a verdict of guilty as charged. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971). Defendant's motion for nonsuit was properly denied.

Prejudicial error does not appear, and the verdict and judgment must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. JOHN HENRY TINSLEY

No. 75

(Filed 13 October 1971)

Robbery § 6— armed robbery — appeal — review of face of the record

On appeal from defendant's conviction of armed robbery, the Supreme Court holds that no error appears on the face of the record proper.

APPEAL by defendant from *Falls, J.*, December 7, 1970 Session, CLEVELAND Superior Court.

The defendant, John Henry Tinsley, was charged by grand jury indictment with the armed robbery of Thomas Arthur Bridges. The indictment alleges the offense occurred July 7, 1970.

Upon inquiry before arraignment, the court found the defendant to be indigent and appointed John Church, Esq. of the Shelby Bar, to represent him.

After conferences between the defendant and his counsel it was agreed the defendant would enter a plea of guilty to the charge. Before accepting the plea, however, the court made detailed inquiry of the defendant and ascertained that he was satisfied with the services of his lawyer, that he understood the charge against him and was advised as to the penalties which could be imposed upon a plea of guilty or upon a conviction. He stated to the court that he was guilty of the offense and desired to plead guilty.

The court heard the testimony of the victim, Thomas Arthur Bridges, which disclosed that the defendant and two others in the nighttime forcibly entered the home of the witness. One of the defendant's companions, all of whom participated in the robbery "held a pistol beside my head and demanded a thousand dollars." The defendant and his two companions had forced their way into Mr. Bridges' home notwithstanding his attempt to prevent their entering by the use of his shotgun which misfired. The intruders took the gun valued at $40.00 and fled.

After hearing the evidence, including the defendant's statement in open court that he and his companions had been engaging in heavy drinking, the court imposed a prison sentence

of 20 to 25 years. After the sentence, the defendant gave notice of appeal.

The court, on defendant's application, extended the time for filing the appeal. From the affidavit of prisoner's counsel, it appeared the defendant was also indicted for first degree burglary.

In his brief filed here, defense counsel states he is unable to discover any error of law in the trial or sentence.

Robert Morgan, Attorney General, by R. S. Weathers, Assistant Attorney General, for the State.

John D. Church for defendant appellant.

HIGGINS, Justice.

In the present condition of the record, the only question of law or legal inference presented is whether error of law appears upon the face of the record proper. *State v. Dawson,* 268 N.C. 603, 151 S.E. 2d 203; Strong's North Carolina Index, 2d, Vol. 3, Criminal Law, XII. Appeal and Error, § 146, p. 87. Careful review shows a valid indictment, the presence of the defendant before the court represented by counsel and a valid plea of guilty entered after extended inquiry. Error is neither shown nor suggested by anything that appears upon the face of the record. Ordinarily, in criminal cases the record proper consists of (1) the organization of the court, (2) the charge (information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment.

This case fits the pattern described in *State v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800: "This case is a fair example of the manner in which that unlimited right (of appeal) is now being perverted at the whim of those who have nothing to lose. An indigent defendant has only to say 'I appeal,' and the county is required to furnish him with counsel, 'transcript and records . . . for . . . appellate review.' " In all likelihood, some "prison lawyer" has advised the defendant that his having been tried on the robbery charge which constituted an essential element of his first degree burglary charge, he is now shielded from the capital offense and has nothing to lose by the appeal. *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838; *State v. Bell,* 205 N.C. 225, 171 S.E. 50.

A careful review of the record proper fails to disclose either error of law or of legal inference.

No error.

STATE OF NORTH CAROLINA v. ROGER LEE BATTLE

No. 2

(Filed 13 October 1971)

1. **Constitutional Law § 34; Criminal Law § 26— mistrial — plea of former jeopardy**

An order of mistrial in a criminal case generally will not support a plea of former jeopardy.

2. **Criminal Law § 128— mistrial — failure to reach verdict — discretion of court**

When the jurors declare their inability to agree, it must be left to the trial judge, in the exercise of his judicial discretion, to decide whether he will then declare a mistrial or require them to deliberate further.

3. **Constitutional Law § 34; Criminal Law §§ 26, 128— failure to reach verdict — mistrial — former jeopardy**

The trial court did not abuse its discretion in declaring a mistrial after the jury had deliberated approximately two hours and forty minutes without reaching a verdict and all the jurors were of the opinion that they never could agree upon a verdict, and defendant's plea of former jeopardy at his subsequent trial for the same offense was properly denied.

APPEAL by defendant from *Burgwyn, E. J.*, 10 August 1970 Session of EDGECOMBE, transferred from the Court of Appeals for initial appellate review by the Supreme Court under its general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

At the 8 June 1970 Session, May, J., presiding, defendant was tried upon a bill of indictment which charged that on 18 March 1970, by the use of tools, he feloniously attempted to force open a certain safe used for storing money and other valuables (a violation of G.S. 14-89.1). The State's evidence tended to show that on 18 March 1970, sometime after 10:30 p.m., defendant and an accomplice entered the office of Williams Transfer and

Storage Company and, by the use of a hammer, chisel, bar, and drill, attempted to open a safe containing about $336.00 belonging to the company. Defendant offered no evidence.

The jurors began their deliberations sometime Friday morning, 12 June 1970. At 1:10 p.m. the jurors were called back into the courtroom. When, upon inquiry, they informed the judge that no verdict had been reached, court was recessed for lunch until 2:30 p.m. Thereafter, the jury deliberated from 2:30 p.m. until 3:17 p.m. when the court again called the jury back into the courtroom. In response to the clerk's inquiry, the jury advised the court that they had not agreed upon a verdict; that they stood "six and six" and that had been the division since before lunch. The court instructed the jury to retire and resume deliberations.

At 4:00 p.m. the court once more called the jury back to the courtroom. The jurors again said that they had not agreed upon a verdict; that they were "still locked the same way"—six to six; and that had been the division since the first fifteen minutes of deliberation. It was the opinion of each juror that the jury could never agree. The court, upon a finding that after having deliberated approximately two hours and forty minutes all jurors were convinced they could never agree upon a verdict, declared a mistrial and ordered a new trial.

After the mistrial was ordered, defendant objected and excepted to the order.

When the cause again came on for retrial at the 10 August 1971 Session before Burgwyn, J., defendant moved in writing that the indictment be dismissed because he had previously been tried for the same offense at the 8 June 1970 Session and to place him on trial again would twice put him in jeopardy, a violation of the provisions of both the Federal and State constitutions. Judge Burgwyn, after reviewing the record of the first trial, overruled the plea of former jeopardy, and the trial proceeded. The State offered evidence tending to establish defendant's guilt of the crime charged. Defendant again offered no evidence. The jury's verdict was guilty as charged and, from the sentence of fifteen years in the State's prison, defendant appealed.

Attorney General Morgan; Assistant Attorneys General Melvin and Costen for the State.

Spruill, Trotter & Lane by Cleveland P. Cherry for defendant appellant.

SHARP, Justice.

The "sacred principle of the common law" that no person can twice be put in jeopardy of life or limb for the same offense has always been an integral part of the law of North Carolina. *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838; *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243; *State v. Prince,* 63 N.C. 529; *State v. Garrigues,* 2 N.C. 241 (1795). Therefore, the decision in *Benton v. Maryland,* 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969), which made the double jeopardy provision of the Fifth Amendment applicable to the several states through the Fourteenth Amendment, added nothing to our law.

[1] However, the general rule is that an order of mistrial in a criminal case will not support a plea of former jeopardy. *See* 53 Am. Jur., *Trial* § 1000 (1945). This rule prevails in North Carolina and in the federal courts. *United States v. Perez,* 9 Wheat. 579, 6 L. Ed. 165 (1824); *State v. Whitson,* 111 N.C. 695, 16 S.E. 332; *State v. Honeycutt,* 74 N.C. 391; *State v. Bullock,* 63 N.C. 570. *See State v. Jefferson,* 66 N.C. 309.

[2] When the jurors declare their inability to agree, it must be left to the trial judge, in the exercise of his judicial discretion, to decide whether he will then declare a mistrial or require them to deliberate further. *State v. Trippe,* 222 N.C. 600, 24 S.E. 2d 340. This is always a delicate question. Either releasing the jury "too soon" or holding it "too long" will bring charges of an abuse of discretion. "But, after all, they [the trial judges] have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office." *United States v. Perez, supra* at 580, 6 L. Ed. at 165.

[3] After a jury has declared its inability to reach a verdict, the action of the trial judge in declaring a mistrial is reviewable only in case of gross abuse of discretion, and the burden is upon defendant to show such abuse. *State v. Birckhead, supra.* In this

case no abuse of discretion appears. The judgment of the court below is

Affirmed.

STATE OF NORTH CAROLINA v. JESSIE MELVIN HIGH

No. 25

(Filed 13 October 1971)

1. **Criminal Law § 161— failure of record to contain assignments of error**
When the case on appeal contains no assignments of error, the judgment must be sustained unless error appears on the face of the record.

2. **Kidnapping § 1— appeal from plea of guilty of kidnapping**
No error appears on the face of the record in this appeal from judgment pronounced upon defendant's plea of guilty of the crime of kidnapping.

APPEAL by defendant from *Parker, J.*, 2 December 1970 Session of ONSLOW Superior Court.

Indicted for the kidnapping and rape of Shannon Elaine Canady on 3 September 1969, defendant in open court and through his privately employed counsel tendered a plea of guilty to the felony of kidnapping, which plea was accepted by the State. The presiding judge examined defendant under oath with reference to the voluntariness of his plea and his understanding of its consequences. At the conclusion of this examination Judge Parker found that defendant's guilty plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress and without promise of leniency. The judge then ordered the plea to be entered in the record and heard evidence offered by the State before pronouncing judgment.

Shannon Elaine Canady testified that prior to 2 September 1969 she was employed as a telephone operator at Jacksonville in Onslow County and was being transferred to New Bern in Craven County. She had placed some of her clothing and furnishings in her 1958 DeSoto automobile and, upon completion of her work about midnight, started alone on her way to Maysville where she planned to spend the night with a relative. Sev-

eral cars overtook and passed her on the highway. Then a car with bright lights approached from the rear and, after driving behind her for some distance, finally passed her and she heard the occupants laugh. She later learned that defendant and John Raymond Dozier were in the car. They stopped on the highway ahead of her and she slowed down. They pulled off the road and turned their emergency blinkers on, whereupon she drove rapidly by them. They reentered the highway, chased Miss Canady at a high rate of speed, finally drove alongside her DeSoto and forced it off the road. She reentered the highway and the maneuver was repeated again and again. The fourth time she was forced from the highway she killed the motor on her old car and was unable to start it. While she sat in her disabled vehicle screaming and blowing the horn, her assailants alighted from their car, lifted the hood of her car and yanked the horn wires out. They then entered her car through a door with a broken lock, pulled her out and carried her to their car. She was placed in the back seat, required to remove all her clothing, and repeatedly raped by defendant and John Raymond Dozier while the car was alternately driven over the countryside by them.

Miss Canady was locked in the trunk of the car when her assailants stopped in New Bern to buy gas. After leaving New Bern she was removed from the trunk and placed again in the back seat of the car. Finally, after promising that she would concoct a story about white marines kidnapping and raping her, they forced her to lie down in the ditch beside the road while they drove out of sight. Miss Canady then made her way to a nearby farm home where she related what had happened, called her parents and notified the officers. It was then about 3:15 a.m.

The testimony of W. C. Jarman, a Deputy Sheriff of Onslow County, indicates that after this defendant and John Raymond Dozier had been arrested, and defendant had been duly advised of his constitutional rights, he signed a written waiver and made a full confession of both the kidnapping and the rape. His statement to the officer minutely corroborates the testimony of Miss Canady.

Defendant offered no evidence to explain his conduct or to mitigate the viciousness of his crime.

Defendant was thereupon sentenced to a term of forty (40) years in State Prison. Seven days after commitment he gave

notice of appeal to the Court of Appeals alleging that "substantial injustice has been done heretofore at the proceeding had at the December Session of Onslow Superior Court." He pled indigency and counsel was duly appointed to perfect the appeal at public expense. The State has furnished a copy of the transcript and has borne the cost of mimeographing the case on appeal and appellant's brief. The case on appeal was docketed in the Court of Appeals and transferred to the Supreme Court for initial appellate review pursuant to the Court's general order dated 31 July 1970.

Joseph C. Olschner, attorney for defendant appellant.

Robert Morgan, Attorney General; Millard R. Rich, Jr., Assistant Attorney General, for the State.

HUSKINS, Justice.

[1] The record contains no exceptions and no assignments of error. The only question for review, therefore, is whether error appears on the face of the record proper. "When the case on appeal contains no assignments of error, the judgment must be sustained, unless error appears on the face of the record." *State v. Higgs,* 270 N.C. 111, 153 S.E. 2d 781 (1967); *State v. Newell,* 268 N.C. 300, 150 S.E. 2d 405 (1966); *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447 (1966); *State v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800 (1966).

[2] An examination of the record proper reveals no error. We note that John Raymond Dozier, defendant's accomplice in the commission of this kidnapping and rape, was convicted by a jury on both charges and received a life sentence in each case. The judgments were upheld by this Court in *State v. Dozier,* 277 N.C. 615, 178 S.E. 2d 412 (1971). It is indeed difficult to see wherein this defendant has cause to complain. This is just a perfunctory appeal—another example of gross abuse by an indigent defendant of the unlimited right of appeal.

The judgment of the superior court is

Affirmed.

STATE OF NORTH CAROLINA v. RICHARD WITHERSPOON

No. 29

(Filed 13 October 1971)

1. **Criminal Law § 23— voluntariness of guilty pleas**
   There was plenary evidence to support the trial judge's finding that defendant freely, understandingly and voluntarily entered a plea of guilty of second degree murder and a plea of guilty of robbery with firearms.

2. **Criminal Law § 161— failure of record to contain assignments of error**
   When the case on appeal contains no assignments of error, the judgment must be sustained unless error appears on the face of the record.

APPEAL by defendant from *Lupton, J.*, 23 November 1970 Session of FORSYTH Superior Court.

Defendant was charged in two bills of indictment, one with murder in the first degree of Nelson Adams, and the other with robbery with firearms of Perley Roosevelt Mack. Upon the call of the cases the defendant, through his court-appointed counsel Robert M. Bryant, tendered pleas of guilty of murder in the second degree and of robbery with firearms. The trial judge carefully examined defendant under oath as to the voluntariness of each plea, and defendant under oath executed written transcripts containing full statements indicating that the pleas were understandingly and voluntarily made. The court thereupon adjudged that the pleas of guilty were freely, understandingly, and voluntarily made, and ordered that the pleas be accepted and entered in the record.

The State offered evidence tending to show that on 22 June 1970 Perley Roosevelt Mack drove from Pennsylvania to Winston-Salem, North Carolina, to visit a sister, Lilie Adams, who was in the hospital. He arrived in Winston-Salem about ten o'clock that night and stopped at a street corner where several people were congregated to ask directions to his sister's house. Defendant Witherspoon and Matthew Green were among the group and stated they were going in that direction and would show him the way. Both of them got in the car with Mack and went to 514 Locust Avenue, the home of Mack's sister and her husband, Nelson Adams. Adams was there and Mack asked Adams to go with him to take Green and Witherspoon back to

where he had picked them up. On the way back Green asked Mack to stop the car. When Mack did so, Green told Adams to give him his gun and money; when Adams replied that he had neither, Green shot him. After the shot Mack stepped on the accelerator and the car "took off." Witherspoon told Mack to stop and when Mack failed to do so, Witherspoon hit Mack with a knife and again told him to stop. When Mack kept going, Witherspoon grabbed the steering wheel, and the car ran into an embankment. Green then told Witherspoon to go through Mack's pockets and take what money he had. Mack had already thrown his billfold into some weeds (later found there by the officer), but Witherspoon took $6 or $7 and some change from Mack's pockets. Witherspoon and Green then turned and started running back the way they had come. Later that night Mack saw Witherspoon and Green and told an officer they were the men who had robbed him and shot Adams.

The State also offered Thelma Barbour and R. H. Frye, a Detective Sergeant with the Winston-Salem Police Department as witnesses. Their testimony tends to corroborate Mack and to show that Adams died from the gunshot wound inflicted by Green.

From sentences imposed, defendant appealed to the Court of Appeals. The cases were transferred to this Court by virtue of the transferral order of 31 July 1970.

Attorney General Robert Morgan and Assistant Attorney General Mrs. Christine Y. Denson for the State.

Robert M. Bryant for defendant appellant.

MOORE, Justice.

[1] There was plenary evidence to support the trial judge's finding that defendant freely, understandingly, and voluntarily entered his plea of guilty of second degree murder and his plea of guilty of robbery with firearms, and the acceptance of the pleas will not be disturbed. *State v. Jones,* 278 N.C. 259, 179 S.E. 2d 433 (1971); *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34 (1967).

The record contains no exceptions and no assignments of error. The only question for review, therefore, is whether error appears on the face of the record proper.

[2] When the case on appeal contains no assignments of error, the judgment must be sustained unless error appears on the face of the record. *State v. Higgs,* 270 N.C. 111, 153 S.E. 2d 781 (1967); *State v. Newell,* 268 N.C. 300, 150 S.E. 2d 405 (1966); *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447 (1966); *State v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800 (1966). An examination of the record in the present case reveals that the indictments sufficiently charged the crimes to which defendant voluntarily pleaded guilty in a properly organized court, and that the sentences were within statutory limits.

We have carefully examined the record and find no error.

No error.

STATE OF NORTH CAROLINA v. JESSE EVERETT ALLEN

No. 59

(Filed 13 October 1971)

1. **Indictment and Warrant § 14— quashal of indictment — grounds for quashal**

   A bill of indictment may be quashed only for want of jurisdiction, irregularity in the selection of the grand jury, or fatal defect appearing on the face of the indictment.

2. **Indictment and Warrant § 11— variance in name of the victim — quashal of indictment**

   A variance between the real name of a homicide victim and the name given in the bill of indictment constitutes no ground for quashal of the indictment.

3. **Criminal Law § 149— right of State to appeal — order of mistrial**

   The State cannot appeal from an order of mistrial. G.S. 15-179.

APPEAL by the State from *Godwin, S.J.,* 8 February 1971 Mixed Session of JOHNSTON, transferred from the Court of Appeals for initial appellate review by the Supreme Court under its general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant, upon arraignment, pled not guilty to an indictment which charged him with the murder of Ervin H. Parrish on 3 November 1969. He was placed on trial for his life, and a

jury was duly impaneled. One of the first questions which the solictor asked the State's first witness was, "Did you know Evin Parrish?" Defendant objected for the reason that the bill of indictment charged the murder of one "Ervin H. Parrish."

Defendant's counsel, in response to a question from the court, "took the position" that defendant knew no man by the name of Evin H. Parrish or Ervin H. Parrish and had no knowledge "that either of these persons named has any connection with the alleged deceased in this particular case." The court then "anticipated" that counsel might deem it his duty to move in arrest of judgment in the event of an adverse verdict. Counsel's reply to this comment was, "Yes, Sir." He further informed the judge that, as attorney for a defendant charged with a capital crime, he could not waive "any possible legal remedy or right available to him at any stage in his trial."

Judge Godwin, after an examination of the record of vital statistics of Johnston County, was convinced that the name of the victim of the murder charged in the indictment was Evin H. Parrish. The solicitor, arguing that the difference between the names of Ervin and Evin was merely a matter of spelling and not such a discrepancy as would constitute a variance between indictment and proof, urged the court to apply the doctrine of *idem sonans*. Judge Godwin, however, voiced the opinion that the indictment should "identify with exactitude" the person allegedly murdered. On his own motion he ordered a mistrial, continued the case, and directed the solicitor to send a new bill of indictment to the grand jury. In doing so, he specifically stated that "this bill is not dismissed; the case is merely continued."

The order of mistrial recited that the court was treating defendant's objection to the question which precipitated the discussion about the name of the murder victim as a motion by defendant for a mistrial, and that the court was allowing defendant's motion.

Defendant objected and excepted to the court's order. The State of North Carolina did likewise and gave notice of appeal.

Attorney General Morgan; Deputy Attorney General Bullock for the State.

T. Yates Dobson, Jr., for defendant appellee.

SHARP, Justice.

This case presents an anomalous situation. Defendant objected to a question which the solicitor asked a State's witness. Defendant did not move for a mistrial or to quash the bill of indictment. Indeed, he made no motion whatever. Yet the judge, over the objection of both State and defendant, declared a mistrial and entered an order reciting that he had treated defendant's objection as a motion for mistrial and allowed the motion. Notwithstanding, the order of mistrial stands, albeit the record will not support the premise upon which it is based.

[1] The State, anticipating that defendant will enter a plea of former jeopardy and move for his discharge upon the next trial, attempts to treat the order of mistrial as a quashing of the bill of indictment. However, this theory likewise finds no support in the record. The judge specifically stated he was continuing the case and not dismissing the indictment. Furthermore, a bill of indictment may be quashed only for want of jurisdiction, irregularity in the selection of the grand jury, or for a fatal defect appearing on the face of the indictment. *State v. Mayo,* 267 N.C. 415, 148 S.E. 2d 257; *State v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745.

[2] However, on this record, no grounds for quashing the indictment appear. The court had jurisdiction; there is no suggestion that the grand jury was not properly constituted; and no defect appears upon the face of the indictment. A variance between the real name of the alleged victim and that given in the bill of indictment is not a defect appearing upon the face of the record, but one which would have to be established by evidence *dehors.* Cases in point are *State v. Sawyer,* 233 N.C. 76, 62 S.E. 2d 515; *State v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51; and *State v. Reynolds,* 212 N.C. 37, 192 S.E. 871.

[3] We have, then, an appeal by the State from an order of mistrial. The judgments from which the State can appeal are listed in G.S. 15-179 (Supp. 1969), and an order of mistrial is not included therein. Moreover, in a criminal case neither the State nor a defendant may appeal from an interlocutory order. *State v. Bailey,* 65 N.C. 426. "It is settled by a series of adjudications that no appeal lies in a criminal action until after the rendition of final judgment in the cause." *State v. Twiggs,* 90 N.C. 685, 686. In *State v. Dove,* 222 N.C. 162, 22 S.E. 2d 231, the defend-

ant appealed from an order of mistrial. This court said: "It is apparent that the appeal is premature and must be dismissed." *Id.* at 163, 22 S.E. 2d at 232. This appeal must also be dismissed.

The remaining question debated in the briefs, whether upon a retrial defendant will be entitled to his release upon a plea of former jeopardy, does not arise upon this record.

Appeal dismissed.

STATE OF NORTH CAROLINA v. CHARLES ROBINSON, ALIAS HOWARD BEASLEY

No. 17

(Filed 13 October 1971)

Criminal Law § 99— expression of opinion on the evidence

In this armed robbery prosecution wherein defendant, in attempting to show that he was at a motel at the time of the robbery, testified that the night before the robbery he had checked into the motel and the operator had asked him to get the key the following morning, and the solicitor objected to a leading question asked defendant as to whether he went down to the desk the next day and asked for the key, the trial court did not express an opinion on the evidence prejudicial to defendant in stating, "I can't see what the key has to do with this case, frankly," where (1) there was no evidence before the court when the comment was made that defendant was attempting to use the key incident to establish an alibi, (2) the comment was in effect a statement that he was overruling the solicitor's objection to the leading question, and (3) defendant was allowed to develop his evidence as to the key incident without any limitation.

APPEAL by defendant from *Bailey, J.*, 11 January 1971 Criminal Session of CUMBERLAND Superior Court.

Defendant was tried upon a bill of indictment charging him with armed robbery.

The evidence is briefly summarized as follows: On 31 August 1970 Robert Sinclair was in the Army stationed at Fort Bragg, North Carolina, and resided at 1600 Murchison Road, Fayetteville, North Carolina. On that date he received his pay and left Fort Bragg to return to his home. Between 10:30 and 11:00 a.m., about half a block from his home, defendant Robinson and another man approached him from the rear. The man

with Robinson had a gun and asked Sinclair for his money. Robinson was standing about a foot in front of Sinclair at the time. Sinclair gave his money, consisting of nineteen twenty-dollar bills, one ten-dollar bill, one five-dollar bill, and a one-dollar bill, to the man with the gun. Robinson also demanded Sinclair's watch. When Sinclair gave Robinson the watch, Robinson and his companion left. Later that day Sinclair saw Robinson on the street in Fayetteville and called the police. Robinson was arrested and searched. Nineteen twenty-dollar bills and a draft card with the name Howard Beasley on it were found in his sock. Robinson also had two ten-dollar bills, one five-dollar bill, and a one-dollar bill in his pocket.

Defendant testified in his own behalf. His testimony tended to show that he arrived in Fayetteville on 30 August 1970 with two girls. They went to the King Cole Motel about eleven or twelve o'clock that night and rented rooms. There was some mix-up about the key. About 10:00 or 10:30 a.m. on 31 August 1970 defendant went to the desk and asked for a key. The man on the desk tried to open the door but the key did not work. It was necessary to make another key. Defendant's testimony further tended to indicate that he was not involved in any robbery and that he spent most of the day with his friends until the time he was apprehended. He did not offer other witnesses.

From a verdict of guilty as charged and sentence imposed, defendant appealed to the Court of Appeals. The case was transferred to this Court under the transferral order of 31 July 1970.

Attorney General Robert Morgan and Deputy Attorney General James F. Bullock for the State.

Sol G. Cherry, Public Defender, for defendant appellant.

MOORE, Justice.

Defendant contends that the trial judge's comment, "I can't see what the key has to do with this case, frankly," constitutes an expression of opinion and is reversible error.

Defendant has testified that he and two girls arrived at the motel about eleven or twelve o'clock on the night of 30 August 1970, and the motel operator let them into the rooms and asked defendant to get the key the following morn-

ing. At this point defendant's attorney asked a leading question: "And did you the next day go down to the desk and ask for a key?" Defendant answered, "Yes sir." The solicitor objected to the question as leading. It was then that the court said, "I can't see what the key has to do with this case, frankly." Defendant contends that the court's comment negated a possible alibi and destroyed any hope that defendant's statement with regard to his movements and activities would be considered by the jury as having any importance.

Two things clearly appear: First, at the time the court made the comment to which defendant takes exception, there was no evidence before the court to indicate that defendant was attempting to set up an alibi for 10:00 or 10:30 a.m. or that he was attempting to use the key incident as a part of the alibi; secondly, the comment by the judge was obviously addressed to the solicitor's objection and was in effect a statement that he was overruling the objection to the leading question. The defendant was allowed to develop his evidence as to the key incident without any limitation. It should also be noted that defendant testified that he was at the motel about 10:00 or 10:30 a.m. The defendant's evidence as to the key does not attempt to establish an alibi between 10:30 and 11:00 a.m., the time of the robbery. Thus, under any consideration of the judge's remark, it cannot be said to be an expression of an opinion prejudicial to the defendant.

As said in *State v. Perry*, 231 N.C. 467, 471, 57 S.E. 2d 774, 777 (1950):

> " . . . The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless."

In charging the jury the court fully stated defendant's evidence concerning the key and in the charge stated:

> "Now, ladies and gentlemen of the jury, the court has no opinion as to what your verdict should not or should be. Anything that the court has said in its charge or anything that the court has said during the course of the trial, shall not be considered by you as an expression of opinion as

to what your verdict should or should not be, because the law of North Carolina does not permit me to express an opinion. In fact the court has no opinion in this matter."

We think the comment made by the trial judge about the key had no appreciable effect on the result of the trial below.

Defendant does not contend that other errors were committed, and we find none.

No error.

STATE OF NORTH CAROLINA v. FRANK HUNTER, JR.

No. 82

(Filed 13 October 1971)

Criminal Law § 23— acceptance of guilty plea — voluntariness of the plea

The acceptance of defendant's guilty pleas will not be disturbed on appeal where it appears that the trial judge made careful inquiry of the accused as to the voluntariness of his pleas, and there is ample evidence to support the judge's finding that defendant freely, understandingly, and voluntarily pleaded guilty to the charges.

APPEAL by defendant, Frank Hunter, Jr., from decision of the North Carolina Court of Appeals (11 N.C. App. 573, 181 S.E. 2d 752) finding no error in the trial before *Copeland, S. J.*, at the 4 January 1971 Criminal Session of IREDELL Superior Court.

Defendant was brought to trial in Iredell Superior Court on an indictment charging secret assault. He had previously appealed from the District Court to Iredell Superior Court convictions of driving under the influence of intoxicating liquor and resisting arrest. The misdemeanor charges, which grew out of the same occurrence, were consolidated with the felony charge for trial. Defendant entered pleas of not guilty to all charges. During the trial a bill of information was read to defendant charging him with felonious assault with a deadly weapon with intent to kill, inflicting serious injuries not resulting in death; whereupon defendant and his attorney in open court and in writing waived the finding and returning of a bill of indictment by the Grand Jury of Iredell County against defendant Frank

Hunter, Jr., charging the offense of assault with a deadly weapon with intent to kill, inflicting serious injuries not resulting in death. Defendant then tendered a plea of guilty to the charge of assault with a deadly weapon with intent to kill, inflicting serious injuries not resulting in death and pleas of guilty to the two misdemeanor charges. Before pleading, defendant signed a transcript of plea, and the trial judge, prior to approving the plea, entered an adjudication in which he adjudges that defendant freely, understandingly and voluntarily made the pleas. The pertinent portion of the "transcript of plea" and the Court's "adjudication" are fully set forth in the opinion of the Court of Appeals. Defendant appealed to the North Carolina Court of Appeals from sentence imposed upon his pleas. The Court of Appeals found no error in the proceedings in the trial court and defendant appealed to this Court pursuant to G.S. 7A-30(1).

Attorney General Morgan and Staff Attorney Eatman for the State.

Thomas K. Spence for defendant.

BRANCH, Justice.

The crux of defendant's assignments of error before the Court of Appeals and this Court is that his pleas of guilty were not freely, understandingly and voluntarily made. He relies principally upon the case of *Boykin v. Alabama,* 395 U.S. 238, 23 L. Ed. 2d 274, 89 S.Ct. 1709, which, *inter alia,* holds that the determination of the voluntariness of a guilty plea cannot be based on a silent record and that the record must show a careful canvassing of the matter with the accused by the trial judge "to make sure he has a full understanding of what the plea connotes and of its consequences." The Court of Appeals recognized the authoritative holding of *Boykin* but held that it did not apply to the facts of this case. We agree. Here it appears that the Judge made careful inquiry of the accused as to the voluntariness of his pleas, and the record reveals ample evidence to support the trial judge's finding that defendant freely, understandingly and voluntarily pleaded guilty to the charges. The acceptance of the pleas tendered by defendant should not be disturbed. *State v. Jones,* 278 N.C. 259, 179 S.E.

2d 433; *Brady v. United States,* 397 U.S. 742, 25 L. Ed. 2d 747, 90 S.Ct. 1463.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. JOE DEAN ROBERTS

No. 26

(Filed 13 October 1971)

1. **Criminal Law § 146— appeal from guilty plea**

An appeal from judgment imposed upon defendant's plea of guilty presents for review only the question whether error appears on the face of the record proper.

2. **Criminal Law § 158; Grand Jury § 1— disqualification of grand juror — unsupported assertion in brief**

Unsupported assertion in defendant's brief that a member of the grand jury which returned the bill of indictment against defendant was unqualified to serve as a grand juror because he had previously pleaded *nolo contendere* to an indictment charging a felony will not be considered by the appellate court.

3. **Criminal Law § 127; Grand Jury § 1— disqualified grand juror — motion in arrest of judgment**

A contention that a member of the grand jury which returned the indictment against defendant was disqualified cannot be urged in arrest of judgment, since a motion in arrest of judgment can be based only upon some fatal defect appearing on the face of the record, and all exceptions to grand jurors on account of their disqualifications must be taken before the petit jury is sworn and impaneled. G.S. 9-23.

APPEAL by defendant from *Snepp, J.,* 1 February 1971 Schedule B Session of MECKLENBURG, transferred from the Court of Appeals for initial appellate review by the Supreme Court under its general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant, indicted in the words of G.S. 15-144 for the murder of Clarence Curtis Morris on 15 August 1970, through his privately employed counsel, John Plumides, tendered a plea of guilty of voluntary manslaughter. In open court Judge Snepp informed defendant that if he pled guilty and if the evidence

disclosed the facts to be as counsel had represented, his sentence would be twenty years in the State's prison. The judge also meticulously examined defendant under oath with reference to the voluntariness of his plea and his understanding of its consequences. At the conclusion of this examination Judge Snepp found that defendant's plea was voluntarily and understandingly made. Defendant signed and verified by oath a transcript of his examination in which he stated that he pled guilty to voluntary manslaughter of his own free will and accord. Judge Snepp then ordered the plea to be entered upon the minutes of the court and heard evidence offered by the State, which tended to show:

About 1:00 a.m. on 15 August 1970 as the deceased, Clarence Curtis Morris, and Mary Frances Austin were leaving a poolroom on Statesville Avenue in Charlotte, defendant made a vulgar remark to Ms. Austin. After deceased and defendant engaged in a brief argument defendant reentered the poolroom, procured a shotgun, and fired one shot from the door. He then reloaded the weapon. The police arrived at 1:10 a.m. and found deceased lying face down in the driveway of the poolroom. In his abdomen was a large wound "caused by a shotgun shooting." A few minutes later defendant was arrested on the street approximately two blocks from the poolroom. At that time he was charged with being publicly drunk.

Defendant offered no evidence.

Judge Snepp, as he had told the defendant he would, imposed upon him a sentence of twenty years in the State's prison. On the same day defendant gave notice of appeal and, upon his affidavit that he was then indigent, the court appointed Lila Bellar, attorney, to perfect his appeal at State expense.

Attorney General Morgan, Assistant Attorney General Icenhour for the State.

Lila Bellar for defendant appellant.

SHARP, Justice.

[1] Since defendant pled guilty his appeal presents for review only the question whether error appears on the face of the record proper. *State v. Higgs,* 270 N.C. 111, 153 S.E. 2d 781; *State v. Newell,* 268 N.C. 300, 150 S.E. 2d 405. Suffice it to say,

no error appears. The bill of indictment is in all respects regular; defendant's plea was understandingly and voluntarily made; and the sentence imposed is within the statutory limits. *See State v. Dawson,* 268 N.C. 603, 151 S.E. 2d 203; *State v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800.

This case is just one more example of the manner in which the unlimited right of appeal, which the State now gives to every criminal defendant, is "being perverted at the whim of those who have nothing to lose." *State v. Darnell, supra* at 641, 146 S.E. 2d at 801.

[2, 3] In defendant's brief filed in this court, his counsel purported to move in arrest of judgment upon the unsupported assertion contained therein that the bill of indictment against defendant was "returned by a grand jury which contained as a member thereof a person who had theretofore pleaded *nolo contendere* to an indictment charging a felony and that said juror was therefore unqualified to be a grand juror." The Court will not consider this statement, which is not supported by the record. *Elliott v. Goss,* 254 N.C. 508, 119 S.E. 2d 192. However, even if it be true and were considered, a charge that a member of the grand jury which returned the indictment against defendant was disqualified cannot be urged in arrest of judgment. In the first place, a motion in arrest of judgment can be based only upon some fatal defect appearing upon the face of the record. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416. Secondly, "[a]ll exceptions to grand jurors on account of their disqualifications shall be taken before the petit jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not taken at that time shall be deemed to be waived." G.S. 9-23.

The judgment of the Superior Court is

Affirmed.

STATE OF NORTH CAROLINA v. VERNELL "BUNK" JACKSON

No. 16

(Filed 13 October 1971)

1. **Criminal Law § 23— acceptance of guilty plea — voluntariness of the plea**

The acceptance of a defendant's guilty plea to second-degree murder will not be disturbed where there is plenary evidence to support the trial judge's findings that defendant freely, understandingly and voluntarily entered his plea.

2. **Criminal Law § 161— appeal as an exception to the judgment — question presented**

The appeal itself is an exception to the judgment and presents the case for review only for errors appearing on the face of the record.

APPEAL by defendant from *May, S. J.*, at the 6 October 1969 Special Criminal Session of WAYNE.

Defendant was charged in a bill of indictment with murder. Upon call of the case, defendant through his court-appointed counsel, T. E. Strickland, tendered a plea of guilty of murder in the second degree. The trial judge thereupon carefully examined defendant, under oath, as to the voluntariness of his plea, and defendant thereafter, under oath, executed a written "transcript of plea" containing full statements indicating that the plea was understandingly and voluntarily made.

The court thereupon adjudged that the plea of guilty of second degree murder was freely, understandingly and voluntarily made, and ordered that the plea be entered in the record.

The State offered evidence tending to show that Jessie Woodard and other persons were working in a tobacco barn owned by Linwood Sauls in Wayne County during the early morning of 11 August 1969. At that time defendant appeared and said: "Jessie, you got my money," and immediately shot Woodard with a single barrel shotgun from a distance of three to five feet. Jesse Woodard suffered gunshot wounds in the lower part of his stomach and died before he was removed from the tobacco barn.

Defendant did not testify, but offered evidence of good character. One of his witnesses, Dike Smith, testified that on the morning of 11 August 1969 defendant told him that Jessie

Woodard was dead and that he (defendant) shot Woodard because he had stolen $50 from him.

The trial judge sentenced defendant to a term of not less than 28 years nor more than 30 years in the State's prison. No notice of appeal was given in open court, but on 15 October 1969 the Clerk of Superior Court of Wayne County received a document from defendant dated 11 October 1969, entitled "Note of an appeal." Defendant's court-appointed attorney was notified of the "Note of an appeal," but no appeal was perfected. On 3 March 1970, the Clerk of Superior Court of Wayne County received an application for a post-conviction hearing from defendant, and Judge J. William Copeland appointed W. Harrell Everett, Jr., attorney, to represent defendant in the proceeding. The post-conviction proceeding was heard by Judge Elbert S. Peel, Jr., who denied the post-conviction petition as premature, but found that defendant had been deprived of his constitutional right to appeal. Judge Peel adjudged defendant to be an indigent, ordered the State to furnish a transcript of the trial proceedings, and appointed W. Harrell Everett, Jr., to represent defendant on his appeal.

This case is before us pursuant to our General Referral Order effective 1 August 1970.

Attorney General Morgan and Staff Attorney Blackburn for the State.

W. Harrell Everett, Jr., for defendant.

BRANCH, Justice.

[1, 2] There was plenary evidence to support the trial judge's findings that defendant freely, understandingly and voluntarily entered his plea of guilty of second degree murder, and the acceptance of the plea will not be disturbed. *State v. Jones,* 278 N.C. 259, 179 S.E. 2d 433; *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34. Further, the record contains no assignments of error, but the appeal itself is an exception to the judgment. The case is therefore presented for review only for errors appearing on the face of the record. *State v. Higgs,* 270 N.C. 111, 153 S.E. 2d 781; *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330.

The indictment sufficiently charged the crime to which defendant voluntarily pleaded in a properly organized court, and the sentence was within statutory limits.

We have carefully examined this record and find

No error.

STATE OF NORTH CAROLINA v. HAROLD JUNIOR SMITH

No. 54

(Filed 13 October 1971)

1. **Criminal Law § 161— case on appeal without assignment of error**

Where the defendant's case on appeal contains no assignment of error, the judgment will be sustained unless error appears on the face of the record proper.

2. **Criminal Law § 25— plea of nolo contendere — review on appeal**

A plea of *nolo contendere*, like a plea of guilty, leaves open for review only the sufficiency of the indictment and waives all defenses other than that the indictment charges no offense.

APPEAL by defendant from *Godwin, S. J.*, 22 March 1971 Special Session of CUMBERLAND, transferred for initial appellate review by the Supreme Court under its general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant, indicted for the first-degree murder of Charles Hedrick on 7 November 1970, entered a plea of *nolo contendere* to second-degree murder through his court-appointed counsel, public defender Sol Cherry. In open court, Judge Godwin examined defendant under oath with reference to the voluntariness of his plea and his understanding of its consequences. This examination is reported verbatim on ten pages of the record. It, and the transcript of the plea which defendant signed and verified, fully support Judge Godwin's finding that the plea was freely, understandingly, and voluntarily made. The solicitor accepted the plea and, on the question of punishment, the court heard the evidence offered by both the State and defendant.

The State's evidence tended to show: At a poolroom in Fayetteville defendant and Charles Hedrick had some words over a woman. Thereafter, while Hedrick was standing with his cue

stick resting on the floor, defendant walked up beside him, "reached up around him, and cut his throat." Defendant then "turned around and ran." Defendant cut a bystander, who attempted to intercept him, on the shoulder and in the stomach.

Defendant testified that, after Hedrick had hit him with a pool stick, he cut him with a knife he used for cutting roofing paper; that he meant to cut Hedrick but he wasn't trying to kill him; that later on that night a friend told him Hedrick's throat had been cut, and the man was dead. On cross-examination defendant conceded that he had "almost cut his (Hedrick's) head off"; that he had previously killed another man with a knife; and that he was on parole at the time he cut Hedrick. Defendant also admitted he had been convicted of assault with a deadly weapon and prison escape.

Judge Godwin imposed a sentence of thirty years in the State's prison, and defendant immediately gave notice of appeal.

Attorney General Morgan by Staff Attorney Davis for the State.

Sol G. Cherry, public defender for defendant appellant.

SHARP, Justice.

[1] Defendant's case on appeal contains no assignment of error. Therefore, unless error appears on the face of the record proper, the judgment will be sustained. *State v. Williams,* 268 N.C. 295, 150 S.E. 2d 447.

[2] "A plea of *nolo contendere,* like a plea of guilty, leaves open for review only the sufficiency of the indictment and waives all defenses other than that the indictment charges no offense." *State v. Stokes,* 274 N.C. 409, 412, 163 S.E. 2d 770, 773. The indictment in this case properly charges the crime of murder in the words of G.S. 15-144. The sentence of thirty years is within the limits prescribed by G.S. 14-17 for murder in the second degree.

Defendant's counsel, the public defender, concedes there is no error in the case. Our examination of the entire transcript discloses another appeal totally without justification. *See State v. Roberts, ante; State v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800.

No error.

STATE OF NORTH CAROLINA v. CURTIS LEE LOVINGS

No. 9

(Filed 13 October 1971)

APPEAL by defendant from *Copeland, S. J.*, November 1970 Session ONSLOW Superior Court.

In this criminal prosecution the defendant, Curtis Lee Lovings, was charged by grand jury indictment with the armed robbery of Dwight M. Craft. The offense is alleged to have occurred on November 9, 1969. Upon arraignment the defendant, represented by counsel, entered a plea of not guilty.

Dwight M. Craft, a witness for the State, testified that on November 9, 1969, he drove his automobile from Jacksonville, Florida, to Jacksonville, North Carolina. He stopped for gas near Wilmington at about 3 o'clock in the morning. The defendant, whom he did not know, requested and was given permission to ride as a passenger in the Craft vehicle to the North Carolina Naval Base at Jacksonville. Before reaching the latter point, the defendant drew a short, flat pistol, not a revolver, and by its threatened use forcibly took from the witness $20.00 in currency.

When Craft stopped the automobile at Jacksonville about 3:30 o'clock in the morning, the defendant ran. Craft notified the police who soon thereafter arrested the defendant in a telephone booth. He had a flat automatic pistol and $18.39 in his pocket. The witness positively identified the defendant as the person who robbed him, and so testified before the jury. The defendant neither testified nor offered evidence. The jury returned a verdict of guilty. The defendant appealed from the sentence imposed.

The court appointed counsel to prosecute the appeal. However, the case on appeal was not served within the time required by the appellate rules. Nevertheless, the Court of Appeals by *certiorari* ordered the appeal docketed for review. The cause was transferred to the Supreme Court as prescribed by its referral order of July 31, 1970. The defendant filed the following signed statement with his case on appeal:

> "That I am entitled to my release from North Carolina custody on the grounds that I have been denied my consti-

tutional right of appeal from verdict and judgment and that an appeal by *Writ of Certiorari* at this late date still results in denial of fundamental constitutional rights because if I am successful on said appeal, a new trial eighteen (18) months later would be inherently unfair, etc.

/s/ Curtis Lee Lovings"

Robert Morgan, Attorney General, by William W. Melvin, Assistant Attorney General; T. Buie Costen, Assistant Attorney General, for the State.

Worth B. Folger for defendant appellant.

HIGGINS, Justice.

The defendant permitted the time to pass without perfecting his appeal. However, on petition the record was ordered filed in the Court of Appeals for review.

The case on appeal notes some minor objections to the introduction of testimony. Review, however, discloses the objections are not sustained. In fact, the record before us fails to disclose any error either in the trial or in the judgment.

No error.

STATE OF NORTH CAROLINA v. JOSEPH COLLINS

No. 68

(Filed 13 October 1971)

APPEAL by defendant from *McLean, J.*, at February 1, 1971 Schedule "A" Criminal Session of MECKLENBURG Superior Court, transferred for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4).

Attorney General Morgan, Assistant Attorney General Lake and Staff Attorney Price for the State.

Warren D. Blair for defendant appellant.

BOBBITT, Chief Justice.

Indicted for the first degree murder of Inez Shropshire on November 14, 1970, defendant, in open court and through his counsel, tendered a plea of guilty of murder in the second degree, which plea was accepted by the State.

Defendant was also charged in a warrant with assault with a deadly weapon, to wit, a shotgun, on Wesley Mae Daniels, on November 14, 1970. After trial, conviction and judgment in the district court, defendant appealed to the superior court for hearing *de novo*. In the superior court, defendant, in open court and through his counsel, entered a plea of guilty.

Defendant was also charged in a warrant with assault with a deadly weapon, to wit, a shotgun, on Maggie Hood, on November 14, 1970. After trial, conviction and judgment in the district court, defendant appealed to the superior court for hearing *de novo*. In the superior court, defendant, in open court and through his counsel, entered a plea of guilty.

Based on defendant's statements in open court under oath, in response to questions by the court, and upon testimony as to what occurred on November 14, 1970, with reference to the criminal offenses charged in the indictment and warrants, the court, in each case, made the following adjudication: "(T)he Court ascertains, determines and adjudges, that the plea of guilty by the defendant is freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of guilty be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded."

Defendant's statements and the evidence fully support the court's findings and defendant's pleas. It is noted that the evidence presented by the State included testimony sufficient to have supported a verdict of guilty of murder in the first degree of Inez Shropshire.

For the murder of Inez Shropshire, the court pronounced judgment "that the defendant be confined in the State's Prison to be assigned to work under the supervision of the State Department of Correction for a period of thirty years."

For the assault on Wesley Mae Daniels, the court pronounced judgment which imposed a sentence of six months, to

commence at the expiration of the sentence imposed in the murder case.

For the assault on Maggie Hood, the court pronounced judgment which imposed a sentence of six months, to commence at the expiration of the sentence imposed for the assault on Wesley Mae Daniels.

Defendant excepted to each judgment and appealed.

On appeal, defendant makes no contention as to any error of law committed in connection with any one of the three judgments. It appears the appeal was perfected by counsel at defendant's request and solely on the ground defendant contended the punishment was too severe. Whether this contention has merit should be addressed to the Board of Paroles. There being no legal error, the judgments must be and are affirmed.

Affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ACORN v. KNITTING CORP.

No. 38 PC.

Case below: 12 N.C. App. 266.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

BRADLEY v. BRADLEY

No. 9 PC.

Case below: 12 N.C. App. 8.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

BURKHIMER v. FURNITURE CO.

No. 37 PC.

Case below: 12 N.C. App. 254.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

EVANS v. ROSE

No. 31 PC.

Case below: 12 N.C. App. 165.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

HAMEL v. WIRE CORP.

No. 36 PC.

Case below: 12 N.C. App. 199.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

IN RE WILL OF HOWELL

No. 42 PC.

Case below: 12 N.C. App. 271.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

INSURANCE CO. v. COTTEN

No. 40 PC.

Case below: 12 N.C. App. 212.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 October 1971.

JOHNSON v. MASSENGILL

No. 11 PC.

Case below: 12 N.C. App. 6.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 October 1971.

PEASELEY v. COKE CO.

No. 39 PC.

Case below: 12 N.C. App. 226.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

RAYNOR v. FOSTER

No. 34 PC.

Case below: 12 N.C. App. 193.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

SCHOOLFIELD v. COLLINS

No. 27 PC.

Case below: 12 N.C. App. 106.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 October 1971.

STATE v. COPELAND

No. 43 PC.

Case below: 11 N.C. App. 516.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. KERSH

No. 108.

Case below: 12 N.C. App. 80.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1971.

STATE v. McCALL and STATE v. SANDERS and STATE v. HILL

No. 22 PC.

Case below: 12 N.C. App. 85.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

STATE v. MONTGOMERY

No. 30 PC.

Case below: 12 N.C. App. 94.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

STATE v. O'HORA

No. 109.

Case below: 12 N.C. App. 250.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1971.

STATE v. ROGERS

No. 28 PC.

Case below: 12 N.C. App. 160.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

STATE v. WALLER

No. 7 PC.

Case below: 11 N.C. App. 666.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. WILLIAMS

No. 35 PC.

Case below: 12 N.C. App. 161.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

WIMBISH v. AVIATION, INC.

No. 29 PC.

Case below: 12 N.C. App. 98.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 October 1971.

STATE OF NORTH CAROLINA v. HAROLD WILLIAMS

No. 14

(Filed 10 November 1971)

1. **Rape § 18— assault with intent to commit rape — instructions — expression of opinion**

Trial court's instructions in a prosecution for assault with intent to commit rape did not constitute an expression of opinion as to the sufficiency of the evidence or as to the verdict which the jury should return. G.S. 1-180.

2. **Criminal Law § 163— instructions — misstatement of contentions — time of objection**

Any misstatement of the contentions of the parties must be called to the attention of the court at the time it is made, so as to permit a correction, or such misstatement will be deemed waived.

3. **Constitutional Law § 36— cruel and unusual punishment — imposition of maximum sentence**

It was not cruel and unusual punishment for the trial judge to impose the maximum sentence authorized by statute upon defendant's conviction of assault on a female with intent to commit rape. G.S. 14-22.

4. **Criminal Law § 75— admissibility of written confession — in-custody interrogation — defendant's request for parents — subsequent confession**

A written confession signed by a 16-year-old defendant, together with his written waiver of counsel, was properly admitted in evidence on the trial for the offense of assault with intent to commit rape, where (1) the defendant voluntarily went to the police station at the request of the police; (2) the defendant, after being fully advised of his constitutional rights and of the matter under investigation, signed the written waiver of counsel; (3) the officer ended his interrogation when defendant requested an attorney but then changed his mind and requested his parents; and (4) the defendant, in the presence of his parents, who told him to tell the truth, made an oral confession to the crime and thereafter signed a written statement of the confession.

5. **Criminal Law § 62— evidence relating to polygraph test — harmless error**

Admission of an officer's testimony that the defendant had agreed to take a polygraph test, which was administered to him, did not constitute reversible error, where (1) the defendant's objection was interposed only after the officer gave this testimony, and (2) the jury heard no evidence as to the nature or results of the test.

6. **Criminal Law § 66— in-court identification of defendant — witness' meeting with defendant in the police station**

A witness' in-court identification of the defendant was not tainted by the fact that the witness had seen the defendant in the hallway of

the police station at a time when defendant was without counsel and did not know he was under observation, where the witness had had ample opportunity to observe the defendant on the night of the crime and based his identification on the events of that night.

APPEAL by defendant from *Crissman, J.*, at the 24 August 1970 Session of FORSYTH, heard prior to determination by the Court of Appeals.

By an indictment, proper in form, the defendant was charged with assault with intent to commit rape. He was found guilty and was sentenced to imprisonment for a term of fifteen years. The evidence for the State was to the following effect:

The victim of the assault, a sixteen year old student at R. J. Reynolds High School in Winston-Salem, attended the Junior-Senior Prom at the school gymnasium on the evening of 24 April 1970, accompanied by her escort, also a sixteen-year-old senior student in the high school. At about midnight, they walked out of the gymnasium and strolled over the surrounding grounds, including the baseball field and tennis courts. The area was not lighted artificially but the moon was shining.

As they approached a building on the school grounds containing rest rooms, the defendant stepped out in front of them and blocked their path. When they tried to go around him, he again blocked their way and, thereupon, four other young Negro men joined him, surrounding the girl and her escort. He then felt a knife at his back and one of the men put his arm on the boy's shoulder so that the boy could see a knife in his hand.

The defendant and his companions compelled the girl and her escort to go to a point on the school grounds where there was less light. There they forcibly separated the escort from the girl, pulling him some distance away and pushing him to the ground, one of his guards having a knife. In that position the girl's escort heard slaps and screams from the area where she had been held by the other three Negroes. One of the boy's guards subsequently exchanged places with one of the three who had originally remained with the girl. The boy finally escaped from his guards, being struck in the face with a hand and with the handle of a knife in the process. Running to the area where he had last seen the girl, he did not find her but found her clothing, with which he ran to the gymnasium and told the principal and another teacher what had occurred. They

returned with him in search of the girl whom they located in a patch of bushes, she being completely nude and having been severely beaten.

After being separated from her escort, the girl was restrained forcibly by the defendant and two of the other men. All three of them began taking liberties with her person. When she begged them to desist, they all began slapping her and jerking her back and forth between them. They threw her to the ground and disrobed her completely, she fighting them at all times. The defendant then sat upon her chest, strangling her with one hand and beating her with the other, and told her he would kill her if she did not stop screaming. While he so sat upon her one of the other two men attempted to have intercourse with her but was unsuccessful due to her resistance, this man striking her repeatedly with his fist.

The defendant then exchanged places with one of the other two men and, thereupon, another person, either the defendant or the third man, attempted to have intercourse with the girl forcibly, but was unsuccessful due to her resistance. Suddenly they all jumped up and ran away, whereupon she fled into the patch of bushes and collapsed.

The girl was carried to the hospital immediately and treated there for a dislocated jaw, a broken cheek bone, an injury to the nerves of her eye and various cuts and bruises over her face and body. At the time of the trial of this defendant, she still had no feeling in her right cheek and the nerves in her eye had not returned to their normal condition.

Both the girl and her escort positively identified the defendant in the courtroom, the girl testifying that in the area where the attack occurred there was enough light to enable one to see people around one, that she would never forget the face of this defendant as he sat upon her, right in front of her, and beat her. Both the girl and her escort identified the defendant as the first of the men to stop them, and the escort identified the defendant as one of the men who separated him from the girl, forcing the escort to the place where he was detained by his guards and then returning to the place where the other men were holding the girl.

Upon cross-examination, the girl's escort testified that he described the defendant to the police on the night of the assault

and saw the defendant again a week later, this time at the police station. He then recognized the defendant as the assailant who had first stopped him and the girl on the night of the attack. When he saw the defendant at the police station the defendant was walking about in the hallway with a police officer. The witness was asked by the officers on that occasion to look at some other men on the same floor of the police station, which he did, but was not able to identify any of them as being among the assailants. He again saw the defendant at the latter's preliminary hearing. At some time during the week following the assault, the girl's escort was shown photographs of fifteen people from which he picked the photograph of the defendant and of one other as being members of the group of five who committed the assault. The inspection of the photographs occurred after the boy had seen and recognized the defendant at the police station. On that occasion he told the officers that the defendant resembled "very much" one of the men who had attacked him and the girl and that he would "like to study him some more."

On cross-examination, the girl testified that while she was in the hospital she was shown a group of fifteen photographs from which she picked a photograph of the defendant as one of her assailants, her selection of the photographs being by reason of her recognition of his face as she remembered seeing it on the night of the assault. Her recognition was not based upon any particular feature but upon her recollection of his face in its entirety.

Detective Sergeant Linville and Detective Benbow of the City Police Force also testified for the State. Sergeant Linville testified that he talked to the defendant, first identifying himself to the defendant and advising the defendant what it was he wished to talk to him about. He advised the defendant of each of his constitutional rights set forth in the usual Miranda warning. The defendant stated that he understood these rights and thereupon the defendant signed a written waiver of counsel and a statement that he was willing to answer questions and to make a statement, this written waiver being introduced into evidence at the trial.

Detective Benbow testified that the defendant came to the police station four days after the assault as the result of Benbow's visit to his home and request to his mother that she tell

the defendant he wanted to talk to him. Upon arrival at the police station, the defendant first talked to Sergeant Linville, as above stated. After Sergeant Linville had advised the defendant concerning his rights, he turned the defendant over to Detective Benbow for interrogation. Detective Benbow then again advised the defendant of his rights, as declared in the Miranda decision, and informed the defendant as to the matter about which he wished to talk to the defendant. The defendant then again signed a form waiving his right to counsel and consenting to talk to the officer. The defendant also consented to the taking of his photograph for the purpose of exhibiting it to the victims of the assault and to the taking of a polygraph test. The defendant was not then under arrest.

After some questioning by Detective Benbow, the defendant stated that, before going any further, he wished to talk to a lawyer. Detective Benbow then asked him what lawyer he would like and offered to assist the defendant in getting a lawyer, giving him a telephone directory. Before anything else occurred, the defendant decided that he wanted to talk to his parents rather than to a lawyer. Thereupon, the defendant's mother and father were brought to the police station and were told by Detective Benbow what was the nature of the discussion and were taken by him into the room where the defendant was and were left alone with the defendant for five or ten minutes.

Upon Detective Benbow's return to the room, the defendant's parents advised him to tell the truth. Thereupon, the defendant made an oral statement of which Detective Benbow took notes. A typewritten statement, prepared from these notes, was handed to the defendant and was read and signed by him, he having been placed under arrest after making his oral statement and during the interval while the written statement was being typed. The defendant's father and mother, Detective Benbow and Lieutenant Revis of the City Police Force were present when the statement was made by the defendant.

In the statement of the defendant, which was introduced in evidence, the defendant identified his four companions, recited that the five of them went to the tennis courts on the the night in question and waited until "a white male and white female came walking down, and we got them at the brick house at the tennis courts." The statement further recited that one of the five had a knife, the defendant "walked beside the boy,"

two others were behind them and two were beside the girl. The defendant and another separated the boy from the girl and, thereafter, the defendant went back to where the girl was being kept by his companions, after which the defendant "held both of the girl's arms" while two of his companions "took the girl's clothes off" and one of them "was trying to mess with her and she got loose and fought him off." The defendant "hit her once." Thinking someone was coming, they all ran away.

Before either of the police officers testified, an extensive voir dire hearing was conducted in the absence of the jury. Both officers were examined on voir dire. The defendant did not testify on voir dire or offer any evidence thereon. On voir dire, Sergeant Linville testified in detail as to the explanation of the defendant's rights given by him to the defendant, this being the complete and customary Miranda warning. The defendant stated that he understood these, and Sergeant Linville then read to the defendant a waiver form which the defendant signed, this being the form above mentioned. The defendant was advised by Sergeant Linville as to the nature of the occurrence about which the officers wished to talk to him.

Officer Benbow testified on the voir dire examination in accordance with his testimony, subsequently given in the presence of the jury as above related, including his repetition of the full Miranda warning, the conference between the defendant and his parents and the making thereafter of the statement by the defendant.

At the conclusion of the voir dire examination, the court made full findings of fact, in accordance with the testimony of the officers, and concluded thereupon that the statement by the defendant and his waiver of his rights were competent to be introduced into evidence. The defendant's motion to suppress the evidence of the statement by the defendant was denied.

The defendant offered no evidence either upon voir dire or before the jury.

Attorney General Robert Morgan and Assistant Attorney General Thomas B. Wood for the State.

H. Glenn Davis for defendant.

LAKE, Justice.

[1] The defendant assigns as error a portion of the court's final instruction to the jury, asserting that therein the court expressed an opinion as to the facts of the case in violation of G.S. 1-180. Earlier in the charge, the court stated correctly the elements of the crime of assault with intent to commit rape and those of the lesser included offense, assault on a female, and reviewed the evidence. In the portion in question, the court restated, correctly, what the jury must find from the evidence, beyond a reasonable doubt, in order to convict the defendant of the respective offenses and stated the contentions of the State and of the defendant as to what verdict the jury should render. Immediately thereafter, the court instructed the jury that if they were not so satisfied from the evidence, beyond a reasonable doubt, they would return a verdict of not guilty, the burden being upon the State to so satisfy them.

[1, 2] Quite obviously, the court expressed no opinion as to the sufficiency of the evidence to prove any fact, or as to the verdict which the jury should return. The defendant does not specify wherein the instructions to which he excepts stated any opinion of the court. We are unable to see any misstatement by the court, either of the law applicable to the offenses in question or of any contention of the defendant. It is well settled that any misstatement of the contentions of the parties must be called to the attention of the court at the time, so as to permit a correction, or such misstatement will be deemed waived. *State v. Britt,* 225 N.C. 364, 34 S.E. 2d 408; *State v. Smith,* 225 N.C. 78, 33 S.E. 2d 472. There is no merit in this assignment of error.

[3] The defendant next contends that the sentence imposed was cruel and unusual. It is the maximum sentence authorized by G.S. 14-22 for the offense of which the defendant has been convicted. This Court has repeatedly held that a sentence which does not exceed the maximum authorized by the statute cannot be deemed cruel and unusual. *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216, and cases there cited. This assignment of error is also without merit.

[4] After the defendant had been fully advised of his constitutional rights and of the nature of the matter concerning which the police officers wished to interrogate him, he waived in writing his right to counsel and stated his willingness to answer

questions. After answering a number of questions by the interrogating officer, the defendant said, "Before I go any further I want to talk to a lawyer." The officer immediately offered to assist him in procuring any lawyer he wished to have. The defendant then said he wanted his parents present instead of a lawyer.

There is nothing in the record to indicate that any further question was propounded to him, or that any statement was made by him, until after both of his parents had arrived at the police station and conferred privately with the defendant. Upon the return of the officer to the interrogation room, the parents advised the defendant to tell the officer the truth about the matter. There was no further suggestion that he or his parents desired the presence of a lawyer prior to resumption of the interrogation. The officer testified to these facts on the voir dire examination. Neither the defendant nor his parents testified.

In *Miranda v. Arizona,* 384 U.S. 436, 473-475, 86 S.Ct. 1602, 16 L. Ed. 2d 694, 723-724, the Supreme Court of the United States said concerning custodial interrogation:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. * * * If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. * * *
>
> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."

In *State v. Fox,* 274 N.C. 277, 295, 163 S.E. 2d 492, this Court said upon that subject:

> "If Roy [Fox] voluntarily made the statement (S-42), or the earlier one which was not transcribed, and *thereafter*

requested counsel for the first time, he was not deprived of his Sixth Amendment right to counsel. If, however, *after* he had requested an attorney, and *before* he was given an opportunity to confer with him, officers continued to interrogate Roy, any incriminating statement thus elicited cannot be received in evidence against him."

In the present case, the defendant was not placed under arrest until after he confessed orally to his participation in the offense of which he has been convicted. He came to the police station voluntarily in response to a request from the police officer, which request was relayed to him by his mother. After he stated a desire for counsel, the officer stopped interrogating him with reference to his activities and his connection with the offense under investigation, inquiring only as to which attorney the defendant desired to consult, offering assistance in getting the attorney of the defendant's choice to come to the station. Without anything further, the defendant informed the officer that he had changed his mind and wanted to confer with his parents instead of an attorney. Nothing in the record indicates any further interrogation by the officer of statement by the defendant until after the arrival of his parents and his conference with them. Both parents were present throughout the remaining interrogation.

Under these circumstances, we find nothing in *Miranda v. Arizona, supra, State v. Fox, supra,* or in G.S. 7A, Art. 36, which precludes the police officer from relying upon the previously written waiver of counsel, resuming the interrogation and taking the defendant's statement voluntarily made. Insofar as any right to counsel is conferred upon an indigent person by G.S. 7A, Art. 36, in addition to his constitutional right, it is to be observed that G.S. 7A-451(b) provides that such right "*begins* * * * *after* the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process." (Emphasis added.)

The undisputed evidence on the voir dire examination fully supports the findings by the trial court to the effect that the defendant voluntarily went to the police station, waived in writing his right to counsel and his right to remain silent, voluntarily, with full understanding of his rights and while not under arrest, made, in the presence of his parents, the oral confession, which was subsequently reduced to writing, and

voluntarily signed the written statement of it. Under these circumstances, there was no error in the admission in evidence of either the written confession or the written waiver. The defendant's Assignments of Error 2, 4, 9 and 10 are overruled.

[5] Without objection, Officer Benbow testified that while the defendant was not under arrest he agreed to take a polygraph test. Thereupon, the defendant objected "to any reference to *the* polygraph test." (Emphasis added.) The court overruled this objection. Thereupon, the solicitor asked the witness if a polygraph test was administered and the witness replied affirmatively. The defendant interposed an objection after the answer was given. The well settled general rule is that objections, interposed after the witness has testified, come too late to form the basis for the award of a new trial. Stansbury, North Carolina Evidence, 2d Ed., § 27; Strong, North Carolina Index, 2d Ed., Trial, § 15. There was no evidence, before the jury, as to the nature of the test, the questions propounded, the answers given, or the result of the test. Upon the voir dire examination of Officer Benbow, in the absence of the jury, and at no other stage of the trial, it was developed upon cross-examination that after the test was given, the defendant was informed that the test showed that he was not telling the truth about the matter. The voir dire examination makes it abundantly clear that the defendant consented to take the test after he signed the written waiver of counsel and of his right to remain silent. There is no merit in this assignment of error.

[6] The defendant further contends that the in-court identification of the defendant by the girl's escort was tainted by this witness having previously observed the defendant walking in the hallway of the police station in the presence of a police officer, at which time the defendant was without counsel. The record clearly indicates that this observation of the defendant by the witness occurred on the day of the defendant's interrogation by the police officers above discussed, that the witness was then at the police station in response to an invitation from the police and that his observation of the defendant occurred after the defendant had waived counsel and prior to his arrest. It does not appear that the defendant was then aware that he was being observed, or was to be observed, by a potential witness against him or that he consented to such observation. There was no lineup and there is no indication that any other Negro male was in the hallway at the time. At trial, the witness testi-

fied that on the occasion of this observation of the defendant, he informed the officers that the defendant resembled one of the participants in the offense "very much" and the witness "would like to study him some more."

The State offered no evidence of this out-of-court observation of the defendant by the witness. All of the foregoing facts concerning it were developed by the defendant on cross-examination of this witness. He did not request a voir dire examination in the absence of the jury with reference to this matter. The defendant, having introduced the evidence through cross-examination, cannot and does not assign its admission as error. His contention is that these facts, so developed by him, made the in-court identification by this witness incompetent and, consequently, the court erred in overruling his motion to strike the testimony concerning such in-court identification. He relies upon *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L. Ed. 2d 1149, and *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L. Ed. 2d 1178. These cases do not support his contention.

In the Wade case, *supra,* the Supreme Court of the United States said:

> "Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a *per se* rule of exclusion of courtroom identification would be unjustified. * * *
>
> "We think it follows that the proper test to be applied in these situations is that quoted in *Wong Sun v. United States,* 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455, 83 S.Ct. 407, '"[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt 221 (1959).' * * * Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person,

the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. * * *

"On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. * * * We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error, *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824, and for the District Court to reinstate the conviction or order a new trial, as may be proper."

It is abundantly clear, upon this record, that this witness had ample opportunity to observe this defendant on a clear moonlight night when the defendant twice stepped immediately in front of him and blocked his passage and then twice forcibly separated the witness from the girl he was escorting, during which time he talked to the witness and demanded that the witness give him and his companions a ride to the airport. The witness' in-court identification of this defendant was positive. Obviously, it had an origin independent of and prior to his observation of the defendant at the police station.

The defendant does not question the competency of the positive, unequivocal, in-court identification of the defendant by the girl, who testified that the defendant sat upon her chest, strangling her with one hand and beating her with the other while his companion was attempting to rape her.

The defendant's Assignments of Error 3, 6 and 7, relating to the in-court identification of the defendant by the girl's escort, are without merit.

No error.

STATE OF NORTH CAROLINA v. RICKEY STEVENSON ALEXANDER AND GRADY WILSON

No. 69

(Filed 10 November 1971)

1. **Arrest and Bail § 3— arrest without warrant — felony**

In order to justify an arrest without a warrant under G.S. 15-41(2), it is not necessary to show that a felony was actually committed, but only that the officer had reasonable ground to believe that such an offense was committed.

2. **Arrest and Bail § 3— arrest without warrant — probable cause — reasonable ground**

The terms "probable cause," as used in the Fourth Amendment to the Federal Constitution, and "reasonable ground," as used in G.S. 15-41, are substantial equivalents having virtually the same meaning.

3. **Arrest and Bail § 3— arrest without warrant — probable cause**

An arrest without a warrant is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and that the person to be arrested is the felon.

4. **Arrest and Bail § 3— arrest without warrant — probable cause**

Police officers had probable cause to arrest defendants without a warrant for the armed robbery of a pharmacy where they had been given descriptions of the robbers, including their height, weight, estimated age, clothing, color and complexion, one defendant had been identified by an informer and from photographs by two eyewitnesses, and defendants and another had been identified as the robbers by a second informant who told the officer how he came into possession of such information and whose information had led to the conviction of seven persons within the past two years.

5. **Arrest and Bail § 3— arrest without warrant — belief that defendants would evade arrest**

In arresting defendants without a warrant for the crime of armed robbery, the very nature of the crime was sufficient to support a reasonable belief by the officers that defendants would "evade arrest if not taken into custody." G.S. 15-41(2).

6. **Criminal Law § 66— lineup — in-court identification — independent origin**

In-court identifications of defendants were competent, even if pretrial lineup procedures were improper, where there was evidence to show and the court found on voir dire that the in-court identifications were independent in origin and not based on the lineup.

7. **Criminal Law § 161— necessity for exceptions**

Assignments of error must be based on exceptions duly noted and may not present a question not embraced in an exception.

8. **Criminal Law § 34— cross-examination as to prior offenses**

When a defendant in a criminal case takes the stand, he may be impeached by cross-examination with respect to previous convictions of crime regardless of his age at the time of his previous convictions.

9. **Courts § 15; Infants § 10— fifteen-year-old defendant — felony — trial in juvenile court or superior court**

A fifteen-year-old defendant charged with the felonies of storebreaking and larceny — the punishment for which could be ten years — may either be processed as a juvenile or tried in the superior court.

10. **Criminal Law § 34; Infants § 10— prior offenses — "conviction" while a juvenile**

Answer by a defendant on cross-examination that he had been "convicted" of storebreaking and larceny when he was a juvenile was competent for impeachment purposes, and failure of the court to conduct a voir dire hearing to determine whether the charge was heard on a petition in juvenile court or on an indictment in superior court was not prejudicial error.

11. **Criminal Law § 101— recesses during trial — instructions to jury**

Defendant was not prejudiced by failure of the trial court to instruct the jury prior to each recess during the trial that the jurors should not discuss the case among themselves or allow anyone to discuss the case with them.

12. **Criminal Law § 113— joint trial — instructions — guilt or innocence of each defendant**

In this joint trial of two defendants for armed robbery, the charge of the court, when considered in its entirety, was not susceptible to the construction that the jury should convict both defendants if it found beyond a reasonable doubt that either defendant committed the offense charged in the indictment.

13. **Criminal Law § 168— construction of charge**

A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct.

14. **Criminal Law § 167— harmless error**

Insubstantial technical errors which could not have affected the result of the trial will not be held prejudicial.

DEFENDANTS appealed from *Hasty, J.*, at the 14 December 1970 Schedule "C" Session, MECKLENBURG Superior Court.

Defendants were charged in separate bills of indictment with armed robbery, and the two cases were consolidated for trial. Upon timely objection in the early stages of the trial, a voir dire was conducted with respect to the legality of defendants' arrest and the competency of their in-court identification

by witnesses to the robbery. The evidence on voir dire tends to show that on 26 August 1970 at about 11 a.m. a young black youth, carrying a small pearl-handled revolver, entered the Carolina Pharmacy in downtown Charlotte. Present in the pharmacy at the time were Mrs. Dorothy Turner, a clerk in charge, Randy Turner, her son, and Vicky Nance, a customer. The gunman held the revolver to Vicky Nance's head while he nudged her behind the counter. Then he held the gun to Mrs. Turner's head and required her to open one of the cash registers. The gunman required all three of them "to get down behind the counter." Then two more young black youths entered the drugstore. One of them opened the other cash register. They took about $60.00 in cash and the three robbers left together. The third robber did not approach the cash registers but stood at the window throughout the robbery, his face not fully visible. Shortly before the robbery, Randy Turner had seen one of the robbers in front of the building for about ten minutes, walking around and looking into the pharmacy through the window. Randy told his mother "that a man kept walking by and looking in" and that he thought they were going to be robbed. A little later, and before the robbery took place, this same man entered the pharmacy, bought a Coke, and returned to the sidewalk in front of the building.

The robbery was immediately reported to the police and Sergeant Smith interviewed Mrs. Turner and her son, both of whom furnished a description of the robbers. A short time after the robbery Sergeant Smith exhibited fourteen photographs to Mrs. Turner but she made no identification from them. A picture of these defendants was not among the fourteen photographs.

About 3 p.m. on the afternoon of the robbery, Sergeant Smith received reliable information from an informer that the robbers were Junior Gill, a man named Grady and a third subject. On 2 September 1970 at about 1 p.m. a second informer, whose information had proven reliable on six or seven previous occasions, told Sergeant Smith that Grady Wilson, Rickey Stevenson Alexander and William Gill, Jr., alias June Gill, were the three individuals involved in this robbery. This informant told the officer "how he knew of this information and how it was revealed to him." Sergeant Smith then saw Mrs. Turner again and exhibited to her ten additional photographs, including

an earlier lineup photograph, and Mrs. Turner identified defendant Grady Wilson from the earlier lineup photograph. Randy Turner likewise identified Wilson from the earlier lineup photograph. None of the twenty-four photographs shown these eyewitnesses contained a picture of Rickey Alexander.

On the basis of the information from the informers and the identifications by Mrs. Turner and her son, defendant Alexander was arrested at his home at 7:30 a.m. on 3 September 1970 without a warrant, and defendant Wilson was arrested at his home twenty minutes later without a warrant. William Gill, Jr. was also arrested. The defendants were taken immediately to the Law Enforcement Center in Charlotte where they were placed in separate interrogation rooms, each warned of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, and each defendant said he understood his rights. Alexander said he was twenty years old and had completed the eleventh grade. Wilson said he was eighteen years old and had completed the tenth grade. Each defendant thereupon signed a written "Waiver of Right to Remain Silent and Right to Counsel During Interview," and each also signed a "Waiver of Right to Presence of Lawyer as my Lawyer for Pre-trial Identification, Including Presence of Lawyer as My Lawyer Free of Cost to me if I am Indigent." Each defendant denied any knowledge of the robbery at Carolina Pharmacy and freely consented to stand in a lineup for identification purposes. A lineup of five participants, including Alexander, Wilson and Gill, was conducted. Mrs. Turner, Randy Turner and Vicky Nance viewed the lineup separately. Mrs. Turner identified subject No. 2 as the robber who came in the pharmacy and bought a Coca-Cola a few minutes before the robbery and later returned with the other two robbers. Randy Turner identified subjects No. 2 and No. 4 as participants in the robbery and said No. 4 was the one who had the gun. Mrs. Turner was then told for the first time that No. 2 was Grady Wilson and Randy was told for the first time that No. 2 was Grady Wilson and No. 4 was Rickey Stevenson Alexander. Vicky Nance identified No. 2 as one of the robbers. Gill was not identified by any of the viewers and was released. Following the lineup defendants were taken before a magistrate at about 11:00 a.m. and an arrest warrant was issued.

Randy Turner further stated on the voir dire that he identified Grady Wilson and Rickey Alexander at the lineup;

that "I did not know their names at that time. None of the photos that I was shown or the lineup I viewed had anything to do with my in-court identification of the defendants. I am basing my in-court identification of the two defendants on when I saw them at the time of the robbery." Mrs. Turner stated: "None of the photographs that I have been shown here today or at any other time had anything to do with the in-court identification I have made of the two defendants. I am basing my in-court identification on the fact that those two boys look, here in court, just as they did on the day of the robbery. At the lineup my son and I viewed the persons at separate times. We did not have a conference and discuss what we had seen. No one suggested to us that the lineup might contain the persons who had robbed us."

The court found facts substantially in accord with the foregoing narrative, and concluded (1) that the officer had probable cause to believe defendants had committed a felony, (2) that the arrests were legal, (3) that defendants, having been duly warned of their constitutional rights, freely and understandingly waived in writing their right to counsel and voluntarily agreed to stand in the lineup for identification purposes, (4) that the photographic identification procedures were not impermissibly suggestive so as to give rise to any likelihood of irreparable misidentification, and (5) the State had established by clear and convincing proof that the in-court identification of defendants by Mrs. Turner and Randy Turner were of independent origin, based on observations at the scene of the robbery.

Defendants offered no evidence on the voir dire.

The jury was recalled and, over objection, Mrs. Turner and Randy Turner positively identified defendants as participants in the robbery. Each defendant testified in his own behalf, and offered other witnesses in corroboration of his testimony, that he was elsewhere at 11 a.m. on 26 August 1970 when the robbery occurred at the Carolina Pharmacy.

The jury convicted both defendants of armed robbery. From judgment imposing active prison sentences, defendants appealed to the Court of Appeals. The appeal was transferred to this Court for initial review under our general order dated 31 July 1970. Errors assigned are noted in the opinion.

Lila Bellar and George S. Daly, Jr., Attorneys for the Defendant Appellants.

Robert Morgan, Attorney General; I Beverly Lake, Jr., Assistant Attorney General, and Ronald M. Price, Staff Attorney, for the State of North Carolina.

HUSKINS, Justice.

Defendants' first assignment of error is based on the contention that their warrantless arrest was made without probable cause and therefore illegal.

[1-3] G.S. 15-41, in pertinent part, provides: "A peace officer may without 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." In order to justify an arrest under this section, it is not required that a felony be shown actually to have been committed. It is only necessary that the officer have reasonable ground to believe that such an offense has been committed. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100 (1954). The terms "probable cause," as used in the Fourth Amendment to the Federal Constitution, and "reasonable ground," as used in the foregoing statute, are substantial equivalents having virtually the same meaning. *Draper v. United States,* 358 U.S. 307, 3 L. Ed. 2d 327, 79 S.Ct. 329 (1959). An arrest without a warrant is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. *McCray v. Illinois,* 386 U.S. 300, 18 L. Ed. 2d 62, 87 S.Ct. 1056 (1967). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant." 5 Am. Jur. 2d, Arrest § 44 (1962); *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971).

[4] Here, the police had a description of defendants, including their height, weight, estimated age, clothing, color and complexion. Defendant Wilson had been identified from photographs by two eyewitnesses and one informer. Furthermore, a second informer whose information had led to the conviction of seven persons within the past two years, had told Sergeant Smith that defendants and William Gill, Jr. were the three individuals involved in this robbery. He told the officer how he came into possession of this information and how it was revealed to him. Manifestly, the totality of these facts and circumstances would warrant a prudent man in believing that the felony of armed robbery had been committed at the Carolina Pharmacy and that these defendants participated in commission of the crime. We hold that the officers acted on reasonable ground and with probable cause. *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1970); *State v. Harris, supra* (279 N.C. 307, 182 S.E. 2d 364).

[5] Defendants further argue, however, that their arrests without a warrant were illegal because the arresting officer had no reasonable ground to believe that they would "evade arrest if not immediately taken into custody." G.S. 15-41(2).

The record in this case reveals that an armed robbery had been committed and the robbers had fled the scene. During the following seven days they had concealed their identity and avoided, if not evaded, arrest. When the officers approached Rickey Alexander at his home on the morning of his arrest he denied his identity and "said he was not Rickey Alexander, but his brother." June Gill, who was in the patrol car and already in custody, identified Rickey Alexander and the officers then placed him under arrest.

Defendant Wilson had been described by eyewitnesses, identified from photographs by them and by an informer, and was subject to recognition on sight by the officers. He had ample reason to keep himself concealed. Although the officers had not been informed by anybody that defendants might flee the jurisdiction or evade arrest, the record shows they knew both defendants were under investigation as suspects in other recent armed robberies at Home Credit Company and Walker Drugstore. Armed robbery is a crime of violence, and those who participate in it may be expected to evade arrest as long as possible. The language of Justice Branch in *State v. Jacobs,*

277 N.C. 151, 176 S.E. 2d 744 (1970), is both appropriate and applicable here: "The facts and circumstances surrounding defendant's arrest furnished plenary evidence to support a reasonable belief on the part of the officers that defendant had committed a felony. The very nature of the crime suffices to support a reasonable belief that defendant would evade arrest if not immediately taken into custody." We hold that the officers were in possession of such facts as to justify taking defendants into custody without a warrant and that the arrest of each defendant was in all respects lawful. *State v. Grier,* 268 N.C. 296, 150 S.E. 2d 443 (1966); *State v. Egerton,* 264 N.C. 328, 141 S.E. 2d 515 (1965); *State v. Jacobs, supra.* This assignment of error is overruled.

Defendants next contend that their in-court identification should have been suppressed since it was the fruit of an illegal arrest and a suggestive lineup. This constitutes defendants' second and third assignments of error. We perceive no merit in these assignments.

[6] In the first place, the arrest was legal. Furthermore, there was evidence to show and the trial court found on voir dire that the in-court identification by Mrs. Turner and her son was independent in origin and not based on the lineup. This alone rendered the in-court identification competent even had the lineup procedures been improper. *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610 (1970); *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968).

[7] Finally, it should be noted that all evidence offered *in the presence of the jury* pertaining to the lineup was elicited by defense counsel on cross-examination. There was no objection made and no exception noted to the admission of this evidence. Assignments of error must be based on exceptions duly noted, *State v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666 (1966), and may not present a question not embraced in an exception. *Wilson v. Wilson,* 263 N.C. 88, 138 S.E. 2d 827 (1964); 1 Strong's N. C. Index 2d, Appeal and Error § 24. These assignments are overruled.

Defendant Alexander, as a witness in his own behalf, testified he was elsewhere at the time of the robbery. On cross-examination he denied he had ever been convicted of any crime. The solicitor then asked: "Were you convicted of store breaking

and larceny in 1965?" His counsel objected, saying: "If the court please, we are talking about juvenile matters which are not part of the criminal record." The objection was overruled and defendant answered: "When I was a juvenile, in 1965, I was convicted of store breaking and larceny." This defendant duly excepted and this constitutes his fourth assignment of error. Defendant argues that the evidence was incompetent for impeachment purposes by reason of the following provisions in G.S. 7A-287: "An adjudication that a child is delinquent or undisciplined shall not . . . be considered as conviction of any criminal offense."

Defendant testified on direct examination that he was twenty-one years of age. He now contends that the store breaking and larceny of which he was convicted was a reference to an adjudication of delinquency in 1965 and that the court should have conducted a voir dire in the absence of the jury to ascertain whether defendant was sixteen, or only fifteen, years of age at the time of the store breaking and larceny and whether it was heard on a petition in the juvenile court or tried on an indictment in the superior court.

[8-10] When a defendant in a criminal case takes the stand, he may be impeached by cross-examination with respect to previous convictions of crime, but his answers are conclusive and the record of prior convictions cannot be introduced to contradict him. *State v. Sheffield,* 251 N.C. 309, 111 S.E. 2d 195 (1959); *State v. King,* 224 N.C. 329, 30 S.E. 2d 230 (1944). In a criminal case, this rule applies to every defendant who takes the stand, regardless of his age at the time of his previous *conviction.* Upon a charge of store breaking and larceny—a felony the punishment for which could be ten years—this defendant, even if only fifteen years old at the time, could have been processed as a juvenile or tried and convicted in the superior court. *State v. Burnett,* 179 N.C. 735, 102 S.E. 711 (1920); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969). He said he had been *convicted.* His answer was competent for impeachment purposes. The burden is on appellant to show error. *Burgess v. Construction Co.,* 264 N.C. 82, 140 S.E. 2d 766 (1965). "The burden is upon the appellant not only to show error but also to make it appear that the result was materially affected thereby to his hurt." *Garland v. Penegar,* 235 N.C. 517, 70 S.E. 2d 486 (1952). On the record before us he has failed to show error or prejudice. This assignment is overruled.

[11] Defendants' fifth assignment of error reads: "The trial judge failed to adequately warn the jurors of their duty to decide the case solely on the evidence." Defendants argue that upon any interim recess during the course of the trial the judge was required to warn the jurors not to discuss the case among themselves nor allow anyone to discuss it with them.

The record discloses that the jury was excused on several occasions in the course of the trial and that such warning was given on at least one occasion. There is no showing or suggestion of any impropriety on the part of any juror and no showing of prejudice. This assignment is obviously without merit and requires no further discussion.

[12] Defendants assign as error certain portions of the charge, contending that the jury was instructed, in effect, that should the jury find beyond a reasonable doubt that either defendant committed the offense charged in the bill of indictment it should convict both defendants.

The record reveals that following the arguments and charge of the court the jury retired and deliberated for a short period. It then returned to the courtroom and inquired whether the cases against these defendants were to be decided separately or jointly. The court instructed them that each case should be decided separately. "You may convict one in one case or acquit one in one case or vice versa. There are two verdicts you have to render." The jury again retired to the jury room and sometime thereafter the court recessed for the day. The following morning the court, on its own motion, further instructed the jury at length, reviewing the instructions he had given the previous day, correcting verbiage he felt might be misleading or susceptible to more than one interpretation, and closed his charge with a separate mandate as to each defendant as follows:

> "Now I give you these final corrected instructions of Rickey Stevenson Alexander. If the State has satisfied you from the evidence beyond a reasonable doubt that on or about August 26, 1970, the defendant Rickey Stevenson Alexander had a firearm and took and carried away or aided and abetted some other person or persons in taking and carrying away $60.00 in cash from the place of business of the Carolina Pharmacy located at Trade and Brevard Streets in Charlotte in the presence of Dorothy Turner

who was there in attendance without her or the pharmacy's voluntary consent, by endangering or threatening the life of Dorothy Turner by the use or threatened use of a firearm, Rickey Stevenson Alexander knowing he was not entitled to take the $60.00 in cash and intending at that time to deprive the Carolina Pharmacy of its use permanently, it would be your duty to return a verdict of guilty of robbery with a firearm as charged in the bill of indictment. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

"I also now give you these final instructions—corrected instructions in the case against Grady Wilson. If the State has satisfied you from the evidence beyond a reasonable doubt that on or about August 26, 1970, the defendant Grady Wilson aided and abetted by some other person or persons who had a firearm, took and carried away $60.00 in cash from the place of business of the Carolina Pharmacy located at Trade and Brevard Streets in Charlotte in the presence of Dorothy Turner, who was there in attendance without her or the pharmacy's voluntary consent, by aiding and abetting the said other person or persons in endangering or threatening the life of Dorothy Turner by the use or threatened use of a firearm, Grady Wilson knowing that he was not entitled to take $60.00 in cash and intending at that time to deprive the Carolina Pharmacy of its use permanently, it would be your duty to return a verdict of guilty of robbery with a firearm as charged in the bill of indictment. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty in the case of Grady Wilson.

"Now, members of the jury, when you retire to the jury room, you will remember and bear in mind the entire charge of the court in your deliberations, which, of course, includes the final instructions I have just given you this morning. In other words, you will not detach the final instructions this morning in each case from the instructions you were given yesterday but consider the final instructions this morning only as a correction to the final instructions you received late yesterday, as I have indicated.

"Now, under the evidence and charge of the court, you may find both defendants guilty or not guilty or you may find one defendant guilty and the other defendant not guilty or vice versa, according as you may find the facts to be under the entire charge of the court.

"So you may retire now and say how you find."

[12-14] In the foregoing charge the able and patient trial judge sought to emphasize that a verdict of guilty should be rendered only against the defendant concerning whose guilt the jury had no reasonable doubt and that the jury should not convict both defendants unless it was satisfied of the guilt of each beyond a reasonable doubt. We think the charge as a whole made that quite clear. "A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965); *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1964); *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169 (1962). If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966). Furthermore, insubstantial technical errors which could not have affected the result will not be held prejudicial. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916 (1955). The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred. *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969); *State v. Jones,* 67 N.C. 285 (1872)." *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971).

A fair appraisal of the charge in its entirety impels the conclusion that the trial court submitted the question of the guilt or innocence of each defendant separately and presented the law fairly. The jury was not misled as defendants contend. The assignment of error addressed to the charge is overruled.

Defendants having failed to show prejudicial error, the verdict and judgment as to each defendant must be upheld.

No error.

FIRST-CITIZENS BANK & TRUST COMPANY, TRUSTEE UNDER THE WILL OF A. B. CURRIN v. HELLEN D. CURRIN CARR, BARBARA D. CURRIN SMETZER AND CONTINGENT HEIRS AT LAW OF A. B. CURRIN, JR., DECEASED

No. 21

(Filed 10 November 1971)

1. **Trusts § 10— termination of trust — distribution of corpus — fiduciary relationship**

When a trust is terminated, it is the duty of the trustee to distribute, with reasonable care and prudence, the corpus of the trust to those entitled to such property by virtue of the trust instrument, and the relation of trustee and *cestui que trust* continues with all its powers and duties until the beneficiaries receive all the property due them by the trust.

2. **Trusts § 10— construction of trust — partition of distributed real estate**

Where a testamentary trust provided that, upon termination of the trust, the testator's widow should receive a life estate in one-half of the trust corpus and that testator's daughter should receive a fee simple title to the other half of the corpus, and the trust instrument directed the trustee to "distribute" the trust property and to "allot" to the widow in her share at least one-half of the real estate, the testator intended that the trustee make an actual partition in the distribution of the lands remaining at the termination of the trust, notwithstanding the trust also contained a provision giving the trustee the power to "include undivided interests in the property so devised or allotted."

3. **Estates § 3; Partition § 1— half interests for life and in fee — partition action by life tenant**

The life tenant of a one-half interest in realty may maintain a partition proceeding against the fee simple owner of the other one-half interest in the property.

4. **Trusts § 10— distribution of corpus — conveyance by trustee — defeat of trustor's intent**

The trustee could not deprive itself of the power to carry out the intent of the testator that an actual partition be made in the distribution of lands remaining in the trust at its termination by executing to one of the beneficiaries a deed purporting to convey in fee simple an undivided interest in the lands.

5. **Declaratory Judgment Act § 1— interpretation of trust — justiciable controversy**

A bona fide controversy justiciable under the Declaratory Judgment Act was presented by the pleadings and stipulations in a trustee's action seeking an interpretation of a testamentary trust as to the manner of distribution of land constituting the trust corpus to testator's widow and daughter upon termination of the trust. G.S. 1-253 *et seq.*

6. Parties § 3; Rules of Civil Procedure § 20— interpretation of trust — beneficiary — necessary party

In a trustee's action seeking an interpretation of a testamentary trust as to the manner of distribution of lands constituting the trust corpus to testator's widow and daughter upon termination of the trust, the testator's daughter was a necessary and proper party, and the trial court erred in allowing the daughter's motion to dismiss the action as to her pursuant to G.S. 1A-1, Rule 41(b).

7. Estates § 3— vested or contingent remainder — standing of life tenant to seek determination

Testator's widow who had been given a life estate in half the corpus of a testamentary trust upon termination of the trust had no standing to demand that the court determine whether the remainder interest after her life estate is vested or contingent.

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

APPEAL by defendant, Hellen D. Currin Carr, from decision of the North Carolina Court of Appeals, 10 N.C. App. 610.

The trial judge heard this case on stipulated facts which are fully set out in the opinion of the Court of Appeals. We summarize the pertinent facts.

A. B. Currin died testate a resident of Harnett County, leaving surviving him his wife, Hellen D. Currin, and one child, Barbara D. Currin, who is the same person as defendant Barbara D. Currin Smetzer. His will was properly admitted to probate, and the named executor and trustee, First-Citizens Bank & Trust Company, duly qualified in both capacities. The will provided, *inter alia*, that when defendant Smetzer reached the age of 35 years, the trust created by the will would terminate. Both defendants Carr and Smetzer survived the testator, and defendant Smetzer has attained the age of 35 years.

The corpus of the trust at the time it was terminated consisted of four tracts of land in Harnett County, one tract of land in Wake County, and certain personal property comprised of farm machinery and equipment.

Defendant Carr demanded that the trustee allot her life interest in specific parcels of land. The trustee refused and executed a trustee's deed dated 1 November 1968 to defendant Smetzer which recited a conveyance to her of a one-half undivided interest in fee in the five tracts of land. Defendant Smetzer accepted the deed.

Plaintiff Bank executed and tendered to defendant Carr a trustee's deed which recited a conveyance to her of a life estate in a one-half undivided interest in the five tracts of land. The deed further provided that upon the death of defendant Carr the one-half undivided interest would pass to the heirs at law of the testator in fee simple. Defendant Carr refused to accept the tendered deed.

Plaintiff Bank also executed as trustee identical separate bills of sale to defendants Carr and Smetzer which conveyed to them certain farm machinery and equipment. Defendant Smetzer accepted the bill of sale tendered to her.

Plaintiff Bank instituted this action seeking a declaration of rights pursuant to the North Carolina Declaratory Judgment Act, G.S. 1-253, *et seq.*, regarding interpretation of the will of A. B. Currin as to its duties and responsibilities as trustee in the distribution of the corpus of the A. B. Currin trust upon its termination.

Judge Harry Canaday heard the matter on plaintiff's and defendants' motions for summary judgment and upon the stipulated facts. He concluded:

> 1. That Item VIII B of the Last Will and Testament, which contains the Trust Agreement, does not require the trustee to make an actual partition of the lands held by the trust between the surviving widow and the daughter of the testator. The testamentary trust only requires the trustee to convey an equal share to each beneficiary named in the trust instrument. EXCEPTION NO. 4.
>
> 2. That the deed to Barbara D. Currin Smetzer, attached to the Complaint and marked Exhibit "B," and the deed to Hellen B. Currin Carr, attached to the Complaint and marked Exhibit "D," comply with all the terms of the Trust Agreement. The trustee has discharged its duty as to the real estate by the execution and delivery of the deeds to the beneficiaries named in Item VIII of the Trust. EXCEPTION NO. 5.
>
> 3. That the Bill of Sale for the personal property owned by the trust and purchased from the income of the trust should be distributed to Barbara D. Currin Smetzer and Hellen D. Currin Carr as tenants in common, each

owning a one-half undivided interest; that the Bill of Sale attached to the Complaint, marked Exhibit "C," is a proper instrument for the trustee to distribute the personal property owned by the trust. EXCEPTION No. 6.

4. That the trustee is entitled to record the deed heretofore tendered to Hellen D. Currin Carr and to forthwith proceed to disburse all of the assets of the trust estate and to file a final account terminating the trust.
EXCEPTION No. 7.

He thereupon ordered and decreed that plaintiff record the deed tended to defendant Carr and distribute any remaining assets held in the estate.

On the same date, by separate order, Judge Canaday allowed defendant Smetzer's motion that the action be dismissed as to her with prejudice.

Defendant Carr appealed from both the judgment and the order of dismissal.

The Court of Appeals, in an opinion by Mallard, Chief Judge, concurred in by Parker, Judge, reversed the order allowing the motion to dismiss as to defendant Smetzer, and affirmed the judgment dated 1 August 1970, filed 11 September 1970. Graham, Judge, dissented and defendant Carr appealed pursuant to the provisions of G.S. 7A-30(2).

Edgar R. Bain for Plaintiff Trustee.

Poyner, Geraghty, Hartsfield & Townsend, by Arch E. Lynch, Jr., for Defendant Hellen D. Currin Carr.

BRANCH, Justice.

The principal question presented by this appeal is whether Trustee must partition the real estate remaining in the corpus of the trust between the beneficiaries.

The will contained the following material provisions pertinent to decision:

ITEM V:

. . . . said Trustee shall have the unrestricted right and full power and authority:

1. (b) To retain the properties now or hereafter received by it or to dispose of them as and when it shall deem advisable by public or private sale or exchange or otherwise, for cash or upon credit or partly for cash and partly upon credit and upon such terms and conditions as it shall deem proper;

1. (k) To make improvements upon any lands held in the trust estate, and to make and unite with other persons in making partition of any such lands; . . . .

1. (n) To divide and allot the trust estate in accordance with the terms of this agreement either in kind or in money or partly in kind and partly in money and to include undivided interests in the property so devised or allotted, and the judgment of the Trustee concerning the relative values of the properties so divided or allotted shall be final and conclusive upon all persons interest in the trust estate.

4. In connection with said trust, it is my hope and desire that said trustee will employ my brother, M. R. Currin and my wife, Hellen D. Currin, if living, to act as supervisors and managers of any and all farming operations which said trustee may elect to conduct and carry on. . . .

ITEM VIII:

Upon the termination of the trust herein created, the trustee shall distribute, pay over and deliver the trust property as follows:

A. To my daughter, Barbara D. Currin, if my wife then be dead, all of said property absolutely and in fee simple.

B. To my daughter, Barbara D. Currin, if she and my wife are both living upon termination of this trust, one-half of said trust estate, absolutely and in fee simple, and the other one-half to my wife to be held and enjoyed by her as life tenant for and during the term of her natural life, but not longer, and upon her death the title to the property in which she has a life estate under the terms hereof shall pass to and vest in my heirs at law, absolutely and in fee simple, according to the North Carolina Statute of Descent and Distribution. It is my wish and desire (but

my trustee shall not consider it mandatory) that my trustee shall, in distributing such trust assets between my wife and daughter, allot to my wife in her share as much of my real estate as my trustee shall deem practical and feasible and in no event shall the trustee allot to my wife less than one-half, in value, of the real estate then held in the trust estate.

D. In settling with any beneficiary hereunder the trustee may make such settlement in kind or in money, or partly in kind and partly in money. The trustee shall have the full power to determine the value of any property delivered to any beneficiary in making settlement of such beneficiary and the value of such property as fixed and determined by the trustee shall be conclusive and binding on all beneficiaries hereunder and shall not be subject to question by any person.

[1] When a trust is terminated, it is the duty of the trustee to distribute, with reasonable care and prudence, the corpus of the trust to those entitled to such property by virtue of the trust instrument. The relation of trustee and *cestui que trust* continues with all of its powers and duties until the beneficiaries receive all the property due them by the trust. *Trust Company v. Taliaferro,* 246 N.C. 121, 97 S.E. 2d 776; Bogert, Trusts and Trustees, § 1010.

[2] Plaintiff trustee contends that defendant Carr has authority under Chapter 46 of the General Statutes to have her life estate allotted in severalty, and that she, rather than the trustee, should initiate partition proceedings. Plaintiff offers no authority to support this contention, and defendant Carr argues that this question remains undetermined in North Carolina. However, our research reveals that this Court decided this question in the case of *McEachern v. Gilchrist,* 75 N.C. 196. There a life tenant sought partition of her one-fifth life interest against tenants in fee. The Court, holding that partition was proper, stated:

"The second ground of defense is that in law no partition lies between a tenant for life and tenants in fee.

. . . .

"In this country parties having limited interests, as for example, tenants for life or years, may have a partition

in equity, as well as at law, in respect of their own interests only. But if a complete partition be desired all parties interested may be brought before the court, and all estates, whether in possession or expectancy, including those of infants and of persons not *in esse,* may be bound by the decree, ...

. . . .

The plaintiff is entitled to have her life estate allotted in severalty; . . . . "

In the case of *Trust Company v. Watkins,* 215 N.C. 292, 1 S.E. 2d 853, the Court in a dicta statement quoted from *McEachern* with approval.

Nevertheless, defendant Carr's ability to institute partition proceedings does not decide the question here presented. We must determine if the testator intended that the trustee should make actual partition.

In *Trust Company v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578, it is stated:

"Judicial construction is guided and controlled by well-recognized and established canons of construction, some of which must be invoked here.

"The discovery of the intent of the testator as expressed in his will is the dominant and controlling objective of testamentary construction, for the intent of the testator as so expresed is his will. *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888; *Trust Co. v. Waddell,* 234 N.C. 454, 67 S.E. 2d 651; *Seawell v. Seawell,* 233 N.C. 735, 65 S.E. 2d 369; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

. . . .

"The intention of the testator need not be declared in express terms. It is sufficient if it can be inferred from particular provisions of the will and from its general scope and import. *Trust Co. v. Miller, supra* (223 N.C. 1, 25 S.E. 2d 177); *Efird v. Efird,* 234 N.C. 607 (68 S.E. 2d 279). And greater regard is to be given to the dominant purpose of the testator than to the use of any particular words. *Heyer v. Bulluck, supra; Trust Co. v. Waddell, supra.*"

Item VIII of testator's will provided that upon termination of the trust the trustee shall *"distribute, pay over and deliver the property."* (Emphasis ours.)

Black's Law Dictionary, 562 (4th ed., 1957) defines "distribute" as follows: "To deal or divide out in proportion or in shares."

In the same Item of the will the testator stated: "My trustee shall, in the distributing such trust assets between my wife and daughter, *allot* to my wife in her share as much of my real estate as my trustee shall deem practical. . . . "

In the case of *Fort v. Allen,* 110 N.C. 183, 14 S.E. 685, this Court said: "The use of the word 'allotted' in itself implies a full partition of the land. To allot means 'to set apart a thing to a person as his share, as to allot a fund or land.' Anderson Law Dictionary, 51."

Black's Law Dictionary, 100 (4th ed. 1957) defines "allot" as follows: "To apportion, distribute; to divide property previously held in common among those entitled, assigning to each his ratable portion, to be held in severalty; to set apart specific property, a share of a fund, etc., to a distinct party."

[3] The use of these key words in their common and accepted meaning implies a testamentary intention that there be a partition of the trust lands. In our opinion the entire will evidences a paramount intent to provide for the well-being of testator's wife and child. Equally manifest is the intention that the wife be allotted at least one-half of the real estate remaining at its termination. By the terms of the will the testator recognized the wife's ability to manage and supervise farm operations, and he specifically gave to his corporate trustee the right to partition and to conclusively fix values in making settlement so as to allow it to safely and easily make partition of the lands with or without court action. Thus, we are led to conclude that the testator intended that the trustee make an actual partition in the distribution of the lands remaining in the trust at its termination.

However, plaintiff argues most strenuously that since the will contains a provision giving the trustee the power to "include undivided interests in the property so devised or allotted," that it is not required to make partition.

In 7 Strong's North Carolina Index 2d, Wills, § 28, pp. 598-599, it is stated:

> "Apparent conflicts will be reconciled, and irreconcilable repugnancies will be resolved, by giving effect to the general prevailing purpose of the testator, and the last expression of intent will ordinarily prevail over a prior irreconcilable provision. But the provisions must be wholly irreconcilable for this rule to apply. A phrase should not be given a significance which clearly conflicts with the evident intent and purpose of the testator as gathered from the four corners of the instrument, and the courts will adopt that construction which will uphold the will in all its parts if such course is consistent with the established rules of law and the intention of the testator."

The power to include undivided interests in making division of the property was listed among the voluminous general powers granted to the corporate trustee in Item V of the will, and was not included in Item VIII of the will where the trustee received its specific directions for distribution upon termination of the trust. The granting of this single power in the general powers given to the trustee will not supersede the evident intent of the testator gathered from the entire will. *Hubbard v. Wiggins,* 240 N.C. 197, 81 S.E. 2d 630.

Nor do we agree with plaintiff's contention that it is now impossible for it to make an actual partition between the beneficiaries because it has executed a trustee's deed to defendant Smetzer purporting to convey in fee simple the undivided interest in the lands in question.

[4] The deed delivered to defendant Smetzer gave her no more interest in the lands than was given by the will. Even giving effect to the deed, both parties would retain an undivided interest in the same lands. The relationship of trustee and *cestui que trust* still exists, and the trustee may not deprive itself of power to carry out the intent of the testator by executing a deed to defendant Smetzer. *Robinson v. Ingram,* 126 N.C. 327, 35 S.E. 612.

The testator evidenced confidence in his executor and trustee by granting it practically unlimited powers for the purpose of administering his estate and the trust. The granting of such extensive powers further indicated his desire that the

trustee be given such powers as would insure an orderly and efficient administration of testator's estate and the trust created by his will.

In Bogert, Trusts and Trustees, 2d ed., § 1010, it is stated:

> "If a trust is terminated in any way . . . the trustee has power to perform such acts as are necessary to the winding up of the trust and the distribution of the trust property as are expressly given or reasonably implied from the trust instrument; and he has the duty of carrying out this part of the trust administration with reasonable care and prudence. . . . *It would be extremely unreasonable to hold that the settlor intended that on the expiration of the trust the burden of care and distribution should fall on the beneficiaries who were entitled to the property.*" (Emphasis ours.)

The trustee, in the exercise of its fundamental duty to administer the trust according to the intent of the testator, should actually partition the real estate constituting the corpus of the trust at its termination.

The Court of Appeals correctly decided that the trial judge committed error in allowing defendant Smetzer's motion to dismiss the action as to her pursuant to Rule 41(b) of the Rules of Civil Procedure.

[5, 6] The pleadings here and the stipulated facts show a bona fide controversy justiciable under our Declaratory Judgment Act. G.S. 1-253 *et seq., Sternberger v. Tannenbaum,* 273 N.C. 658, 161 S.E. 2d 116. The pleadings and stipulations raise issues of fact and questions of law common to all the parties, and defendant Smetzer's rights must of necessity be affected by a final judgment. She is a proper and necessary party. *Oxendine v. Lewis,* 251 N.C. 702, 111 S.E. 2d 870, *Overton v. Tarkington,* 249 N.C. 340, 106 S.E. 2d 717.

[7] Defendant Carr requests that we determine whether the remainder interest after her life estate is vested or contingent.

The language of the will makes it abundantly clear that testator intended that his wife (defendant Carr) have only a life estate in the lands remaining in the trust at its termination. This intent is not contrary to any rule of law and not at variance with public policy. *Trust Co. v. Bass,* 265 N.C. 218, 143

S.E. 2d 689. Thus, defendant Carr has no standing to demand that we make this determination.

We affirm that part of the Court of Appeals' decision which reversed the trial judge's order dated 1 August 1970 and filed 21 August 1970.

We reverse that portion of the decision of the Court of Appeals which affirmed the judgment dated 1 August 1970 and filed 11 September 1970.

This case is returned to the Court of Appeals with direction that it enter an order vacating the judgment of the Superior Court of Harnett County and directing the Superior Court to enter judgment consistent with this opinion.

Except as to the reversal of the trial court's order allowing defendant Smetzer's motion to dismiss the action as to her, the decision of the Court of Appeals is

Reversed.

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

STATE OF NORTH CAROLINA v. RONALD DWAINE CARNES AND RICHARD ALLEN CARTER

No. 19

(Filed 10 November 1971)

1. **Robbery § 3— armed robbery — admission of loaded pistol not used in robbery**

Although the State's evidence tended to show that the only gun used in an armed robbery by two defendants was a .32 pistol found in defendants' car at the time of their arrest less than a half hour after the robbery, the trial court did not err in the admission of a .38 pistol found on the ground beside defendants' car on the same occasion or in the admission of testimony that it was loaded.

2. **Robbery § 3— armed robbery — bills and coins found in defendants' possession**

In this prosecution for the armed robbery of a food store, the trial court did not err in the admission of bills and coins found in defendants' pockets when they were arrested less than a half hour

after the robbery at a location two miles from the crime scene, notwithstanding there was a discrepancy between the aggregate of the bills and coins so found and the amount allegedly taken from the food store and there was no identification of the money in defendants' possession as that taken from the store.

3. **Criminal Law § 115— instructions on lesser degrees**

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises only when there is evidence from which the jury could find that such included crime of lesser degree was committed. G.S. 15-169; G.S. 15-170.

4. **Robbery § 5— armed robbery — failure to submit lesser included offense**

In this armed robbery prosecution, the trial court did not err in failing to instruct the jury on lesser included offenses where the State's evidence showed a completed robbery at gunpoint and there was no evidence that would support a finding that either defendant was guilty of a lesser included offense.

5. **Criminal Law § 21— preliminary hearing — withdrawal of retained counsel — denial of continuance — court-appointed counsel representing two defendants**

Where an attorney had been appointed to represent two defendants charged with armed robbery, and an attorney retained by one defendant three days before a preliminary hearing was scheduled appeared at the hearing and requested that he be allowed to withdraw as counsel because he had not had sufficient time to prepare for the hearing, which request was allowed by the court, the trial court did not err in denying a motion for continuance of the preliminary hearing and in holding the hearing with the court-appointed attorney representing both defendants, notwithstanding one defendant stated that he did not want the court-appointed attorney to represent him.

APPEAL by defendants from *Johnston, J.*, November 9, 1970 Criminal Session of FORSYTH Superior Court, transferred for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G. S. 7A-31(b) (4).

Defendants, Ronald Dwaine Carnes (Carnes) and Richard Allen Carter (Carter), were charged in separate bills of indictment with robbery with firearms of Opal Juanita Stroud in violation of G.S. 14-87. Defendants pleaded not guilty and were represented at trial by Robert H. Sapp, Esq., court-appointed counsel.

The only evidence was that offered by the State.

The testimony of Mrs. Opal Juanita Stroud, summarized except where quoted, tends to show the facts narrated in the following two paragraphs.

Defendants entered the Li'l General Food Store on Patterson Avenue, Winston-Salem, at approximately 9:00 p.m. on September 10, 1970. Mrs. Opal Juanita Stroud, a new employee, was by herself at the back of the store. Carnes entered first and asked for a certain type of wine, which the store did not have. Carter asked where the cold wine was kept and said he would take two bottles of Red Ripple. Mrs. Stroud climbed on top of the cooler to get the wine. One of the defendants asked for Cold Duck, but the other wanted pink champagne, which Mrs. Stroud got. Several teenagers had come into the store by this time and a line had formed at the cash register at the front of the store, so Mrs. Stroud went to help the new arrivals. Carnes got in line and said something which Mrs. Stroud did not hear. Then he said, "This is a holdup." Mrs. Stroud disbelieving him, he said, "I am not kidding. This is a holdup, you better look at the door." Mrs. Stroud looked at the door and saw Carter "holding a .32 automatic gun" on her.

Carnes reached over the counter and took the money out of the open register. Carter called to him, saying, "Ronald, get it all, get the change—get it all." Scattering change over the floor, Carnes dropped the money he had gathered into the bag with the wine. He demanded four packs of Juicy Fruit, and Mrs. Stroud said nothing. He took the four packs of chewing gum and departed. Carter started to go but then went over to Mrs. Stroud and asked for her pocketbook. Mrs. Stroud denied having a pocketbook, whereupon Carter picked her pocketbook up from the floor and departed with it. The pocketbook, Mrs. Stroud believed, contained almost $50.00; the cash register had contained about $80.00. Later, in the police-station garage, she noticed, by chance, her pocketbook lying on the back seat of a white Toyota.

Sharon Fulton, whose testimony completely substantiated Mrs. Stroud's, went into the Li'l General Store just before the robbery. Miss Fulton fully recognized both defendants, having stood in line behind Carnes when the latter gave his order to "Look up," and then having looked up at Carter and at the gun he was pointing toward the people in the store. Miss Fulton had observed a white Toyota turn around in the bank parking lot opposite the Li'l General Store and go "around the corner" before she went into the store. After the robbery, she observed defendants walking toward a filling station near which a white Toyota was parked.

James Williams happened by the store, not knowing a robbery was taking place. He started to enter, but did not "because there were too many people standing around the door." He went on walking down the street, when he heard a running noise behind him. Two fellows, one of whom he positively identified as Carnes, ran to a white Toyota and got in. While they were trying to start the Toyota, Williams made a mental note of the license number and went back to the L'il General Food Store to inform Mrs. Stroud of it.

Police Officer R. U. Lloyd, on patrol on the evening of September 10, 1970, received a call on the radio concerning a white 1968 two-door Toyota, license number AX7145. He saw the car at approximately 9:30 p.m., two miles from the store. One defendant was in the car, the other outside. He pulled up behind them and told them to put their hands on the trunk of the car. He found a knife, several rounds of ammunition, and some change in Carnes' pockets. He found a large amount of coins in Carter's right front pocket and an unknown quantity of U. S. bills of unknown denomination in his left front pocket. A .32 caliber pistol and a box of .32 bullets were found in the glove compartment, and a lady's handbag on the back seat. He found "three bottles of wine, one empty in the right front floorboard of the car. All three bottles were cold. There were two bottles of Red Ripple and one bottle of Champagne." Just as the Toyota was being driven away by a fellow officer, Officer Lloyd observed a loaded .38 caliber pistol lying on the grass by the curb.

The money in question was turned over to Detective H. E. Hartsoe of the Winston-Salem Police Department. Hartsoe testified that the change amounted to $13.37; the bills totaled $68.00 in tens, fives, and ones; $3.19 was found in the pocketbook.

The jury returned verdicts of guilty as charged. As to each defendant, judgment imposing a sentence of not less than fifteen nor more than twenty years was pronounced. Defendants excepted and appealed.

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

Robert H. Sapp for defendant appellants.

BOBBITT, Chief Justice.

Three assignments of error were brought forward by both defendants. Two relate to the admission of evidence and one relates to the judge's charge. An additional assignment of error is brought forward by Carnes and relates solely to him.

[1] Each defendant assigns as error the admission in evidence of the .38 pistol and of testimony that it was loaded. He contends the pistol pointed at Mrs. Stroud when defendants were robbing her was a .32 and therefore evidence as to the loaded .38 found by Officer Lloyd when defendants were arrested was irrelevant.

The evidence shows the loaded .38 pistol was found beside the white Toyota less than half an hour after the robbery and at a location two miles from the Li'l General Food Store. It was found on the same occasion when the officers found the .32 pistol and a box of .32 bullets in the glove compartment, Mrs. Stroud's handbag on the back seat, bottles of wine and champagne from the Li'l General Food Store in the Toyota and bills and coins in the pockets of defendants.

If defendants, on the occasion of the robbery, had a loaded .38 pistol available for use in case their felonious venture "backfired," this would seem a relevant circumstance even though no necessity arose for the display or use of the loaded .38 pistol. Relevant or not, this evidence constituted an insignificant part of the State's case. The overwhelming evidence of defendants' guilt dispels any suggestion that prejudice resulted from the admission in evidence of the .38 pistol and of testimony that it was loaded.

[2] Each defendant assigns as error the admission in evidence of the bills and coins found in defendants' pockets. Defendants direct attention to the discrepancy between the aggregate of the bills and coins so found and the amount allegedly taken from the Li'l General Food Store and to the failure to identify the money in defendants' possession as bills and coins taken from the Li'l General Food Store. In view of the time, place and circumstances of the arrest of defendants, the fact they had bills and coins in their possession would seem relevant. We perceive no prejudicial error in the admission of the bills and coins and the testimony relating thereto.

As to each defendant, the court instructed the jury they could return one of only two possible verdicts: "either guilty as

charged in the bill of indictment or not guilty." Each defendant assigns as error the court's failure to instruct the jury that they might find him "guilty of some lesser degree of the offense charged: common law robbery, attempted robbery, assault with a deadly weapon, or simple assault." The assignment is without merit.

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

G.S. 15-170 provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

[3] G.S. 15-169 and G.S. 15-170 are applicable *only when there is evidence* tending to show that the defendant may be guilty of a lesser offense. *State v. Jones,* 249 N.C. 134, 139, 105 S.E. 2d 513, 516 (1958), and cases cited; *State v. Williams,* 275 N.C. 77, 88, 165 S.E. 2d 481, 488 (1969). "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954); *State v. Williams, supra.*

[4] In the present case, the State's evidence, which showed a completed robbery of Mrs. Stroud by defendants at gunpoint, was positive and unequivocal as to each and every element of the crimes charged in the bills of indictment. There was no evidence that would warrant or support a finding that either defendant was guilty of a lesser included offense. Hence, the court's instructions were proper.

[5] There remains for consideration the additional assignment of error by Carnes. The record discloses the following pertinent

facts: Defendants were arrested on September 11, 1970. Each requested the assignment of counsel; and, upon findings that each was an indigent, Chief District Court Judge Abner Alexander appointed Robert H. Sapp, Esq., to represent them. Preliminary hearings were scheduled for September 21, 1970. On September 21, 1970, Sammie Chess, Jr., Esq., appearing before Judge Alexander in district court, stated that he had been retained as counsel for Carnes on September 18, 1970; that he had numerous cases in other courts that week; and that, because of insufficient time to prepare the case, he was not in position to try it at that time. Thereupon, Mr. Chess moved for leave to withdraw as counsel. Judge Alexander allowed this motion and ordered that Mr. Sapp proceed as counsel for both defendants notwithstanding Carnes stated he did not want Mr. Sapp to represent him.

A motion by Mr. Sapp that the preliminary hearings be deferred was denied. The preliminary hearings were held as scheduled. The record is silent as to what occcurred at the preliminary hearings except that Judge Alexander found probable cause as to each defendant and bound him over to the Superior Court of Forsyth County. At the preliminary hearings before Judge Alexander and later at trial in the superior court, both defendants were represented by Mr. Sapp, their court-appointed counsel.

In his brief, Carnes asserts that "it is probable that said attorney (Chess) would have remained as his attorney for the course of the trial" if the request for postponement of his preliminary hearing had been granted. This contention is pure speculation. Nothing in the record indicates any attempt was made to procure the services of Mr. Chess as counsel for Carnes in the superior court.

The record fails to show that Carnes was prejudiced in any way because he was represented by Mr. Sapp rather than by Mr. Chess at the preliminary hearing to determine whether the evidence was sufficient to support a finding of probable cause as to Carnes' guilt of armed robbery as charged in the warrant. Seemingly, both defendants were represented by their court-appointed counsel at the preliminary hearings and at trial in the superior court as effectively as the State's evidence and defendants' lack of evidence would permit.

Accordingly, the verdicts and judgments will not be disturbed.

No error.

JUNIOR JERNIGAN, PETITIONER v. STATE OF NORTH CAROLINA, RESPONDENT

No. 39

(Filed 10 November 1971)

1. **Criminal Law § 181— post conviction relief — authority of Paroles Board — reinstatement of parolee's sentence to run at completion of new sentence**

A prisoner who is currently serving a valid sentence for a crime committed during his parole may not use the Post Conviction Act to challenge an order of the Board of Paroles providing that the remainder of the sentence upon which the parole was revoked shall be served at the completion of the sentence for the crime committed during the parole, the question not arising out of the proceeding which resulted in his conviction. G.S. 15-217; G.S. 15-217.1; G.S. 148-62.

2. **Habeas Corpus § 2— right to habeas corpus hearing — prisoner serving valid sentence — challenge to Paroles Board's authority to reinstate old sentence**

A prisoner who is currently serving a valid sentence for a crime committed during his parole may not avail himself of the writ of habeas corpus to challenge an order of the Board of Paroles providing that the remainder of the sentence upon which the parole was revoked shall be served at the completion of the sentence for the crime committed during the parole.

3. **Habeas Corpus § 2— writ of habeas corpus — prisoner's right to be released at future date**

The writ of habeas corpus is not available to test a prisoner's right to be released at some future time.

4. **Administrative Law § 3— review of Paroles Board order — inapplicability of administrative review statutes**

The provisions for Judicial Review of Decisions of Certain Administrative Agencies are inappropriate to challenge the constitutionality of a statute authorizing the Board of Paroles to reinstate a parolee's sentence so as to run at the expiration of the sentence currently being served by the parolee. G.S. 143-306 through G.S. 143-316.

5. **Declaratory Judgment Act § 1; Criminal Law § 145.5— declaratory judgment — review of Paroles Board order**

The Declaratory Judgment Act is an appropriate means whereby a prisoner who is currently serving a valid sentence for a crime com-

mitted during his parole may challenge an order of the Board of Paroles providing that the remainder of the sentence upon which the parole was revoked shall be served at the completion of the sentence for the crime committed during the parole. G.S. 1-253 through G.S. 1-267; G.S. 148-62.

6. **Declaratory Judgment Act § 1— declaratory judgment — civil remedy**

A declaratory judgment is a civil remedy which may not be resorted to to try ordinary matters of guilt or innocence.

7. **Declaratory Judgment Act § 1— declaratory judgment relief — penal matters**

The courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters.

8. **Criminal Law § 145.5; Constitutional Law §§ 5, 9— reinstatement of parolee's original sentence — authority of Paroles Board to impose consecutive sentence — separation of powers**

The statute which empowers the Board of Paroles to order that the remainder of a parolee's sentence upon which his parole was revoked shall be served at the completion of the sentence imposed for a crime committed during the parole, *held* constitutional; there is no merit to a defendant's contention that the statute failed to provide adequate guidelines for the Board of Paroles or that it violates the separation of powers clause of the State Constitution. G.S. 148-60; G.S. 148-62; N. C. Constitution, Art. I, §§ 6, 19 (1970) and Art. IV, § 1 (1970).

ON *certiorari* to review the decision of the Court of Appeals (reported in 10 N.C. App. 562, 179 S.E. 2d 788) affirming the judgment of *Canaday, J.*, entered at the 22 June 1970 Criminal Session of DURHAM.

Proceeding instituted by Junior Jernigan, a person imprisoned in the penitentiary. Petitioner, purporting to act under the Post Conviction Hearing Act (G.S. 15-217 through G.S. 15-222), petitioned the Superior Court of Durham County to reverse an order of the Board of Paroles directing that the sentences under which he is presently confined in the State Prison System be served consecutively.

The facts are not in dispute. In 1959 and 1960 petitioner was convicted of various felonies and received prison sentences totaling over fifteen years. He was paroled 5 October 1966 and was on parole on 11 March 1967.

At the April 1967 Criminal Session of Durham, petitioner was convicted of larceny from the person, which allegedly occurred on 11 March 1967. On 6 April 1967, the presiding judge,

the Honorable Leo Carr, sentenced petitioner to a term of ten years. The judgment made no reference to his prior sentences and, on 7 April 1967, petitioner was committed to Central Prison to begin serving the ten-year sentence.

On 10 April 1967, under the authority of G.S. 148-61.1, the Board of Paroles revoked petitioner's parole of 5 October 1966, and, under G.S. 148-62, directed that he serve the remainder of the sentences upon which his parole had been revoked after the completion of the ten-year-sentence imposed by Judge Carr on 6 April 1967.

In June 1970 petitioner, *in propria persona,* instituted this proceeding by filing a petition in which he sought, *inter alia,* to present the question whether his ten-year-sentence for the offense of larceny from the person should run concurrently with the remainder of the sentences upon which his parole had been revoked. Upon his application for counsel Judge Canaday adjudged him to be an indigent and appointed Mr. James B. Craven III, attorney-at-law, to represent him.

At the hearing before Judge Canaday on 26 June 1970 petitioner stipulated that he was not asserting any error or denial of constitutional rights in the trials which resulted in the sentences against him; that the only issue he raises is whether the sentence imposed by Judge Carr should run concurrently with the unserved portions of the sentences upon which parole had been revoked. Petitioner attacked the validity of G.S. 148-62 and argued that the Board of Paroles lacked authority to order the sentences served consecutively. Judge Canaday ruled the statute valid and "explicit" in this case. He denied petitioner "any relief in this situation" and ordered him returned to the custody of the Department of Correction.

The Court of Appeals granted petitioner's application for certiorari. It held that G.S. 148-62 did not contravene the Constitution of North Carolina and affirmed Judge Canaday's judgment. We allowed certiorari.

Attorney General Morgan; Staff Attorney Eatman for the State.

James B. Craven III for plaintiff appellant.

SHARP, Justice.

[1] The first problem presented by this appeal is whether the question which petitioner raises is justiciable under the Post Conviction Act. The answer is No. The Act authorizes any prisoner serving a sentence in the State Prison System to institute a proceeding in the Superior Court of the county of his conviction to challenge the validity of his incarceration upon the following grounds: (1) that *in the proceeding which resulted in his conviction* there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina; (2) that the court was without jurisdiction to impose the sentence; (3) that the sentence exceeds the maximum authorized by law; or (4) that the sentence is subject to collateral attack upon any ground heretofore available under any common law or statutory remedy as to which there has been no prior adjudication. G.S. 15-217 and G.S. 15-217.1.

Petitioner concedes the validity of his trial and the sentences under which he is now being held. His only attack is upon the subsequent order of the Board of Paroles relating to the administration or order in which the sentences are to be served. The Post Conviction Hearing Act may not be used for this purpose. How then should petitioner have proceeded?

[2, 3] Petitioner could not have proceeded by petition for a writ of habeas corpus because he is not now illegally imprisoned. Presently he is serving a valid ten-year-sentence, begun 7 April 1967. Under our decisions the sole question for determination in a habeas corpus proceeding is whether the petitioner is *then* being unlawfully imprisoned. The writ is not available to test a prisoner's right to be released at some future time. *State v. Lewis,* 274 N.C. 438, 164 S.E. 2d 177; *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581; *In re Renfrow,* 247 N.C. 55, 100 S.E. 2d 315; *In re Swink,* 243 N.C. 86, 89 S.E. 2d 792. *Cf. State v. Clendon,* 249 N.C. 44, 105 S.E. 2d 93; *State v. Austin,* 241 N.C. 548, 85 S.E. 2d 924. *Contra Peyton v. Rowe,* 391 U.S. 54, 20 L. ed. 2d 426, 88 S.Ct. 1549 (1967)—construing 28 U.S.C. § 2241(c)(3)(1970), a section of the federal habeas corpus statutes.

[4] The provisions for Judicial Review of Decisions of Certain Administrative Agencies (G.S. 143-306 through G.S. 143-316) were likewise inappropriate to initiate an attack upon the con-

stitutionality of a statute fixing the powers and duties of the Board of Paroles. If ever applicable to an order of the Board of Paroles, these provisions were not designed for this particular purpose. "The question of the constitutionality of a statute is not for administrative boards but for the judicial branch." *Insurance Co. v. Gold, Commissioner of Insurance,* 254 N.C. 168, 173, 118 S.E. 2d 792, 796.

[5] G.S. 148-62 has not heretofore been considered by this Court. Since the question of its constitutionality is a matter of importance both to the public and to prisoners, it is one which should be answered authoritatively. We therefore treat this proceeding as one instituted under the Declaratory Judgment Act. For the reasons hereinafter set out we deem this Act to provide an appropriate means of deciding this case.

The Declaratory Judgment Act (G.S. 1-253 through G.S. 1-267) provides that "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." G.S. 1-254. To that end the courts of record are "empowered to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." G.S. 1-253.

[6] A declaratory judgment is a civil remedy which may not be resorted to to try ordinary matters of guilt or innocence. It will not be granted when its only effect is to determine questions which properly should be decided in a criminal action. 22 Am. Jur. 2d *Declaratory Judgments* § 28 (1965); Annot., *Declaratory Relief—Criminal Statutes,* 10 A.L.R. 3d 727 (1966). For instance, one charged with the violation of a statute is not entitled to a declaratory judgment adjudicating its constitutionality, a matter which can be authoritatively settled in the criminal action. *Spence v. Cole,* 137 F. 2d 71 (4th Cir. 1943). *See Chadwick v. Salter,* 254 N.C. 389, 119 S.E. 2d 158; 26 C.J.S. *Declaratory Judgments* § 33 (1956). "The rationale seems to be that if the facts upon which the propriety of a criminal prosecution are in dispute, the dispute ought to be resolved by the triers of the facts in a criminal prosecution in accordance with the rules governing criminal cases. . . . This reasoning, however, is inapplicable if the crucial question is one of law, since the question of law will be decided by the court in any event and

not by the triers of the facts." *Bunis v. Conway,* 234 N.Y.S. 2d 435, 437, 17 App. Div. 2d 207. *See* 22 Am. Jur. 2d *Declaratory Judgments* § 24 (1965); Annot., 10 A.L.R. 3d 733 (1966).

G.S. 148-62 is not a criminal law in the sense that it defines or prohibits a specific crime and imposes a penalty for its commission. It relates to the administration by the Board of Paroles of a prisoner's several *criminal* sentences after his parole has been revoked upon conviction of a new crime. The constitutionality of the statute is a pure question of law; no disputed facts are involved.

[7] The courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters. When a plaintiff has a property interest which may be adversely affected by the enforcement of the criminal statute, he may maintain an action under the Declaratory Judgment Act to determine the validity of the statute in protection of his property rights. *Calcutt v. McGeachy,* 213 N.C. 1, 195 S.E. 49; *Bryarly v. State,* 232 Ind. 47, 111 N.E. 2d 277 (1953), and cases therein cited. In *Calcutt* this Court held that a declaratory judgment was available to test the constitutionality of the statute making the possession of certain slot machines illegal and authorizing their confiscation. The decision upheld the statute.

In *Vanilla v. Moran,* 67 N.Y.S. 2d 833, *aff'd* 272 App. Div. 859, 70 N.Y.S. 2d 631, *appeal denied* 272 App. Div. 971, 72 N.Y.S. 2d 420, *app. dismd.* 297 N.Y. 593, 75 N.E. 2d 265, *aff'd* 298 N.Y. 796, 83 N.E. 2d 696 (1949), the plaintiff, whose sentence had been commuted, brought an action against the governor of the State of New York and its Board of Paroles for a judgment declaring that he was no longer subject to the Board's jurisdiction. The court in holding that plaintiff was entitled to the declaratory judgment emphasized that (1) only a question of law was involved; (2) a determination of the question would serve a practical end by defining an uncertain or disputed jural relationship; (3) the plaintiff had no other adequate legal remedy. After having approved the procedure the court rendered judgment against the plaintiff on the merits. A similar result was reached in *Koyce v. United States Board of Parole,* 306 F. 2d 759 (D.C. Cir. 1962), a case in which the plaintiff sought a declaratory judgment that parole conditions could not be applied to him because he had been convicted by court martial.

It is the rule in this jurisdiction that "[a]n Act will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees." *Roller v. Allen,* 245 N.C. 516, 518, 96 S.E. 2d 851, 854. This may be done in a properly constituted action under the Declaratory Judgment Act when a specific provision of a statute is challenged by a person directly and adversely affected thereby. *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413. This case presents such a challenge.

If the statute is unconstitutional, petitioner will be entitled to his release from prison at the conclusion of the ten-year-sentence he is now serving. If the statute is constitutional, at the completion of his present sentence he will begin the unserved portions of the previous sentences from which he was paroled. Fundamental rights are involved. Petitioner is entitled to know what effect the statute has upon his future.

Having determined the route to decision, we now consider the constitutionality of G.S. 148-62. It reads as follows:

"If any parolee, while being at large upon parole, shall commit a new or fresh crime, and shall enter a plea of guilty or be convicted thereof in any court of record, then, in that event, his parole may be revoked according to the discretion of the Board of Paroles and at such time as the Board of Paroles may think proper. If such parolee, while being at large upon parole, shall commit a new or fresh crime and shall have his parole revoked, as provided above, he shall be subject, in the discretion of the Board of Paroles, to serve the remainder of the first or original sentence upon which his parole was granted, after the completion or termination of the sentence for said new or fresh crime. Said remainder of the original sentence shall commence from the termination of his liability upon said sentence for said new or fresh crime. The Board of Paroles, however, may, in its discretion, direct that said remainder of the original sentence shall be served concurrently with said second sentence for said new or fresh crime."

[8] Petitioner concedes the validity of that portion of G.S. 148-62 which authorizes the Board of Paroles to revoke the parole of a parolee who "shall commit a new or fresh crime and shall enter a plea of guilty or be convicted thereof in any court of

record." He challenges only the provisions of the statute which empower the Board to direct that a returned prisoner shall serve the remainder of any sentence upon which his parole was revoked *after* the completion of the sentence for the new crime.

In *In re Parker,* 225 N.C. 369, 372, 35 S.E. 2d 169, 171, this Court said: *"In the absence of a statute to the contrary,* and unless it sufficiently appears otherwise in the sentence itself, it is generally presumed that sentences imposed in the same jurisdiction, to be served at the same place or prison, run concurrently, although imposed at different times and by different courts and upon a person already serving a sentence." (Emphasis added.)

Relying upon *In re Parker,* petitioner asserts that "there is a clear conflict between the case law of the Supreme Court . . . and the statute relied on by the Board of Paroles, G.S. 148-62." He argues that the statute is unconstitutional because (1) it grants judicial power to the Board of Paroles in contravention of N. C. Const., Art. IV § 1(1970) and contravenes the separation of powers clause, N. C. Const., Art. I § 6 (1970); and (2) it provides no standards to guide the Board of Paroles in the exercise of the discretionary power granted it and thereby deprives petitioner of his liberty other than by the law of the land, a violation of N. C. Const., Art. I § 19 (1970).

In a lucid and closely reasoned opinion by Judge Parker, the Court of Appeals rejected petitioner's contentions and upheld the constitutionality of G.S. 148-62. We adopt the rationale of that opinion which is supported by convincing authority. *Zerbst v. Kidwell,* 304 U.S. 359, 58 S.Ct. 872, 82 L. Ed. 1399 (1937); *State v. Fazzano,* 96 R.I. 472, 194 A. 2d 680 (1963), and cases therein cited. *See* 59 Am. Jur. 2d *Pardon and Parole,* §§ 79, 83 (1971).

This State is firmly committed to the doctrine that "[t]he legislative, executive, and supreme judicial powers of the State Government shall be forever separate and distinct from each other." N. C. Const., Art. I, § 6 (1970). However, " 'the classification cannot be very exact, and there are many officers whose duties cannot be exclusively arranged under the duties of either of these heads.' Cooley on Torts, p. 375 . . . The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination

be one of guilt, then to pronounce the punishment or penalty prescribed by law. The execution of the sentence belongs to a different department of the government. The manner of executing the sentence and the mitigation of punishment are determined by the legislative department, and what the Legislature has determined in that regard must be put in force and effect by administrative officers." *People v. Joyce,* 246 Ill. 124, 135, 92 N.E. 607, 612.

In the division of governmental authority the "legislature has exclusive power to determine the penalogical system of the [State]. It alone can prescribe the punishment for crime. . . . It may therefore establish a parole system. . . . The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be intrusted by the legislature to non-judicial agencies." *Commonwealth ex rel Banks v. Cain,* 345 Pa. 581, 587, 28 A. 2d 897, 900-1 (1942), 143 A.L.R. 1473, 1476-1477 (1943).

When Judge Carr sentenced petitioner, then a parolee, he performed a judicial act by fixing his punishment within the limits prescribed by the legislature. The legislature may also prescribe the order in which multiple sentences are to be served. This it has done with reference to sentences imposed for escapes from the prison system, G.S. 148-45, and it has given the Board of Paroles the option of so doing when it revokes a parole under G.S. 148-62. When Judge Carr sentenced petitioner his parole had not been revoked. Whether it would thereafter be revoked because of petitioner's new crime was a matter committed to the discretion of the Board of Paroles under G.S. 148-62, the provisions of which are annexed to every parole. *Cf. State v. Yates,* 183 N.C. 753, 111 S.E. 337. These provisions do not infringe upon the authority of the judiciary.

In *State v. Fazzano, supra,* a case involving a situation identical with this one, the Supreme Court of Rhode Island considered a statute giving the Board of Paroles power to determine whether a parole violator should serve concurrent or consecutive sentences. In upholding the validity of the statute, the court said:

"Not only is it within the power of the legislature to provide that one who violates his parole must serve the balance of the original term and the term imposed for the violation consecutively, but it is also clearly within its power to provide

that the balance of the original term shall be served only if a parole board in its sole discretion revokes the conditional release or parole given to the offender. A person imprisoned by a court is turned over to an administrative agency for the execution of the sentence." *Id.* at 96, 194 A. 2d at 684.

In *Zerbst v. Kidwell, supra,* the Supreme Court sustained the authority of the federal Board of Paroles to require a parolee, returned to prison because of his commission of a second crime, to complete his interrupted first sentence at the expiration of his second. Justice Black, who delivered the opinion of the Court said: "Unless a parole violator can be required to serve some time in prison in addition to that imposed for an offense committed while on parole, he not only escapes punishment for the unexpired portion of his original sentence, but the disciplinary power of the Board will be practically nullified." *Id.* at 363, 82 L. Ed. at 1401, 58 S.Ct. at 874.

Petitioner's contention, that the legislature has provided no standards to guide the Board of Paroles in determining whether a parole violator shall serve his original sentence concurrently with his new sentence or at the completion of it and that this failure nullifies the purported grant of authority, cannot be sustained.

G.S. 148-60 enumerates a number of factors to which the Board of Paroles shall give "due consideration" before it paroles a prisoner. In effect, however, the statute merely says that before the Board paroles a prisoner its members should feel that there is "a reasonable probability" that his release will not be "incompatible with the welfare of society." The legislature could have multiplied words but, in the end, it could have given the Board no more precise instructions with reference to parole. The same is true with reference to the exercise of its discretion in determining whether the sentence of a parole violator shall run concurrently or consecutively. It is implicit in the law that the Board's primary consideration shall be the "welfare of society."

The inherent conflict between the need to place discretion in capable persons and the requirement that discretion be in some manner directed cannot be satisfactorily resolved. No specifications can be written which will achieve the welfare of society, justice, rehabilitation, and similar goals. By what

standard does a judge determine a convicted defendant's sentence when the statute provides limits of "not less than five nor more than 60 years" (G.S. 14-19) or specifies "imprisonment in the court's discretion not to exceed 10 years"? In prescribing the punishment for crime the legislature has not attempted the impossible; it has eschewed guidelines and, of necessity, reposed confidence in the judge. Of necessity, it has done the same with reference to the Board of Paroles.

We hold that G.S. 148-62 does not violate the Constitution of North Carolina. The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. GERALDINE GLADDEN

No. 94

(Filed 10 November 1971)

1. **Criminal Law § 76— defendant's statements to an officer — admissibility**

Police officer's testimony on voir dire provided ample evidence to support the court's findings of fact and conclusions of law that defendant had been fully advised as to her constitutional rights prior to making a statement to the officer and that any statement she made was freely and voluntarily made without any threats against her or any promise of reward.

2. **Criminal Law § 75— in-custody interrogation — statements made in defendant's home**

Defendant's conversation with a police officer in her own home when the officer, upon receiving a call from defendant, went there to investigate a homicide, was not an in-custody interrogation within the scope of Miranda v. Arizona, 384 U.S. 436, where nothing in the record indicates that defendant was in custody or otherwise deprived of her freedom of action prior to or during her conversation with the officer, or that defendant at that time had been charged with any criminal offense.

3. **Homicide § 26— second degree murder — instructions — "intentional" shooting**

Failure of the court in a single instance to charge that, in order to find defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that defendant "intentionally" shot deceased was not prejudicial error where in subsequent portions of the charge the court used the word "intentionally" in every instance in which a substantially similar instruction was given.

4. Homicide § 9— self-defense — real or apparent necessity

The right of self-defense rests upon necessity, real or apparent; and, in the exercise of his lawful right of self-defense, a person may use such force as is necessary or apparently necessary to protect him from death or great bodily harm.

5. Homicide § 9— killing in self-defense — apparent necessity

One may kill in self-defense even though to kill is not actually necessary to avoid death or great bodily harm if he believes it to be necessary and has a reasonable ground for that belief, it being for the jury to determine the reasonableness of the belief from the facts and circumstances as they appeared to him at the time of the killing.

6. Homicide § 28— self-defense — instructions on apparent necessity

While neither "apparent" nor "apparently" appears in the court's instructions on self-defense in this homicide prosecution, the court sufficiently instructed the jury on apparent necessity when it charged that defendant, in the lawful exercise of her right of self-defense, could stand her ground in her own home, without retreating, "and use whatever force she reasonably believed to be necessary to save herself from death or great bodily harm" and that it was for the jury "to determine the reasonableness of the Defendant's belief, from the circumstances as they appeared to her at the time."

APPEAL by defendant from *Collier, J.*, March 22, 1971 Session of RANDOLPH Superior Court, transferred for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant was indicted, in the form prescribed by G.S. 15-144, for the murder of "Arron Robert Golston" on July 27, 1969, and tried thereon for murder in the second degree or such lesser included offense as the law and the evidence might justify.

The State offered the testimony of Dr. Richard P. Hudson, Jr., Chief Medical Examiner of the State of North Carolina, and of Lt. Neil Cockerham of the Detective Division of the Asheboro Police Department.

Dr. Hudson testified that he performed an autopsy on the body of Aaron Robert Colston and that in his opinion Colston's death "was caused from hemorrhage from gunshot wounds of the abdomen."

The testimony of Lt. Cockerham consists largely of statements made to him by defendant in her own home when he went there to investigate the homicide. She informed him that on July 26, 1969, a Saturday, Colston came to her residence in

Asheboro about 8:45 p.m. He had come there and had spent the weekend "many times" in the past. Colston and his wife had kept defendant's son until he was thirteen years old. Upon Colston's arrival on this occasion, he and defendant sat around and drank some intoxicating beverages. They became involved in an argument, which grew louder and more intense. During the altercation Colston cursed and contemned Lester Bright. Colston insisted that defendant go back to Albemarle and stay with him and with Mrs. Colston. He was "high-tempered." He put his hand in his pocket. She was afraid of a knife. She did not see a knife or a gun but was afraid. At that time, "she shot him twice with a handgun, pistol." (Cockerham *understood* that Colston and defendant were blood first cousins and that Lester Bright was defendant's husband.)

Defendant offered the testimony of Barney Trogdon and of Elsie (Cuffie) McMillan.

Trogdon testified in substance: He is seventy-one years old. Colston "was not quite as old." Colston was a "well-built," "heavy-set man," weighing 170 to 180 pounds and was "around 5'6" or 5'8" tall." Trogdon looked after Lester's garden and on this occasion went to defendant's home because he had "a tiller" there. He and Colston arrived at defendant's home about the same time. Defendant was not there. Upon defendant's return, Colston and defendant became involved in an argument. Colston was insisting that defendant go home with him and she was refusing. Although no fighting or shooting occurred while he was there, he could see "trouble was coming up" and he "didn't want to get involved." Trogdon testified: "He [Colston] told her he had a home for her as long as she lived. She [defendant] said she couldn't go and she told him not to stay there and he said, 'I'll stay if I dam well please.' It got hot when I left." Trogdon's testimony contains no reference to McMillan.

McMillan testified in substance: He had been at defendant's residence for approximately "20 or 30 minutes" when the shooting occurred. The argument between Colston and defendant continued until Colston was shot. While in the kitchen, Colston had slapped and kicked defendant. Colston put his hand in his pocket and defendant backed from the kitchen to her bedroom. Colston followed her "until she got the pistol." She came out of the bedroom with the pistol in her hand. Although she asked him to leave, Colston did not leave but kept

trying "to walk up on her." Defendant told Colston not to walk up on her with his hands in his pockets. She asked him, "Please, take your hands out." He did not comply and she shot him one time. He gritted his teeth and took "a step away towards Geraldine." She fired a second time and he fell. The shooting occurred in the living room. Defendant called the police and the ambulance. McMillan "never did see a weapon of any kind in the hands of" Colston nor did he hear Colston make any statement as to "what he was going to do to [defendant] with what he had in his pocket." McMillan testified he left before the investigating officers arrived; that he did not talk to any investigating officer; and that, prior to trial, defendant's counsel was the only person he had told concerning what he saw on the occasion of the shooting.

The jury returned a verdict of guilty of voluntary manslaughter and judgment imposing a sentence of eighteen to twenty years was pronounced.

Attorney General Morgan, Assistant Attorney General Harris and Trial Attorney Cole for the State.

Bell, Ogburn & Redding, by John N. Ogburn, Jr., and J. Howard Redding for defendant appellant.

BOBBITT, Chief Justice.

Defendant excepted to the findings of fact and conclusions of law made by Judge Collier at the conclusion of a *voir dire* hearing that was held to determine the admissibility of Cockerham's testimony about statements made to him by defendant. Defendant assigns error on the ground the evidence did not support the court's findings and conclusions.

[1] On *voir dire* Cockerham testified that before he permitted defendant to tell what had occurred, he advised her in detail of each of her constitutional rights in the manner required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974 (1966), as a prequisite to an in-custody interrogation. Defendant did not testify at *voir dire* or at trial. Judge Collier made findings of fact and conclusions of law to the effect that defendant had been fully advised as to her constitutional rights and that any statement she made was freely and voluntarily made without any threats against her or any promise of reward. Cockerham's testimony on *voir dire* pro-

vided ample evidence to support the court's findings of fact and conclusions of law.

[2] If considered an in-custody interrogation, Cockerham's testimony as to statements made by defendant was competent. However, under the circumstances of this case, we are of opinion and hold that the conversation of defendant with Cockerham in defendant's own home was not an in-custody interrogation. Apparently, having called the police, defendant wanted an opportunity to explain what had happened. Defendant had known Cockerham as an officer for at least fifteen years; and, upon his arrival, she invited him into her home where the conversation occurred. Nothing in the record indicates defendant was in custody or otherwise deprived of her freedom of action prior to or during her conversation with Cockerham. Nor is there any indication that defendant at that time had been charged with any criminal offense.

Miranda involved custodial interrogations. The majority opinion, delivered by Mr. Chief Justice Warren, states: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444, 16 L. Ed. 2d at 706, 86 S.Ct. at 1612, 10 A.L.R. 3d at 993. The opinion states further: "Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Id.* at 477-78, 16 L. Ed. 2d at 725-26, 86 S.Ct. at 1629-30, 10 A.L.R. 3d at 1013. The opinion also states: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.* at 478, 16 L. Ed. 2d at 726, 86 S.Ct. at 1630, 10 A.L.R. 3d at 1014. See *State v. Meadows,* 272 N.C. 327, 336, 158 S.E. 2d 638, 644 (1968).

In our view, the requirements of *Miranda* prerequisite to an in-custody interrogation do not apply to the present factual

situation. Thus, Cockerham's testimony about what defendant said was competent for two separate reasons: compliance with *Miranda* and inapplicability of *Miranda.*

Defendant assigns as error the denial of her motion at the conclusion of all the evidence for judgment as in case of nonsuit. Her contention is based on the asserted incompetency of Cockerham's testimony as to her statements. Absent this testimony, she contends the evidence shows she acted in self-defense. Since Cockerham's testimony was competent, we need not consider whether the evidence offered by defendant, if accepted by the jury, was sufficient to exonerate her on the ground of self-defense.

[3] Defendant excepted to the following portion of the court's charge, *viz.:* "Now, I charge you, Members of the Jury, for you to find the Defendant guilty of murder in the second degree, the State must prove two things beyond a reasonable doubt; first, that the Defendant shot Aaron Robert Colston with a deadly weapon, and I instruct you that a firearm is a deadly weapon; and, second, that the deceased, excuse me, Aaron Robert Colston's death was a natural and probable result of the Defendant's act. Now, to find the Defendant guilty of murder in the second degree, the State must prove beyond a reasonable doubt that the Defendant intentionally shot Aaron Robert Colston with a deadly weapon and that Aaron Robert Colston's death was a natural and probable result of the Defendant's act. The law then presumes that the killing was unlawful and done with malice which, nothing else appearing, constitutes murder in the second degree."

Defendant concedes that the second and third sentences of this excerpt from the charge are in accord with our decisions. See *State v. Barrow,* 276 N.C. 381, 390, 172 S.E. 2d 512, 518 (1970), and cases cited; *State v. Winford,* 279 N.C. 58, 65, 181 S.E. 2d 423, 427-28 (1971); *State v. Duboise,* 279 N.C. 73, 81-82, 181 S.E. 2d 393, 398 (1971). With reference to the phrase "natural and probable result," see *State v. Woods,* 278 N.C. 210, 219, 179 S.E. 2d 358, 363-64 (1971).

Defendant assigns as error the first sentence of the instruction on the ground the word "intentionally" was omitted. Subsequent to the portion of the charge assigned as error, the court used the word "intentionally" in every instance in which

a substantially similar instruction was given. Moreover, near the end of the charge, the court instructed the jury as follows: "If the State has failed to prove from the evidence and beyond a reasonable doubt that she *intentionally* shot him or that his death was a natural and probable result of Geraldine Gladden's act, it would be your duty to find the Defendant not guilty." (Our italics.) In our view, the inadvertent omission of the word "intentionally" in a single instance could not have misled or confused the jury, especially when there is no suggestion that the firing of the pistol by defendant was unintentional.

[4, 5] Defendant assigns as error the court's instructions relating to self-defense. As defendant correctly contends, the right of self-defense rests upon necessity, real or apparent; and, in the exercise of his lawful right of self-defense, a person may use such force as is necessary or apparently necessary to protect him from death or great bodily harm. *State v. Jennings*, 276 N.C. 157, 164-65, 171 S.E. 2d 447, 452-53 (1970), and cases cited. In this connection, the full significance of the phrase "apparently necessary" is that a person may kill even though to kill is not actually necessary to avoid death or great bodily harm, if he believes it to be necessary and has a reasonable ground for that belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to him at the time of the killing. *State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24 (1968), and cases cited.

[6] Defendant contends the court failed to instruct properly with reference to *apparent necessity*. While neither "apparent" nor "apparently" appears in the court's instructions, the court did charge the jury that defendant, in the lawful exercise of her right of self-defense, could stand her ground in her own home, without retreating, "and use whatever force she reasonably believed to be necessary to save herself from death or great bodily harm" and that it was for the jury "to determine the reasonableness of the Defendant's belief, from the circumstances as they appeared to her at the time." In our view, the instructions were substantially in accord with our decisions. Defendant's contention relates more to semantics than to substance.

We deem it unnecessary to discuss assignments of error directed to other excerpts from the charge. None discloses prejudicial error.

It is noted: The indictment charges the murder of "Arron Robert Golston." Deceased is referred to in the evidence and in the court's charge by the name of "Aaron Robert Colston." The evidence offered by the State and by defendant as to the circumstances under which the deceased was shot and killed by defendant dispels doubt as to the identity of the deceased. No question has been or is raised by defendant on account of the discrepancy.

Accordingly, the verdict and judgment of the court below will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. FRANKIE ROSEMAN, ALIAS FRANKLIN ROSEMOND

No. 24

(Filed 10 November 1971)

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

On motion for judgment of nonsuit, all admitted evidence favorable to the State, whether competent or incompetent, must be considered and must be deemed true.

2. Criminal Law § 106— motion for nonsuit — question presented

On motion for judgment of nonsuit, the question for the court is whether there is substantial evidence to support a finding both that an offense charged in the bill of indictment has been committed and that the defendant committed it.

3. Rape § 17; Criminal Law § 9— assault with intent to commit rape — sufficiency of evidence — aiding and abetting.

State's evidence was sufficient to support a jury finding that defendant was a participant in an assault upon a female with intent to commit rape; it is immaterial whether defendant personally intended to rape the female if he, being present, aided and abetted his companions in their assault with such intent.

4. Rape § 18— assault with intent to commit rape — instructions on lesser offense of assault on a female

Trial court, in a prosecution for assault on a female with intent to commit rape, was not required to instruct the jury on the lesser included offense of assault on a female, where all the evidence relating to the assault tended to show that the purpose of the assailants was to commit rape, and there was no evidence that the female was assaulted for any other purpose or for no purpose.

5. **Rape § 18; Indictment and Warrant § 17— assault with intent to commit rape — instruction as to date of offense — question of variance between instruction and indictment**

In a prosecution for assault on a female with intent to commit rape, an instruction which gave the date of the offense as 24 April 1970 was not prejudicially erroneous on the ground that the indictment alleged the offense to have occurred on 25 April 1970, where (1) all of the evidence was to the effect that the girl who was assaulted and her escort went to a school dance on the evening of April 24, that they both left the gymnasium around midnight, and that the assault occurred shortly thereafter; (2) the defendant did not claim an alibi; and (3) the defendant admitted to the investigating officer that he assaulted the girl.

6. **Criminal Law § 76— admission of written confession into evidence — removal of introductory paragraph**

The removal of the introductory paragraph from defendant's written confession, prior to the introduction of the confession into evidence, was not prejudicial to the defendant, where the paragraph merely contained language that the defendant was making his statement after being advised of his rights and without any threats or promise of reward being made to him.

7. **Criminal Law § 76— admissibility of confession — sufficiency of court's finding of voluntariness**

In a prosecution for assault on a female with intent to commit rape, findings by the trial court that the minor defendant's confession to the crime was freely, voluntarily, and understandingly made, *held* supported by the evidence on the voir dire, especially where the defendant himself testified on voir dire that he had not been threatened or coerced into making the statement, that he was not scared of the officer, and that he told the officer the truth.

8. **Criminal Law § 75— contention that officer's interrogation of defendant was too brief**

Defendant's novel contention that the investigating officer did not take enough time in interrogating him, thereby violating his constitutional rights, *held* without merit.

APPEAL by defendant from *Lupton, J.*, at the 23 November 1970 Criminal Session of FORSYTH, heard prior to determination by the Court of Appeals.

Upon an indictment, proper in form, the defendant was tried upon the charge of assault with intent to commit rape. He was found guilty as charged and sentenced to ten to fifteen years in the State's Prison. This is a companion case to *State v. Harold Williams*, decided this day, although the two cases were tried separately before different judges and different juries. In the present case, the State's evidence as to the circumstances

and details of the assault was substantially the same as is set forth in the Williams case.

Neither the girl nor her escort was able to identify the present defendant as one of the five assailants. The only evidence so identifying him was a statement by him to Police Detective Dalton following his arrest upon a warrant duly issued. The substance of his statement, put in evidence by the State, after a voir dire in the absence of the jury, was that he, Harold Williams and three others rode together to the Reynolds High School and were together on the school grounds, the scene of the assault; seeing the girl and her escort approaching, the defendant and his companions told them that they were prison escapees (a false statement) and wanted to go to the airport; the five Negroes then separated the girl from her escort, two of them taking her escort a short distance away and the other three remaining with the girl; they disrobed the girl; thereupon, one of the defendant's partners instructed him to go up the hill where the girl's escort and his custodians were; the defendant did so but returned, and upon his return "the girl's face was bloody" and the defendant started walking away; his four companions then came by, picked him up and carried him home. The girl's escort testified that one of her five assailants stuttered in response to a question by Williams concerning a gun. The defendant has an impediment in his speech.

The defendant did not testify and offered no evidence at his trial, except that he and his father testified in the absence of the jury upon the voir dire with reference to the giving of the defendant's statement. At the trial the defendant was represented by his privately retained counsel. The same counsel was appointed by the court to represent him upon this appeal, the defendant having been found to be an indigent subsequent to the trial and giving notice of appeal. The only witness for the State, other than the girl and her escort, was Officer Dalton who testified:

Following the defendant's arrest and the service upon him of a warrant charging him with assault with intent to commit rape, he read to the defendant a statement of his rights. This statement, which was put in evidence, was the complete and customary Miranda warning. The defendant then stated that he understood what his rights were, but did not want to sign a

waiver of them and wanted to telephone his father. Officer Dalton then took the defendant into an adjoining room and permitted him to make a telephone call. He then brought the defendant back to the interrogation room. There the defendant signed a waiver of his rights, after which he made an oral statement. He was then taken before a secretary of the police department and made a statement before her, which she typed and he signed. This was the statement subsequently introduced in evidence by the State and summarized above.

The waiver so signed by the defendant was printed or typed upon the same paper as the statement of rights so read to him. It stated that the defendant had read the statement of his rights and understood what they were, that he was willing to make a statement and answer questions, that he did not want a lawyer at that time, that no promises or threats had been made to him and no pressure or coercion applied by anyone, and the defendant understood and knew what he was doing. Upon the State's asking that the waiver of rights be marked as an exhibit, the defendant objected and requested a voir dire, which was conducted in the absence of the jury.

Upon the voir dire, Officer Dalton testified:

After the defendant made the telephone call to someone, he made a statement to the officer. At that time he made no request for counsel and gave no indication of unwillingness to make a statement. Officer Dalton made no threats to the defendant, nor did anyone else in his presence. No promises of leniency were made to the defendant in return for his statement. The defendant, in the officer's opinion, was not under the influence of alcohol or drugs. Following the oral statement, Officer Dalton carried the defendant to the secretary's office where the defendant made a statement, which was typed by the secretary. Officer Dalton handed the typewritten statement to the defendant and the defendant held it in position as though reading it. After the defendant finished reading it, Officer Dalton asked him if he desired to make any changes or corrections therein. The defendant replied in the negative and signed the statement in Officer Dalton's presence. The defendant was arrested shortly after 5 p.m., the warning of his rights was read to him by Officer Dalton at 5:22 p.m., the defendant started giving his statement to the secretary at 6:10 p.m., the dictation thereof

required five to seven minutes and the typing just a few minutes.

The statement of rights so read to the defendant, the defendant's signed waiver and the defendant's signed statement concerning the offense were offered in evidence on the voir dire. At the top of the statement concerning the offense appeared the following:

> "April 29, 1970 6:10 P. M.
> "STATEMENT OF FRANKLIN ROSEMOND, CM, Age 17, 750 E. Clemmonsville Rd
>
> "I, Franklin Rosemond, make the following statement to Detective G. T. Dalton and Detective L. L. Benbow, whom I know to be Police Officers for the Winston-Salem Police Department. I make this statement after being advised of my rights and signing a waiver of rights, without any threats or promise of reward being made to me."

Officer Dalton further testified on the voir dire as follows:

Following the telephone call, made by the defendant at 5:25 p.m., the defendant was asked by Officer Dalton if he wanted to sign the waiver of rights and he replied in the affirmative. He thereupon signed it, Officer Dalton noting the time, 5:28 p.m., thereon. Officer Archer and Officer Dalton were present when the defendant made the telephone call. Officer Dalton did not talk by telephone to the defendant's father. He does not recall whether Officer Archer did so. After the defendant signed the waiver of rights, Officer Dalton asked what happened on the night of the assault and the defendant made an oral statement to Officer Dalton in the presence of Officer Archer. He was then carried to the secretary before whom he again made his statement in the presence of Officer Dalton. The secretary typed the statement in the presence of the defendant and Officer Dalton. The above quoted first paragraph of the typed statement was not spoken to the secretary by the defendant. After the typed statement was prepared, it was handed to the defendant, he indicated that he had read it and desired to make no change in it and signed it.

The defendant testified on the voir dire as follows:

He first saw the waiver after he had made his statement and signed it, Officer Dalton having told him to read it and

sign it. Prior to that, Officer Dalton had stated the defendant's rights to him. He requested permission to call his father. Officer Dalton told him to tell his part, his companions having told what they had to tell. Prior to telling the defendant of his rights, Officer Dalton had asked him what happened at the scene of the assault. He started reading the statement after the secretary typed it, but Officer Dalton took it from him before he had finished. He signed the statement. He had not telephoned his father at the time he signed either the statement or the waiver, being permitted to call his father after he had so signed the papers. Officer Dalton also talked to his father on the telephone. His father came to the jail fifteen to thirty minutes after the telephone conversation.

The defendant further testified on the voir dire:

"I did not lie to the police officers when I talked to them. I told them the truth." He is seventeen years of age and in the tenth grade at Parkland High School in Winston-Salem. He could have read the typewritten statement which he signed but he did not. He was looking at it. He was not threatened by Officer Dalton and was not scared of him. No police officer mistreated him, threatened him or beat him and he was not afraid of them. He did not include in his oral statement to the secretary the first paragraph of the written statement above quoted.

The defendant's father testified on the voir dire:

He learned of the defendant's arrest when the officer called him. The person who talked to him on the telephone did not identify himself but informed the witness that his son was charged with attempted rape. He heard the defendant say, "Daddy" on the telephone. He arrived at the detective's office fifteen minutes after the telephone call. Detective Dalton greeted him at the door and told him his son was involved in some trouble. The defendant walked out into the lobby and they talked. The defendant did not tell his father at that time that he had signed a statement.

The defendant, recalled on the voir dire, testified:

The officer told him to tell what happened because it could help him in court but said he wouldn't guarantee that it would

help him. At the time he signed the statement, he did not know it could be used in court against him.

Officer Dalton, recalled on the voir dire, testified:

The defendant signed the waiver before making any statement. The oral statement to Officer Dalton was substantially the same as the written statement transcribed by the secretary. He did not tell the defendant that to make a statement might help him.

At the conclusion of the voir dire, the court found: The defendant was arrested on a valid warrant; he was brought to the Detective Division of the Police Department where Officer Dalton read to him his rights (the finding setting these out in detail); thereafter the defendant said he understood his rights; he did understand them; he intelligently, understandingly, freely, voluntarily and without any promises or threats or duress waived the said rights; thereafter he intelligently, understandingly, freely, voluntarily, and without any promises or threats or duress made an oral statement to Officer Dalton and dictated a statement to a secretary, this being the State's exhibit, except for the first paragraph; Officer Dalton did not tell the defendant that if he made a statement it might help him, but he could not guarantee it. Thereupon, the court concluded that both the oral statement and the written statement, with the exception of the first paragraph of the latter, were admissible in evidence and overruled the objections of the defendant thereto.

Thereupon, Officer Dalton testified, in the presence of the jury, to the same effect as his testimony upon the voir dire. He identified the waiver and the statement, signed by the defendant. These were admitted into evidence over the defendant's objection, the above quoted first paragraph of the typewritten statement having first been cut therefrom pursuant to the order of the court.

The court instructed the jury that it might return one of two verdicts: Guilty of an assault with intent to commit rape, as charged in the bill of indictment, or not guilty. The defendant assigns as error, among other things, the court's failure to instruct the jury that it might return a verdict of guilty of assault on a female.

Attorney General Robert Morgan and Assistant Attorney General Thomas B. Wood for the State.

Annie Brown Kennedy for the defendant.

LAKE, Justice.

[1-3] The defendant's Assignments of Error 5 and 6 are to the failure of the court to grant his motion for judgment of nonsuit. Upon such a motion, all admitted evidence favorable to the State, whether competent or incompetent, must be considered and must be deemed true. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777. The question for the court is whether there is substantial evidence to support a finding both that an offense charged in the bill of indictment has been committed and that the defendant committed it. *State v. Cutler, supra; State v. Bass,* 253 N.C. 318, 116 S.E. 2d 772. The evidence in this record is clearly sufficient to support a finding that the offense charged in the bill of indictment was committed and that the defendant was a participant therein. It is immaterial whether he, personally, intended to rape the girl if he, being present, aided and abetted his companions in their assault with such intent. These assignments of error are without merit.

[4] The defendant's Assignments of Error 7 and 9 are to the failure of the court to instruct the jury that it could find the defendant guilty of assault on a female, a lesser offense included within the crime charged in the indictment. Where all of the evidence tends to show that the offense committed, if any, was that charged in the bill of indictment and there is no evidence tending to show the commission of a lesser, included offense, except insofar as it is a necessary element of the offense charged, the court is not required to submit for the jury's consideration the possibility of a verdict of guilty of such lesser, included offense, or to instruct the jury concerning such lesser offense. *State v. Bridges,* 266 N.C. 354, 146 S.E. 2d 107; *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27; *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545; *State v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188. All of the evidence in the present record concerning the assault upon the girl tends to show that the purpose of the assailants was to commit rape. There is no evidence what-

ever tending to show that she was assaulted for any other purpose, or for no purpose. Under these circumstances, it was not error to instruct the jury that they might return either a verdict of guilty of assault with intent to commit rape or a verdict of not guilty. These assignments of error are without merit.

[5] Assignment of Error No. 8 is that the court instructed the jury that if they found from the evidence and beyond a reasonable doubt, that "on the twenty-fourth day of April, 1970" the defendant assaulted the girl (the other elements of the offense being included in the instruction), it would be the jury's duty to render a verdict of guilty as charged in the bill of indictment. The alleged error is that the indictment states that the offense occurred on the 25th of April 1970. All of the evidence is to the effect that the girl and her escort went to the dance on the evening of April 24th and left the gymnasium, wherein the dance was held, about midnight and that the assault occurred shortly thereafter. The defendant does not claim an alibi. His statement to the investigating police officer was an admission that he participated in the assault. The portion of the court's charge of which he now complains could not have prejudiced him in any way. There is no merit in this assignment of error.

[6] Assignments of Error 3 and 4 are to the admission in evidence of the typewritten statement signed by the defendant after the court had caused to be cut off from the statement, as originally signed, the first paragraph, which paragraph is quoted in the foregoing statement of facts. The record shows that the court's reason for withholding this paragraph from the jury was that the evidence, on the voir dire examination, showed that these words were not spoken by the defendant to the police secretary but were a mere introductory form customarily used by the Police Department in the writing of such statements. While the jury might well have been permitted to see the entire typewritten statement, since all of the evidence is to the effect that the statement in its entirety was submitted to the defendant for his inspection and he, thereupon, signed it, it is obvious that the withholding of the paragraph in question from the jury's consideration could not possibly have been prejudicial to the defendant. There is no suggestion in the record that the defendant requested that this paragraph remain

on the statement in the event that the jury was to be permitted to see or hear the remainder. There is no merit in these assignments of error.

[7] The defendant's Assignments of Error 1 and 2 are directed to the court's findings upon the voir dire and to the admission in evidence of the waiver of rights signed by the defendant, the statement of his rights which Officer Dalton testified he read to the defendant and the defendant's signed statement concerning his participation in the offense charged. The court's findings are supported by evidence received upon the voir dire and are, therefore, conclusive upon appeal. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581; *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Inman,* 269 N.C. 287, 152 S.E. 2d 192; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. The defendant's own testimony on the voir dire was to the effect that he was not threatened or coerced into signing either the waiver of his rights or the statement concerning his participation in the offense charged. He testified that he was not scared of the investigating officer. The evidence is clear that he could read and that he had the opportunity to read both the waiver and the statement concerning his participation in the offense charged. He testified on the voir dire that he told the officer the truth.

[8] In his brief the defendant contends that Officer Dalton's notes and testimony show the whole sequence of events, beginning with his arrest and culminating in his signing of the statement, consumed approximately one hour. His contention that the officer did not take enough time in the interrogation, and thereby violated the defendant's constitutional rights, is a novel variation upon the current theme song of criminals who have made in-custody confessions. The usual contention is that the confession was obtained by prolonged interrogation, wearing down the suspect's will and so exhausting him that, hungry, frightened and weary, he was coerced into a confession he would not otherwise have made. The novelty of this defendant's variation of the theme does not confer any merit upon it. There is nothing to show that Officer Dalton was told that the defendant's father was en route to the police station or that the defendant wished to defer further conversation until his father arrived. These assignments of error are overruled.

No error.

Smith v. Exterminators

HALLIE SMITH, MOTHER, EDWARD SMITH, FATHER, JERRY SMITH, DECEASED, EMPLOYEE PLAINTIFF v. ALLIED EXTERMINATORS, INC., EMPLOYER AND BITUMINOUS CASUALTY CORPORATION, CARRIER DEFENDANTS

No. 50

(Filed 10 November 1971)

1. **Master and Servant § 91— workmen's compensation — failure to file claim — insurance carrier's request for hearing**

A father was not barred from participation in a workmen's compensation award for the death of his son by his failure to file a claim therefor, where the matter was heard by the Industrial Commission upon the request of the employer's insurance carrier pursuant to G.S. 97-83.

2. **Master and Servant §§ 69, 79— workmen's compensation death benefits — persons entitled to payment — amount of payment**

When the deceased employee left no one who was dependent upon him, wholly or partially, G.S. 97-40 determines the person or persons entitled to the death benefits provided in the Workmen's Compensation Act, but the amount payable to the person or persons entitled thereto is determined by G.S. 97-38, commuted to its present, lump sum value.

3. **Master and Servant § 69— workmen's compensation death benefits — amount of payment**

When the deceased employee left no dependent, whole or partial, the amount payable is not reduced from the amount which would have been payable had the deceased employee left a person wholly dependent upon him unless there is no person surviving who falls within the term "next of kin" as defined in G.S. 97-40.

4. **Master and Servant § 79— workmen's compensation death benefits — next of kin**

Where the deceased employee leaves surviving him a person or persons in two or more of the categories of relationship included as "next of kin" in G.S. 97-40, the benefits are not distributed among all such surviving "next of kin," but the statute directs the Industrial Commission to "the general law applicable to the distribution of the personal estate of persons dying intestate" to determine "the order of priority" among the several persons.

5. **Master and Servant § 79— workmen's compensation death benefits — next of kin — order of priority**

The meaning of "order of priority" in G.S. 97-40 is that the person or persons in one category take to the exclusion of the others.

6. **Master and Servant § 79— workmen's compensation death benefits — next of kin — father, mother and brothers — persons entitled to benefits**

Where a deceased employee was not survived by a widow, child or any whole or partial dependent, but was survived by his father, mother and two brothers, the mother and father would be entitled

to the death benefits for which the employer or its carrier is liable under G.S. 97-38 to the exclusion of the brothers, nothing else appearing. G.S. 29-15(3).

7. **Master and Servant § 79— workmen's compensation — parent who abandoned employee during minority — right to share in award**

Since under G.S. 31A-2 a father who wilfully abandons his child during the child's minority loses all right to intestate succession in the distribution of the personal estate of his intestate, deceased child, such a father cannot share in death benefits for which the deceased child's employer or its carrier is liable under G.S. 97-38.

APPEAL by plaintiff, Hallie Smith, and by defendants, from the decision of the Court of Appeals, reported in 11 N.C. App. 76, 180 S.E. 2d 390, reversing an award by the North Carolina Industrial Commission and remanding the matter to the Commission, *Brock, J.*, dissenting.

It is stipulated that, on 17 July 1969, Jerry Smith, an employee of Allied Exterminators, Inc., sustained an injury by accident arising out of and in the course of his employment, which injury resulted in his immediate death, and that his average weekly wage was $64.00. The matter came on for hearing before the full North Carolina Industrial Commission upon the request of the insurance carrier pursuant to G.S. 97-83. No exception, except as hereafter noted, is taken to its findings of fact, which summarized, were:

The deceased employee was the son of Hallie and Edward Smith. Two other sons, aged 24 and 23, respectively, were also born of the marriage. At the time of the hearing, the father and mother of the deceased had been separated approximately twelve years. The father had not supported any of the children for more than eleven years prior to the death of the deceased employee. He wilfully abandoned the care and maintenance of the deceased during his minority. He has never filed a claim for compensation in this matter with the Commission. At the time of his death, the deceased and his brothers lived in the home maintained by Hallie Smith, their mother. The deceased paid his mother weekly payments in lieu of board and lodging. The deceased was not survived by a widow, child or any dependent, whole or partial. Neither his mother, his father nor either of his two brothers was dependent upon the deceased, wholly or partially.

Upon these facts, the majority of the Commission concluded: The father, Edward Smith, abandoned the care and

maintenance of the deceased during his minority and, thereby, lost all right to intestate succession in any part of the estate of the deceased. Not having filed a claim with the Commission within one year from the date of the death, the father is now barred from filing a claim. The deceased was survived by no dependents, whole or partial. He was survived by his mother, who is his next of kin and who, in that capacity, is entitled to compensation at the rate of $38.40 per week for 350 weeks, commuted to its present value and payable in a lump sum.

An award of such compensation payable to Hallie Smith, the mother of the deceased, together with funeral expense benefits, was made by the Commission. Commissioner Stephenson concurred in the result, his view being that G.S. 31A-2 has no bearing upon the matter since death benefits payable under the Workmen's Compensation Act do not become a part of the assets of the estate of the deceased employee, but the father, having filed no claim within twelve months from the date of the death, cannot share in the compensation benefits payable and, consequently, they are payable to the mother alone.

From the award of the Industrial Commission the defendants appealed to the Court of Appeals, assigning as error:

1. The findings by the Commission that the father has not filed a claim for compensation with the Commission and that he was not dependent, wholly or partially upon the deceased, and the conclusion of the Commission that, by such failure to file a claim within one year from the death of the deceased, the father is now barred from filing such claim.

2. The Commission erred in its conclusion that the mother is entitled to the present commuted value of compensation at the rate of $38.40 per week for 350 weeks, and in the award thereof.

The Court of Appeals, Judge Brock dissenting, reversed and remanded to the Full Commission for the entry of an award in accordance with its opinion. It held that the Commission had jurisdiction to determine the rights of the father, that it erred in concluding that the father's right was barred by his failure to file a claim, and that G.S. 31A-2, which provides that any parent, who has wilfully abandoned the care and maintenance of his or her child, shall lose all right to intestate succession in any part of the child's estate, does not apply to this

matter since death benefits, payable under the Workmen's Compensation Act, do not become part of the estate of the deceased employee. Judge Brock dissented on the ground that G.S. 31A-2 is applicable and excludes the father from participation in the benefits payable by reason of the employee's death, thus entitling the mother to the award made by the Commission.

Notice of the hearing before the Commission was mailed by the Commission to the father at his last known address. He did not appear at the hearing. His whereabouts are unknown.

The defendants contend that the Commission had jurisdiction to determine the claim of the father and that it correctly concluded that, by reason of his wilful abandonment of the deceased employee during the latter's minority, the father is not entitled to any portion of the death benefit. They contend, however, that the respective claims of the father and the mother are separate and distinct so that his ineligibility to receive what would otherwise have been payable to him does not enlarge the amount payable to the mother but relieves the defendants from that portion of what would otherwise be payable.

Powe, Porter & Alphin by Willis P. Whichard for Plaintiff.

Dupree, Weaver, Horton, Cockman & Alvis by Walter L. Horton, Jr., for Defendants.

LAKE, Justice.

G.S. 97-83 provides that if the employer and the dependents of the employee fail to reach an agreement in regard to compensation payable under the Workmen's Compensation Act within fourteen days after the "employee" (obviously a misprint intended to read "employer") has knowledge of the death, either party may make application to the Industrial Commission for a hearing in regard to matters at issue, and for a ruling thereon, whereupon the Commission shall set the date for a hearing and notify the parties thereof. G.S. 97-84 provides that the Commission shall hear the parties at issue and determine the dispute.

[1] In the present case, no agreement having been reached within the specified time and the carrier having made such application to the Commission, the Commission set the matter for hearing and gave notice to the parties, including the father.

The Commission, at such hearing, had jurisdiction to determine the rights of the father and mother, respectively, to benefits under the Act by reason of the death of their son. See, *Hanks v. Utilities Co.*, 210 N.C. 312, 186 S.E. 252. Thus, the father is not barred from participation in benefits payable under the Act by reason of his failure to file a claim therefor, but he is barred by the Commission's determination that he is not entitled to such benefits by reason of his abandonment of the deceased employee during the latter's minority, unless that determination be error:

G.S. 97-38 provides:

"If death results approximately from the accident * * * the employer shall pay or cause to be paid, subject to the provisions of the other sections of this article, weekly payments of compensation equal to sixty percent (60%) of the average weekly wages of the deceased employee at the time of the accident * * * for a period of three hundred and fifty weeks * * * to the person or persons entitled thereto as follows: * * * ."

G.S. 97-40 provides:

"Subject to the provisions of G.S. 97-38, if the deceased employee leaves neither whole nor partial dependents, then the compensation which would be payable under G.S. 97-38 to whole dependents shall be commuted to its present value and paid in a lump sum to the next of kin *as herein defined.* For purposes of this section and G.S. 97-38, 'next of kin' shall include only child, father, mother, brother or sister of the deceased employee. For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section, the order of priority among them shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate. * * * (Emphasis added.)

"If the deceased employee leaves neither whole dependents, partial dependents, nor next of kin as hereinabove defined, then no compensation shall be due or payable on account of the death of the deceased employee, except that the employer shall pay or cause to be paid the burial expenses of the deceased employee not exceeding five hundred dollars ($500.00) to the person or persons entitled thereto."

[2, 3] In the present case, it is stipulated, and the Commission has found that the deceased employee left no one who was dependent upon him, wholly or partially. Thus, G.S. 97-40 determines the person or persons entitled to receive the death benefits provided in the Act, but the amount payable to the person or persons entitled thereto is determined by G.S. 97-38, commuted to its present, lump sum value. When, as here, the deceased employee left no dependent, whole or partial, the amount payable is not reduced from the amount which would have been payable had the deceased employee left a person wholly dependent upon him unless there is no person surviving who falls within the term "next of kin," as defined in G.S. 97-40. Here, such a person does survive. Therefore, the amount to be paid is the full amount which would have been payable had the deceased left a person wholly dependent upon him. The only question remaining is, To whom is this sum payable?

[4, 5] G.S. 97-40 provides that the next of kin includes "child, father, mother, brother or sister" of the deceased. Obviously, however, where the deceased leaves surviving him a person or persons in two or more of these categories of relationship, the benefits are not distributed among all of such surviving "next of kin." In that event, the statute directs the Commission to "the general law applicable to the distribution of the personal estate of persons dying intestate" to determine "the order of priority" among these several persons. The meaning of an "order of priority" is that the person or persons in one category takes to the exclusion of the others.

The determination of the taker or takers is to be made in accordance with the general law governing the distribution of the personal property of the deceased employee, assuming he died intestate, leaving only his father, mother and two brothers surviving him. This is not because the benefits under the Act are or become part of the assets of the estate of the decedent. They do not. The Commission is directed to the general law governing intestate succession simply because, for this purpose only, the general law of intestate succession is incorporated by reference into G.S. 97-40.

[6, 7] Turning to the general law governing intestate succession to personal property, we find that, nothing else appearing, the father and the mother take in preference to the brothers. G.S. 29-15(3). Thus, the brothers do not share in the death

benefits for which the employer or its carrier is liable. However, something else does appear. The father wilfully abandoned the care and maintenance of the deceased during the latter's minority. G.S. 31A-2 provides that, in that event, the father loses all right to intestate succession in the distribution of the personal estate of his intestate, deceased child. Consequently, he does not share in the death benefits for which the employer or its carrier is liable under G.S. 97-38. This leaves the mother, Hallie Smith, as the only person entitled. She takes the entire sum which would have been payable had there been a person wholly dependent.

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

Reversed and remanded.

JOSEPH F. STEELMAN, ADMINISTRATOR OF THE ESTATE OF JOSEPH FLAKE STEELMAN, JR. v. CITY OF NEW BERN, NORTH CAROLINA, A MUNICIPAL CORPORATION

No. 6

(Filed 10 November 1971)

1. **Municipal Corporations § 12— electrocution of boy — action against municipality — sovereign immunity doctrine**

   The doctrine of sovereign immunity completely bars an action against a municipality for the death of a 16-year-old boy who was electrocuted when he touched a guy wire maintained by the municipality as a part of its street lighting system.

2. **Municipal Corporations § 12; State § 4; Constitutional Law § 10— modification of sovereign immunity doctrine — role of the Supreme Court**

   Modification or repeal of the doctrine of sovereign immunity should come from the General Assembly, not from the Supreme Court.

APPEAL by plaintiff from *Blount, J.*, December 1970 Civil Session of CRAVEN Superior Court.

On the night of 3 October 1969 Joseph Flake Steelman, Jr., attended a football game at the high school in New Bern, North

Carolina. While looking for an automobile in which he was to ride home, he was electrocuted when he touched a guy wire which supported a light pole on the New Bern High School grounds. The pole in question was owned by the city of New Bern as part of its operation of an electric distribution system. Joseph F. Steelman, father of the deceased and administrator of his estate, brought a civil action against the city of New Bern for the wrongful death of his sixteen-year-old son, alleging that his son's death was caused by the negligence of the city. The city filed an answer denying negligence and pleading governmental immunity.

In apt time defendant made a motion for summary judgment alleging that the cause of action arose out of the maintenance of a street lighting system operated by the city, a governmental rather than proprietary function, and that the doctrine of governmental immunity was applicable and constituted a complete bar to the action. Defendant filed affidavits of the city manager and an electrical engineer with the motion. These affidavits stated that the pole and wire in question were a part of the public street lighting system of the city of New Bern and that this system was separate and apart from the electrical system employed in the distribution of electricity for private purposes. The plaintiff did not respond to the defendant's affidavits by way of counter-affidavits or otherwise, as provided by Rule 56 of the North Carolina Rules of Civil Procedure.

On 3 November 1970 Judge Blount, after finding the facts in accordance with defendant's affidavits, concluded as a matter of law that plaintiff's cause of action arose out of the maintenance by defendant, a municipal corporation, of its public street lighting system; that the maintenance of said system was a governmental rather than a proprietary function; and that even if it should appear that the defendant was guilty of any act of negligence as alleged in the complaint, the defendant would have no liability to the plaintiff by reason thereof, for that governmental immunity is applicable and constitutes a complete bar to the maintenance of this action by plaintiff. The court then allowed the defendant's motion for summary judgment and dismissed the action.

Plaintiff excepted to the signing of the judgment and gave notice of appeal to the Court of Appeals. The case was trans-

ferred to this Court for initial appellate review under our order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

Adams, Lancaster, Seay, Rouse & Sherrill by Basil L. Sherrill and John E. Lansche for plaintiff appellant.

Walter L. Horton, Jr., and A. D. Ward for defendant appellee.

MOORE, Justice.

[1] Plaintiff's sole assignment of error is to the granting of defendant's motion for summary judgment on the basis that the governmental immunity doctrine applies to the maintenance of a municipal street lighting circuit.

Plaintiff, in an excellent and persuasive brief, concedes that this Court in *Baker v. Lumberton,* 239 N.C. 401, 79 S.E. 2d 886 (1953), held that a municipal corporation is not liable for negligence of its officers or agents when the injury results from contact with a wire used by the city in transmitting electricity for street lighting purposes only, since street lighting was a governmental function and not a proprietary function. In that case Justice Winborne (later Chief Justice) said:

> "1. It is contended, and rightly so, that the evidence shows affirmatively that the death of plaintiff's intestate resulted from contact with a wire used by the city in transmitting electricity for street lighting purposes only, a governmental function, in the performance of which the city is not liable for tortious acts of its officers and agents. *Hodges v. Charlotte,* 214 N.C. 737, 200 S.E. 889; *Beach v. Tarboro,* 225 N.C. 26, 33 S.E. 2d 64; *Alford v. Washington,* 238 N.C. 694; *Hamilton v. Hamlet,* 238 N.C. 741.
>
> "The decisions of this Court uniformly hold that, in the absence of some statute which subjects them to liability therefor, when cities acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit, they are not liable for the tortious acts of their officers or agents. See *Hodges v. City of Charlotte, supra;* also *Hamilton v. Hamlet, supra,* and numerous cases there cited.

"And it has been held by this Court that the installing and maintaining of a traffic light system in and by a city is in the exercise of a discretionary governmental function. See *Hodges v. City of Charlotte, supra; Beach v. Tarboro, supra; Alford v. Washington, supra; Hamilton v. Hamlet, supra.*"

In feudal England the monarchy was sovereign and could not be liable for damage to its subjects. This was based on the theory that "the king could do no wrong." Apparently, the present-day doctrine of governmental immunity from tort liability originated in the English case of *Russel v. Men of Devon,* 2 T.R. 667, 100 Eng. Rep. R. 359 (1788), which held that an unincorporated town could not be liable for damage caused by a defective bridge.

The doctrine was not a part of the common law of England which was adopted by the State of North Carolina in G.S. 4-1. That statute adopted the common law of England as of the date of the signing of the Declaration of Independence, which took place thirteen years before the *Russel* case was decided. The early North Carolina decisions expressly rejected the doctrine. *Meares v. Wilmington,* 31 N.C. 73 (1848); *Wright v. Wilmington,* 92 N.C. 156 (1885). However, commencing with the decision in *Moffitt v. Asheville,* 103 N.C. 237, 254, 9 S.E. 695, 697 (1885), this Court has not wavered from the basic rule there succinctly stated by Justice Avery:

"The liability of cities and towns for the negligence of their officers or agents, depends upon the nature of the power that the corporation is exercising, when the damage complained of is sustained. A town acts in the dual capacity of an *imperium in imperio,* exercising governmental duties, and of a private corporation enjoying powers and privileges conferred for its own benefit.

"When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents, subject to their control, although they may be engaged in some work that will enure to the general benefit of the municipality. . . .

> "On the other hand, where a city or town in exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence. . . . "

Plaintiff contends, however, that despite these decisions the origin of the doctrine of governmental immunity is questionable, its application results in gross inequities, and that the very definite trend in modern decisions is to abolish the doctrine.

From 1788 until fourteen years ago the doctrine of governmental immunity from tort liability remained the rule in all jurisdictions in this country, although for many years the doctrine has been under attack. See 5 Wake Forest Intra. L. Rev. 383 (1969); 1964 Duke L. J. 888 (1964); 41 N.C.L. Rev. 290 (1963).

In 1957 the Florida Supreme Court retreated from its previously announced position on the doctrine of governmental immunity. In doing so the Court first addressed itself to the ancient theory that "the king can do no wrong." The Florida Court said that this idea had been erroneously transposed into our democratic system and that the time had arrived to declare this doctrine anachronistic not only to our system of justice, but to our traditional concepts of democratic government. That Court then held that when an individual suffers a direct personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrong done. *Hargrove v. Town of Cocoa Beach,* 96 So. 2d 130 (Fla. 1957); Annot., 60 A.L.R. 2d 1193.

Since 1957 fifteen jurisdictions, in addition to Florida, have overruled or greatly modified the immunization of municipalities from tort liability. See: *Colorado Racing Commission v. Brush Racing Association,* 136 Colo. 279, 316 P. 2d 582 (1957); *Molitor v. Kaneland Community Unit District No. 302,* 18 Ill. 2d 11, 163 N.E. 2d 89 (1959); *Muskopf v. Corning Hospital District,* 55 Cal. 2d 211, 359 P. 2d 457, 11 Cal. Rptr. 89 (1961); *Williams v. City of Detroit,* 364 Mich. 231, 111 N.W. 2d 1

(1961); *Holytz v. City of Milwaukee,* 17 Wis. 2d 26, 115 N.W. 2d 618 (1962); *Spanel v. Mounds View School District No. 621,* 264 Minn. 279, 118 N.W. 2d 795 (1962); *City of Fairbanks v. Schaible,* 375 P. 2d 201 (Alas. 1962); *Stone v. Arizona Highway Commission,* 93 Ariz. 384, 381 P. 2d 107 (1963); *Haney v. City of Lexington,* 386 S.W. 2d 738 (Ky. 1964); *Brinkman v. City of Indianapolis,* 141 Ind. App. 662, 231 N.E. 2d 169 (1967); *Bergen v. Koppenal,* 97 N.J. Super. 265, 235 A. 2d 30 (1967); *Parish v. Pitts,* 244 Ark. 1239, 429 S.W. 2d 45 (1968); *Brown v. City of Omaha,* 183 Neb. 430, 160 N.W. 2d 805 (1968); *Tucker v. City of Okolona,* 227 So. 2d 475 (Miss. 1969); *Becker v. Beaudoin,* 261 A. 2d 896 (R.I. 1970).

Plaintiff contends that this Court should follow the modern trend and since the Court first declared the doctrine, it is appropriate that the Court should now declare that such doctrine no longer serves a useful purpose. It is true that the doctrine was first adopted in North Carolina by this Court. However, this judge-made doctrine is firmly established in our law today, and by legislation has been recognized by the General Assembly as the public policy of the State. See *Galligan v. Town of Chapel Hill,* 276 N.C. 172, 171 S.E. 2d 427 (1969). See also G.S. 160-191.1, which provides:

> "Municipality empowered to waive governmental immunity.—The governing body of any incorporated city or town, by securing liability insurance as hereinafter provided, is hereby authorized and empowered, but not required, to waive its governmental immunity from liability for any damage by reason of death, or injury to person or property, proximately caused by the negligent operation of any motor vehicle by an officer, agent or employee of such city or town when acting within the scope of his authority or within the course of his employment. Such immunity is waived only to the extent of the amount of the insurance so obtained. Such immunity shall be deemed to have been waived in the absence of affirmative action by such governing body."

Subsequent legislation allowed other governmental bodies to purchase insurance and thereby waive their immunity to that extent. G.S. 153-9(44) (Board of County Commissioners); G.S. 115-53 (City and County Boards of Education); G.S. 115A-17 (Boards of Trustees of Community Colleges); G.S. 143-291

allowed agencies and departments of the State to waive immunity to some extent in certain cases. The General Assembly has modified the doctrine but has never abolished it. In fact, a bill was introduced in the 1971 General Assembly to abolish governmental immunity in its entirety, but this bill failed to pass.

[2] It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted. However, despite our sympathy for the plaintiff in this case, we feel that any further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court.

Affirmed.

STATE OF NORTH CAROLINA v. ARCHIE BANNER, JR.

No. 65

(Filed 10 November 1971)

1. Criminal Law § 66— in-court identification of defendant — admissibility — victim's pretrial confrontation with defendant in absence of counsel

In a prosecution for armed robbery, the victim's in-court identification of the defendant was not tainted or rendered inadmissible by reason of her having seen the defendant in the presence of a police officer immediately after the robbery and at a time when defendant was not represented by counsel.

2. Criminal Law § 66— identification of defendant — change in clothing from time of offense

Identification of defendant as the perpetrator of an armed robbery was not weakened by the fact that, when the victim identified defendant 15 minutes after the robbery, the defendant was not wearing the white hat and sun glasses that he wore during the robbery, where the defendant was still wearing a gold and white sweat shirt and the orange corduroy pants with a tear on the right hip.

3. Robbery § 5— armed robbery prosecution — instruction on common law robbery

The trial court in an armed robbery prosecution was not required to charge on the lesser offense of common law robbery, where all the evidence tended to show an armed robbery and there was no evidence on which to predicate a charge of common law robbery.

State v. Banner

APPEAL by defendant from *Kivett, J.*, January 4, 1971 Session FORSYTH Superior Court.

The defendant, Archie Banner, Jr., was charged by bill of indictment, proper in form, with the armed robbery of "the place of business known as Coleman's Take Home #1" on Northwest Boulevard, Winston-Salem.

At the trial the defendant, represented by counsel, entered a plea of not guilty. Miss Sandra Bradsher (the person in charge) testified that on December 8, 1970, around 8:30 p.m. while she was at the cash register, a man whom she did not know, pointed a small pearl handled pistol at her stating " . . . (I)t was a robbery and he wanted my money. . . . (H)e cocked the gun and he told me he wasn't fooling . . . . He told me he would shoot me if I didn't give him the money." The witness delivered the contents of the cash register—$50 to $60. During the robbery and as he left, the witness carefully observed his appearance and attire.

Miss Bradsher immediately called the police, reported the robbery and described the man and his clothing. At the time of the robbery the man was wearing " . . . (S)ort of rusty or orange color pants, goldish orange looking. They looked like a corduroy material and then he had on a sort of like a sweat shirt thing with stripes in it going around the body and they were white and kind of goldish orange, too. He had on a white jacket, a purple hat and sunglasses." As he went out the door, she observed he had a tear on the right rear of his pants.

In about 15 minutes the police officers appeared at Coleman's Take Home #1 with the defendant in custody. Miss Bradsher first said he looked like the robber. When she saw him in a better light, she made a positive identification.

Detective Goforth testified he received from Miss Bradsher a report of the robbery, a description of the robber, and a detailed description of his clothing. Mr. Goforth immediately broadcast a "lookout." Within about 15 minutes after the broadcast, Officer Johnson arrested the defendant near the scene. "At that time, the defendant was wearing a striped shirt as described by Miss Bradsher . . . yellow corduroy trousers . . . . (W)hen we turned him around, the right rear pocket was torn." The State introduced the shirt and pants in evidence.

The defendant testified that he was visiting friends at an apartment and left shortly before his arrest to go to a Broad Street store for cigarettes and beer. He was arrested as he was leaving the store. He said he had not been at the scene of the robbery. He testified, also, that Miss Bradsher could not identify him at first.

On cross-examination the defendant testified, "I can't recall if, on February 19, 1957, I was arrested and convicted of larceny. I still can't recall if, on May 27, 1959, I was arrested and convicted of store-breaking and larceny. I don't remember that I was convicted of violation of prohibition laws on May 18, 1963." The defendant did remember that he had been convicted twice for abandonment. He was unable to give the apartment number where he had visited friends just before his arrest. He admitted the shirt and pants which the State introduced in evidence were his.

The jury returned a verdict finding the defendant "guilty as charged." From the judgment imposing a prison sentence, the defendant appealed.

Robert Morgan, Attorney General by (Mrs.) Christine Y. Denson, Assistant Attorney General for the State.

J. Erle McMichael and Wilson, Morrow and Boyles by John F. Morrow for defendant appellant.

HIGGINS, Justice.

The defendant's exceptions and assignments of error involve (1) the failure of the court to conduct a voir dire to determine if defendant's constitutional rights were violated by failure to provide counsel during the pre-trial identification; (2) the failure of the court to sustain the motion to dismiss at the close of the evidence; and (3) the failure of the court to submit to the jury the lesser offense of common law robbery.

[1, 2] The objection to Miss Bradsher's in-court identification cannot be sustained. The defendant was picked up 15 minutes after and near the scene of the holdup. The arresting officer in the vicinity made the arrest after he received the radio description from police headquarters. Miss Bradsher gave a detailed description of the robber's attire—rusty or orange colored pants and a sweat shirt with white and "goldish" orange

stripes going around the body. As the robber left the scene, Miss Bradsher had noted a tear in the right rear of his pants.

The fact the robber did not have the purple hat, the white coat or the sunglasses does not weaken the identification. It would be normal for a guilty party to change his appearance as quickly as possible to escape detection and arrest. One out at night without a hat, or without sunglasses would not be unusual. However, it would seem unusual for one to appear on a cold December night in his shirt sleeves. Moreover, a second man on the street wearing a gold and white sweat shirt, orange colored corduroy pants with a tear on the right hip would be as infrequent as a visit to earth by Halley's Comet. In his testimony the defendant admitted he was wearing the described clothing at the time of his arrest. He did not claim to have swapped clothes between the time of the holdup and his arrest. The motion to dismiss was properly denied.

The defendant argues Miss Bradsher's in-court identification was tainted by the confrontation at the scene immediately after the robbery and at a time when the defendant was without counsel. He contends the in-court testimony should have been excluded. Both federal and state cases hold evidence of a prior identification will not invalidate the in-court identification unless the former was fundamentally unfair. The totality of the circumstances surrounding the prior identification will determine its admissibility at the trial. To remove the likelihood of a false identification is the purpose of the exclusionary rule. If the in-court identification is of independent origin, a prior confrontation of a suspect in the custody of the officers will not warrant excluding the identifying testimony. *Foster v. California,* 394 U.S. 440, 22 L. Ed. 2d 402; *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507, and cases therein cited.

This the officers knew: The defendant was arrested near the time and place of the robbery, attired in a shirt with alternating white and gold stripes around the body, golden orange colored corduroy trousers with a tear on the right hip. Surely this description with the other evidence was sufficient to make out the case of robbery. However, to guard against charging one whom the victim might exonerate, the officers requested the witness to look at the defendant. The physical evidence was sufficient to make out the case. Hence the defendant's chance of release depended not on a failure of the witness to identify

him, but on her opinion he was not the robber. The confrontation was to guard against holding the wrong man. *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732.

In this case the defendant did not request a voir dire. Neither did he make a motion to suppress the identification at the scene of the robbery. The evidence offered shows the defendant was not prejudiced by the fact the State's chief witness saw him in the custody of the officers 15 minutes after the robbery wearing this unusual attire without a lawyer at his side.

[3] The exceptions to the court's failure to submit to the jury the offense of common law robbery was not error. All the evidence was to the effect that the robber drew a pistol, cocked it and threatened to use it unless Miss Bradsher, the attendant, surrendered to him the contents of the cash register. There was no evidence upon which to predicate a charge of common law robbery. *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399; *State v. Owens,* 277 N.C. 697, 178 S.E. 2d 442.

Other assignments of error are formal and need not be discussed.

In the trial and judgment, we find

No error.

WILLIAM H. ALLEN AND WIFE, MAE ALLEN v. REDEVELOPMENT COMMISSION OF HIGH POINT

No. 44

(Filed 10 November 1971)

Municipal Corporations § 4— action against redevelopment commission — summary judgment in favor of commission

In this action seeking the recovery of actual and punitive damages by reason of alleged negligence and alleged wilful, wanton and malicious conduct of defendant redevelopment commission in connection with its acquisition from plaintiffs of a house and lot and its subsequent disposition thereof, the trial court did not err in granting defendant's motion for summary judgment where it was undisputed that plaintiffs voluntarily accepted the offer of defendant to purchase their land, conveyed it to defendant and were paid the full agreed purchase price, and that the land was acquired by defendant in the carrying out of a lawfully adopted redevelopment plan, there was no allegation and nothing in plaintiffs' affidavit or exhibits to indicate any fraud, mis-

representation or overreaching of the plaintiffs by defendant, and the subsequent conveyance of the property by defendants was in no way an injury to plaintiffs and did not damage them.

APPEAL by plaintiffs from *Armstrong, J.*, at the 11 January 1971 Session of GUILFORD (High Point Division), held prior to determination by the Court of Appeals.

The plaintiffs sued for recovery of actual and punitive damages by reason of alleged negligence and alleged wilful, wanton and malicious conduct of the defendant in connection with its acquisition from the plaintiffs of a house and lot and its subsequent disposition thereof.

The plaintiffs allege in their complaint: The defendant is engaged in carrying out a plan adopted by the City of High Point for the redevelopment of an area known as the East Central Urban Renewal Area; the plaintiffs owned and lived in their home, known as 1204 Kivett Drive, within that area; representatives of the defendant first advised the plaintiffs that their home was in a clearance area and the defendant would have to acquire it, but subsequently informed them that acquisition of their home would not be necessary; the plaintiffs' house and lot were thereupon acquired from them by the defendant for $10,000; the plaintiffs then built a new home outside the city at a cost of $25,000; the defendant did not remove the house so acquired from the plaintiffs but subsequently sold the house and lot to Dan Kelly and wife for $4,375; and by reason of the negligence of the defendant "in not ascertaining positively that the land of the plaintiffs was necessary for redevelopment purposes before acquiring it," the plaintiffs have been damaged.

The defendants allege in their answer: The redevelopment plan involves the widening and relocation of Kivett Drive and the acquisition of a right of way across the property for an access ramp for a traffic interchange; the defendant began negotiations with the plaintiffs for the purchase of their property; while such negotiations were pending, plans for the street improvements were modified; thereupon the defendant offered to permit the plaintiffs to retain their property subject to dedication of a right of way across it for the access road and certain other restrictions; the plaintiffs, however, through their counsel, advised the defendant that they had elected to sell their entire property and tendered the defendant a deed therefor,

which offer and deed the defendant accepted, paying the plaintiffs the full agreed purchase price; thereafter, the defendant conveyed the property to Mr. and Mrs. Kelly, subject to the above mentioned restrictions and right of way, as part of an exchange of properties. The defendant also asserts in its answer that the complaint fails to state a cause of action upon which relief can be granted and pleads the statute of limitations and laches.

In response to interrogatories by the defendant, the plaintiffs replied, among other things: The plaintiffs did not contest the legal right of the defendant to acquire the property before they conveyed it to the defendant; they conveyed it voluntarily; they claim as damages the amount they spent for their new home over and above what they were paid for the property in question; and the legal theory of their action is "negligence, fraud, duress, interference with contractural relations, ultra vires acts on the part of the defendant * * * and any other theory which the evidence might support."

The defendant moved for a summary judgment dismissing the claim of the plaintiffs with prejudice. In support of its motion, the defendant filed: An affidavit by its executive director; two appraisals of the property made prior to the conveyance of it by the plaintiffs to the defendant; various excerpts from minutes of the defendant; a copy of defendant's letter to plaintiffs' counsel offering to purchase the property or to permit the plaintiffs to retain it subject to certain conditions; a copy of the letter from the plaintiffs' counsel stating that the plaintiffs had decided to sell the property to the defendant for the price offered by it; a copy of the deed from the plaintiffs to the defendant; a copy of the agreement for exchange of properties between the defendant and Mr. and Mrs. Kelly; and copies of deeds from the Kellys to the defendant and from the defendant to the Kellys. These documents support the allegations of the answer.

In opposition to the motion for summary judgment, the plaintiffs asserted: The defendant first gave the plaintiffs notice that their property was in the clearance area and would be acquired by it, but subsequently advised them that it would not have to acquire their property; it was negligence for the defendant "to upset the neighborhood and the people before they knew exactly what they were going to need and five or

six years before the land was needed"; their house did not need extensive repairs (one of the conditions required by the defendant of Mr. and Mrs. Kelly being their agreement to make extensive repairs to the house); the exchange between the defendant and Mr. and Mrs. Kelly was not a fair exchange; and the plaintiffs had no knowledge that the defendant was not going to demolish the house of the plaintiffs until less than a year prior to the institution of the action and so are not guilty of laches and are not barred by the statute of limitations. In support of their response to the motion for summary judgment, the plaintiffs filed an affidavit asserting that the defendant "confused us to the extent that we had no choice but to move although it was not what we wanted to do." The plaintiffs also filed as exhibits certain communications received by them from the defendant concerning the redevelopment plan in general.

The court granted the motion for summary judgment, finding there was no genuine issue between the parties with respect to the material facts, which facts the court found and recited in the judgment. The court concluded there was no allegation or showing of any violation of any right of the plaintiffs or any breach of any obligation owed by the defendant to them and that the plaintiffs have failed to state a claim on which relief can be granted. Accordingly, the court adjudged that the action be dismissed by summary judgment, with prejudice to the right of the plaintiffs to recover from the defendant by reason of the matters asserted in the pleadings, the costs being taxed against the plaintiffs.

The facts found by the court, summarized, include these: The defendant is lawfully constituted; a redevelopment plan for the area in question was lawfully adopted; the plan provided for the widening and relocation of Kivett Drive and construction of the above mentioned interchange; after the fair market value of the plaintiffs' property was established by appraisals, the defendant negotiated with the plaintiffs, in the course of which the defendant offered to permit the plaintiffs to retain their property on certain enumerated conditions; the plaintiffs notified the defendant that they had elected to sell their property for the price offered by the defendant and tendered a deed therefor, which the defendant accepted, paying the agreed purchase price; the plaintiffs do not contend that they were

not paid the fair market value of their property; after selling their property, the plaintiffs purchased a new home at a cost of $25,000; after the acquisition of the property by the defendant, the defendant entered into an agreement with Dan Kelly and wife for an exchange of certain properties, pursuant to which the defendant, for $4,375, conveyed the property acquired from the plaintiffs to Kelly and wife, subject to certain conditions which substantially decreased its value as compared to the value it had when owned by the plaintiffs.

John W. Langford for plaintiffs.

Haworth, Riggs, Kuhn and Haworth by John Haworth for defendant.

LAKE, Justice.

The only assignment of error is to the granting of the motion for summary judgment and the signing of such judgment. In this there was no error. It is undisputed that the plaintiffs voluntarily accepted the offer of the defendant to purchase their land, conveyed it to the defendant and were paid the full agreed purchase price. The land was acquired by the defendant in the carrying out of the lawfully adopted redevelopment plan. There is no allegation and nothing in the plaintiffs' affidavit or exhibits to indicate any fraud, misrepresentation or overreaching of the plaintiffs by the defendant. The subsequent conveyance of the property by the defendant to Mr. and Mrs. Kelly was in no way an injury to the plaintiffs and did not damage them. If it be assumed that the price paid for the property by the Kellys to the defendant was a matter of legitimate concern to the plaintiffs, there is nothing in the record to suggest that it was not a fair and adequate price for the property, subject to the reservations and restrictions imposed by the deed from the defendant to the Kellys. Upon this record, the granting of the summary judgment was in accordance with Rule 56(c) of the Rules of Civil Procedure.

No error.

STATE OF NORTH CAROLINA v. GEORGE JUNIOR JENNINGS

No. 45

(Filed 10 November 1971)

1. **Criminal Law § 113; Homicide § 28— statement of evidence — application of law thereto**

In this manslaughter prosecution, the trial court sufficiently stated the evidence relating to self-defense and explained the law arising thereon as required by G.S. 1-180, although the court referred to the evidence by its substance in the form of contentions rather than by a recital of the words of the witnesses.

2. **Criminal Law § 111— instructions — speed with which read to jury**

Defendant's objection based on the speed with which the judge read the charge to the jury, *held* without merit, especially since the jury had a typewritten copy of the charge during its entire deliberation.

APPEAL by defendant from *Johnston, J.*, February 8, 1971 Regular Criminal Session, GUILFORD Superior Court, High Point Division.

The defendant, George Junior Jennings, was indicted at the September 1968 Session of the court on a charge of murder in the killing of Willie Edward Gibson. The defendant was tried at the December 9, 1968 Session and was convicted of manslaughter. From a sentence of not less than seven nor more than ten years he appealed to the North Carolina Court of Appeals. The court heard the appeal and found no error in the trial. The decision is reported in 5 N.C. App. 132, 167 S.E. 2d 784.

On defendant's petition, this Court granted certiorari and after argument and consideration here a new trial was ordered for error in the charge on the issue of self-defense. The decision is reported in 276 N.C. 157, 171 S.E. 2d 447. The evidence before the court in the first trial is recited and discussed both by the Court of Appeals and by this Court. The evidence in the case before us now is in substance the same as that reported and considered by both the Court of Appeals and this Court on the first review.

Again the jury convicted the defendant of manslaughter. The court imposed a prison sentence of not less than seven nor more than ten years. The defendant again appealed. Our referral order of July 31, 1970, brought the appeal here for our second review.

Robert Morgan, Attorney General by Ralph Moody, Deputy Attorney General for the State.

Arch K. Schoch, Jr. for defendant appellant.

HIGGINS, Justice.

The defendant's appeal (as stated in the brief) presents two questions: (1) Did the court fail to recite the substance of the evidence and explain the law arising thereon to the jury as required by G.S. 1-180? and (2) "Did the trial court commit error by delivering its charge with such brevity and speed that it could not possibly have been intelligently understood by the jury?"

At the trial the defendant, in apt time, filed written request for instructions dealing especially with the right of self-defense. In addition, the defendant requested that the court's entire charge be reduced to writing and a copy delivered to the jury for its guidance during the pre-verdict deliberation. The court complied with the request to transcribe the charge and to deliver a copy to the jury. The heart of the charge dealt with the defendant's right of self-defense. We quote here material portions of what the court told the jury:

> "Now, members of the jury, the court instructs you that, under the law of this State manslaughter is the unlawful killing of a human being by another human being.
>
> If the State has satisfied you beyond a reasonable doubt that the defendant intentionally shot and killed the deceased with a deadly weapon, to wit, a 22 caliber rifle, the law raises the presumption that the killing was unlawful and as you have been instructed, an unlawful killing of a human being by another human being is manslaughter.
>
> * * * *
>
> Now, members of the jury, the defendant in this case, . . . pleads self-defense. Our law recognizes the right of self-defense, but it says that it is based on necessity, either real or apparent. A person may kill another person when it is necessary in order to protect himself from death or great bodily harm. A person may kill another person when it is not actually necessary, if he believes it to be necessary and if he has reasonable grounds for his belief,

in order to protect himself from death or great bodily harm; but it is for the jury to say, not for the defendant to say, the reasonableness of his apprehension, but the jury shall make this determination in the light of the circumstances as they reasonably appeared to the defendant at the time that the fatal shot was fired.

Now, members of the jury, all persons do not have the right of self-defense. A person who is an aggressor, that is, a person who enters into an encounter with another person willingly, in the sense of voluntarily and without just cause, excuse or justification, he doesn't have the right of self-defense.

There is evidence before you in this case that the defendant and Naomi Gibson, wife of the deceased, had associated with one another and dated each other for a period of approximately five years just before July, 1968, and further, that defendant had assisted Naomi Gibson in removing herself and her children from the home of the deceased on July 17, 1968, and taken them to the home of her father. The court instructs you that he is not to be deprived of the right of self-defense solely by reason of such conduct or association with the deceased's wife. The court further instructs you that the defendant is not to be deprived of his right of self-defense solely by reason of the fact that he came to the roadway in front of the Clawson residence in his automobile and stopped it there.

* * * *

If the deceased attacked the defendant, however, with the intent to kill him, or when it reasonably appeared to the defendant that by reason of the attack that he was in danger of suffering death or great bodily harm, the defendant would have no duty to retreat before he could kill the deceased in self-defense.

The court further instructs you that if the defendant was acting in self-defense but used a greater amount of force than was necessary, or reasonably appeared to him to be necessary, to protect himself from death or great bodily harm, then he would be guilty of manslaughter.

* * * *

You shall take your recollection of the evidence and consider it in its entirety in reaching your verdict. The

State contends that you should convict the defendant. The defendant contends that you should acquit him.

* * * *

Your verdict must be unanimous, and you will return one of the two following verdicts: one, guilty of manslaughter; or, two, not guilty, depending entirely upon how you, the jury, find the facts under the evidence and the court's instructions as to the law."

The defendant, as a witness for himself, testified describing his association over a number of years with the wife of the man he killed. He described the previous unfriendly relations between them. He testified he and the deceased had had an altercation earlier in the day during which the deceased had assaulted him. By way of explanation as to why he was looking for the deceased immediately before the fatal shooting, he said: "So I wanted to find out why he hit me then." He explained the possession of a rifle in his automobile by saying that he intended to pawn it. He did admit, however, that just before he left home he loaded live cartridges into the magazine. At the time of the actual confrontation, the defendant testified the deceased was attempting to assault him with a pistol, did shoot at him and that he (defendant) fired the fatal shots in self-defense. There was neither claim nor evidence of accident or misadventure.

The crucial question, therefore, before the jury was whether the defendant had satisfied the jury that he killed his adversary in his own necessary, or apparently necessary, self-defense. The defendant's written request for instruction was confined solely to the question of self-defense. *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *State v. Matthews,* 263 N.C. 95, 138 S.E. 2d 819; *State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154; *State v. Fowler,* 268 N.C. 430, 150 S.E. 2d 731; *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512.

[1, 2] The defendant's objection based on the speed with which the judge read the charge does not seem to be valid, especially since the jury had a typewritten copy during its entire deliberation. The court, in the main, referred to the evidence by its substance in the form of contentions, rather than by recital of the words of the witnesses. There is a lack of indication that the jurors were in any wise misled or confused. Moreover,

defense counsel failed to request any additional instruction or amplification of the testimony.

The evidence discloses this tragedy grew out of a dispute between the defendant and the deceased as to which had the superior equity in the affections of the latter's wife. Two juries have convicted the defendant of manslaughter. Two able judges have each imposed a prison sentence of not less than seven nor more than ten years. The trial, verdict and sentence are amply supported by the record before us in which we find

No error.

STATE OF NORTH CAROLINA v. WILLIAM TYRONE POWELL

No. 38

(Filed 10 November 1971)

Automobiles § 126; Criminal Law § 64— admissibility of breathalyzer test results — requisites of admissibility

Testimony relating to a breathalyzer test administered by a police officer qualified to give the test *is held* properly admitted in evidence in a drunken driving prosecution, and it was not necessary to the admissibility of such testimony that the State introduce a certified copy of the methods approved by the State Board of Health for administering the test. G.S. 20-139.1(b).

ON *certiorari* to review the decision of the Court of Appeals reported in 10 N.C. App. 726, 179 S.E. 2d 785 (1971), which found no error in the trial before *Bowman, S.J.*, at the 11 November 1970 Special Session of WAKE Superior Court.

Defendant was convicted in the District Court of Wake County of operating a motor vehicle on the highway under the influence of intoxicating liquor. He appealed to the Superior Court. From a jury verdict of guilty and judgment thereon, defendant appealed to the Court of Appeals. The Court of Appeals found no error in the trial, and we allowed *certiorari.*

Attorney General Robert Morgan, Assistant Attorneys General William W. Melvin and T. Buie Costen for the State.

William T. McCuiston for defendant appellant.

MOORE, Justice.

Defendant presented only one assignment of error to the Court of Appeals, which he brings forward to this Court: Did the trial court err when it ruled that the breathalyzer reading in this case was admissible in evidence? The Court of Appeals held not. We agree with the Court of Appeals.

G.S. 20-139.1 in pertinent part provides:

"Results of chemical analysis admissible in evidence; presumption.—(a) In any criminal action arising out of acts alleged to have been committed by any person while driving a vehicle under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's breath or blood shall be admissible in evidence and shall give rise to the following presumptions:

"(1) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor.

* * *

"(b) Chemical analyses of the person's breath or blood, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Board of Health and by an individual possessing a valid permit issued by the State Board of Health for this purpose. The State Board of Health is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Board of Health; provided, that in no case shall the arresting officer or officers administer said test."

The State's evidence tends to show that on 15 August 1970 about 9:50 p.m. Officer Raymond DeVone of the Raleigh Police Department observed defendant driving a Volkswagen on Western Boulevard in the city of Raleigh. The officer stopped defendant and found him to be, in the opinion of the officer, under the influence of intoxicating liquor. Officer DeVone arrested defendant and took him directly to the Wake County magistrate's office. Officer James Pegram of the Raleigh Police

Department was present and, after observing defendant, was also of the opinion that defendant was under the influence of intoxicating liquor. At 10:28 p.m. that same night Officer Pegram administered a breathalyzer test to defendant. This test showed a reading of .18%.

The State's evidence further tends to show that Officer Pegram took the training course at the Wilson Community College for breathalyzer operators as required by the State Board of Health and that he obtained a permit from the Board authorizing him to administer breathalyzer tests. Officer Pegram testified that he had a great deal of experience in administering breathalyzer tests using the same type machine that was used to test the defendant, and that in this case he administered the breathalyzer test in accordance with the rules and regulations established by the State Board of Health and the North Carolina General Statutes on a machine approved by the State Board of Health. Officer Pegram's permit authorizing him to administer breathalyzer tests was admitted into evidence without objection.

Defendant contends that Officer Pegram should not be permitted to testify as to the results of the breathalyzer test until a certified copy of the rules and regulations of the State Board of Health containing the approved methods of administering such a test is admitted into evidence. Defendant asserts that his right of cross-examination was seriously hampered because a copy of such rules and regulations was not introduced in evidence. These rules and regulations of the State Board of Health are public records. A copy can be obtained from the State Board of Health, and copies are filed in the office of the Clerk of the Superior Court in each county, with the local health directors, and with the Secretary of State in Raleigh. Counsel for defendant could have obtained a copy without difficulty, and with this he would have been free to fully cross-examine Officer Pegram concerning his compliance with these rules and regulations. His failure to do so does not make Officer Pegram's testimony incompetent.

G.S. 20-139.1(b) requires two things before a chemical analysis of a person's breath or blood can be considered valid under that section. First, that such analysis shall be performed according to methods approved by the State Board of Health, and second, that such analysis be made by a person possessing a

valid permit issued by the State Board of Health for this purpose. Officer Pegram had a valid permit issued by the Board to conduct such analysis and testified that he made the analysis in this case according to methods approved by that Board. We hold this sufficient to meet the requirements of G.S. 20-139.1(b).

In *State v. Powell,* 264 N.C. 73, 140 S.E. 2d 705 (1965), defendant was convicted of operating an automobile while under the influence of intoxicating liquor on the public highways of this State. He appealed and assigned as error the court's ruling in permitting Lieutenant Polson to state the results of the test made by using a breathalyzer. Before the witness was asked to relate the results of his test, inquiries were made touching his qualifications to make the test. He testified as to his various courses in the operation of the machine used in making the test, exhibited the machine to the jury, and explained the principle on which it worked. Among other qualifications he testified that in 1964 he took a course given by the State Board of Health for the use of breathalyzers and that the Board licensed him to make such tests. In a *per curiam* opinion, this Court held:

> "The qualifications of the person making the test, and the manner in which the tests were made, met the requirements of G.S. 20-139.1. The evidence was competent. *State v. Willard,* 241 N.C. 259, 84 S.E. 2d 899; *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548; *Robinson v. Insurance Co.,* 255 N.C. 669, 122 S.E. 2d 801."

In *State v. Cummings,* 267 N.C. 300, 148 S.E. 2d 97 (1966), the defendant was charged with the offense of driving a motor vehicle upon the public highways while under the influence of intoxicants, and the results of a breathalyzer test administered by Captain Joseph D. Wade were admitted into evidence. Before being permitted to testify, Officer Wade was questioned preliminarily, and his answers tended to show that the tests were made in compliance with G.S. 20-139.1 and the regulations of the State Board of Health as provided for in the statute, and that he was a graduate of the State Board of Health school on breathalyzer work and duly certified as an operator by the Board. The Court, in an opinion by Justice Pless, stated: "The defendant's objections to the results of the Breathalyzer Test are not sustained. . . . "

In *State v. Mobley,* 273 N.C. 471, 160 S.E. 2d 334 (1968), Chief Justice Parker, although holding that the testimony of Officer Krauss concerning the results of a breathalyzer test was incompetent, indirectly approved *State v. Cummings, supra,* and *State v. Powell, supra,* when he stated:

> " . . . However, the officer gave no testimony as to his training with the exception that he graduated from the Department of Community College. There is nothing in his testimony to show what he studied in the Community College. The record is bare of any evidence that he attended any school or course of instruction on making breathalyzer tests. There is nothing in his testimony to show that he is qualified to make a test for alcoholic content in human blood and to testify as to results obtained from such a test of defendant's blood. Officer Krauss may be thoroughly qualified as an expert witness to administer the breathalyzer test, but if so, his qualifications do not appear from the meager evidence before us. So far as the present record discloses, the witness Krauss had no such qualifications to make a breathalyzer test as did the witness in *S. v. Cummings,* 267 N.C. 300, 148 S.E. 2d 97, and *S. v. Powell,* 264 N.C. 73, 140 S.E. 2d 705."

Defendant's objections to the admission into evidence of the results of the breathalyzer test are not sustained.

No error.

DAVID D. ENNIS v. JOE W. GARRETT, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA

No. 122

(Filed 10 November 1971)

1. Automobiles § 2— revocation of license — what constitutes "state of revocation"

A person whose driver's license was revoked from 2 January 1970 to 2 January 1971 and who had not complied with the statutory procedures for the restoration of his driving privilege at the time when he committed a moving violation on 6 March 1971 *is held* not a person whose driver's license is in a "state of revocation" so as to authorize the revocation of his driving privilege under G.S. 20-28.1; the status of the person is simply that of a person without a valid operator's or chauffeur's license. G.S. 20-6; G.S. 20-7(i1); G.S. 20-17; G.S. 20-19(f).

2. Automobiles § 2— binding effect of judgment relating to motor vehicle offense

The Department of Motor Vehicles was bound by the judgment of a court of competent jurisdiction finding a person not guilty of driving while his license was revoked.

APPEAL by respondent from *Hall, J.*, at the 17 May 1971 Session of Harnett, heard prior to determination by the Court of Appeals.

The Department of Motor Vehicles revoked the petitioner's license to operate a motor vehicle for a period of one year, effective 9 April 1971, on the ground that he had been convicted of a motor vehicle moving offense while his license was revoked, purporting to act under the authority of G.S. 20-28.1. The petitioner, pursuant to G.S. 20-25, filed his petition in the superior court for a hearing and a judgment vacating the order of the Department. In the superior court the facts were stipulated. The court entered its judgment vacating the order of the Department and permanently restraining the respondent from revoking the petitioner's driving privilege by reason of his conviction of certain offenses committed on 6 March 1971. The court concluded from the stipulated facts that the petitioner's driving privilege was not in a state of revocation when the offenses in question were committed and that the order revoking his driving privilege by reason thereof was in excess of the respondent's authority. The respondent appealed, assigning the foregoing conclusions and judgment as error.

The stipulated facts material to this appeal are these: On 2 January 1970, the petitioner was convicted in the District Court of Johnston County of driving while under the influence of intoxicating liquor. As the result of that conviction, the respondent entered an order revoking the petitioner's driving privilege, which revocation took effect 2 January 1970. The petitioner was eligible for reinstatement of his driving privilege on 2 January 1971. On 6 March 1971, the petitioner was charged with driving while under the influence of intoxicating liquor and with driving while his license was revoked. Being tried on these charges in the District Court of Johnston County on 19 March 1971, he was found not guilty of driving while his license was revoked, but was convicted of careless and reckless driving and of driving without a valid operator's license. (Presumably, he was found not guilty of driving under the

influence of intoxicating liquor.) On 6 March 1971, the petitioner had not applied for a reinstatement of his driving privilege and had not paid the $10.00 fee required by G.S. 20-7(il) for restoration of a previously revoked license. By reason of the convictions of the petitioner in the District Court of Johnston County on 19 March 1971, the respondent entered an order revoking the petitioner's privilege for a period of one year, effective 9 April 1971.

Attorney General Morgan and Assistant Attorney General Costen for respondent-appellant.

Stewart and Hayes by Gerald Hayes, Jr., for petitioner-appellee.

LAKE, Justice.

[1] G.S. 20-28.1(a) provides, "Upon receipt of notice of conviction of any person of a motor vehicle moving offense, such offense having been committed while such person's driving privilege was in a state of suspension or revocation, the Department shall revoke such person's driving privilege for an additional period of time as set forth in subsection (b) hereof." The revocation ordered by the respondent is for the period specified in paragraph (b) of this statute. Thus, the sole question upon this appeal is whether the petitioner's driving privilege was in a state of suspension or revocation on 6 March 1971, he having been convicted of a motor vehicle moving offense committed on that date.

G.S. 20-6 provides:

> " 'Revocation' shall mean that the licensee's privilege to drive a vehicle is terminated *for the period stated in the order of revocation.*
>
> " 'Suspension' shall mean the licensee's privilege to drive a vehicle is temporarily withdrawn." (Emphasis added.)

The parties have stipulated that the petitioner's driving privilege was *revoked* on 2 January 1970 upon his conviction of driving while under the influence of intoxicating liquor.

G.S. 20-17 provides:

> *"Mandatory revocation of license by Department.*— The Department shall forthwith revoke the license of any

operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final: * * *

"(2) Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug. * * * ."

G.S. 20-19(f) provides, in effect, that when an operator's license is revoked by the Department on the ground of the holder's first conviction of driving a motor vehicle while under the influence of intoxicating liquor, "the period of revocation shall be one year." Obviously, the Department of Motor Vehicles cannot revoke an operator's license for a period in excess of that prescribed by the statute. The respondent contends that G.S. 20-19(f) must be read in conjunction with G.S. 20-7(i1) which provides:

"Any person whose operator's or chauffeur's license or other privilege to operate a motor vehicle in this State has been suspended, canceled or revoked pursuant to the provisions of this chapter shall pay a restoration fee of ten dollars ($10.00) to the Department prior to the issuance to such person of a new operator's or chauffeur's license or the restoration of such operator's or chauffeur's license or privilege, (sic) such restoration fee shall be paid to the Department in addition to any and all fees which may be provided by law."

The respondent's contention is that a revocation remains in effect not only throughout the period stated in the order of revocation but also until the person whose license was revoked applies for a restoration of his license and pays the restoration fee. This is contrary to the definition of "revocation" in G.S. 20-7, above quoted. G.S. 20-7(i1) does not expressly extend the period of a suspension, cancelation or revocation. On its face, it merely provides for the payment of a fee for an administrative act by the Department. It cannot reasonably be given the construction for which the respondent contends.

When the period of revocation stated in the order of revocation terminates, the license is no longer "in a state of suspension or revocation" within the meaning of G.S. 20-28.1(a). This does not mean that the former holder of the license may immediately resume driving. Before he may do so the fee required by G.S. 20-7(i1) must be paid. In the interim,

he is simply a person without a valid operator's or chauffeur's license. If, in that interim, he operates a motor vehicle upon a highway of this State, he is subject to the penalties provided for one who operates a motor vehicle without a valid operator's or chauffeur's license, but G.S. 20-28.1(a) does not apply to his conviction of a "motor vehicle moving offense" during such interim.

[2] Furthermore, in this instance, it is stipulated that by reason of his activities on 6 March 1971, this petitioner was charged with driving while his license was revoked, that this charge was heard in the District Court of Johnston County and, upon this charge, the petitioner was found not guilty. Such judgment by a court of competent jurisdiction to hear and determine such charge is binding upon the State, and so upon the respondent.

It follows that the order of the Department revoking the petitioner's driving privilege for one year on account of his conviction of offenses committed 6 March 1971 was not within the authority conferred upon the Department of Motor Vehicles by G.S. 20-28.1.

Affirmed.

IN RE BOBBY LEE JONES (MINOR)

No. 55

(Filed 10 November 1971)

1. **Infants § 10— amendment of juvenile petition — discretion of district court**

The district court acted within its discretion in allowing a juvenile petition to be amended to allege the ownership and value of the property allegedly stolen by the juvenile.

2. **Appeal and Error § 3— amendment of juvenile petition — substantial constitutional question — dismissal of appeal**

Juvenile's purported appeal from a decision of the Court of Appeals based solely on the assertion that the district court's allowance of an amendment to the juvenile petition deprived him of a constitutional right is dismissed by the Supreme Court *ex mero motu* for failure to present a substantial constitutional question within the meaning of G.S. 7A-30(1).

PURPORTED appeal by Bobby Lee Jones, respondent, under G.S. 7A-30(1), from the decision of the Court of Appeals reported in 11 N.C. App. 437, 181 S.E. 2d 162, which found "No error" in the juvenile proceedings conducted by *District Court Judge Warren* in CABARRUS District Court.

Attorney General Morgan, Assistant Attorney General Banks, Staff Attorney Price and Associate Attorney Payne for the State.

Thomas K. Spence for respondent appellant.

PER CURIAM.

The proceedings were initiated February 1, 1971, by petition which alleged that Bobby Lee Jones, aged 15, was a delinquent child "in that he did on or about January 29, 1971, at approximately 9:00 p.m., take, steal and carry away a set of blue lights from a vehicle parked on Buffalo Street, Concord, North Carolina." The verified petition was signed by "D. J. Taylor, Concord Police Department."

On February 17, 1971, respondent, through his counsel, (1) demurred to the petition, (2) moved to quash the petition, and (3) moved to dismiss the proceedings, on the ground the petition was fatally defective because it did not allege the ownership of the property allegedly stolen by respondent. On February 19, 1971, prior to the entry of respondent's plea, Judge Warren heard and overruled respondent's demurrer and motions and allowed an amendment to the petition which alleged the ownership and value of the property. Respondent excepted to each of these rulings. After a hearing on the petition as amended, at which respondent was represented by counsel, Judge Warren found that respondent "did on or about Jan. 29, 1971, take, steal and carry away a set of blue lights, the same being the property of the City of Concord and valued at approximately $40.00," and further found beyond a reasonable doubt that respondent was a "(d)elinquent child." See G.S. 7A-278(2). Upon these findings, Judge Warren committed respondent to the North Carolina Board of Juvenile Correction for an indefinite term, not to extend beyond his eighteenth birthday. See G.S. 7A-286(4)c.

[1] Respondent's appeal, which is based solely on the assertion that the allowance of the amendment deprived him of a consti-

tutional right, is without substance. The amendment was allowed by the judge of the court which had original jurisdiction of the proceedings. If the original petition were quashed, a new petition containing the allegations of the amended petition could have been filed forthwith. As held by the Court of Appeals, the allowance of the amendment was within the discretionary power of the district court judge. Respondent does not contend he was taken by surprise by the allegations in the amendment. The identity of the person who verified the petition and the description of the property alleged to have been stolen sufficed to give respondent full and complete notice of all aspects of the accusation on which the hearing was to be conducted.

[2] This Court, *ex mero motu,* dismisses respondent's purported appeal on the ground it does not directly involve a substantial constitutional question within the meaning of G.S. 7A-30(1).

Appeal dismissed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

DALE v. LATTIMORE

No. 47 PC.

Case below: 12 N.C. App. 348.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 November 1971.

DANTZIC v. STATE

No. 140.

Case below: 12 N.C. App. 409.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 November 1971. Appeal dismissed *ex mero motu* for lack of substantial constitutional question 2 November 1971.

MILLER v. SNIPES

No. 48 PC.

Case below: 12 N.C. App. 342.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 November 1971.

PHILLIPS v. WRENN BROTHERS

No. 46 PC.

Case below: 12 N.C. App. 35.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 November 1971.

SPEIZMAN CO. v. WILLIAMSON

No. 44 PC.

Case below: 12 N.C. App. 297.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 November 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. WRENN

No. 106.

Case below: 12 N.C. App. 146.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1971.

STEPHENS v. BANK

No. 154.

Case below: 12 N.C. App. 323.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 November 1971. Appeal dismissed *ex mero motu* for lack of substantial constitutional question 2 November 1971.

STATE OF NORTH CAROLINA v. CHARLIE RICHARDSON, JR.

No. 115

(Filed 15 December 1971)

1. Criminal Law § 66— in-court identification — necessity for voir dire

The trial court did not err in permitting an in-court identification of defendant by a robbery and assault victim without first finding on a voir dire examination that such identification did not result from an illegal, out-of-court confrontation, where there was no evidence that the victim identified, or even saw, defendant between the time of the robbery and assault and the time of his in-court identification.

2. Arrest and Bail § 7— right to communicate with friends and relatives

The record does not support assertions by defendant that he was illegally imprisoned in jail for five days without a warrant and that during this interval he was not afforded counsel or permitted to communicate with friends or relatives.

3. Criminal Law §§ 75, 84— pistol voluntarily produced by defendant — failure to hold voir dire

Where the record shows that, in the course of the sheriff's investigation of a felonious assault and an armed robbery, the sheriff asked defendant whether he owned a weapon and defendant got a .38 pistol from his room and handed it to the sheriff, the trial court did not err in admitting the pistol into evidence and permitting the sheriff to testify where it was obtained without first finding on voir dire that defendant voluntarily produced the pistol, there being no request for or occasion for a voir dire hearing.

4. Robbery § 5— armed robbery — failure to submit common law robbery

In this armed robbery prosecution, the trial court did not err in failing to instruct the jury on the lesser included offense of common law robbery where the State's evidence showed a completed robbery at gunpoint and there was no evidence that would support a finding that defendant was guilty of the lesser offense.

5. Robbery § 1— elements of robbery and armed robbery — assault — assault with deadly weapon

The crime of robbery includes an assault on the person; the crime of armed robbery defined in G.S. 14-87 includes an assault on the person with a deadly weapon.

6. Assault and Battery § 5; Robbery § 1— felonious assault — intent to kill — serious injury — armed robbery

The elements of intent to kill and infliction of serious injury which are essentials of the crime of felonious assault defined in G.S. 14-32(a) are not essentials of the crime of armed robbery defined in G.S. 14-87.

7. **Assault and Battery § 4; Robbery § 1— assault in perpetration of robbery**

An assault is committed in the perpetration of a robbery if made to overcome resistance, to effectuate flight, or to eliminate the possibility of identification by the victim, notwithstanding the assault may occur after the robber has taken possession of the victim's goods.

8. **Assault and Battery § 5; Robbery § 6— felonious assault during robbery — separate crime**

The fact that a felonious assault is committed during the perpetration of armed robbery does not deprive the felonious assault of its character as a complete and separate felony.

9. **Assault and Battery § 5; Criminal Law § 26; Robbery § 6— armed robbery — felonious assault — continuous course of conduct — conviction of both crimes**

When separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, verdicts of guilty as charged will support separate judgments for each crime, since all of the essential elements of felonious assault are not essential elements of armed robbery, notwithstanding the two crimes share the common element of assault with a deadly weapon.

Justice LAKE concurring.

Justice HIGGINS concurring in the decision in Case No. 2296 and dissenting in the decision in Case No. 2295.

APPEAL by defendant from *Kivett, J.,* September 14, 1970 Criminal Session of ANSON Superior Court, transferred for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4), docketed and argued as No. 34 at Spring Term 1971.

These criminal prosecutions were based on two bills of indictment, *viz.:*

In Case No. 2295 the bill charged that on July 2, 1970, defendant, Charlie Richardson, Jr., " . . . did, unlawfully, wilfully, and feloniously assault Lester Smith with a certain deadly weapon, to wit: a gun, with the felonious intent to kill and murder the said Lester Smith, inflicting serious injuries, not resulting in death, upon the said Lester Smith, to wit: by shooting him about the head, face, body and limbs, ... "

In Case No. 2296 the bill charged that on July 2, 1970, defendant, Charlie Richardson, Jr., " . . . unlawfully, wilfully, and feloniously, having in his possession and with the use and

threatened use of firearms, and other dangerous weapons, implements, and means, to wit: A Gun, A 22 cal. pistol, whereby the life of Lester Smith was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away money in amount of $50.00; 22 Cal. Pistol, and a wallet, of the value of less than $200. from the presence, person, place of business . . . of Lester Smith . . . . "

On July 16, 1970, District Court Judge Langley, after inquiry, found defendant an indigent and appointed Enos T. Edwards, Esq., to represent him.

In the superior court, defendant, through his court-appointed counsel, entered pleas of not guilty to the charges in the indictments. Without objection, the two cases were consolidated for trial.

The State's evidence tends to show the facts narrated below.

Bigguns Texaco Service Station is located on Highway 74 about 14 miles east of Wadesboro, N. C. Lester Smith was the employee on duty at about 8:00 a.m. on July 2, 1970, when the alleged robbery and assault occurred. Smith first observed defendant while Smith was engaged in carrying out some trash. Defendant was then coming down the side of the road toward the station. Upon Smith's return to the station, defendant was standing at the front door. Defendant followed Smith into the station and asked for a package of gum.

When Smith turned around to hand defendant the gum, defendant pulled a .38 pistol out from under his shirt, pointed it in Smith's face and told Smith "it was a holdup and to do as he was told." While holding the .38 pistol in his right hand and pointing it in Smith's face, defendant took approximately $50.00 from the cash register and Smith's loaded .22 caliber pistol from a cigar box near the cash register. Defendant made Smith take off his pants and shoes, go to the back of the store, lie down with his face on his hands. Defendant then shot Smith three times in the back of the head with the .22 caliber pistol.

Smith remained conscious but continued to lie still on the floor until defendant went out and shut the door. Thereafter Smith went to a side door and saw defendant about one-tenth of a mile away, walking along the rural paved road which ran southward. Smith then came out the front door, stopped a car

and was carried to a hospital where he was operated on and three .22 caliber bullets were extracted from his head.

On July 7, 1970, "[i]n carrying out his investigation," Sheriff Jarman saw defendant at Greene's Peach Camp, a campground for migrant workers during peach season. The camp is located "some 3 miles from Bigguns Texaco." After advising him of his constitutional rights, Sheriff Jarman asked defendant if he was the owner of any weapons of any kind. Defendant admitted he had a gun and got a .38 caliber pistol from his room and handed it to the sheriff. Then and since then defendant has steadfastly denied being at Bigguns Texaco on July 2, 1970. On July 7, 1970, he told the sheriff he had spent the night of July 1, 1970, at the home of Jimmy Little, a friend, in Harlem Heights, Wadesboro, N. C., and was there at 8:00 a.m. on the following morning. The sheriff never did find the .22 pistol with which Smith was shot.

Defendant testified and offered evidence tending to show the facts narrated below.

He did not rob or assault Smith. He did not know he was suspected of such a robbery and assault until July 7, 1970, about 7:00 a.m., when Sheriff Jarman came to Greene's Peach Camp and told him that "he wanted to talk with him for suspicion." After talking with Sheriff Jarman, defendant went back into his room and got his pistol and gave it to a deputy who had accompanied Sheriff Jarman.

Defendant spent the night of July 1, 1970, in Harlem Heights, Wadesboro, N. C., in the home of his friends, Jim Little and wife, Ella Little, and stayed there until the morning of Thursday, July 2, 1970. Defendant testified he left the home with Jim Little about 9:15 *(sic)* a.m. and that he stopped at a bank in Wadesboro "about 7 minutes to 9:00 o'clock" before going to a district court session in Wadesboro. Jim Little testified he and defendant left the Little home at about 8:30 a.m. in a cab and got to Wadesboro about 8:45. He saw defendant again about 9:15 at which time defendant said he was going to court. Ella Little testified her husband and defendant left "about 7:30 or 8:00 o'clock A.M." at which time defendant said "he was coming to a trial."

Defendant was not working on July 2, 1970, because he had been notified to be in district court in Wadesboro at 9:30

a.m. on that date to testify as a State's witness in a criminal case in which one Lee Vernon Henry was charged with stealing his (Richardson's) polaroid camera. He testified he arrived in district court at approximately 9:05 a.m. and remained there until the larceny case against Henry was disposed of. This occurred "a little after 12:00 o'clock." He was not a witness because Henry pleaded guilty. He received his camera and signed a release to Sgt. Hooks of the Police Department.

It was stipulated that a criminal proceeding was had against Lee Vernon Henry on July 2, 1970, in the District Court of Anson County, and that the defendant Lee Vernon Henry entered a plea of guilty as charged.

On July 1, 1970, defendant bought the .38 pistol in Ellerbe and paid $25.00 for it. He bought it with money he had found in a billfold lying beside the road. He had delivered the billfold and its contents other than money (bills) to the sheriff. Before going to the district court hearing on July 2, 1970, he left the .38 with a cab driver in Wadesboro. He expected to get it when court was over and register it with the sheriff but did not see that cab driver until the following day.

On cross-examination defendant admitted he knew the location of the Bigguns Texaco Station and went by it almost daily. He admitted he had been tried and convicted "twice for assault, once for larceny of some wrenches, and one time for breaking and entering."

In each case, the jury returned a verdict of guilty as charged. In Case No. 2296 charging armed robbery, the court imposed a sentence of not less than 22 nor more than 30 years. In Case No. 2295 charging felonious assault, the court imposed a sentence of not less than 8 nor more than 10 years, this sentence to commence upon expiration of the sentence imposed in Case No. 2296. Defendant excepted and appealed.

Upon finding that defendant was then an indigent, the court appointed E. A. Hightower, Esq., to represent him in prosecuting his appeal and ordered the state of North Carolina to pay all expenses incident thereto.

Attorney General Morgan and Staff Attorney Ricks for the State.

E. A. Hightower for defendant appellant.

BOBBITT, Chief Justice.

Neither in the trial court nor here has defendant challenged the sufficiency of the evidence to require submission to the jury and to support the verdicts. Apart from the isolated instruction referred to in our discussion of Assignment of Error #4, the court's charge is not made a part of defendant's case on appeal.

We shall consider first the five assignments of error set forth in the record on appeal. Thereafter, we shall consider the motion defendant filed in this Court for arrest of judgment in Case No. 2295, the felonious assault case.

[1] In Assignment #1, defendant asserts "[t]he Court erred in permitting the in-court identification of the defendant by the witness Smith without first finding, on a voir dire examination, that his in-court identification had an independent origin and did not result from illegal, out-of-court confrontation." In his testimony at trial, Smith pointed out and positively identified defendant as the man who entered the service station and robbed and shot him. Assignment #1 is without merit for the simple reason there is no evidence whatever that Smith identified, or even saw, defendant between the time of the robbery and assault and the time of his in-court identification. The in-court identification, therefore, could not have been influenced or tainted by prior confrontation because there was no such prior confrontation.

[2] Assignments #2 and #5 contain assertions that defendant was arrested without a warrant on July 7, 1970, and illegally imprisoned in jail without a warrant from July 7, 1970, until July 12, 1970, and that during this interval defendant was not advised of his constitutional rights or "afforded counsel" or permitted to communicate with friends or relatives. These assertions are not supported by the record. All the record discloses with reference to what occurred on July 7, 1970, is contained in the testimony of Sheriff Jarman and of defendant. The record shows that warrants for the arrest of defendant for armed robbery and felonious assault were issued July 12, 1970, and were executed the same day. Nothing in the record shows defendant was arrested and "imprisoned in jail" prior to July 12, 1970, or that he at any time was denied permission to communicate with friends or relatives. The record does disclose the formal appointment of counsel for defendant on July 16, 1970, the date

of the preliminary hearings. There being no basis for consideration of the assertions therein, Assignments #2 and #5 are overruled.

[3] In Assignment #3, defendant asserts "[t]he Court erred in permitting the .38 caliber pistol to be introduced into evidence and in permitting the Sheriff to relate where it was obtained or that it was obtained, without first finding, upon voir dire in the absence of the jury, that the production of the pistol by the defendant was done voluntarily and understandingly." Under the circumstances disclosed by the record, there was no request for or occasion for a *voir dire* hearing. The record indicates Sheriff Jarman's conversation with defendant on July 7, 1970, was simply an incident in the course of Sheriff Jarman's investigation of the armed robbery and felonious assault committed on Lester Smith on July 2, 1970. An inference may be drawn from the facts in evidence that the investigation by Sheriff Jarman continued in order to afford opportunity to check the statements made to him by defendant on July 7, 1970, when defendant voluntarily delivered the .38 pistol to Sheriff Jarman.

[4] The *only portion* of the charge in the record is the following: "Now, as to the charge in that Bill of Indictment, which is referred to as armed robbery, you may return one of two verdicts, members of the jury. You may either find the defendant guilty of armed robbery, as charged, or not." Assignment #4 is based on defendant's exception to this isolated excerpt from the charge. Defendant contends the court erred in charging the jury in Case No. 2296 that they might return a verdict of guilty of armed robbery as charged or a verdict of not guilty. Since a charge must be considered contextually and not piecemeal, the record is insufficient to support this assignment. Even so, defendant's contention that the court should have instructed the jury that they might return a verdict of guilty of common law robbery is without merit. The State's evidence, which showed a completed robbery of Lester Smith at gunpoint, was positive and unequivocal as to each and every element of the crime charged in the bill of indictment in Case No. 2296. The crucial issue was whether the crime was committed *by defendant.* There was no evidence that would warrant or support a finding that defendant was guilty of a lesser included offense. Hence, the court's instruction was proper. *State v. Williams,* 275 N.C. 77, 88, 165 S.E. 2d 481, 488 (1969); *State v. Carnes,* 279 N.C. 549, 554, 184 S.E. 2d 235, 238-39 (1971).

[9] Defendant's motion that this Court arrest the judgment in Case No. 2295 is based on the contention that the felonious assault for which he was indicted and convicted in Case No. 2295 is a lesser included offense of the armed robbery for which he was indicted and convicted in Case No. 2296. Answering, the Attorney General contends the motion should be denied. We agree.

[5, 6] The crime of robbery includes an assault on the person. *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954). The crime of armed robbery defined in G.S. 14-87 includes an assault on the person with a deadly weapon. The crime of felonious assault defined in G.S. 14-32(a) is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in G.S. 14-87.

If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, as in *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496 (1964), and *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970), and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested. In such case, the armed robbery is accomplished by the assault with a deadly weapon and *all* essentials of this assault charge are essentials of the armed robbery charge. However, if a defendant is convicted simultaneously of armed robbery and of *felonious* assault under G.S. 14-32(a), neither the infliction of serious injury nor an intent to kill is an essential of the armed robbery charge. A conviction of armed robbery does not establish a defendant's guilt of felonious assault.

In the present case, the evidence shows that, by the use or threatened use of his .38 pistol, defendant robbed his victim of cash and of a .22 pistol and ordered him to go to the back of the store and lie down with his face on his hands. Thereafter, while the victim was lying on the floor, defendant shot him in the head, closed the door and left when his victim was apparently dead. Thus, separate assaults were committed in quick succession, the first being an assault with a deadly weapon and the second an assault with a deadly weapon which was made with intent to kill and which inflicted serious injuries.

[7, 8] It is true that both of these assaults were committed in the perpetration by defendant of the felony of armed robbery defined in G.S. 14-87. An assault is committed in the perpetration of a robbery if made to overcome resistance, to effectuate flight, or to eliminate the possibility of identification by the victim, notwithstanding the assault may occur after the robber has taken possession of the victim's goods. However, the fact that a felonious assault is committed during the perpetration of armed robbery does not deprive the felonious assault of its character as a complete and separate felony.

Here the injury inflicted by the felonious assault was not fatal. However, the injury was serious and the assault was made with intent to kill. The question is whether the felonious assault is to be ignored as an independent felony simply because an assault with a deadly weapon is an essential element both of felonious assault and of armed robbery and the permissible punishment for armed robbery is greater than the permissible punishment for felonious assault. We perceive no sound reason why two felonies should be treated as one simply because they share a single essential element, when they consist of additional separate elements.

Our research has disclosed few decisions bearing closely upon the precise question under consideration. *People v. Thomas,* 59 Cal. App. 2d 585, 139 P. 2d 359 (1943), presented an analogous factual situation. In *Thomas,* the defendants were charged with the crime of robbery (Count I) and of assault by means of force likely to produce great bodily injury (Count II), offenses committed on the same occasion and in the course of the same series of acts. As stated in the opinion: "Defendants pleaded guilty to the charge of assault by means of force likely to produce great bodily injury (Count II), and not guilty to the charge of robbery (Count I). When placed on trial for the latter crime they interposed a plea of once in jeopardy and at the conclusion of their trial moved to dismiss the robbery charge, upon the grounds of former conviction and former jeopardy. The motions were denied, defendants were found guilty of robbery and were sentenced for each crime, to state prison for the crime of robbery and to the county jail for the assault, the sentences to run concurrently. All of them have appealed from the conviction of robbery." *Id.* at 586-87, 139 P. 2d at 360. The court sustained the conviction of robbery and the sentence pronounced thereon. Apposite excerpts from the opinion include the following:

"The two felonies charged to appellants, having different essential elements, are separate and distinct offenses . . . . Neither offense is included within the other and appellants in a prosecution for one of the offenses could not have been convicted of the other. Appellants' contention is not that they have been convicted twice of the same offense or that either of the offenses of which they have been convicted is included in the other. They say only that they might have been convicted of simple assault in either prosecution, which is correct, but they overlook the important fact that in neither prosecution were they adjudged guilty only of the offense of simple assault . . . ." *Id.* at 588, 139 P. 2d at 361.

"Appellants' argument amounts only to this: that in prosecutions for two distinct and different felonies, each involving an element of criminality not found in the other, and each involving the act of assault constituting the offense of simple assault, there can be a conviction of one or the other of the major crimes but not convictions of both. . . . [Defendants] stand convicted of two felonies, each involving an act of assault upon the person of their victim, but each involving an element distinguishing the major offense from the offense of simple assault. They would have us hold that they have been convicted twice solely of the offense of simple assault, which is true only in the sense that the plea of guilty in the one case or the conviction in the other would have barred further prosecution for the offense of simple assault or any other included offense. But all that has happened is that they have been convicted of two felonies committed in the course of a continuous series of acts, which offenses have the common element of assault on the person of the victim constituting the offense of simple assault.

"While the law jealously protects a culprit from double punishment, it does not allow him to commit two separate and distinct offenses for the price of one merely because they have some minor common element. Here the defendants assaulted their victim with great violence, rendering him unconscious, and while he was unconscious they robbed him; they might just as well have robbed him or attempted to rob him first and attacked him afterwards, as was the case in *People v. Bentley, supra,* (1888) 77 Cal. 7 [18 P. 799, 11 Am. St. Rep. 225]. It would be wholly illogical to say that in either case one of the major crimes must go unpunished because, perchance, appellants in

each felony prosecution might have been, although they were not, convicted only of the offense of simple assault. Of course, as we have said, two convictions of simple assault could not stand. A plea of guilty to simple assault in one case and a conviction of simple assault in the other, would be an acquittal of the greater offenses charged and would eliminate the elements which distinguish each in the major offenses from the other and from the offense of simple assault. But the judgments here establish the existence of those distinct elements as realities and they cannot be ignored. Appellants are subject to punishment for the offense of assault by means of force likely to produce great bodily injury and for the offense of robbery, because these are separate and distinct offenses, neither of which is necessarily included within the other. Although the *act* of assault is involved in each, in neither case can it be said that defendants are suffering punishment for the mere *offense* of simple assault and they are therefore not suffering double punishment." *Thomas* at 588-90, 139 P. 2d at 361-62.

Decisions in accord with *People v. Thomas, supra,* include the following: *State v. Moore,* 326 Mo. 1199, 33 S.W. 2d 905 (Mo. 1930); *Foss v. State,* 36 Ohio App. 417, 173 N.E. 296 (1930); *Higgins v. Superior Court,* 185 Cal. App. 2d 37, 7 Cal. Rptr. 771 (1960); *Commonwealth ex rel. Hairston v. Myers,* 202 Pa. Super. 214, 195 A. 2d 813 (1963).

In *People v. Logan,* 41 Cal. 2d 279, 260 P. 2d 20 (1953), the defendant was convicted of an assault with a deadly weapon (Count 1) and of robbery in the first degree, that is, robbery committed by one "armed with a dangerous or deadly weapon" (Count 2). Both offenses arose out of the same conduct. As in our decisions in *State v. Parker, supra,* and *State v. Hatcher, supra,* the judgment for an assault with a deadly weapon was reversed on the ground *all* essentials of assault "with a deadly weapon" were essentials of robbery committed by one "armed with a dangerous or deadly weapon." Justice Schauer, speaking for the Supreme Court of California, distinguished this case from *People v. Thomas, supra,* on the ground that neither of the offenses for which the defendants in *Thomas* were convicted contained *all* the essentials of the other but each contained additional separate elements.

Decisions cited as tending to support a different conclusion are discussed below.

In *State v. Richardson,* 460 S.W. 2d 537 (Mo. 1970), the defendant's attempted robbery by the threatened use of a butcher knife was thwarted by the would-be victim and no injury was inflicted. The defendant was convicted of attempted robbery. Later he was convicted of "assault with intent to maim without malice," and he appealed this conviction on the ground of double jeopardy. The Missouri Supreme Court upheld his plea.

The fundamental difference between the present case and the Missouri *Richardson* case lies in the type of assault for which defendant was convicted. Defendant herein has been found guilty of "assault with a deadly weapon, with intent to kill, *inflicting serious injury*"—not merely assault with intent to kill. The Attorney General of Missouri argued that assault with intent to rob and assault with intent to maim were different criminal offenses, even if involving the very same act. But the Missouri Supreme Court held the State could not split one act of assault into two crimes *merely by changing the name of the intent.* It was noted that proof of the unlawful act gives rise to a presumption of criminal intent, which presumption was of both intent to rob *and* intent to maim. In the first trial, the prosecutor had elected to treat the criminal intent as the intent to rob. There is no presumption of serious injury. Serious injury must be separately proved in a prosecution under our statute, G.S. 14-32(a); serious injury need not be shown at all in a prosecution under G.S. 14-87, for armed robbery.

Likewise, in *Wilcox v. State,* 74 Tenn. (6 Lea) 571, 40 Am. Rep. 53 (1880), and in *Duckett v. State,* 454 S.W. 2d 755 (Tex. Crim. 1970), convictions for "assault with intent to murder" followed robbery convictions, and the assault convictions met reversal. In neither case was felonious assault *resulting in serious injury* charged. In neither case was the State put to the proof of the additional, critical element of serious injury (though it does appear that the victim in *Duckett* testified to being "shot").

The court in *Duckett* makes much of the proposition that " '[t]he State can carve the minor part of the transaction . . . or can carve the major part of the transaction . . . . However, the State can carve only the one time.' " *Duckett* at 757, quoting *Paschal v. State,* 49 Tex. Crim. 111, 114, 90 S.W. 878, 880 (1905). We agree that a single independent criminal offense can only be punished once. We do *not* agree the same is true of a criminal

transaction which involves more than one independent criminal offense. "To support a plea of *former acquittal,* it is not sufficient that the two prosecutions should grow out of the same transaction; but they must be for the same offense; *the same, both in fact and in law.*" *State v. Nash,* 86 N.C. 650, 651 (1882).

It is noteworthy that the maximum penalties for armed robbery in Missouri, Tennessee and Texas are far more severe than in North Carolina. The maximum penalty in North Carolina is 30 years in prison (minimum 5 years). G.S. 14-87. In Missouri, the maximum penalty is death (minimum 5 years), 41 Vernon's Mo. Stats. § 560.135 (1953); in Tennessee, death (minimum 10 years), 7 Tenn. Code § 39-3901 (1970 Cum. Supp.); in Texas, death (minimum 5 years), 3 Vernon's Texas Penal Code, art. 1408 (1953).

[9] The question before us is whether, when separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, and verdicts of guilty as charged are returned, these verdicts provide support for separate judgments.

The motion in arrest of judgment in Case No. 2295 is denied.

Defendant having failed to show error in the trial, the verdicts and judgments will not be disturbed.

No error.

Justice LAKE, concurring.

I concur in the majority opinion solely because the two offenses charged involved separate assaults. The assault with a deadly weapon which was an essential element of the robbery, with which the defendant was charged in Case No. 2296, was over and done with when the assault with a deadly weapon with intent to kill, inflicting serious injuries not resulting in death, with which he is charged in Case No. 2295, occurred.

Had there been no display or other use of the .38 pistol prior to the completion of the robbery by the taking of the money and the .22 pistol, the defendant, in my opinion, would have been guilty of common law robbery only. The subsequent shooting of Smith with his own .22 pistol, taken from him in the robbery, was a separate offense, no element of which was an element of

the crime of armed robbery. The fact that two separate pistols were used is not, of course, the determining circumstance upon which I reach this conclusion, but it does point up the separateness of the two offenses.

I, therefore, concur in the majority view that the defendant has been convicted of two separate, distinct crimes and can be punished for both.

I am also inclined to the view suggested in the majority opinion that the second assault, though committed after the offense of robbery was completed, may be deemed to have been committed in the perpetration of the felony of armed robbery, within the meaning of G.S. 14-17, so that, had Smith died from the wounds inflicted upon him, the defendant might have been convicted of first degree murder. However, that question is not before us for decision in this case.

It is my view that the majority opinion necessarily leads to conclusions not consistent with the constitutional protection against double jeopardy. The constitutional prohibition against being put twice in jeopardy for the same offense cannot be avoided by the State by the simple process of consolidating two separate indictments for trial, as was done in this case.

The double jeopardy question is not resolved by merely observing, correctly, as the majority opinion does here, that each of the two principal offenses charged in the respective indictments involves an element not involved in the other. It is my understanding that the test of double jeopardy is whether the defendant, upon trial under the second indictment, could be convicted of any offense for which he could have been convicted upon trial under the first indictment. If so, by being brought to trial under both indictments, whether in succession or simultaneously, he is placed in double jeopardy of a conviction for that offense, which the Constitution forbids. *State v. Overman,* 269 N.C. 453, 464, 153 S.E. 2d 44; *Re Nielsen,* 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118; *Commonwealth v. Comber,* 374 Pa. 570, 97 A 2d 343, 37 ALR 2d 1058; Anno. 37 ALR 2d 1068; 21 Am. Jur. 2d, Criminal Law, § 187.

That which makes the constitutional protection against double jeopardy inapplicable to the present case is not the circumstance that each of the two offenses, armed robbery and felonious assault, in addition to the common element of assault

with a deadly weapon, has an element not present in the other. The controlling circumstance, on that question, in this case is the fact that here we are concerned with two separate, distinct assaults with a deadly weapon. The second assault, in my opinion, was not an element of the offense of armed robbery and, had it been the only assault with a deadly weapon, the conviction of armed robbery could not be sustained. Conversely, under an indictment for armed robbery, the defendant could not be convicted of an assault with a deadly weapon committed after the robbery was completed.

Justice HIGGINS, concurring.

In the decision of the Court finding no error in Case No. 2296 in which the defendant was convicted and sentenced for armed robbery; but dissenting in Case No. 2295 in which the defendant was convicted and sentenced for felonious assault.

The cases grew out of an armed robbery of the Bigguns Texaco Station on a public road fourteen miles east of Wadesboro on the morning of July 2, 1970. The evidence of Mr. Smith, who was in charge of the station, is stated in full in the Court's opinion.

The defendant's court-appointed counsel did not object to the consolidation of the two cases for trial and did not challenge the sufficiency of the evidence to go to the jury in either case. However, counsel appointed to prosecute the defendant's appeal challenges the validity of the conviction for felonious assault as charged in Case No. 2295 upon the ground the same was embodied in the charge of armed robbery and that to permit the conviction for the assault to stand would punish the defendant twice for one offense. The motion in arrest, therefore, requires a determination whether the armed robbery charge includes felonious assault. The origin and purpose of a statute furnish essential background for its interpretation.

Prior to the convening of the General Assembly in 1929, an armed robber entered a bank, shot one of the attendants, seriously injuring him, then shot another inflicting a superficial wound. The officers arrived before the robber obtained possession of any property from the bank. The State indicted the robber (1) for attempting to commit robbery (a misdemeanor); (2) for assault with the intent to kill, inflicting serious injury

not resulting in death (a felony); (3) for assault with a deadly weapon; and (4) for carrying a concealed pistol. The jury returned guilty verdicts in all the cases. Maximum sentences were imposed: two years on the road for the unsuccessful attempt to rob; ten years for the felonious assault inflicting serious injury; two years for the assault with the deadly weapon; and six months for carrying a concealed pistol. The trial judge, from the bench, announced that he was sorry the law did not permit the court to inflict sufficient punishment for the offenses committed.

At the subsequent convening of the General Assembly, House Bill No. 549 and Senate Bill No. 1202 were introduced and subsequently passed as Chapter 187, Public Laws of 1929, now codified as G.S. 14-87, and are here quoted in full:

> "Section 1. Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

The bill of indictment in this case specifically charges that the defendant with the use of a firearm, whereby the life of the attendant was endangered, unlawfully took personal property from the victim. Was the shooting a part of the robbery?

In two robbery cases this Court arrested the judgment in a second indictment which charged assault with intent to kill. The jury convicted of an assault with a deadly weapon. The ground for the decision was based on a duplication of the charges. In *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496, and later in *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892, this Court allowed motions in arrest of judgment for the lesser included offenses of assault with a deadly weapon. In the Parker case, this Court said:

"In this case, all the evidence shows the assaults on Erskine Hill with the pistol and axe handle were committed in connection with, as a part of, and included in the robbery. A conviction of that charge includes all elements of assault with a deadly weapon. This Court, *ex mero motu,* takes notice of the duplication, quashes the indictment charging the assault, sets aside the verdict, and arrests the judgment."

In the case of *State v. Hatcher, supra,* the Court arrived at a similar result.

The prosecution seems to admit that a charge of assault with a deadly weapon is embraced within the robbery charge. It contends that the bill does not charge serious injury and, therefore, a felonious assault charge is not included. True, the statute and indictment do not charge serious injury. Neither do they charge assault, but analysis of the statute makes it abundantly plain, it seems to me, that assault with intent to kill and the infliction of serious injury are both well within the statute and the indictment. The statute provides and the indictment charges that the defendant by the use of the pistol endangered and threatened the life of Lester Smith.

The customary use of a pistol is to fire deadly bullets. Of course, a pistol could be used as a paperweight, but such was not the use contemplated by G.S. 14-87. The bill charges the use of a pistol in such manner as endangered life. That means any use that falls short of taking life. The prosecution admits that if the shooting is such as not to inflict serious injury, the charge is included in armed robbery. But if the bullet goes a little deeper and inflicts a little more injury, that is not included in armed robbery. If the shooting in the robbery results in the death of the victim, the robber can be charged with murder in the first degree and the proof that the killing was in the perpetration of the robbery, the charge of murder is established. In that event the capital felony statute applies, but if the injury falls short of death, the armed robbery statute takes over and provides punishment up to thirty years for that offense. That punishment is the same as that provided for the most aggravated crime of murder in the second degree.

By holding, as the Court now does, that felonious assault is not included in armed robbery, the Court puts emphasis on

minute, technical manipulation of legal phraseology, but displays practically no knowledge of the "use of a pistol." The State says the offenses must be kept separately because some officer might appear on the scene and be shot and seriously wounded and the defendant protected from prosecution by reason of the robbery charge. The illustration does not fit. The robbery charge is confined to the robber and the victim. If a stranger comes on the scene, whatever either does to him, the doer is answerable. The use of the firearm must be in the taking, or the attempt to take, personal property from a person, or a person in charge, and the firearm used in such manner as to endanger or threaten life. The use of the firearm involves the result of the use.

Finally, the prosecution contends the robbery was over and the shooting occurred after the defendant had possessed himself of the victim's money and his pistol. The whole transaction in the little one-man filling station was over in seconds and at no time did the robber retreat or even turn backward toward the door until after the property was taken and the shots were fired.

If the State's position is correct, if the shots had been fatal, the robber could not have been convicted of a felony-murder because the robbery was over. Surely the Court does not desire to put in the books a statement which would enable a robber who shoots his victim to come into the court and say, "Oh, no. I got his property before I shot him and, therefore, you cannot convict me of murder in the first degree because of a killing in the perpetration of a robbery."

Intent is a condition of the mind to be inferred from conduct and surroundings. The indictment in plain words charged the defendant with the use of a pistol in such manner as endangered Smith's life. The *use* of the pistol inflicted the wounds. The statute fixes the maximum punishment for armed robbery at three times the maximum for common law robbery, and three times the maximum for the most vicious case of assault with a deadly weapon with intent to kill. In this case the judgment fixed the defendant's maximum punishment at thirty years in the armed robbery case and ten years in the felonious assault case, the sentences to run consecutively. The defendant says he is being punished twice for one offense in violation of his rights under Article I, Section 19, North Carolina Constitution, and Articles V and XIV of the United States Constitution.

In the case of *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838, Justice Moore, for this Court, states the general rule here quoted with respect to double jeopardy:

> ". . . (W)hen an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution to the other.
>
> The only exception to this well established rule is the holding in some cases that conviction of a minor offense in an inferior court does not bar a prosecution for a higher crime, embracing the former, where the inferior court did not have jurisdiction of the higher crime."

In *State v. Freeman,* 162 N.C. 594, 77 S.E. 780, this Court said: ". . . (A) test almost universally applied to determine the identity of the offenses is to ascertain the identity in character and effect of the evidence in both cases."

The victim's testimony, recorded in eighteen lines of the record, describes all that took place inside the filling station between the time the robber drew the pistol and the time he closed the door as he left the scene. Two different crimes cannot be established on the basis of differences in time of the successive acts constituting the robbery. The robbery was not over so long as the robber was on the scene trying to dispatch his victim, to facilitate his escape with the loot and to prevent alarm and pursuit.

In *State v. Bell,* 205 N.C. 225, 171 S.E. 50, this Court said:

> "The principle to be extracted from well-considered cases is that by the term, 'same offense,' is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment.
>
> When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater.
>
> To adopt any other view would tend to destroy the efficacy of the doctrine governing second jeopardy which

is embedded in our organic law as a safeguard to the liberties of the citizens."

In determining former jeopardy the well-considered cases place emphasis on the question whether one should be punished twice for the same unlawful conduct. Both the charges in the indictments and the evidence at the trial are properly examined to determine whether two prosecutions are attempted for one overall offense.

> "It is generally agreed that if a person is tried for a greater offense, he cannot be tried thereafter for a lesser offense necessarily involved in, and a part of, the greater, at least when, under the indictment for the greater offense, the defendant could have been convicted of the lesser offense." Wharton's Criminal Law and Procedure, Vol. 1, Sec. 148.

In well-reasoned opinions, appellate courts of other states have passed on essentially the same questions now before us. In *Duckett v. State* (Texas) 454 S.W. 2d 755, the petitioner was indicted, convicted and sentenced on the charge of robbery by the use of a firearm. At the same time he was indicted for assault with intent to murder. Both indictments grew out of the same transaction. The court said:

> "This is one continuous transaction, within the contemplation of the clause of the constitution which inhibits a second trial for the same offense; and, being such, the state cannot be permitted to prosecute again for assault with intent to murder. The State can carve the minor part of the transaction . . . or can carve the major part of the transaction . . . . However, the state can carve only the one time.
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> * * * * * * *
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> The inhibition against double jeopardy is determined by the facts and circumstances and not by the name of the offense."

In *State v. Richardson,* 460 S.W. 2d 537, the Supreme Court of Missouri (en banc) reversed a conviction for assault with intent to maim on the ground Richardson had been convicted of an attempt to commit robbery. The court held: "A person may by one act violate more than one statute or commit more than one

offense, but the state cannot split a single crime and prosecute it in parts without placing the defendant in double jeopardy."

Perhaps the leading case on the question before us is *Wilcox v. State,* 6 Lea (Tenn) 571, 40 Am Rep 53. The accused was convicted of robbery and subsequently convicted at a later term of the court for assault with intent to commit murder growing out of the same transaction. The court said:

> "The prosecutor (victim), upon the trial, testified to a violent and dangerous assault made upon him by the defendants, and he stated also on his cross-examination, that he had testified to the same facts upon his examination in the previous trial of defendants on the charge of robbery. It was for the assault at the time of the robbery that the conviction was had in this case. Force and violence were proved in each case, and were alike essential in both to sustain a conviction. *It was one continuous transaction, in which defendants perpetrated a robbery, by violence, dangerously wounding the prosecutor.* (Emphasis added.) Being one transaction, the prosecutor may carve as large an offense out of it as he can, but it is said 'he must cut only once . . . .'
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> * * * * * * *
>
> The assault or violence in the robbery case being an essential element or ingredient of the offense, and constituting an important and material part of that offense, as it does in the offense of assault with intent to commit murder, and having been once punished in the robbery case as a material part thereof, it cannot be again punished, as it would be if the judgment below were allowed to stand."

The two related statutes involved here are G.S. 14-87 and G.S. 14-32. They must be construed together. When they involve a case of armed robbery, the former includes the latter. Criminal statutes must be strictly construed. "The forbidden act must come clearly within the prohibition of the statute, for the scope of a penal statute will not ordinarily be enlarged by construction to take in offenses not clearly described; and any doubt on this point will be resolved in favor of the defendant." *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329; *State v. Garrett,* 263 N.C. 773, 140 S.E. 2d 315; *State v. Heath,* 199 N.C. 135, 153 S.E. 855.

The evidence discloses the robbery took place during daylight in a one-man filling station in the country. From the vic-

tim's evidence it clearly appears the robbery was over in a very short time, perhaps in seconds. The robber entered, drew his pistol, demanded and received the contents of the cash register, seized a .22 pistol from a cigar box by the cash register, ordered the victim to lie down with his head on his hands, whereupon the robber fired three shots and fled. We may assume neither the victim nor the robber wasted any time in what they were doing. A daylight robbery would not ordinarily be a leisurely conducted affair. Does not this record disclose one overall transaction?

This Court has repeatedly held that a charge of assault with a deadly weapon is a lesser included offense in the charge of assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death. The very fine opinion by Bobbitt, Justice (now Chief Justice), contains the following: "It (assault with a deadly weapon) is an essential element of the felony created and defined by G.S. 14-32, being an included 'less degree of the same crime.' " *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633. See also *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27; *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545.

The Court now says the foregoing is not true in this particular case because the assault with a deadly weapon is included in and a part of the armed robbery, but is not included in this particular felony charge. In my opinion the necessity of making this fine and illogical legal distinction stems from the error which the Court is now committing in upholding the felonious assault charge in this case. If there is one conviction of assault with a deadly weapon, can there be a subsequent conviction of the felony charge of which it is a part? The Bell, Birckhead, and other cases say "No."

If the Court's present decision is correct, may not the State obtain indictments against persons who inflict serious injury by the use of a deadly weapon in robbery cases and require the robber to answer for the separate crime of felonious assault which he committed in connection with and as a part of the robbery? The statute of limitations does not run in felony cases. If the crimes are independent and separate, as the Court now holds, they need not be tried at the same time and as a part of the robbery charge. This further illustrates and underscores the fallacy of the Court's present action in denying the motion in arrest of judgment in Case No. 2295.

In dividing one transaction into two separate felonies the Court is planting a "booby trap."

I concur in the decision finding no error in Case No. 2296.

I vote to arrest the judgment in Case No. 2295.

STATE OF NORTH CAROLINA v. DANNY CHANCE

No. 78

(Filed 15 December 1971)

1. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— capital case — jury selection — challenge to veniremen who would never return death penalty**

The defendant in a capital case cannot complain of the exclusion of those veniremen who stated unequivocally that they would automatically vote against the imposition of capital punishment without regard to any evidence that might develop in the trial.

2. **Criminal Law § 89— credibility of witnesses — restrictions on attempts to discredit**

The defendant in a capital case was not prejudiced when the trial court restricted his attempts to discredit the principal witnesses by showing inconsistencies in their testimony, where (1) the subject matter of the questions did not in itself tend to discredit the witnesses and (2) the purported inconsistencies were of little moment when considered in context with the facts of the case.

3. **Criminal Law § 87— refreshing the recollection of a witness**

The solicitor was properly allowed to refresh the recollection of his witness by asking the witness to read a written statement that the witness had given another person, and such action did not amount to an impeachment of the witness.

4. **Criminal Law § 88— restrictions on cross-examination — attempt to discredit State's witness — offer of parole**

Trial court properly sustained an objection to defense counsel's asking the State's witness whether or not he had been told by his attorney that he would probably get help on a parole if he testified for the State, especially since there was no evidence to indicate that the attorney was acting on behalf of the State with his promise of parole.

5. **Criminal Law § 43— photographs of victim's body — admissibility**

In a homicide and kidnapping prosecution, photographs of the victim's body, which were used by physicians to illustrate their testimony, *held* properly admitted in evidence.

6. Criminal Law § 43— admissibility of photographs — requisites

Ordinarily, a witness may use photographs to explain or illustrate anything which is competent for him to describe in words; if a photograph is relevant and material, the fact that it is gory or gruesome will not alone render it inadmissible.

7. Criminal Law § 120— rape case — instruction on return of the death penalty

In a prosecution charging defendant with rape, trial court's instruction to the jury, "You may find the defendant guilty of rape, as charged in the bill of indictment, and if you say no more, I will sentence him to die," *held* not prejudicial to the defendant.

8. Constitutional Law § 29; Criminal Law § 135; Rape § 7— death penalty for rape — validity and constitutionality

Imposition of the death penalty upon defendant's conviction of rape in 1971 was not rendered unconstitutional by the U. S. Supreme Court decisions of *U. S. v. Jackson*, 390 U.S. 570, and *Pope v. U. S.*, 393 U.S. 651.

9. Criminal Law § 146— appellate review in capital case

In capital cases the Supreme Court reviews the record and *ex mero motu* takes notice of prejudicial error.

10. Criminal Law § 66— in-court identification of defendant — capital case — effect of police lineup in the absence of counsel

A rape and kidnapping victim's in-court identification of defendant as the perpetrator of the crimes was properly admissible in evidence, notwithstanding the victim saw the defendant in a police identification lineup at a time when the defendant was without counsel and could not waive his statutory right to counsel, where the victim's in-court identification was clearly based upon her observation of the defendant during the commission of the crimes, which took place over a five or six hour period. G.S. 7A-451(b)(2) and G.S. 7A-457(a).

11. Criminal Law § 75— admissibility of incriminating statements — capital case — absence of counsel — voluntariness of statements

Defendant's statements implicating him in the crimes of kidnapping and murder were not rendered inadmissible on the ground that defendant had not been accorded his statutory right to counsel at the time the statements were made, where the statements were in fact volunteered by defendant and were not obtained by an in-custody interrogation. G.S. Ch. 7A, Art. 36.

12. Criminal Law §§ 74, 75— what constitutes a confession — test of admissibility — accused who is in custody

The extra-judicial statement of an accused is a confession if it admits that the defendant is guilty of the offense charged or of an essential part of the offense; the fact that such statement is made while the accused is in custody does not, in itself, render the confession incompetent.

State v. Chance

APPEAL by defendant from *Bailey, J.*, at 29 March 1971 Session of CUMBERLAND Superior Court.

Defendant was charged in four separate bills of indictment, each proper in form, with the murder of James Earl Buckner, the rape of Gwen Davis, the kidnapping of James Earl Buckner, and the kidnapping of Gwen Davis. The cases were consolidated for trial, and defendant entered a plea of not guilty to the charge contained in each indictment.

During the selection of the jury, defendant excepted to the action of the trial judge in allowing challenges for cause as to five of the veniremen.

The following is a summary of the evidence offered by the State:

Gwen Davis testified that on 28 June 1970 she was fourteen years old. When asked if she had seen Danny Chance on 29 June 1970, defendant's counsel objected and requested a voir dire hearing. On voir dire, Gwen Davis testified to events which revealed that she was in the presence of defendant from about midnight on 28 June 1970 until about 5:30 a.m. on 29 June 1970; that during that time she was forcibly taken into an automobile driven by defendant, and for a period of about 35 to 45 minutes she sat in the front seat next to defendant; that she later saw him on the 29th day of June at the Sheriff's office in a lineup consisting of defendant and three other white males of about the same height; she identified Danny Chance immediately without any suggestion from anyone, and that her identification was based on having seen him during the period from 12 o'clock on June 28th to the early morning hours of June 29.

Louis Frye also testified in the absence of the jury and stated that on 29 June 1970 he was a deputy sheriff in Cumberland County, and that he saw defendant Chance at about 2:00 o'clock on 29 June; that before talking with him, he advised him of his "rights," and that at that time defendant read and signed a form which acknowledged that he had received warnings as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602.

Still on voir dire, the witness related statements made by defendant. He stated that defendant also signed a consent to

allow search of his house and car. Defendant offered no evidence on voir dire. The trial judge thereupon found facts and concluded:

> "That the search of the suspect Chance's car and home was in every respect valid, was not induced by any fear of harm or hope of reward and that such statement as he gave to Detective Frye was purely voluntary and was given freely and voluntarily and understandingly and in full knowledge of his rights at a time when the defendant was not under the influence of alcohol or any other— or had any other apparent mental abnormality."

The trial judge also overruled both the objection as to the identification of defendant by the witness Davis and the objection to statements given to Mr. Frye by defendant.

The witness Davis then returned to the stand and testified: that on 28 June 1970, at about 3:00 o'clock p.m., she and a friend went to Steve's Drive-In in Fayetteville and remained there until about 11:00 o'clock p.m., when she departed with James Earl Buckner, aged 23. They drove directly to her home within a period of about eight to ten minutes. Buckner stopped his car about 30 yards from the front of her house, and she and Buckner were leaning against the car facing the road, engaged in conversation. At this point, a white 1961 or 1962 model Chevrolet station wagon, which was dented, rusty, and had one rear taillight broken out, passed, turned around and came back and parked behind Buckner's car. Four men emerged from the car and surrounded the witness and Buckner. These four men were Charles Wilcosky, David Sisneros, Andrew Strickland and the defendant Danny Chance. She had never seen any of these men before that night. Strickland pulled out a pistol, stuck it in Buckner's ribs, and told both Buckner and Gwen to get into the station wagon. Buckner was forced into the back seat by Sisneros and Wilcosky, and she was placed in the front seat between the driver Chance and Strickland. Chance drove the automobile out on old 301 into the country, and while he was driving Strickland put his left arm around her shoulder and began to kiss her on her face and lips while trying to penetrate her privates with his hand. He forced her to remove her panties and handed the pistol to defendant Chance. Chance put the pistol between his leg and her leg and she grabbed the pistol and threw it out of the window. Strickland at that point

struck her. After driving several miles into the country, Chance drove the automobile into and snapped a cable stretched between two posts which blocked access to a "two-rut" road. He continued down the road and stopped the automobile between two ponds, where Sisneros and Wilcosky took Buckner out of the automobile. Chance got out of the automobile, and Strickland put her into the back seat, where he forced her to commit a crime against nature and then forcibly had intercourse with her. She stated that she did not consent to any of these acts. Strickland left the automobile and Chance got into the back seat and ripped off her remaining clothes. He then forced her to commit a crime against nature with him and forced her against her will to have intercourse with him.

Sisneros and Wilcosky, in turn, entered the car and forced her to commit sexual acts with each of them. While Wilcosky, the last of the four to assault her, was in the back seat, the others returned to the car and Chance drove the car back through the broken cables, down a dirt road into a tobacco field. There Strickland and Chance go into the back seat with her and further assaulted her. Thereafter, her clothes were returned and somebody began to choke her. The next thing she remembered was waking up in the sunshine lying on two small boards placed across a ditch. She walked to a house belonging to Harold Eldridge, who carried her to her home in Fayetteville. Her mother immediately called the Sheriff's office and Detective Frye answered the call. Gwen showed Detective Frye the route taken the previous night, and they located the body of James Earl Buckner. Later, at the courthouse, she identified a station wagon as the one used the night before, and identified as hers an earring which was shown to her by Major Kiser of the Fayetteville Police Department.

Detective Frye of the Fayetteville Police Department then testified that in response to a call he went to the home of Gwen Davis on the morning of 29 June 1970. He found her badly bruised about the face, neck and shoulders, and apparently in a daze. She told him briefly what had happened, and he went to the place where Buckner's car was parked and observed tracks nearby made by "mud-grip" tires. Gwen Davis was able, with great difficulty, to show him where she had been taken. They found the road leading into the woods and he observed a snapped cable and a place where an automobile had left tracks

made by "mud grip" tires. They drove down the road to a point beyond two gravel pits, where he found a scarred pine tree, and observed that the grass around the base of the tree had been "trampled down." He followed the drag mark into the bushes and discovered the dead body of a man which Gwen Davis identified as the body of James Earl Buckner. Buckner's hands were tied together and his face and neck were badly bruised and swollen. (Detective Frye used photographs of the body to illustrate his testimony at this point.) Frye and Gwen Davis returned to Fayetteville to look for the station wagon in which she had been abducted. He had broadcast a description of the station wagon earlier in the day, and when they returned to Fayetteville they found a station wagon matching the description given him by Gwen Davis parked behind the courthouse. He went into the Sheriff's office and there found Major Kiser of the Sheriff's Department and Danny Chance. Chance consented to a search of the car, and Major Kiser found an earring in the back seat which was identified by Gwen Davis as one belonging to her which she had worn on the previous night.

Frye testified concerning certain questions asked by defendant and statements made by him.

David Sisneros testified that he and Charles Wilcosky were members of the U. S. Army, stationed at Fort Bragg. He knew Strickland prior to 28 June 1970, but had never seen Chance until that evening. The four men met at the Drop Zone Club in Fayetteville and drank together until about midnight, at which time they bought a case of beer and rode around in Chance's automobile drinking the beer. It was at Strickland's suggestion that they stopped and abducted Gwen Davis and Buckner. He testified that Chance drove the station wagon into the woods and stopped, and that he and Wilcosky forcecd Buckner out of the back seat. Chance suggested that they tie Buckner to a tree and gave Sisneros a piece of rope. After tying Buckner to the tree, Chance, Sisneros and Wilcosky stood around for Strickland to get out of the car. They observed Strickland having intercourse with Gwen Davis in the back of the station wagon. Chance then entered the car and Strickland went over to the tree where Buckner was tied. Strickland tied Buckner tightly to the tree, winding the rope around his neck. Chance got out of the car and Sisneros got into it, and had sexual relations

with Gwen Davis. When Sisneros got out of the car, Buckner was no longer tied to the tree. He did not see Buckner anywhere. After refreshing his memory from a written statement, handed him by the Solicitor, Sisneros stated that Strickland or Chance told him they had killed Buckner and put him in the bushes. Sisneros did not remember which of the two made the statement. After that, Sisneros, Strickland and Chance got in the car, and Chance drove to a tobacco field and parked. When Wilcosky got out of the back seat, Chance and Strickland got in the back seat and again assaulted Gwen Davis. Someone gave Gwen Davis her clothes and as she was dressing, Strickland told Sisneros and Wilcosky, "We have already killed the guy, and it's your chance to kill the girl." Wilcosky and Sisneros did not kill the girl and Strickland reached back and hit her in the throat and proceeded to choke her until she passed out. Chance, Sisneros and Wilcosky placed her on Strickland's shoulder and he headed into the woods. At one point, when she appeared to regain consciousness, Strickland dropped her on her head and stated that he thought her neck was broken. Chance asked if Gwen were dead, and thereupon walked up and "stomped on her neck . . . for 30 to 45 seconds." Strickland put his weight on Chance's shoulders and "Chance stood on Gwen Davis' throat no more than ten or fifteen seconds." Gwen did not move, and they put her in some bushes and left.

The State offered medical testimony showing that Gwen Davis had been badly bruised around the head and shoulders and that she was bruised around the pelvic area; her female organ had been penetrated by a male organ. The pathologist who performed an autopsy on Buckner stated that he had died of ligature strangulation, and that he had been badly beaten around the head, neck, shoulders, arms and groin.

Defendant offered testimony of an acquaintance and a minister to the effect that he bore a good reputation.

The jury returned a verdict of guilty to the charge of rape with no recommendation, a verdict of guilty of murder with recommendation of life imprisonment, a verdict of guilty of kidnapping James Earl Buckner and a verdict of guilty of kidnapping Gwen Davis. On the rape charge Judge Bailey pronounced the mandatory sentence of death by asphyxiation. On the murder charge he pronounced a sentence of life imprisonment, and on the verdict of guilty of kidnapping James Buckner

a sentence of 99 years in prison, and on the verdict of kidnapping Gwen Davis, a sentence of 99 years in prison. It was adjudged that the death sentence be first imposed and that the other sentences run consecutively.

Defendant gave notice of appeal in open court, and the court appointed Sol G. Cherry, the Public Defender, to represent defendant on his appeal.

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

Sol G. Cherry, Public Defender, Twelfth Judicial District, and William S. Geimer, Assistant Public Defender, for the defendant.

BRANCH, Justice.

[1] By his first assignment of error, based on Exceptions 2, 3, 4 and 5, defendant contends that the jury's selection in the present case violated the mandate of *Witherspoon v. Illinois,* 391 U.S. 510, 20 L. Ed. 2d 776, 88 S.Ct. 1770.

Each of the challenged veniremen stated unequivocally that he or she would automatically vote against the imposition of capital punishment without regard to any evidence that might develop in the trial.

In Footnote 21 of *Witherspoon v. Illinois, supra,* it is stated:

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakeably clear (1) *that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them,* or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*" (Emphasis added.)

The examination which is fully set out in the record clearly shows that each of the challenged jurors would not return a verdict that would result in the imposition of the death sentence. We hold that the jury selection in the present case did not

violate the mandate of *Witherspoon. State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572; *State v. Miller,* 276 N.C. 681, 174 S.E. 2d 481; *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241.

[2] Defendant assigns as error the action of the trial judge in restricting defendant counsel's cross-examination.

Defendant's counsel asked the witness Gwen Davis:

> Q. Now, Miss, did you not make a statement to Mr. Gerald Cannon (?) in Lillington, and at that time you told him that you had dated Buckner?

The trial judge sustained the State's objection.

Again on cross-examination of the witness Gwen Davis, the following occurred:

> "I don't remember who was in the car when I heard something like someone hit Buckner.
>
> Q. Is that what you testified to in the Wilcosky and Sisneros trial?
>
> Objection by State
>
> Court: Sustained.
>
> EXCEPTION EXCEPTION No. 10."
>
> Later, the witness Louis W. Frye was asked:
>
> "Q. Well, didn't you say on direct examination that she said Buckner was her boyfriend?
>
> A. She said a friend, that had brought her home.
>
> Q. Didn't you testify to that, Mr. Frye?
>
> Objection by State.
>
> Court: Sustained.
>
> EXCEPTION EXCEPTION No. 11."

The applicable law permits joint consideration of these several rulings.

It is true that a witness may be impeached by proof of prior inconsistent statements. *State v. Britt,* 225 N.C. 364, 34

S.E. 2d 408. However, "The limits of legitimate cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby." The above statement was quoted with approval in *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50.

This record does not show what the witness would have said had he or she been allowed to answer, and a denial would have been binding on the cross-examiner since the matter inquired into was obviously collateral. Stansbury, N. C. Evidence, 2d Ed., § 48, p. 96. The subject matter of the questions addressed to the witness Davis and the witness Frye did not, in itself, tend to discredit either witness. Whether Gwen Davis had "dated" Buckner, or whether he was her friend or "boyfriend" or who was in the car when she heard something like someone hit Buckner, all seem to be of little moment when considered in context with the facts of this case. Even conceding technical error, defendant fails to show that the verdict was improperly influenced by these rulings.

This assignment of error is overruled.

[3] By his next assignment of error defendant contends that the trial judge erred by allowing the Solicitor to impeach his own witness, David Sisneros. This assignment of error is based on Exception No. 12, which points to the following portion of the record.

> Q. I refer to the statement marked State Exhibit 12 and ask you, would you read it to yourself, the last paragraph, on page 2 and ask you if you can refresh your recollection from that?
>
> Attorney Cherry: I object to this, he is trying to impeach his own witness.
>
> Court: Well, I will let him read it to himself. Then you may read it. Then I will read it. It is hard to rule on it until I do.
>
> QUESTIONS Continued by Solicitor Thompson:
>
> Q. From reading and refreshing your recollection from this statement —

Attorney Cherry: Objection, your Honor.

Court: Overruled.

EXCEPTION EXCEPTION No. 12.

I now recall that Chance or Strickland told me that they had already killed him and put him in the bushes. I don't remember which one it was. Chance was present."

State's Exhibit 12 is identified on page 67 of the record as being the statement given to a Mr. Neal by the witness Sisneros.

Stansbury, N. C. Evidence, 2d Ed. § 32, p. 62, contains the following statement:

"A witness may be compelled, at the instance of a party who is examining or cross-examining him, to inspect a writing which is present in court, if it is in his handwriting or it otherwise appears that his memory may be refreshed by reading it."

In the case of *State v. Noland,* 204 N.C. 329, 168 S.E. 412, this Court, speaking through Adams, J., stated:

". . . The witness had made an affidavit as to facts which were material and upon his examination in this case was hesitant and evasive in his answers to questions asked him by the solicitor. The court gave the prosecuting officer leave to call the attention of the witness directly to the contents of his affidavit. The examination was not intended as an impeachment of the witness but as an effort to refresh his memory by reference to statements he had previously made and to prevent confusion or equivocation in his testimony. The trial court in the exercise of its discretion may under such circumstances permit a party to propound leading questions to his own witness."

The Judge correctly allowed the Solicitor to refresh the recollection of this witness, and such action did not amount to an impeachment of his own witness.

[4] Defense counsel asked witness Sisneros if his attorney, Mr. Allen Litch, did not tell him that he would probably get help on a parole if he, Sisneros, testified for the State. The trial judge sustained the State's objection.

It is recognized that it is proper on cross-examination to test a witness as to bias concerning a promise of or his just expectation of pardon or parole as the result of his testifying for the State. *State v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277. However, this rule must be applied in connection with the equally well recognized rule that the legitimate bounds of cross-examination are largely within the discretion of the trial judge, so that his ruling will not be held as prejudicial error absent a showing that the verdict was improperly influenced thereby. *State v. McPherson, supra.*

Here the question was directed to a conversation with defendant's attorney. There is nothing to indicate that he was in any way connected with the State so as to be able to promise or deliver parole relief. Further, defendant by his question carried to the jury the full force and implication of his contention. The trial judge's ruling was within the extent of his authority, and defendant has failed to show prejudicial error resulting from this ruling.

By Assignment of Error No. 23 defendant contends that the trial judge erred by limiting his cross-examination of the witness Sisneros. Defendant seems to concede that this ruling was made in the exercise of the trial judge's discretion. We agree that this was a discretionary ruling and that no abuse of discretion is shown. *State v. McPherson, supra.* This assignment of error is overruled.

[5] Defendant next contends that the trial judge committed error by admiting into evidence photographs of the deceased Louis Buckner because they were inflammatory and served no useful purpose.

Defendant does not contend that the photographs are inaccurate, repetitious, or that they were not properly taken and authenticated.

[6] Ordinarily, a witness may use photographs to explain or illustrate anything which it is competent for him to describe in words, *State v. Atkinson, supra; State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824, and if a photograph is relevant and material, the fact that it is gory or gruesome will not alone render it inadmissible. *State v. Atkinson, supra; State v. Lentz,* 270 N.C. 122, 153 S.E. 2d 864; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10;

State v. Gardner, supra. The photographs in this case were used by the physicians to illustrate and make their testimony more intelligible to the jury. They were admitted into evidence under a proper instruction limiting their use to illustration of the witnesses' testimony. The photographs were relevant, properly authenticated, served a useful purpose, and were properly admitted into evidence and viewed by the jury.

[7] In his charge to the jury the trial judge stated, *inter alia,* "You may find the defendant, Danny Chance, guilty of rape, as charged in the bill of indictment, and if you say no more, I will sentence him to die." Defendants excepts and assigns as error this portion of the charge.

Defense counsel in his brief states: "It is recognized that the court considered somewhat stronger language by the same trial judge in *State v. Atkinson,* 278 N.C. 168, and found no error. For this reason, it would seem to be an exercise in futility to bring this particular question forward." We agree.

This portion of the charge does not constitute an expression of opinion by the trial judge which prejudiced this defendant in the eyes of the jury. *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410; *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412. This assignment of error is overruled.

[8] Finally, defendant, by Assignment of Error No. 32, contends that the death penalty imposed in the rape case constituted cruel and unusual punishment, prohibited by the United States Constitution and the Constitution of the State of North Carolina.

Defendant, in his brief, concedes that *State v. Atkinson, supra,* and the cases there cited, make his argument as to this assignment of error futile. However, he requests that we now consider the assignment of error in light of the memorandum decisions of the United States Supreme Court which reversed the death sentences imposed by the several superior courts, which were affirmed by this Court, in the cases of *Atkinson v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 859, 91 S. Ct. 2283 (1971); *Hill v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S. Ct. 2287 (1971); *Roseboro v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S. Ct. 2289 (1971); *Williams v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S. Ct. 2290 (1971); *Sanders v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 860, 91 S. Ct. 2290

(1971); *Atkinson v. North Carolina,* 403 U.S. 948, 29 L. Ed. 2d 861, 91 S. Ct. 2292 (1971).

This Court considered this question in light of these cases in a nearly identical factual situation, in the case of *State v. Doss, ante,* 413, 183 S.E. 2d 671. There the Court, speaking through Moore, Justice, said:

> "... In the decisions entered by the Supreme Court of the United States, that Court as authority for its decision in each case cited *United States v. Jackson,* 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968), and *Pope v. United States,* 392 U.S. 651, 20 L. Ed. 2d 137, 88 S. Ct. 2145 (1968). Neither of these cases is controlling in the case at bar. Prior to the commission of the crime charged in this case and to the trial, G.S. 15-162.1 was repealed. Under that statute any person accused of first degree murder could have tendered in writing a plea of guilty of said crime, and the State with the approval of the court could have accepted such plea, in which case punishment was life imprisonment. G.S. 15-162.1 was similar to the Federal Kidnapping Act, 18 U.S.C. § 1201(a), the death penalty of which was condemned in *Jackson,* and the Federal Bank Robbery Act, 18 U.S.C. § 2113(e), the death penalty of which was condemned in *Pope.* With the repeal of G.S. 15-162.1, this infirmity insofar as the death penalty in the felony of murder in the first degree, or burglary in the first degree, or arson, or rape in North Carolina was removed."

G.S. 15-162.1 was repealed effective 25 March 1969. Its provisions were substantially re-enacted effective 15 June 1971. This re-enactment was repealed on 21 July 1971.

In instant case the crime was committed on 29 June 1970. The trial commenced on 29 March 1971 and final judgment was rendered in the Superior Court of Cumberland County on 31 March 1971. Since G.S. 15-162.1 had been repealed and had not been re-enacted when the crime in instant case was committed and judgment rendered, the infirmity as to the death penalty condemned in *Jackson* and *Pope* had been removed.

By authority of *State v. Doss, supra,* this assignment of error is overruled.

[9] Defendant does not, by assignment of error, attack his in-court identification or evidence as to proceedings at the lineup on the ground that he was without counsel when the lineup proceedings were conducted; neither does he contend that the court erred in admitting into evidence questions asked by him and statements made by him to Detective Frye in the absence of counsel. However, in capital cases we review the record and *ex mero motu* take notice of prejudicial error.

It should be noted in this case that the "lineup" was held on 29 June 1970 and the statements made by defendant to Detective Frye were made on the same date. There was no finding or evidence in the record relating to defendant's indigency on 29 June 1970. On 26 October 1970 Judge Thomas D. Cooper found defendant to be an indigent and appointed the Public Defender of the 12th Judicial District to represent him.

We first consider the pretrial identification procedures.

Since decision in *United States v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926, and *Gilbert v. California,* 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951, on 12 June 1967, it has been established that an accused has a constitutional right to the presence of counsel at in-custody proceedings and, absent voluntary waiver, when counsel is not present any testimony by witnesses that they had identified the accused at a lineup is rendered incompetent and the in-court identification of an accused by a lineup witness is rendered inadmissible unless it is first determined on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal lineup. *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507; *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581.

[10] There was no evidence offered in the presence of the jury that the witness Gwen Davis had identified the accused at a lineup and we therefore are only concerned with the admissibility of the in-court identification.

Defendant does not contend, nor does the record disclose, that the lineup in instant case was conducted in such a manner as to be unnecessarily suggestive and conducive to mistaken identification or that the procedures were such as to offend fundamental standards of decency, fairness and justice in violation of the guarantees of the Fourteenth Amendment. *Rochin v.*

California, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205; *State v. Austin, supra; State v. Rogers, supra.*

Prior to the passage of Chapter 7A, Article 36 of the General Statutes of North Carolina, it was unquestioned that an accused could waive his right to counsel at in-custody proceedings, either orally or in writing, if he did so freely, voluntarily and understandingly. *United States v. Wade, supra; State v. Wright, supra; State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353.

The provisions of Chapter 7A, Article 36 of the General Statutes grant to an accused indigent the right to have counsel at any pretrial identification procedure at which presence of the accused is required, and provides that waiver of any right granted to an indigent by that subschapter must be in writing. It further provides that there can be no waiver of such rights in capital cases. G.S. 7A-451(b)(2) and G.S. 7A-457(a); *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561.

In instant case the witness Gwen Davis testified on voir dire that she was in defendant's presence for a period of five or six hours, and during that time she sat next to him in the station wagon for about 45 minutes. He later had sexual intercourse with her against her will, and on two occasions forced her to commit the abominable crime against nature with him. It seems clear that she had ample opportunity to observe him. She instantly pointed out defendant as one of her assailants when she saw him in the lineup, and stated there was no doubt in her mind that he was one of her assailants. She further testified that her identification of him in court was based on having seen him on the 28th and 29th of June 1970, and that the identification was not based upon having seen him in the lineup.

The record shows that the lineup identification was made shortly after the crime was committed and that there had been no prior conflicting identifications or descriptions.

Defendant offered no evidence on voir dire. At the conclusion of the voir dire hearing the trial judge found facts and concluded "that her in-court identification is based upon the fact that she was with Chance over a period of substantial time from about midnight on the 28th day of the early morning hours of the 29th of June and in no way is based upon having seen him in the lineup."

One who, because of the statute, is precluded in a capital case from waiving the right to counsel during an in-custody, pretrial lineup stands in the same position as an accused who did not knowingly, understandingly and voluntarily waive the right to counsel before the enactment of Chapter 7A, Article 36 of the General Statutes. Therefore, since the State, on voir dire, showed by clear and convincing evidence that the in-court identification was of independent origin and was not tainted by the lineup procedures, the in-court identification evidence was competent.

Further, had we found error in the violation of the provisions of Chapter 7A, Article 36 of the General Statutes, the strong evidence of identification by the witness Davis, the witness Sisneros, defendant's accomplice, and the physical evidence introduced by the State, which pointed the finger of guilt to defendant Chance as one of the perpetrators of these crimes, was so overwhelmingly that any error resulting was clearly harmless error beyond a reasonable doubt. *Harrington v. California,* 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726; *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824; *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398; *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399; *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744.

[11] We next consider whether admission into evidence of statements made by defendant to Detective Frye resulted in prejudicial error.

Detective Frye testified that he first saw defendant at the Sheriff's office and that he immediately warned defendant of his constitutional rights and that defendant then read and signed a written form which, among other things, contained the following:

> " . . . . Before we ask you any questions, you must understand your rights. You have the right to remain silent; anything you say can be used against you in court; you have the right to talk to a lawyer for advice before we ask you any questions and to have him present with you during any questioning. If you cannot afford a lawyer, one will be appointed for you before any questions; but if you decide to answer questions now without a lawyer you will still have a right to stop answering any time until you talk to a lawyer."

Detective Frye testified:

"He told me that he wished to give me a statement in full as to what happened but, at the time, I did not know what county the crime had occurred in and thought it had happened in Harnett County. I told him to hold the information for the Harnett County officers.

. . . .

" . . . . I told him that a girl had been kidnapped and that a man had been murdered, and that he was a suspect. He asked me 'Is the boy dead?' I told him that the boy was dead. He then asked what happened to the girl. I told him that she made it to the road and got help. He stated that he had been worried about what had taken place and didn't want to take the rap by himself; he said that it wasn't all his fault.

"Danny stated to me that the 1962 automobile belonged to him. He said that he had bought it in Connecticut but didn't have any registration for it."

The United States Supreme Court and this Court have long recognized that a person (including an indigent) accused of a crime, capital or otherwise, could orally or in writing voluntarily waive his constitutional privilege against self-incrimination and his right to legal counsel, and any in-custody confession made by an accused was admissible into evidence when the trial judge held a voir dire and found upon competent evidence that the accused freely, understandingly and knowingly waived these rights and that the confession was voluntarily made. *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37; *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581; *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602.

In instant case the trial judge conducted a voir dire hearing, in the absence of the jury, and heard testimony from the State's witnesses concerning the admissibility of certain statements and questions allegedly made by defendant. Defendant offered no evidence.

There was ample competent evidence to sustain the trial judge's finding:

" . . . . that such statement as he gave to Detective Frye was purely voluntary and was given freely and voluntarily

and understandingly and in full knowledge of his rights at a time when the defendant was not under the influence of alcohol or any other—or had any other apparent mental abnormality. The objection to the statement as given to Mr. Frye is overruled."

However, the General Assembly of North Carolina by enactment of Chapter 7A, Article 36 of the General Statutes has stated that in a capital case there shall be no waiver of the rights granted therein by an indigent. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561. One of the rights there granted is the right to counsel in an "in-custody interrogation."

Did absence of counsel during the above quoted colloquy between defendant and Detective Frye result in prejudicial error? We think not.

[12] The extra-judicial statement of an accused is a confession if it admits that the defendant is guilty of the offense charged or an essential part of the offense. *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193. The fact that such statement is made while the accused is in custody does not, in itself, render a confession incompetent. *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1.

In the case of *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638, this Court considered whether defendant made statements as a result of a custodial interrogation. There the defendant, who was in his own yard and surrounded by family and friends, made inculpatory statements amounting to a confession to police officers immediately after he had shot the deceased person. He was not warned as to his constitutional rights as set forth in *Miranda v. Arizona, supra,* and the Court, in holding that such warning was not necessary, stated:

"In *Miranda,* the majority opinion, delivered by Mr. Chief Justice Warren, states that the constitutional issue decided 'is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way.' Repeatedly, reference is made to 'custodial interrogation.' Thus, the opinion states: '(T)he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to

secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' . . . 'Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.' "

In *Miranda v. Arizona, supra,* we also find this statement:

"The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without benefit of warnings and counsel, but *whether he can be interrogated.* There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding to-day." Id. at 478, 16 L. Ed. 2d at 726, 86 S.Ct. at 1630. (Emphasis added.)

Accord: *State v. Fletcher and St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405; *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245; *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802.

In instant case it is clear that defendant was in custody, but is equally clear that no statements were made as a result of questions from the police officers. There is no evidence in this record of any interrogation or any other procedure which would tend to overbear the will of the accused as is condemned in the line of authorities represented by *Miranda.* It appears in this record that defendant wanted to make a full confession and that the police officer declined to take it. The conclusion is inescapable that the questions posed by defendant and the statements made by defendant were volunteered. We hold that under the facts and circumstances of this case there was no "in-custody interrogation." Thus, the presence of counsel was not required. The trial judge correctly admitted into evidence the statements made by defendant to Detective Frye.

We find no errors of law resulting in prejudicial error to this defendant.

No error.

STATE OF NORTH CAROLINA v. DWIGHT H. WILLIAMS

No. 23

(Filed 15 December 1971)

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

Assignments of error not discussed in defendant's brief are deemed abandoned.

2. **Criminal Law § 66— identification of defendant — voir dire hearing**

The voir dire hearing to determine the admissibility of identification testimony should be conducted before such testimony is admitted in evidence.

3. **Criminal Law § 66; Constitutional Law § 32— in-custody lineup — defendant's right to counsel**

The in-custody lineup being a critical stage, the accused person must be advised, not vaguely of "rights," but specifically of the right to counsel (including the appointment of counsel in the event of indigency) and of his right to the presence of his counsel when the lineup is conducted.

4. **Criminal Law § 66— identification of defendant — illegality of police lineup — right to counsel — award of new trial**

A defendant accused of armed robbery is awarded a new trial on the grounds that the police identification lineup was illegal and that the victim's in-court identification of the defendant, which was based on the lineup, was consequently inadmissible, where there was no evidence (1) that the defendant had been advised by the police of his right to have an attorney present at the lineup or (2) that the defendant had voluntarily waived the right to have an attorney present.

5. **Criminal Law §§ 86, 89; Witnesses § 6— impeachment of witnesses — evidence that witness is under indictment for other offenses**

For purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial.

6. **Criminal Law §§ 86; 89; Witnesses § 6— impeachment of witnesses — evidence that witness has been accused of other crimes**

For purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been accused, either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been arrested for such unrelated criminal offense.

7. **Indictment and Warrant § 7— definition of indictment**

A bill of indictment is a written accusation which charges a named person with a specific criminal offense.

8. **Criminal Law § 86— impeachment of defendant — evidence of other indictments — new trial**

The circumstances of the particular case will determine whether defendant will be awarded a new trial for having had to answer on cross-examination that he is currently under indictment for other crimes.

9. **Criminal Law § 86— impeachment of defendant — evidence of other indictments — new trial**

In a prosecution in New Hanover County for armed robbery, it was prejudicial error for the solicitor to have elicited from defendant that he was also under indictment for armed robberies in Onslow, Wayne, and possibly Lenoir Counties.

Justice HIGGINS dissenting.

APPEAL by defendant from *Cowper, J.*, June 9, 1970 Session of NEW HANOVER Superior Court, transferred for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant was indicted for the robbery of Jackie Horne with a dangerous weapon, to wit, a pistol, in violation of G.S. 14-87.

The State's case is based on the testimony of Jackie Horne, age 26, who, on the night of November 16, 1968, was in charge of Direct Oil Company's Fourth Street filling station in Wilmington. Horne testified that, between eight and nine o'clock, defendant walked in the door of the station, "put the gun on [him] and said he wanted [his] money"; that a larger man without a gun entered the side door; that Horne told defendant the money was in his pocket; that defendant then took the money from Horne's pocket, $45.00, the property of Direct Oil Company; that Horne crossed the street between the two robbers; that when they reached the corner Horne turned to the left and the robbers went straight "down the hill"; and that, soon thereafter, Horne returned to the station and "called the police."

Horne also testified on *voir dire* and at trial concerning an in-custody lineup in which he identified defendant as the man who had robbed him at gunpoint.

Defendant's evidence consisted of his own testimony. He testified he was a member of the Marine Corps, having the rank of Corporal E-4; that he had been in the Marine Corps for approximately six years and had "never had any disciplinary

action taken against [him]"; that he had never been convicted of anything in his life; that about two months before November 16, 1968, he had re-enlisted and had gotten a re-enlistment bonus of $3,000.00; that his pay was $358.00 a month; that he was married and lived in Wilmington, North Carolina, at 904 South Fifteenth Street, where he spent the nights when not on duty; that he did not rob Horne; that he had never seen Horne except when he testified in the district court; that he did not even know where the Direct Oil Company filling station was; and that Horne had "picked out the wrong man."

Defendant also testified on *voir dire* and at trial concerning the in-custody lineup in which, according to the State's evidence, he was identified by Horne.

Additional evidential facts relating to the lineup will be stated in the opinion.

The record shows the following occurred during the solicitor's cross-examination of defendant.

"Q. Aren't you under indictment right now in Onslow County for armed robbery?

"MR. SPERRY: I object, and move for a mistrial if he starts talking about that.

"COURT: Overruled.

EXCEPTION NO. 5

"Q. Answer my question. Are you under indictment in Jacksonville for armed robbery right now?

"Objection: Overruled EXCEPTION NO. 6

"Yes, sir, I am. The way the police officers work here in Wilmington and everywhere else, when you arrested for one charge, they try to put every charge in the world on you.

"Q. Now, you are under an indictment for armed robbery in Goldsboro, aren't you?

"Objection: Overruled EXCEPTION NO. 7

"A. Yes sir.

"Q. Aren't you under indictment in Kinston?

"Objection: Overruled EXCEPTION NO. 8

"A. I am not sure."

The jury returned a verdict of guilty and the court pronounced judgment which imposed a prison sentence of twelve years. Defendant excepted and appealed.

Attorney General Morgan and Staff Attorney Evans for the State.

George H. Sperry for defendant appellant.

BOBBITT, Chief Justice.

[1] On appeal, defendant sets forth ten assignments of error. Assignments Nos. 4, 9 and 10 are not discussed in defendant's brief and therefore are deemed abandoned. In Assignments Nos. 1, 2 and 3, defendant asserts the lineup was illegally conducted and therefore the court erred by admitting in evidence over defendant's objection Horne's in-court identification testimony. In Assignments Nos. 5, 6, 7 and 8, defendant asserts the court erred by permitting the solicitor to elicit on cross-examination of defendant testimony that defendant was also *under indictment* in unrelated pending cases.

When Horne responded affirmatively when asked if he saw, sitting in the courtroom, the man who had "put the gun on [him]," the solicitor then asked: "Who is that?" Defendant's objection to that question was overruled. Horne identified defendant as the man. Defendant excepted to the court's ruling and bases Assignment No. 1 thereon.

[2] The agreed case on appeal shows a *voir dire* hearing was conducted *after* the court had admitted Horne's in-court identification testimony. Obviously, the hearing to determine admissibility should have been conducted *before* the evidence was admitted. However, for present purposes, we treat the hearing as having been conducted at the proper time.

The evidence before the court on *voir dire* consisted of the testimony of Horne, Detective George Davis of the Wilmington Police Department, and defendant. The testimony of each, summarized except where quoted, is narrated below.

Horne testified that, "a couple of weeks, or a week or so, after the robbery," he went to a lineup conducted upstairs in

the jail; that he was told to "just look and pick out the one [he] thought it was" from the seven or eight people in the lineup; that he "picked out the one that robbed [him], Dwight Williams"; that he had never heard the name "Dwight Williams" before he went to the lineup.

Detective Davis testified that, on November 23, 1968, he saw defendant at the Wilmington Police Department, at which time the following occurred: "I advised him of his rights, and he told me that he fully understood them, and didn't question us so far as right were concerned. We advised him that we wanted the man to look at him, and that we were going to place him in a lineup so that this man could see him, and that same afternoon we left the police station with Dwight and brought him over to jail where we prepared a lineup. He said he understood about that." Davis testified that Horne was called to the jail and there advised to look at the individuals in the lineup, "to look at whoever he thought was the one who robbed him, and, if he could pick him out, tell us which position he was in in the lineup, and that's what he did." Davis also testified to the age, clothing and characteristics of the persons in the lineup.

Defendant's testimony related solely to the age, clothing and characteristics of the persons in the lineup.

According to the record: "The court found as a fact from the foregoing evidence that the defendant, Dwight Williams, was duly advised by police officers that he had a right to have an attorney present at any lineup for identification purposes, and had ignored it, and voluntarily waived the right to have an attorney present. The court further found as a fact from the evidence that the lineup was made up of seven or more persons of the age, clothing and characteristics of the defendant, Dwight H. Williams." Defendant excepted to these findings and bases his Assignment No. 2 thereon.

Whether the evidence on *voir dire* was sufficient to support the finding that "the lineup was made up of seven or more persons of the age, clothing and characteristics of the defendant, Dwight H. Williams," need not be determined. Decision on this appeal does not depend upon whether the lineup was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." See *Simmons v. United States,* 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 1253, 88 S. Ct. 967,

971 (1968). In other material respects, the findings are unsupported and deficient.

"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." *State v. Smith,* 278 N.C. 476, 481, 180 S.E. 2d 7, 11 (1971), and cases cited. Accord: *State v. Harris,* 279 N.C. 177, 179-80, 181 S.E. 2d 420, 421 (1971).

[3, 4] There is *no evidence* that defendant "was duly advised by police officers that he had a right to have an attorney present at any lineup for identification purposes, and had ignored it, and voluntarily waived the right to have an attorney present." Davis testified he advised defendant "of his rights" and defendant said he fully understood "them." The in-custody lineup being a critical stage, the accused person must be advised, not vaguely of "rights," but specifically of the right to counsel (including the appointment of counsel in the event of indigency) and of his right to the presence of his counsel when the lineup is conducted. *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). Moreover, there is *no evidence* defendant had knowledge of and waived these specific rights.

Following the *voir dire* hearing and the court's findings, the solicitor, in the presence of the jury, asked Horne if he could identify the man whom he had identified at the lineup and who he said had robbed him. Defendant's objection was overruled and defendant excepted. Assignment of Error No. 3 is based thereon.

[4] On account of the illegality of the lineup, and the insufficiency of the evidence and findings to dispel the prejudicial effect thereof, the admission of Horne's in-court testimony was error for which defendant is entitled to a new trial.

[5] The question presented by Assignments Nos. 5, 6, 7 and 8 is whether, for purposes of impeachment, a witness, including the defendant in a criminal case, may be cross-examined as to whether he has been *indicted* or is *under indictment* for a criminal offense other than that for which he is then on trial. In *State v. Maslin,* 195 N.C. 537, 143 S.E. 3 (1928), this Court's unequivocal answer was, "Yes." The rule adopted in *Maslin* has been approved and applied in subsequent decisions to and including *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297 (1965). Unquestionably, as defendant concedes, these decisions support the rulings of the trial court. However, both reason and the overwhelming weight of authority in other jurisdictions impel us to reconsider and overrule prior decisions on this point.

We reaffirm the rule that, for purposes of impeachment, a witness, including the defendant in a criminal case, is subject to cross-examination as to his *convictions* for crime. *Ingle v. Transfer Corp.,* 271 N.C. 276, 279-80, 156 S.E. 2d 265, 268-69 (1967), and cases there cited. The precise question reconsidered is whether, *for purposes of impeachment,* the witness may be asked if he has been *indicted* or is *under indictment* for a criminal offense other than that for which he is then on trial.

G.S. 8-54 permits a defendant in a criminal action to be a witness in his own behalf. If he testifies, he occupies the position of any other witness. He is entitled to the same privileges and is "equally liable to be impeached or discredited." *State v. Efler,* 85 N.C. 585, 587 (1881). Accord: *State v. Sheffield,* 251 N.C. 309, 311, 111 S.E. 2d 195, 197 (1959), and cases there cited. Hence, rules relative to cross-examination for purposes of impeachment apply equally to the cross-examination of all witnesses, including but not limited to the cross-examination of a defendant in a criminal action.

In *State v. Maslin, supra,* the defendant, a bank officer, testified at his trial for the embezzlement of funds of a particular estate of which the bank was trustee. On cross-examination, the solicitor was permitted to ask over defendant's objections whether he was then under indictment (1) for embezzling funds belonging to the bank, (2) for embezzling funds belonging to another estate of which the bank was trustee, and (3) for receiving deposits when he knew the bank was insolvent. The defendant admitted that he had been indicted for these offenses.

It was held that the questions were permissible for the purpose of impeaching the defendant as a witness.

Three of the decisions cited in *Maslin,* namely, *State v. Garrett,* 44 N.C. 357 (1853), *State v. Lawhorn,* 88 N.C. 634 (1883), and *State v. Holder,* 153 N.C. 606, 69 S.E. 66 (1910), held that, for impeachment purposes, a witness, including the defendant in a criminal action, may be asked on cross-examination whether he has been *convicted* of unrelated criminal offenses. No case cited in *Maslin* decided or considered whether it was permissible to cross-examine the defendant as to prior or pending *indictments* against him.

State v. Wiggins, 171 N.C. 813, 816, 89 S.E. 58, 59 (1916), was cited with approval in *Maslin* as authority for the proposition that "[e]vidence of a mere accusation of crime should be excluded." *State v. Maslin, supra* at 541, 143 S.E. at 6. In *Wiggins,* a witness for the State was asked on cross-examination, for the purpose of impeaching him, if he had not been *accused* of stealing a certain man's hogs. Noting that "[t]he question was not whether he had been convicted, but whether he had been accused . . . ," the Court held that the objection to this question was properly sustained. *State v. Wiggins, supra* at 816, 89 S.E. at 59.

In *Maslin,* the Court undertook to distinguish between an accusation and an indictment in these words: "But an indictment duly returned as a true bill, while in a sense an accusation, is much more than a bare charge: it is an accusation based upon legal testimony and found by the inquest of a body of men, not less than twelve in number, selected according to law and sworn to inquire into matters of fact, to declare the truth, and as preliminary to the prosecution to find bills of indictment when satisfied by the evidence that a trial ought to be had." *State v. Maslin, supra* at 541, 143 S.E. at 6.

It seems appropriate to review later decisions which cite *State v. Maslin, supra.*

In *Nichols v. Bradshaw,* 195 N.C. 763, 143 S.E. 469 (1928), a witness for the plaintiff testified he had been indicted for blockading. The defendant's counsel asked whether he had been convicted. The plaintiff's objection was sustained. This Court held that the trial judge had erred in sustaining the plaintiff's objection to the question about the witness's convictions, but that

the point was immaterial since the witness on redirect examination stated that he had been convicted.

In *State v. Dalton,* 197 N.C. 125, 147 S.E. 731 (1929), the solicitor, in cross-examining the defendant, asked: "There is a warrant out for you now from the Federal Court against you?" His objection to this question having been overruled, the defendant answered: "Yes, I guess there is." The trial court's ruling was sustained. Although *Wiggins* and *Maslin* are cited, neither was authority for this decision. (Note: In *State v. Thomas,* 98 N.C. 599, 4 S.E. 518 (1887), which is not cited in *Wiggins, Maslin* or *Dalton,* a defendant on trial for murder was asked, "What offense were you accused of committing in [Alabama]?" and, his objection having been overruled, answered that he had been accused of murder in Alabama, and this ruling was upheld.)

In *State v. Nelson,* 200 N.C. 69, 72, 156 S.E. 154, 155-56 (1930), *Maslin* is included in a list of cases cited for the general proposition that a witness may be impeached *inter alia* "(4) by cross-examination tending to show (a) that the witness had been convicted of a crime although evidence of mere accusation of crime is incompetent; . . . ."

In *State v. Griffin,* 201 N.C. 541, 160 S.E. 826 (1931), the defendant, on trial for murder, was asked on cross-examination "if he did not shoot Katherine Mangum with the same pistol he shot the deceased." His objection having been overruled, the defendant answered, "No, sir, I did not." The defendant's exception was held to be without merit. The question here involved related solely to what *the witness himself had done,* not to whether he had been accused by others of unrelated criminal offenses.

In *State v. Howie,* 213 N.C. 782, 197 S.E. 611 (1938), the defendant, on trial for the rape of Mrs. Margaret Wilkins, was asked on cross-examination, over objection, "if he and another were indicted for raping Helen Thompson." Presumably, the defendant's answer was, "No." Later in his testimony the defendant admitted, without objection, that he was indicted, tried in police court and bound over on the charge of raping her. This decision rests squarely on *Maslin.*

In *State v. Troutman,* 249 N.C. 395, 106 S.E. 2d 569 (1959), the question presented was whether the trial court had erred

in permitting the solicitor to cross-examine the defendant in reference to *convictions* against him in other criminal cases.

In *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297 (1965), the solicitor, upon cross-examination of the defendant, was permitted over objection to elicit from the defendant testimony that he had been indicted for or charged with armed robbery in 1962 and that he had been indicted for breaking and entering in January of 1965. The trial court's ruling was upheld on authority of *Maslin.*

Later cases which do not cite *Maslin* but are in accord therewith in respect of the point now reconsidered include *State v. Cureton,* 215 N.C. 778, 3 S.E. 2d 343 (1939), and *State v. George,* 271 N.C. 438, 156 S.E. 2d 845 (1967). In *Cureton,* a defendant on trial for murder was asked on cross-examination if he had not been *indicted* as an accessory of another killing. The Court approved the ruling summarily by stating that a defendant who takes the stand may be asked about *particular acts* tending to impeach his credibility. In *George,* a defendant on trial for armed robbery was asked on cross-examination "about his neck brace when he was arrested in California in the early part of December 1963 and charged with armed robbery." The Court stated that "the questions were competent for the purpose of impeachment." Since the defendant had testified earlier that he had pleaded guilty to robbery in the California courts, the quoted statement was unnecessary to decision.

[5] We now hold that, *for purposes of impeachment,* a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *indicted* or is *under indictment* for a criminal offense other than that for which he is then on trial. In respect of this point, we overrule *State v. Maslin, supra,* and decisions in accord with *Maslin,* on the basic ground that an indictment cannot rightly be considered as more than an unproved accusation.

[6] *A fortiori,* we hold that, *for purposes of impeachment,* a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *accused,* either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been *arrested for* such unrelated criminal offense.

[7] A bill of indictment is a written accusation which charges a named person with a specific criminal offense. It is prepared by the solicitor, who endorses the names of the State's witnesses thereon and submits it to the grand jury. The grand jury, in secret session, hears such testimony as it deems sufficient to justify the return of "a true bill" and thereby authorize the solicitor to proceed further with the prosecution. The examination of witnesses before the grand jury is conducted informally by the foreman or under his direction. An indictment is not subject to quashal on the ground the testimony of the witnesses who appeared before the grand jury was hearsay. *State v. Wall,* 273 N.C. 130, 159 S.E. 2d 317 (1968); *State v. Hartsell,* 272 N.C. 710, 712, 158 S.E. 2d 785, 786 (1968). The grand jury acts under explicit instructions that its function is not to determine guilt or innocence but only to determine whether the State's evidence, nothing else appearing, is considered sufficient to authorize placing the defendant on trial. If the defendant is placed on trial on the indictment (which is not mandatory, since the solicitor may take a nol. pros.), the trial judge instructs the jury that the bill of indictment is not to be considered in any sense as evidence of the defendant's guilt but is simply the procedure for placing a defendant on trial; that the defendant's plea of not guilty clothes him with the presumption of innocence; and that the burden of proof is upon the State to prove the guilt beyond a reasonable doubt by testimony in open court before a verdict of guilty may be returned. For excellent statements of similar import, see *State v. Wigger,* 196 Mo. 90, 99, 93 S.W. 390, 392-93 (1906), and *Slater v. United States,* 1 Okla. Crim. 275, 283, 98 P. 110, 113 (1908). As stated succinctly in *People v. Morrison,* 195 N.Y. 116, 117, 88 N.E. 21, 22 (1909): "An indictment is a mere accusation and raises no presumption of guilt. It is purely hearsay, for it is the conclusion or opinion of a body of men based on *ex parte* evidence."

The rule now adopted by this Court is in accord with the overwhelming weight of authority (near unanimity) in other jurisdictions. See Annotation, "Comment Note.—Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution," 20 A.L.R. 2d 1421 (1951), and its supplements. There are only two jurisdictions whose decisions unequivocally permit cross-examination about prior or concurrent accusations or indictments not resulting in conviction. *State v. Bigler,* 138 Kan. 13, 23 P. 2d 598 (1933), and *People v. Foley,* 299 Mich.

358, 300 N.W. 119 (1941). In 20 A.L.R. 2d at 1444, the commentator refers to three jurisdictions where a distinction had been drawn "between a mere accusation and a formal complaint or indictment," citing the North Carolina case of *State v. Maslin, supra;* the Tennessee case of *Hill v. State,* 91 Tenn. 521, 19 S.W. 674 (1892); and the Texas cases of *Lasater v. State,* 88 Tex. Crim. 452, 227 S.W. 949 (1921), and *Monday v. State,* 124 Tex. Crim. 44, 60 S.W. 2d 435 (1933). In the two jurisdictions other than North Carolina the distinction has been abandoned. The *present* Tennessee rule is "that an accused himself on trial may not be asked about pending indictments against him on cross-examination," *Montesi v. State,* 220 Tenn. 354, 367, 417 S.W. 2d 554, 560 (1967); and the *present* Texas rule is that "the fact that a witness has been charged with an offense is inadmissible for the purpose of impeaching him unless the charge has resulted in a final conviction." *Stephens v. State,* 417 S.W. 2d 286, 287 (Tex. Crim. 1967).

[8] Whether a violation of the rule will constitute sufficient ground for a new trial will depend upon the circumstances of the particular case. Reference is made to *State v. McNair,* 272 N.C. 130, 157 S.E. 2d 660 (1967), in which this Court indicated that a reconsideration of the rule announced in *Maslin* was in the offing; there, the asserted error in permitting the question as to whether the defendant had been indicted for larceny was held harmless in view of the defendant's unequivocal denial that he had been so indicted.

[9] In the present case, the solicitor was permitted, for purposes of impeachment, to elicit on cross-examination at defendant's trial in New Hanover County for armed robbery the fact that defendant was then also *under indictment* for armed robberies in Onslow, Wayne and possibly Lenoir Counties. Obviously, the evidence so elicited was prejudicial to defendant.

A new trial is awarded for the reasons stated above. In doing so, we deem it appropriate to call attention to matters *not* affected by this decision.

We are not at present concerned with *the general rule* that, in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has been convicted of another distinct, independent, or separate offense, nor with any of the *well recognized exceptions* to that rule. See *State v. Mc-*

Clain, 240 N.C. 171, 81 S.E. 2d 364 (1954), and cases cited. Evidence which is admissible under any of the *well recognized exceptions* is admissible as substantive evidence. At present, we are concerned only with questions which are permissible on cross-examination solely *for purposes of impeachment.*

It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. *State v. Patterson,* 24 N.C. 346 (1842); *State v. Davidson,* 67 N.C. 119 (1872); *State v. Ross,* 275 N.C. 550, 553, 169 S.E. 2d 875, 878 (1969). Such questions relate to matters *within the knowledge of the witness,* not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith.

New trial.

Justice HIGGINS dissenting.

In the ordinary case I have favored the Federal rule which protects a defendant, when a witness for himself, from cross-examination with respect to other indictments against him. The reason for the Federal rule is that a presumption of innocence is not overcome by an indictment which is only a charge. As pointed out in the Court's opinion, the State has been permitted to impeach by showing an indictment for a separate offense.

The record in this case indicates to me the admission of the defendant that two and probably three other armed robbery cases against him are now pending in nearby communities. Under the rule the Court now adopts, a defendant may find a filling station operator alone in his place of business, hold him up, take his money, proceed to the next similar place of business, similarily attended by a lone operator, and continue the process *ad infinitum.* In each instance there are two eyewitnesses to the robbery—the victim and the robber. The latter may make a good appearance, raising a doubt as to his guilt and be acquitted. Each succeeding case becomes a repeat performance. Of course, if the robber is acquitted, the acquittal does not impeach him.

I think the proper rule should be that the State may be able to impeach the defendant by showing a trail of indictments following his movements and if he denies the indictments, the State should be able to call witnesses who could identify him as the man who was leaving behind him a trail of robberies.

Of course the time, distance, and similarity of the criminal actions should have weight in showing this course of conduct. I fear the breadth and sweep of this new rule will unduly handicap the State in its criminal prosecutions.

STATE OF NORTH CAROLINA v. ALBERT LEE WRENN

No. 27

(Filed 15 December 1971)

1. **Criminal Law § 115— submission of lesser degrees**

Where, under the bill of indictment, it is permissible to convict defendant of a lesser degree of the crime charged, and there is evidence to support a milder verdict, defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions.

2. **Criminal Law § 115— failure to submit lesser degrees — conviction of crime charged**

Erroneous failure to submit the question of defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the court's charge.

3. **Homicide § 14— intentional shooting which proximately causes death — presumptions**

If the State has satisfied the jury beyond a reasonable doubt that defendant intentionally shot his wife with a shotgun and thereby proximately caused her death, the presumptions arise that the killing was (1) unlawful and (2) with malice; and, nothing else appearing, the defendant would be guilty of murder in the second degree.

4. **Homicide § 14— assertion that killing was accidental — burden of proof**

Defendant's assertion that the killing of his wife with a deadly weapon was accidental is not an affirmative defense which shifts the burden of proof to him to exculpate himself from a charge of murder, but is merely a denial that he has committed the crime, and the burden remains on the State to prove a homicide resulting from the intentional use of a deadly weapon before any presumption arises against defendant.

5. Homicide § 30— failure to submit involuntary manslaughter

In this prosecution of defendant for first degree murder of his wife with a shotgun, the trial court erred in failing to submit involuntary manslaughter as a possible verdict where defendant's evidence was to the effect that he only intended to scare his wife with the shotgun and had no intention of killing her, and that in the scuffle between the parties the shotgun went off accidentally.

6. Homicide § 6— involuntary manslaughter

The crux of the crime of involuntary manslaughter is whether an accused unintentionally killed his victim by a wanton, reckless, culpable use of a firearm or other deadly weapon.

7. Homicide § 23— proximate cause of death — instructions — use of "natural and probable result"

The use of the phrase "natural and probable result" in homicide instructions is disapproved, the crucial question being whether a wound inflicted by an unlawful assault *proximately caused* the death.

Justice SHARP dissenting.

APPEAL by defendant from *Johnston, J.*, 2 December 1970 Session, GUILFORD Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of his wife Mary Etta Wrenn on 25 July 1970.

The State's evidence tends to show that various neighbors of defendant and deceased were in the general vicinity of the Wrenn home at the time of the killing and heard three gunshots at the Wrenn residence. One witness heard a gunshot, saw defendant in the yard struggling with a long object, and then heard two more shots. Shortly thereafter the sheriff's office was advised of the difficulty by telephone, and ten minutes later the defendant himself called the sheriff's office, stating that he had killed his wife and needed help immediately. Officers were dispatched to the scene and found defendant sitting on the front porch unarmed. Mrs. Wrenn's body was lying facedown in the yard near a trailer. Her head, surrounded by a pool of blood, was partially blown away and particles of the brain were scattered around the yard. Defendant was fully advised of his constitutional rights at the scene, placed under arrest, and taken to jail.

The investigating officers entered the home and found the death weapon, a shotgun, leaning against the end of a table. On

the sofa in the living room the officers found a note in defendant's handwriting which stated: "I can't live with a woman that does me like she does so I'll end it all. Please you or all (illegible) to take what I'm going to do so bury us together."

Defendant was again warned of his rights at the jail, stated that he understood them, and freely, knowingly and voluntarily made a statement to the sheriff which was transcribed in the sheriff's own handwriting and signed by defendant after the transcription had been read to him. That statement reads as follows: "I ran her off yesterday and she went to her daughter's, Shirley Engle's, living in a trailer on Summit Avenue. Friday night I went over to Shirley's and brought the children home. When I put them to bed, I started drinking. I went back to Shirley's trailer and she drove her car home, and I followed her. I made her go to bed and I had another drink or two and went to bed. When I woke up about noon, she was gone. About an hour after I got up, she drove in with the kids. I shot at her when she started in the house while I was writing the note on the sofa, and she ran around the house toward the garden, and I ran out the front door behind her and got around in front of her and shot her. The gun had halfway jammed and I had to get the empty out. When I got around in the yard, she was squatted down behind a trailer and we had a scuffle and she was laying on the ground grabbing at my gun when I shot her. I make this statement freely and voluntarily and have been advised of my rights."

The State's evidence further tends to show that when the jailer asked defendant which funeral home he wanted to take care of the body he said, "I don't give a damn. Let the family take care of it."

Defendant testified in his own behalf and offered other witnesses whose testimony tends to depict the background of the tragedy.

Ronald Lee Wrenn, twenty-year-old son of defendant and deceased, testified that his mother had been keeping company for two months with a man named Bob Dalton; that his father and mother had a big argument on Friday night before his mother was killed on Saturday; that his father stated on Friday night that he had found out about Bob Dalton and had told his mother to leave.

Arnold Wrenn, twelve-year-old son of defendant and deceased, testified that his mother was keeping company with Bob Dalton, and he had accompanied them when they would go out to eat and to other places. Bob Dalton would come to their home when his father was absent and ask the children to go to another room or "to the store or something." He told his father about the situation on the day before his mother was killed. He and his mother came home on Saturday morning, walked in the house, and saw his father in the hallway. Nothing was said. His mother ran out of the house and was about halfway around the house when the first shot, which hit the truck, was fired. His father went around the house and he ran into his brother's room, and when he looked out the window his mother had hold of the end of the gun barrel and they were struggling with the gun. "She kind of fell and was kicking his hands and his chest and made the gun go off and it hit her in the head." He and his sister then went to the front door and his father told them to leave. On Friday, the day before his mother was killed, he heard his father tell her, "Woman, you'd better not be here when I get back or you're going to be a dead woman"; and on Saturday, just before his mother was killed, he heard his father say he "ought to just kill her there or words to that effect."

Albert Lee Wrenn, testifying in his own behalf, said that about six o'clock one morning he received a phone call from Bob Dalton's wife in which she stated that Mrs. Wrenn was running around with her husband; that he didn't believe it and went to where his wife worked and asked her about it. His wife stated there was nothing to it and he forgot about it. On Tuesday night before the killing on Saturday, Bob Dalton's wife telephoned again and said Mrs. Wrenn had bought Mr. Dalton a shirt and had placed a note in the pocket stating that she was in love with him. Mrs. Wrenn walked into the room while that conversation was taking place and again denied the accusation. On Friday morning his son Arnold told him that his mother had been going with Bob Dalton and that they had been over to Shirley Engle's the night before. He went to his daughter's home, and she verified what Arnold had told him. He returned home and again confronted his wife with the accusations, to which she replied, "If you hadn't been so damned stupid, you'd have realized it the first time that woman called you." He then told her to be gone when he got home from work that night. When he came home from work Friday night, his wife and children were gone. He

realized he couldn't afford a baby-sitter and decided that he would make his wife come back home, quit her job, and take care of the children. He went to the home of his daughter, Shirley, got his wife and children, took them home, and put the children to bed. He drank half a fifth of Old Grandad whiskey and went to bed, telling his wife to sleep with the children. When he arose on Saturday morning his wife and children were gone, and he then decided it was necessary to scare her in order to bring about a change in her conduct. He wrote the note offered in evidence by the State, and shortly thereafter his wife drove into the yard with the two youngest children, Diane and Arnold. She entered the house, and he asked her where she had been. She replied "none of your damn business," and he said "I'm going to make it some of mine," and reached for the shotgun. She went out the front door and, after she jumped off the porch, he fired the gun "straight out the door," striking the truck. He then walked out the door and around the corner of the house where he saw his wife duck her head behind the trailer. He again fired the gun over her head, the load striking the house. He walked to the back of the trailer where she was squatting and she began cursing him, whereupon he shook his finger at her and said, "Tell me why in the world I shouldn't just kill you laying right there?" She grabbed the end of the shotgun with her left hand, pulled it up to her head, then placed her other hand on the gun and started kicking, breaking his little finger in two places. While trying to pull the gun away, it went off and she was killed. The only intention he had was to scare his wife and "make her do better." He wrote the note intending that his wife should find it. He was very intoxicated at the time but was not so drunk on this occasion that he didn't know what he was doing.

The court limited the jury in its deliberations to one of three verdicts, to wit: Murder in the first degree (with or without recommendation as to punishment), murder in the second degree, or not guilty. Defendant was convicted of murder in the second degree and sentenced to a term of twenty-five years in prison. He appealed to the Court of Appeals, and the case was transferred to the Supreme Court for initial review pursuant to the Court's general order dated 31 July 1970. Errors assigned will be noted in the opinion.

Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, for defendant appellant.

Robert Morgan, Attorney General; Sidney S. Eagles, Jr., Assistant Attorney General; Russell G. Walker, Jr., Staff Attorney, for the State of North Carolina.

HUSKINS, Justice.

Defendant assigns as error the failure of the trial court to submit manslaughter as a permissible verdict.

[1, 2] Where, under the bill of indictment, it is permissible to convict defendant of a lesser degree of the crime charged, and there is evidence to support a milder verdict, defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. *State v. Keaton,* 206 N.C. 682, 175 S.E. 296 (1934); *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535 (1970). Erroneous failure to submit the question of defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the court's charge. *State v. Davis,* 242 N.C. 476, 87 S.E. 2d 906 (1955). This principle applies, however, only in those cases where there is evidence of guilt of the lesser degree. *State v. Smith,* 201 N.C. 494, 160 S.E. 577 (1931). If all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show commission of a crime of less degree, the principle does not apply and the court correctly refuses to charge on the *unsupported lesser degree. State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971), and cases cited. See *State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461 (1969), for discussion of the law in this and other jurisdictions when there *is* evidence sufficient to require submission of manslaughter but the jury convicts of murder in the first degree.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; *State v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188 (1950). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.

State v. Foust, 258 N.C. 453, 128 S.E. 2d 889 (1963). Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Benge,* 272 N.C. 261, 158 S.E. 2d 70 (1967). Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, *and without intention to kill or inflict serious bodily injury. State v. Foust, supra; State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485 (1959); *State v. Satterfield,* 198 N.C. 682, 153 S.E. 155 (1930).

[3] If the State has satisfied the jury beyond a reasonable doubt that defendant *intentionally* shot his wife with a shotgun and thereby proximately caused her death, "two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice; and, *nothing else appearing,* the defendant would be guilty of murder in the second degree." *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969); *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968). Justice Bobbitt (now Chief Justice) accurately analyzed these principles in *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322 (1955), as follows:

> "When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. In *State v. Gregory,* 203 N.C. 528, 166 S.E. 387 [1932], where the defense was that an *accidental* discharge of the shotgun caused the death of the deceased, it was stated that the presumptions arise only when there is an *intentional killing* with a deadly weapon; and since the *Gregory case* it has been often stated that these presumptions arise only when there is an intentional killing with a deadly weapon. But the expression, *intentional killing,* is not used in the sense that a specific intent to kill must be admitted or established. The sense of the expression is that the presumptions arise when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted. [Citations omitted.] A specific intent *to kill,* while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use,

gives rise to the presumptions. . . . The presumptions do not arise if an instrument, which is *per se* or may be a deadly weapon, is not intentionally used as a weapon, *e.g.*, from an accidental discharge of a shotgun."

[4] Here, the presumptions arise if the jury finds, under proper instructions, that defendant *intentionally* shot his wife and thereby caused her death. Conversely, they do not arise if the jury finds the shotgun accidentally discharged, resulting in her death. Defendant's assertion that the killing of his wife with a deadly weapon was accidental is not an affirmative defense which shifts the burden of proof to him 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 a homicide resulting from the intentional use of a deadly weapon before any presumption arises against the defendant. *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337 (1965). *Accord, State v. Williams,* 235 N.C. 752, 71 S.E. 2d 138 (1952).

[5, 6] Although the State's evidence tends to show an intentional killing with malice and with premeditation and deliberation, defendant's evidence is to the effect that he only intended to scare his wife and had no intention of killing her; that in the scuffle between the parties the shotgun went off accidentally. In this setting, and with credibility a matter for the jury, the court should have submitted involuntary manslaughter with appropriate instructions. "It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter." *State v. Foust, supra* (258 N.C. 453, 128 S.E. 2d 889). As it relates to involuntary manslaughter, intent is not an issue. The crux of that crime is whether an accused unintentionally killed his victim by a wanton, reckless, culpable use of a firearm or other deadly weapon. *State v. Phillips, supra* (264 N.C. 508, 142 S.E. 2d 337). *Accord, State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354 (1963); *State v. Griffin,* 273 N.C. 333, 159 S.E. 2d 889 (1968).

Since the evidence offered by defendant, if believed by the jury, is sufficient to support a verdict of involuntary manslaugh-

ter, which is a lesser degree of the crime charged in the bill of indictment, the court erred in excluding it from the list of permissible verdicts. This error entitles defendant to a new trial.

[7] Discussion of the remaining assignments of error is deemed unnecessary. However, it is not amiss to call attention to the fact that the use of the phrase "natural and probable result" in homicide charges has been expressly 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." *State v. Woods,* 278 N.C. 210, 219, 179 S.E. 2d 358, 363 (1971).

New trial.

Justice SHARP dissenting.

As stated in the majority opinion, while defendant was convicted of second-degree murder, the State's evidence makes out a case of murder in the first degree. Concededly, if there is any evidence which tends to reduce the crime to manslaughter, defendant is entitled to have this issue submitted to the jury upon a proper charge. *State v. Merrick,* 171 N.C. 788, 88 S.E. 501.

Defendant's version of the homicide and the events preceding it, except when quoted, are summarized as follows:

The deceased, defendant's wife and the mother of his five children, had been carrying on an illicit love affair with one Bob Dalton. On the afternoon before her death defendant accused her of it, and she taunted him with his stupidity for not having discovered it earlier. He ordered her to leave in these words: "Woman, you'd better not be here when I get back or you're going to be a dead woman." At the time he said it, however, he did not mean it.

Deceased went to the home of her married daughter, taking with her the two youngest children, Diane and Arnold. That evening defendant brought the children home. Later that night he decided he could not afford a baby sitter and he would make his wife give up her job, stay at home, and care for the children. He returned to his daughter's and made his wife come

back. He told her he "wasn't sleeping with her any more," and made her get in bed with the little girl. When he awakened the next morning his wife was gone.

After two drinks he decided that the only thing he could do about the situation was to give his wife "a good scaring." Thereupon he wrote the following note: "I can't live with a woman that does me like she does so I'll end it all. Please you or all (the next word is illegible) to take what I'm going to do so bury us together." Defendant placed this note on the couch, got his shotgun, and put four shells in it.

Defendant was sitting on the couch with the gun beside him when his wife, preceded by Diane and Arnold, came in the front door about thirty minutes later. Defendant asked her where she had been. She replied that it was none of his damn business. He said he was going to make it some of his business and reached back for the shotgun. She ran out of the front door and jumped off the porch. With the intention of scaring her he fired straight out the door by which she had left. The shot hit his truck. She ran around the corner of the house to hide behind a trailer. When she raised her head he pointed the shotgun at her. She ducked; he threw up the gun and fired. This shot hit the side of the house. He then walked around to the back of the trailer "where she was squatting down." She "let into cussing" him. He pushed her over, shook his finger at her and said, "Tell me why in the world I shouldn't just kill you laying right there?" Defendant's version of what happened after he said that is quoted verbatim as follows:

"She reached with her left hand and got the end of my shotgun and pulled it up to her head like that, and got it with the other hand like that, and that's when she started kicking at me. I was trying to pull it away from her and that's when it went off. . . . The only intention I had was to scare my wife and make her do better. . . . When I shot her in the head, she was lying on the right side with her two hands on the end of the gun barrel. . . .

"I wasn't so drunk I didn't know what I was doing. I knew what I was doing. . . .

"That's what I've told; that I wrote this note and armed myself with the shotgun and went out to where my wife was

and I'm telling this jury that she brought it all on herself and she is the one that put the gun up to her head. I had the gun in my hand at the time it went off.

"I don't think I had my hand on the trigger when it fired and blew her head off. I had my right hand like this, and I said, 'Tell me why I shouldn't kill you right here,' and that's when she grabbed that gun and started kicking. I grabbed back with the gun to pull it away. She did have both hands on the barrel. She did not have her hands on the trigger at all. I don't remember having my hand on the trigger when it fired and killed her. I was trying to get the gun away from her."

At the time of the shooting defendant's twelve-year-old son, Arnold, and his little girl, Diane, were at the house witnessing these events.

The majority decision is that the foregoing testimony, if the jury should believe it, would support a verdict of involuntary manslaughter and that defendant is entitled to a new trial because the judge excluded it from the list of permissible verdicts. In my view, evidence of manslaughter is lacking, and defendant is guilty of murder in the second degree upon his own statement.

The distinction between murder in the second degree and manslaughter is the presence or absence of malice, express or implied. Murder in the second degree is the unlawful killing of another with malice but without premeditation and deliberation. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Downey,* 253 N.C. 348, 353, 117 S.E. 2d 39, 43.

Malice has many definitions. To the layman it means hatred, ill will or malevolence toward a particular individual. To be sure, a person in such a state of mind or harboring such emotions has actual or particular malice. *State v. Benson,* 183 N.C. 795, 111 S.E. 869. In a legal sense, however, malice is not restricted to spite or enmity toward a particular person. It also denotes a wrongful act intentionally done without just cause or excuse; "whatever is done 'with a willful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means constitutes legal malice.' " *State v. Knotts,* 168 N.C. 173, 182-3, 83 S.E. 972, 976. It comprehends

not only particular animosity "but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person." 21 A. & E. 133 (2d Edition 1902). *Accord, State v. Long,* 117 N.C. 791, 798-9, 23 S.E. 431.

This Court has said that "[m]alice does not necessarily mean an actual intent to take human life; it may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life." *State v. Trott,* 190 N.C. 674, 679, 130 S.E. 627, 629; *State v. Lilliston,* 141 N.C. 857, 859, 54 S.E. 427. In such a situation "the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist." 1 Wharton, Criminal Law and Procedure § 245 (Anderson, 1957).

Manslaughter is of two types—voluntary and involuntary. Instances of voluntary manslaughter are (1) a killing by reason of anger suddenly aroused by provocation which the law deems adequate to dethrone reason temporarily and thus to displace malice; and (2) a killing resulting from the use of excessive force in the exercise of the right of self-defense. *State v. Woods,* 278 N.C. 210, 179 S.E. 2d 358; *State v. Marshall,* 208 N.C. 127, 179 S.E. 427; *State v. Merrick, supra; State v. Baldwin,* 152 N.C. 822, 68 S.E. 148. Thus "under given conditions, this crime may be established, though the killing has been both unlawful and intentional." *State v. Baldwin, supra* at 829, 68 S.E. at 151.

Clearly the evidence in this case does not justify a charge upon *voluntary* manslaughter. Defendant makes no contention that he shot his wife in the heat of passion or in self-defense. By his testimony the discharge of the gun was not intentional.

Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony *or naturally dangerous to human life,* or (2) by an act or omission constituting culpable negligence. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889; *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485; *State v. Satterfield,* 198 N.C. 682, 153 S.E. 155. In *Foust,* it is said that ordinarily an unintentional homicide resulting from the reckless use of firearms "in the absence of intent to discharge the weapon,

or in the belief that it is not loaded, *and* under circumstances *not evidencing a heart devoid of a sense of social duty,* is involuntary manslaughter." *Id.* at 459, 128 S.E. 2d at 893. (Emphasis added.) When the circumstances do show a heart devoid of a sense of social duty, the homicide cannot be involuntary manslaughter.

Defendant's appeal, and the majority decision that he is entitled to have the issue of involuntary manslaughter submitted to the jury, are based upon defendant's testimony. He asserts that he did not intend to shoot his wife; that his sole purpose was to give her "a good scaring." Conceding the truth of defendant's testimony that he did not intentionally fire the gun, still his admitted conduct was so wanton and reckless of consequences, and so naturally dangerous to human life, that the law will imply malice from it. In determining the degree of homicide, the events immediately preceding the killing may not be disassociated from the actual shooting.

First, defendant shot straight out the door through which his wife had fled when she saw him reach for the gun. Then he pursued her and, discovering her behind a trailer, he pointed the gun at her, a violation of G.S. 14-34. When she ducked he threw up the gun and fired a second shot, after which he went to where she was "squatting" and pushed her to the ground. Standing over her, gun in hand, he inquired why he shouldn't kill her "laying right there." And "that's when she grabbed the gun and started kicking."

Surely she had every reason to believe that defendant intended to kill her. He should have expected her to grab the barrel of the gun in an attempt to divert it, the only defensive move she could have made as she lay on the ground at his feet. Certainly he should have known that the gun was likely to discharge in any such struggle for its possession.

It would defy not only the legal definitions but also common sense for the law to allow defendant, under the circumstances here disclosed, to say that, because the gun fired while he was trying to get it away from the woman he had threatened to kill and who obviously thought he meant to kill her, the shooting was unintentional and his conduct not malicious. His own statement precludes any disclaimer of malice and convicts him of murder in the second degree.

One who is an aggressor, or who enters a fight voluntarily without lawful excuse, may not plead self-defense when he slays his adversary. *State v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132. Similarly, one who engages in a struggle over a gun with another, whom he has threatened to kill with it, should not be heard to say that the killing was unintentional when the gun is discharged in the fracas.

Defendant's acts, naturally dangerous to human life and evidencing a callous recklessness, establish malice as a matter of law, in my view. That he would do such deeds in the presence of his two young children is a further manifestation of a "heart devoid of a sense of social duty." My vote is to uphold the trial below.

STATE OF NORTH CAROLINA v. KENNETH SHUTT

No. 13

(Filed 15 December 1971)

1. **Rape § 18— assault with intent to rape**

The State's evidence was sufficient for the jury in this prosecution for assault with intent to commit rape allegedly committed in the elevator of a public building.

2. **Criminal Law § 97—admission of evidence after jury has begun deliberations**

It was within the discretion of the trial judge to reopen the case and to allow the State to present additional evidence after both parties had rested and even after the jury had retired for its deliberations.

3. **Criminal Law § 114— instructions — expression of opinion**

The trial court did not express an opinion in its instructions in this prosecution for assault with intent to commit rape.

4. **Rape § 18— assault with intent to rape — intent required**

The trial court did not fail to instruct the jury that the requisite intent in an assault to commit rape is an intent to have sexual intercourse with the prosecutrix notwithstanding any resistance that she might make.

5. **Criminal Law § 34— evidence that defendant was Work Release inmate**

In this prosecution for assault with intent to commit rape, the trial court did not err in the admission of testimony that defendant was

an inmate of a certain prison camp and a participant in the Work Release Program, and that work release prisoners were picked up at the end of their work day by a bus stopping at the building where the alleged assault occurred, since the testimony tended to place defendant at the scene of the assault at the approximate time it allegedly occurred, nothwithstanding such testimony also tended to show that defendant had committed other offenses.

6. **Criminal Law §§ 66, 169— admission of book of photographs and defendant's photograph — absence of prejudice**

Defendant was not prejudiced by the admission into evidence of two books of photographs shown to an assault victim and the photograph of defendant selected by her therefrom, where such evidence was introduced while the jury was out of the courtroom engaged in its deliberations and nothing in the record indicates that the jury ever saw the photograph of defendant or the other contents of the books.

7. **Criminal Law § 66— photographic identification**

In this prosecution for assault with intent to commit rape, the trial court did not err in admitting, over objection, testimony by the prosecutrix that immediately after the assault she examined two books of photographs shown to her by police officers and from the second book selected the photograph of defendant as her assailant, where there is nothing in the record to indicate that the collection of photographs or the manner in which they were exhibited to the prosecutrix was unduly suggestive or contributed impermissibly to her selection of defendant's photograph.

8. **Criminal Law § 66— photographic identification — necessity for voir dire**

Although a voir dire hearing held prior to the introduction of any evidence related primarily to a lineup identification, there was no necessity for the court to conduct a second voir dire at the time of the prosecutrix' testimony before the jury concerning a photographic identification of defendant, where her testimony on voir dire had disclosed her identification of the photograph prior to the lineup, she had been cross-examined as to this by defendant's counsel on voir dire, and the voir dire disclosed no suggestion of impropriety in the photographic identification procedure.

9. **Criminal Law § 66— lineup — defendant's name on his shirt**

Although an assault victim observed the name "Kenneth" on the shirt of her assailant and was told by the police that the name of the man whose photograph she had selected as her assailant was Kenneth Shutt, a lineup subsequently conducted at a prison camp was not rendered unnecessarily suggestive by the fact that the men in the lineup wore uniform shirts on which their respective names appeared, where the victim was approximately 40 feet from the place where the men stood in the lineup and it was unlikely that defendant's name upon his shirt was legible at that distance.

10. Criminal Law § 66— lineup — right to counsel

Defendant's constitutional rights were violated by a pretrial lineup at which he was not represented by counsel, was not informed of his right to counsel and did not waive his right to counsel.

11. Criminal Law § 66— illegal pretrial identification — independent origin of in-court identification

In a prosecution for assault with intent to commit rape, the trial court did not err in admitting the victim's in-court identification of defendant, notwithstanding the victim had identified defendant in an illegal pretrial lineup, where the evidence on voir dire fully supported the court's findings that the in-court identification was based on factors complete and independent of the lineup identification and was based entirely on what the victim observed at the time of and before the alleged assault.

12. Criminal Law §§ 84, 169— admission of unlawfully obtained evidence — harmless error

Admission, over objection, of evidence obtained in violation of a right guaranteed the defendant by the Constitution of the United States is harmless error only if the court can declare that there is no reasonable possibility that such evidence contributed to the conviction.

13. Criminal Law §§ 66, 169— evidence of illegal lineup identification — harmless error

In this prosecution for assault with intent to commit rape, the admission, over objection, of evidence of the victim's identification of defendant at an illegal pretrial lineup was harmless error beyond a reasonable doubt where the victim's in-court identification of defendant was clear, positive and unequivocal, the victim testified that she conversed with defendant for five minutes in the corridor of a public building before getting into a lighted elevator with him, where the assault allegedly occurred, the victim picked defendant's photograph from a large collection of photographs within minutes after the assault occurred, her observation of him an hour or two later in a lineup could have added nothing to her ability to identify him in court and her testimony concerning the lineup added nothing to the persuasiveness of her positive identification of him in the courtroom, and her in-court identification was supported by testimony of another witness.

APPEAL by defendant from *Martin, S.J.*, at the 11 December 1970 Session of GUILFORD, heard prior to determination by the Court of Appeals.

Upon an indictment, proper in form, the defendant was found guilty of assault with intent to commit rape and was sentenced to a term of 12 to 15 years in the State's prison. The evidence introduced by the State tended to show:

On 16 July 1970, at 4:45 p.m., Marilee Henderson was on the second floor of the City-County Building in High Point. Her husband was then confined in the jail in that building. She had just talked by telephone to his employer about procuring his release. Following the telephone conversation she observed the defendant standing nearby. No one else was present.

The defendant engaged Mrs. Henderson in conversation, stated that his name was Fred Tedder and told her that he could get her husband out of jail if she wanted him to do so. She replied it did not matter who got her husband out of jail so long as he was released. She and the defendant got on the elevator together three to five minutes after the beginning of the conversation. The defendant pushed the emergency "stop button" but also pushed another button and the elevator began to move upward. The defendant, by an obscene remark, stated his intent to have sexual relations with Mrs. Henderson, grabbed hold of her and began pulling off her underclothes. She struggled with him and began screaming. The elevator door came open and the defendant ran out. He went first in one direction and then in another and disappeared.

Mrs. Henderson, observing the janitor cleaning the floor, the elevator having gone to the third floor, called to him to stop the defendant and said the defendant had tried to rape her. The janitor summoned the police, who came promptly.

The officers took Mrs. Henderson to a lower floor of the building where they showed her two books of pictures of individuals. After going completely through one book and through ten or fifteen pages of the second, she selected the picture of the defendant as being a photograph of the man who had attacked her in the elevator. (The books were identified by Mrs. Henderson and were subsequently offered in evidence, but there is nothing in the record to indicate that either of the books or the photograph so selected by her was exhibited to the jury.)

The officers then took Mrs. Henderson out to Sandy Ridge, a camp for prisoners on work release. There she, remaining in the office, observed through the window three white men, all dressed in prison uniform, dark pants and light blue shirt, come to and stand at the fence of the prison yard, and from them she picked the defendant as the man who had attacked her in the elevator.

At the trial, Mrs. Henderson positively identified the defendant, sitting in the courtroom, as the man who had so attacked her. She and the defendant were together in the elevator a minute or two from the time the door closed on the second floor until it opened on the third floor. In that interval she observed the name "Kenneth" on his shirt.

The janitor, who observed a man and Mrs. Henderson come out of the elevator on the third floor, testified that she appeared to be frightened, that the man walked rapidly away and that his manner of walking was like that of the defendant.

Before any evidence was introduced, the defendant moved to suppress the testimony of Mrs. Henderson and requested a voir dire, which was conducted in the absence of the jury. On the voir dire, the defendant testified:

On the day of the alleged offense, he was serving a sentence at the Sandy Ridge Prison Camp and was there placed in a lineup in connection with the offense here in question. The lineup consisted of three or four other prisoners, selected at random and all dressed in the prison uniform with their names thereon. The men were lined up inside the fence, the defendant being told that they were viewed from inside the office. The name "Kenneth" was on his uniform. Prior to the lineup, he was not advised that he had a right to counsel before being placed in the lineup. Prison officials simply told the men to go and stand at the fence. At that time he had not been arrested for the offense now in question and was not told why he was placed in the lineup. He was told that he was a suspect in a case but was not told the nature of it. He did not object to being in the lineup, going to the fence pursuant to the order of the prison official. Earlier in the same day, he had been away from the prison camp, pursuant to the work release program. From the fence to the office, from which he and his companions in the lineup were viewed, is approximately 35 feet. They were standing two feet inside the fence.

Upon the voir dire, Mrs. Henderson testified concerning the circumstances of the attack, as subsequently testified to by her before the jury, and also testified:

In their conversation preceding the attack upon her, the defendant, having told her his name was Fred Tedder, said that

he was the son of Jack Tedder, a bondsman in the city whom she knew. She was able to see her assailant's face in the elevator, which was not dark. When she selected the defendant's photograph from the book shown her by the police officers immediately following the attack, she was told by one of the officers that the man shown in the photograph had walked out of the prison camp and that his name was Kenneth Shutt. The officers suggested that they go out to the Sandy Ridge Prison Camp and let Mrs. Henderson see if "that is the one." Standing inside the office at the camp, she looked out of the window. Three white men, dressed alike, were brought up to the fence and she picked the defendant from among the three as the man who had attacked her. One of the three men was taller than the defendant and the other about the same size. She was alone in the office when viewing the three men. He looked like the picture she had seen. She based her identification on having seen him in the elevator. She knew him the next time she saw him. She knew him "in the book" and she knew him in the courtroom. She would not forget his face.

At the conclusion of the voir dire, the court found as a fact that Mrs. Henderson first saw the defendant for approximately five minutes and had a conservation with him and thereafter observed him in a lighted elevator while standing in close proximity to him; that she had ample opportunity to observe him and did observe him; that the in-court identification was based upon her observation of the defendant other than at the lineup; and that her identification of him in the lineup had its origin in her identification of him at and before the time of the alleged assault. The court further found as a fact that her identification of the defendant in court was based upon factors complete and independent of the lineup and entirely on what she observed at the time of and before the alleged assault. The defendant's motion to suppress the testimony of Mrs. Henderson was therefore overruled.

Attorney General Morgan, Deputy Attorney General Moody and staff Attorney Lloyd for the State.

Wallace C. Harrelson for defendant.

LAKE, Justice.

[1] The defendant assigns as error the denial of his motion for judgment of nonsuit. There is no merit in this assignment of

error. Upon such motion, all of the evidence for the State which is admitted, whether competent or incompetent and whether admitted over objection or otherwise, is considered, is taken to be true and is considered in the light most favorable to the State. *State v. Roseman,* 279 N.C. 573, 184 S.E. 2d 289, decided November 10, 1971, and cases there cited. So considered, the evidence is clearly sufficient to support a finding that the offense charged in the bill of indictment was committed and that the defendant was the person who committed it.

[2] After the State rested and after the solicitor had made his argument to the jury, but prior to the argument by counsel for the defendant, the State was permitted, over objection, to recall one of its witnesses, Sergeant Johnson, to testify that the Sandy Ridge Prison Camp is a unit for prisoners assigned to the Work Release Program and that the bus upon which prisoners returned to the camp after their work day stopped in front of the building where the alleged assault occurred. Again, after the conclusion of all arguments and the charge to the jury and after the jury had retired and commenced its deliberations, over objection, the State was permitted to reopen its case once more and to introduce in evidence the books of photographs and the picture of the defendant selected therefrom by Mrs. Henderson, which exhibits had previously been identified. Nothing in the record indicates that the jury was recalled to the courtroom or that these exhibits were ever exhibited to it. It is well settled that it is within the discretion of the trial judge to reopen a case and to admit additional evidence after both parties have rested and even after the jury has retired for its deliberations. *State v. Jackson,* 265 N.C. 558, 144 S.E. 2d 584; *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774; *State v. Page,* 215 N.C. 333, 1 S.E. 2d 887; *State v. Noblett,* 47 N.C. 418; Stansbury, North Carolina Evidence, 2d Ed, § 24.

[3] The defendant's Assignments of Error 10 through 14 relate to excerpts from the charge of the court to the jury. There is no merit in any of these and a detailed discussion of them would serve no useful purpose. Two of them are directed to the court's review of the evidence. Nothing in the record indicates that any error therein was called to the attention of the judge before the jury retired. They do not, as the defendant contends, constitute expressions of opinion by the court. The following state-

ment by Justice Barnhill, later Chief Justice, in *State v. Jessup*, 219 N.C. 620, 14 S.E. 2d 668, is pertinent to these assignments:

> "The defendant complains, first, that the court, in detailing the evidence, expressed an opinion that certain facts were fully proven. This contention cannot be sustained. In reviewing the evidence the court clearly indicated that it was so doing by making reference to the witness and then detailing the substance of his testimony. A careful examination of the charge discloses that when it is considered as a whole the court below carefully followed the requirements of C.S., 564 [G.S. 1-180], in stating the evidence in a plain and correct manner. The defendant is not permitted to segregate clauses or sentences thereof which, when considered alone, unrelated to the charge as a whole, make it appear that the judge was indicating his own personal opinion in respect to the weight and sufficiency of the evidence."

[4] Assignment of Error 13 is that the court erred in charging the jury:

> ". . . at any time during the assault he had the intent to have sexual relations or intercourse with the prosecuting witness forcibly and against her will, although before the act of intercourse the prosecuting witness might have consented, or if he abandoned that intent by reason of her resistance."

In his brief the defendant says in support of this assignment of error:

> "The trial court defined intent as 'intent to have sexual relations or intercourse with the prosecuting witness forcibly and against her will . . . .' Such a charge as this ignores the required disregard of the victim's resistance and is insufficient, *State v. Moose*, 267 N.C. 97, 147 S.E. 2d 521."

The portion of the charge immediately preceding the sentence thus partially quoted by the defendant reads as follows:

> "To convict one charged with an assault with intent to commit rape, the evidence must show beyond a reasonable doubt not only an assault, as I have just defined, but an intent upon the part of the defendant to have sexual inter-

course with the prosecuting witness, *notwithstanding any resistance that she might make. Any intent short of this is not an assault with intent to commit rape.*" (Emphasis added.)

Not only did the trial judge instruct the jury in the immediate context of the statement assigned as error precisely as the defendant says he should have done, but at least three times thereafter he repeated this instruction and it was the final instruction to the jury on that point. The defendant's statement of this assignment of error and his argument in support thereof cannot be deemed consistent with the duty of counsel to this Court to state fairly and correctly the charge given by the trial judge.

[5] Turning to the content of the evidence which the court permitted the State to introduce after it had originally rested, we find no error in admitting the testimony that prisoners, returning to the Sandy Ridge Camp at the end of their day on work release jobs, were picked up by a bus stopping at the building where the alleged assault occurred. Nor was there error in admitting the earlier testimony that the defendant was an inmate of the camp and a participant in the Work Release Program.

This testimony was relevant upon the question of whether this defendant was the perpetrator of the assault, for it tended to place him at the scene of the assault at the approximate time that it is alleged to have occurred. With reference to the admissibility of evidence tending to show the defendant in a criminal action has committed other offenses, Professor Stansbury has correctly stated the rule as follows:

> "This is commonly supposed to be a somewhat difficult and complex field, marked out by a general rule of exclusion and a series of exceptions. 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." Stansbury, North Carolina Evidence, 2d Ed. § 91.

[6] As to the admission into evidence of the books of photographs shown to Mrs. Henderson and the photograph of the defendant selected by her therefrom, it is sufficient to note that nothing in the record indicates that the jury ever saw the photograph of the defendant or the other contents of the books. On the contrary, it appears from the record that these were introduced in evidence while the jury was out of the courtroom engaged in its deliberations, the offer and introduction of this evidence being purely formal. The books and the photograph of the defendant selected therefrom had previously been identified by witnesses in the presence of the jury. Therefore, it is apparent that the jury did observe in the hand of the witness, or of counsel, the outsides of the books and the sheet of paper bearing the photograph, but nothing indicates that the picture, itself, was ever in a position to be observed by the jury. The defendant was not prejudiced and the State was not benefited in any way by the actual introduction of these documents into evidence.

[7] Again, there was no error in admitting, over objection, the testimony of Mrs. Henderson to the effect that, immediately after the alleged assault, the police officers, who came in response to the janitor's request, took her to an office on the first floor and that there she examined two books of photographs, from the second of which she selected a photograph identified by the officers as that of the defendant.

There is nothing whatever in the record to indicate that the collection of photographs, so shown to Mrs. Henderson within a very few moments after she was assaulted, or that the manner in which they were exhibited to her was unduly suggestive or contributed impermissibly to her selection of the photograph of the defendant as a picture of her assailant. With reference to identification of a criminal suspect by the selection of his photograph from amongst those of other persons, the Supreme Court of the United States said, in *Simmons v. United States,* 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247:

> "Simmons, however, does not contend that he was entitled to counsel at the time the pictures were shown to the witnesses. Rather, he asserts simply that in the circumstances the identification procedure was so unduly preju-

dicial as fatally to taint his conviction. This is a claim which must be evaluated in light of the totality of surrounding circumstances. * * *

"Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power [over the lower Federal courts] or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

In *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583, this Court, speaking through Chief Justice Bobbitt, said:

"[I]n our view, if either defendant was in actual custody but with no charge against him related to the alleged burglary when the photographic identifications were made which led to the issuance of a warrant and his arrest on the burglary charge, his Sixth Amendment rights were not violated solely because he was not represented by counsel when such photographic identifications were made. * * *

"In our view, the doctrine of Wade [*United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149] and Gilbert [*Gilbert v. California,* 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178] *should not be extended* to out-of-court examinations of photographs including that of *a suspect,* whether the suspect be at liberty or in custody."

[8] Nothing in the record indicates that the photograph of the defendant so shown to and selected by Mrs. Henderson was un-

lawfully taken. Prior to the introduction of any evidence, the defendant moved to suppress the testimony of Mrs. Henderson concerning her identification of the defendant and, at his request, a voir dire was had in the absence of the jury. While this related primarily to the identification of the defendant by Mrs. Henderson at the lineup conducted at the Sandy Ridge Prison Camp, Mrs. Henderson's testimony on voir dire disclosed her identification of the photograph prior to the lineup. As to this, she was cross examined by the defendant's counsel on voir dire. There was no necessity for the court to conduct a second voir dire at the time of Mrs. Henderson's testimony before the jury concerning her identification of the photograph. The voir dire disclosed no suggestion of impropriety in connection with the examination of the photographs. There is no merit in this assignment of error.

[9] There was error in the admission, over objection, of the evidence, introduced by the State, concerning Mrs. Henderson's identification of the defendant at the lineup conducted at the Sandy Ridge Camp. We do not reach this conclusion by reason of the fact that evidence on the voir dire showed that the men in the lineup wore uniform shirts on which their respective first names appeared. It is true that, before viewing the lineup, Mrs. Henderson had been told that the photograph selected by her was a photograph of a man named Kenneth Shutt, and that she had observed the name "Kenneth" on the shirt of her assailant. However, her testimony was that she did not notice this name on the shirt of her assailant until after they were together in the elevator, not having so observed it when they were talking in the corridor, presumbly at a slightly greater distance from each other. The defendant's own testimony on voir dire was that at the lineup Mrs. Henderson was approximately 40 feet from the place where the other men stood. It is unlikely that the word "Kenneth" upon his shirt was legible at that distance. We cannot conclude from this evidence that the lineup, itself, was so suggestive as to point unfairly to the defendant.

[10] It is quite clear, however, that the defendant was not represented by counsel at the time of the lineup, was not informed of his right to counsel at that time and did not waive counsel. For this reason the lineup violated his constitutional rights, as declared by the Supreme Court of the United States, and it was error to admit, over objection, the testimony of his

identification therein. *United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149; *Gilbert v. California,* 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178; *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345, cert. den., 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518; *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581.

[11] There was no error, however, in admitting Mrs. Henderson's in-court identification of the defendant. *U.S. v. Wade, supra; Gilbert v. California, supra; State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507. The trial judge found on the voir dire that she first observed the defendant and conversed with him for approximately five minutes, following which she again observed him in a lighted elevator wherein they were in close proximity. He found that Mrs. Henderson had ample opportunity to observe the defendant and did observe him; that the in-court identification was based upon her observations of him other than in the lineup; that the in-court identification was based on factors complete and independent of the lineup identification and was based entirely on what she observed at the time of and before the alleged assault. Upon these findings, the court overruled the motion of the defendant to suppress the evidence of the in-court identification. These findings were fully supported by the evidence on the voir dire.

[12] Nothing else appearing, the error committed in admitting, over objection, the evidence of Mrs. Henderson's identification of the defendant at the lineup would require a new trial. The record before us discloses, however, that this was harmless error not requiring a new trial. In *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, the Supreme Court of the United States held "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Admission, over objection, of evidence obtained in violation of a right guaranteed the defendant by the Constitution of the United States is harmless error if, but only if, the court can declare that there is no reasonable possibility that such evidence contributed to the conviction. *Chapman v. California, supra; Fahy v. Connecticut,* 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171; *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399; *State v. Brinson,* 277 N.C. 286, 295, 177 S.E. 2d 398; *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744. That

is, the error is harmless if, beyond a reasonable doubt, the jury would have reached the same verdict had the incompetent evidence not been admitted.

[13] In the present case, the in-court identification of the defendant by the prosecuting witness was clear, positive and unequivocal. She testified that for five minutes before getting into the elevator she conversed with the defendant in the corridor of a public building in mid-afternoon and then was with him in a lighted elevator, in close proximity, for one or two additional minutes. His conduct during that period was such as would fix his features in her memory. Minutes later she picked his photograph from a large collection of photographs. Her observation of him an hour or two later in a lineup, when she was 40 feet from him, could have added nothing to her ability to identify him in court and her testimony concerning the lineup added nothing to the persuasiveness of her positive identification of him in the courtroom. Her in-court identification was supported by the testimony of the janitor, who observed her assailant leaving the elevator and walking fast away from it and who testified that the defendant "walks just like" the man he so observed. This evidence was clearly competent. Upon this record we find no basis for reasonable doubt that had there been no testimony whatever concerning the lineup identification, the verdict of the jury would have been the same.

The solicitor, being in the position to offer a positive, unequivocal, in-court identification by the victim of the assault, corroborated by the testimony of another observer, was ill advised in offering evidence of identification at the lineup for it added nothing to the strength of his case. However, the admission of this testimony was harmless error and the conviction will not be set aside since it is inconceivable that a new trial could lead to a different result.

No error.

Guthrie v. Taylor

L. G. GUTHRIE, FOR AND ON BEHALF OF HIMSELF AND ALL OTHER SCHOOL TEACHERS IN NORTH CAROLINA v. H. PAT TAYLOR; EDWIN GILL; A. CRAIG PHILLIPS; JOHN A. PRITCHETT; DALLAS HERRING; CHARLES E. JORDAN; MRS. EDELWEISS F. LOCKEY; WILLIAM R. LYBROOK; G. DOUGLAS AITKEN; R. BARTON HAYES; JOHN M. REYNOLDS; MRS. MILDRED S. STRICKLAND; HAROLD L. TRIGG, MEMBERS OF THE STATE BOARD OF EDUCATION AND THE BURLINGTON CITY BOARD OF EDUCATION AND ROBERT MORGAN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 60

(Filed 15 December 1971)

1. **Schools § 13; Constitutional Law §§ 20, 23— renewal of teachers' certificates — constitutionality of State Board regulation — due process — equal protection**

A regulation of the State Board of Education which requires all public school teachers to renew their teachers' certificates every five years by earning credits, at least some of which must be earned by the successful completion of college or university courses, *held* constitutional. There is no merit to the contentions of the plaintiff, a classroom teacher who had to forego summer employment in order to earn the required credits, that the regulation exceeds the authority granted to the Board; or that the regulation is discriminatory in not applying to employees of the Board; or that the regulation is arbitrary. U. S. Constitution Amendment XIV; N. C. Constitution, Art. 1, § 19 and Art. IX, §§ 8, 9 (prior to the 1971 revision); G.S. 115-11; G.S. 115-152, 153.

2. **Schools § 13; Constitutional Law § 7— certification of public school teachers — authority of Board of Education — delegation of powers**

The principle forbidding the delegation of legislative powers without the establishment of appropriate standards has no application to the authority of the State Board of Education to promulgate and administer the regulations relating to the certification of public school teachers, since such authority is conferred by the State Constitution itself rather than by statute.

3. **Constitutional Law § 2; Administrative Law § 3— delegation of powers by the Constitution — nature of the delegation — administrative agencies — rule-making powers**

Where the power to make rules and regulations has been delegated to an administrative board or agency by the Constitution itself, the delegation is absolute, except insofar as it is limited by the Constitution of the State, by the Constitution of the United States, or by the Legislature, or some other agency, pursuant to power expressly conferred upon it by the Constitution.

4. **Constitutional Law § 1— certification of public school teachers — delegation of authority by State Constitution — U. S. Constitution**

The delegation by the N. C. Constitution to the State Board of Education of the authority to regulate the certification of public school

teachers presents no question under the U. S. Constitution as regards the validity of such delegation.

5. **Constitutional Law § 20— classification of persons and activities — reasonable basis of classification**

Neither the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution nor the similar language in Art. I, § 19, of the N. C. Constitution takes from the State the power to classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law.

6. **Schools § 13; Constitutional Law § 20— equal protection of the laws — regulation requiring certification of public school teachers**

A regulation of the State Board of Education which requires public school teachers to renew their teaching certificate every five years by one of several specified procedures, including the completion of college courses, does not deny a teacher the equal protection of the law on the ground that the regulation is inapplicable to the employees of the State Board of Education in Raleigh, who are engaged in non-teaching duties.

7. **Schools § 13— certification of teachers — reasonableness of regulations**

A regulation of the State Board of Education which requires public school teachers to renew their teaching certificates every five years by one of several alternative procedures, including the completion of college or university courses, is neither unreasonable nor arbitrary, there being a reasonable basis for the belief that the quality of a teacher's classroom performance will be improved if the teacher broadens or refreshes his knowledge by one of the specified procedures.

APPEAL by plaintiff from *Blount, S.J.*, at the 12 April 1971 Session of ALAMANCE, heard prior to determination by the Court of Appeals.

The plaintiff is the holder of a Class G certificate authorizing him to teach in the public schools of North Carolina. At the time he brought this action, 23 February 1971, he was employed as teacher of History and Assistant Principal of Walter Williams High School in the Burlington Administrative Unit. He sued, on behalf of himself and all other classroom teachers in the State, for a judgment declaring the invalidity of the rules and regulations of the State Board of Education, which require a teachers' certificate to be renewed each five years by one of several specified alternative procedures, and which require certain deductions in the salary of a teacher who continues to teach without such certificate renewal. In substance, the complaint alleges (numbering ours) :

1. The plaintiff holds the above mentioned certificate and is employed as such teacher and assistant principal. The defendants occupy the positions indicated in the caption.

2. G.S. 115-152 requires all teachers, and other members of the professional personnel, employed in the public schools to hold certificates issued in accordance with the law. G.S. 115-155 makes it unlawful for any city or county board of education to employ or keep in service any teacher, or other member of the professional school personnel, not holding a certificate in compliance with the provisions of law and forbids the payment of salary to one employed in violation of such statute.

3. The State Board of Education, at a regular meeting and pursuant to proper vote, adopted rules and regulations pertaining to certification of teachers, which rules and regulations, now in force, are attached to and made part of the complaint.

4. Such rules and regulations provide that all certificates issued to teachers expire after five years, unless sooner renewed.

5. The rules and regulations require for such renewal the earning of six units of credit during the five year period immediately preceding such renewal. Such credit may be obtained in ways prescribed, including the completion of further college courses.

6. The rules and regulations provide for a salary penalty of $20.00 per school month to be imposed upon any teacher continuing to teach while holding an expired certificate.

7. The City Board of Education has adopted rules and regulations governing the renewal of teachers' certificates, pursuant to authorization contained in the rules so adopted by the State Board.

8. To obtain a renewal of his certificate, a teacher must, at his own expense, earn the credit units required.

9. Employees of the State Board, stationed at its Raleigh Office, are not required to obtain further education as a condition precedent to the retention of their employment. Likewise, superintendents of administrative school units, who do not obtain renewal of their certificates, are not subject to deductions

from their salaries on that account. However, all teachers, irrespective of age, teaching experience or previous education, are required so to renew their certificates each five years. Thus, the plaintiff, whose Class G certificate shows that he holds a master's degree and who has been teaching continuously in the public schools of North Carolina since 1953, will, under the rules and regulations, be barred from, or penalized for, teaching subsequent to the expiration date of his certificate unless he obtains a renewal in the manner prescribed, whereas an inexperienced, recent graduate, holding a bachelor's degree and a Class A certificate, may teach the same courses without penalty.

10. The plaintiff cannot obtain the necessary credits for renewal of his certificate except at his own expense, including the loss of summer employment, which has been offered to him for the summer of 1971 and from which his earnings would be $2,000.

11. If the plaintiff does not earn such units of credit, the defendant State Board of Education will refuse to renew or extend his certificate and the defendants will either refuse to permit him to teach or will subtract $20.00 per month from his salary.

12. Such threatened action of the defendants is unlawful and in excess of their authority for the reason that there is no statutory authority for the adoption of a regulation requiring teachers to undergo, at their own expense, further education as a condition precedent to the continuing validity of their contract.

13. Even if there were statutory authority for the adoption of such rules and regulations, the said proposed action of the defendants is unlawful and beyond their authority for the reason that such act of the General Assembly contravenes Article I, § 6, and Article II, § 1, of the Constitution of North Carolina because of the absence therefrom of legislative standards. Furthermore, such proposed action by the defendants would, in that event, be in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and of Article I, § 19, of the State Constitution in that such statute discriminates against school teachers in favor of other professions, discriminates against classroom teachers in favor of employees in a school which does not have a locally organized

program (as authorized in the rules and regulations of the State Board of Education) in favor of teachers in a school which does have such program. The proposed action of the defendants would, in that event, be unlawful because in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and of Article I, § 19, of the Constitution of North Carolina in that school teachers are thereby deprived of a livelihood and of property without serving any reasonable end or public purpose, the said rules and regulations being arbitrary and unreasonable.

The defendants filed answer denying no material allegation of fact and moved to dismiss for failure to state a claim upon which relief can be granted. The plaintiff, thereupon, moved for judgment on the pleadings. At the hearing upon these motions, counsel for all parties agreed that there is no substantial controversy as to the facts. Thereupon, the court entered judgment, setting forth its findings of fact and conclusions of law, denying the plaintiff's motion for judgment on the pleadings and granting the defendants' motion for dismissal for failure to state a claim upon which relief may be granted. The court's findings of fact, material to this appeal, are as follows:

"1. That the plaintiff is a citizen and resident of Alamance County, North Carolina, and teaches history in, and is assistant principal of, Walter Williams High School in the Burlington administrative school unit. * * *

"4. That the plaintiff now has a masters degree and has been issued a Class G certificate by the State Board of Education which under the rules and regulations of the State Board of Education * * * is scheduled to expire before the beginning of the fall term at the Burlington City Schools.

"5. That under the rules and regulations of the State Board of Education referred to above, the plaintiff must have six units of credit in order to have his certificate renewed. * * * That under the present circumstances, plaintiff will be forced to obtain college course credit sometime before the start of the fall term of the Burlington City Schools in order to obtain the four units he now lacks.

"6. That the plaintiff has been offered summer employment which will offer him earnings of one thousand

dollars ($1,000) a month and that in order to satisfy the certificate renewal requirements of the State Board of Education he will be forced to forego such employment.

"7. That if plaintiff does not acquire such four units of credit the defendant, State Board of Education, will refuse to issue a renewal certificate or extend the plaintiff's present certificate.

"8. That if the plaintiff fails to receive a renewal certificate he will be subject either to a penalty of twenty dollars ($20.00) a month deducted from his salary as a teacher * * * or may be disqualified from teaching in the public schools of North Carolina in accordance with the provisions of G.S. 115-155.

"9. * * * That said rules and regulations have been duly adopted by the State Board of Education and provide that the renewal requirements may be satisfied in four ways: * * *."

Upon these findings of fact the trial court made the following conclusions of law:

"1. That in adopting the rules and regulations pertaining to renewal of teachers' certificates, the State Board of Education acted legally within the authority vested in it by Article 9, Sec. 9 of the North Carolina Constitution and by G.S. 115-153 that said rules and regulations in no way exceed the lawful authority of the State Board of Education.

"2. That the authority vested in the State Board of Education to formulate such rules and regulations is constitutional and lawful.

"3. That the rules and regulations of the State Board of Education pertaining to renewal of teachers' certificates comport with the requirements of equal protection of both the North Carolina and United States Constitutions.

"4. That such rules and regulations are in compliance with the requirements of the due process clauses of the Fourteenth Amendment to the United States Constitution and of Article I, Sec. 19 of the North Carolina Constitution.

"5. That such rules and regulations of the State Board of Education are neither arbitrary nor unreasonable."

The plaintiff assigns as error each of the foregoing conclusions of law.

Dalton & Long, by W. R. Dalton, Jr., for plaintiff.

Attorney General Morgan and Staff Attorney Lloyd for defendant appellees.

LAKE, Justice.

[1] The regulation of the State Board of Education, attacked by the plaintiff, requires a teacher in the public school system to procure the renewal of his or her teachers' certificate each five years by earning, at the teacher's expense, credits, at least some of which must be earned by the successful completion of additional college or university courses. The plaintiff contends that this regulation is: (1) In excess of the authority delegated to the State Board of Education; (2) is unreasonably discriminatory and, therefore, violates the Equal Protection Clauses of the State and Federal Constitutions; and (3) is arbitrary and, therefore, violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the Law of the Land Clause in Art. I, § 19, of the Constitution of North Carolina. We find no merit in any of these contentions.

Article IX, §§ 8 and 9, of the Constitution of North Carolina, prior to the revision which became effective on 1 July 1971, provides:

> Sec. 8: *"State Board of Education.*—The general supervision and administration of the free public school system * * * shall * * * be vested in the State Board of Education * * *."
>
> Sec. 9: *"Powers and duties of the board.*—The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the text books to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free

public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly."

The last sentence in Art. IX, § 9, above quoted, was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly. The Constitution, itself, however, conferred upon the State Board of Education the powers so enumerated, including the powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system. Thus, in the silence of the General Assembly, the authority of the State Board to promulgate and administer regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution, itself.

The revision of the Constitution of North Carolina, which took effect 1 July 1971, provides in Art. IX, Sec. 4, for the appointment of the members of the State Board of Education and in Sec. 5 states its powers as follows:

"Sec. 5. *Powers and duties of Board.*—The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly."

Rules and regulations relating to the certification of teachers being needed for the effective supervision and administration of the public school system, there is no difference in substance between the powers of the State Board of Education with reference to this matter under the old and the new Constitutions.

Chapter 115 of the General Statutes, entitled "Elementary and Secondary Education," contains 357 sections dealing in detail with various aspects of the maintenance and operation of the public school system in North Carolina. None of these pro-

visions specifically limits the authority of the State Board of Education to promulgate or administer rules and regulations concerning the certification of teachers. On the contrary, G.S. 115-11 provides:

> "The powers and duties of the State Board of Education are defined as follows: * * *
>
> "(14) Miscellaneous Powers and Duties.—All the powers and duties exercised by the State Board of Education shall be in conformity with the Constitution and subject to such laws as may be enacted from time to time by the General Assembly. Among such duties are:
>
> "a. To certify and regulate the grade and salary of teachers and other school employees. * * *."

By G.S. 115-152, all teachers in the public schools are required to hold certificates. G.S. 115-153 provides:

> "The State Board of Education shall have entire control of certificating all applicants for teaching, supervisory, and professional positions in all public elementary and high schools of North Carolina; and it shall prescribe the rules and regulations for the renewal and extension of all certificates * * *."

The defendant contends that the authority to promulgate rules and regulations relating to the certification of teachers is not lawfully conferred upon the State Board of Education for the reason that these statutes do not set forth standards by which the State Board of Education is to be guided in the promulgation and administration of such rules and regulations.

These statutes, all enacted in their present form prior to the revision of the Constitution, neither enlarge nor restrict the authority to make rules and regulations concerning the certification of teachers conferred by the Constitution of North Carolina upon the State Board of Education. Thus, they are not delegations of power to the State Board of Education by the General Assembly.

The plaintiff relies in his brief upon G.S. 115-156 which provides:

> "*Colleges to aid as to certificates.*—Each and every college or university of the State is hereby authorized to aid

public school teachers or prospective teachers in securing, raising, or renewing their certificates, in accordance with the rules and regulations of the State Board of Education."

[2] It is not necessary upon this appeal to determine the meaning of G.S. 115-156. It is sufficient to observe that it does not purport to enlarge or restrict the power of the State Board of Education to promulgate and administer rules and regulations governing the issuance and the renewal of teachers' certificates. Thus, the authority of the State Board of Education to promulgate and administer such rules and regulations is that which has been conferred upon it by the Constitution of the State.

When the General Assembly delegates to administrative officers and agencies its own power to prescribe detailed administrative rules and regulations governing the right of individuals to engage in a trade or profession, the statute granting such authority must lay down or point to a standard for the guidance of the officer or agency in the exercise of his or its discretion. Otherwise, such statute will be deemed an unlawful delegation by the General Assembly of its own authority. *Turnpike Authority v. Pine Island,* 265 N.C. 109, 143 S.E. 2d 319; *In re Annexation Ordinances,* 253 N.C. 637, 645, 117 S.E. 2d 795; *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854, 128 A.L.R. 658. See also, *Lanier, Comr. of Insurance v. Vines,* 274 N.C. 486, 164 S.E. 2d 161. The reason is that the people, in the Constitution of North Carolina, Art. II, § 1, have conferred their legislative power upon the General Assembly. This power it may not transfer to another officer or agency without the establishment of such standards for his or its guidance so as to retain in its own hands the supreme legislative power.

[3] This principle has no application to a direct delegation by the people, themselves, in the Constitution of the State, of any portion of their power, legislative or other. In such case, we look only to the Constitution to determine what power has been delegated. Where, as here, power to make rules and regulations has been delegated to an administrative board or agency by the Constitution, itself, the delegation is absolute, except insofar as it is limited by the Constitution of the State, by the Constitution of the United States or by the Legislature, or some other agency, pursuant to power expressly conferred upon it by the Constitution.

[2] The State Board of Education derives powers both from the Constitution, as above noted, and from acts of the General Assembly contained in Chapter 115 of the General Statutes. *State v. Williams,* 253 N.C. 337, 117 S.E. 2d 444. The above mentioned principle forbidding delegation of legislative powers without the establishment of appropriate standards applies to the powers conferred upon the Board by statute. *State v. Williams, supra.* It does not apply to the powers conferred upon the Board by the Constitution.

[4] No question arises under the Constitution of the United States with reference to the validity of such delegation of authority to the State Board of Education. As the Supreme Court of the United States, speaking through Mr. Justice Cardozo, said in *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835, "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."

[2] We hold that the promulgation and administration of the regulation of which the plaintiff complains fall within the authority conferred upon the State Board of Education by the Constitution of North Carolina in the provisions above cited. Consequently, it may be properly made applicable to the plaintiff, unless it is unreasonably discriminatory, so as to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or the like clause in Art. I, § 19, of the Constitution of North Carolina, or is so arbitrary and unreasonable as to amount to a deprivation of the plaintiff's liberty or property, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States or the similar Law of the Land Clause of Art. I, § 19, of the Constitution of North Carolina.

[5] Neither the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution nor the similar language in Art. I, § 19, of the Constitution of North Carolina takes from the State the power to classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law. *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369; *Silver v. Silver,* 280 U.S. 117, 50 S. Ct. 57, 74 L. Ed. 221; *Cheek v. City of Charlotte,* 273 N.C. 293, 160 S.E. 2d 18; *Motley*

v. Board of Barber Examiners, 228 N.C. 337, 45 S.E. 2d 550, 175 A.L.R. 253; *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198. The test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation. *Cheek v. City of Charlotte, supra; State v. Trantham, supra.*

[6] The regulation of which the plaintiff complains requires all teachers employed in the public school system of North Carolina to obtain a renewal of their teaching certificates every five years and prescribes for all teachers the same number of credits and the same methods for obtaining such credits for the renewal of their certificates. The plaintiff attacks the regulation because it is not made to apply to employees of the State Board of Education whose duties are performed in the Board's offices in the City of Raleigh. These employees are not engaged in teaching. Since the purpose of requiring a certificate to teach is to assure good quality of performance in the classroom, there is an obvious and reasonable basis for making the rule applicable to those who teach and omitting from its applicability those who do not. Thus, the requirement in question does not deny to the plaintiff the equal protection of the law.

[7] It is equally clear that there is a reasonable basis for the belief that the quality of a teacher's classroom performance will be improved if the teacher, by taking further courses in a college or university, or by one or the other means of earning credits permitted by the regulation in question, broadens or refreshes his or her own knowledge. Not only is there a constant discovery of new truth, even in fields to which instruction in the public schools relates, but there is also constant change in teaching skills, methods and techniques. It cannot be deemed arbitrary for the State to insist that the teachers in its public schools keep their own knowledge abreast of such changes. Nor is it arbitrary to require that this be done by one or more procedures, which may reasonably be deemed likely to produce the desired result, to the exclusion of other procedures which might also be deemed reasonably likely to do so. Such choice between possibly effective procedures is for the rule making authority, not for this Court.

As Mr. Justice Minton, speaking for the Supreme Court of the United States in *Adler v. Board of Education,* 342 U.S. 485, 492, 72 S. Ct. 380, 96 L. Ed. 517, said:

"It is clear that such persons [teachers in the public schools] have the right under our law to assemble, speak, think and believe as they will. [Citation omitted.] It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers v. Mitchell,* 330 U.S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of [the State]. If they do not choose to work on such terms, they are liberty to retain their benefits and associations and go elsewhere. * * * A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."

The law of New York sustained in the Adler case was held unconstitutional in the subsequent case of *Keyishian v. Board of Regents of the University of the State of New York,* 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629, with reference to the denial to public school teachers of rights of association, which the Supreme Court of the United States there held to be protected by the First Amendment to the Constitution of the United States. However, the above quoted statements of Mr. Justice Minton in the Adler case have not been rejected by the Supreme Court of the United States in regard to the general right of the State, as employer, to prescribe qualifications to be met by those seeking to teach in its schools.

There being a reasonable basis for the requirement that a teacher periodically renew his or her certificate by further study or by educational travel, as the regulation in question provides, it is immaterial whether the plaintiff be correct in his contention that experience gained by continuous teaching in the public schools is an equally efficacious method for maintaining and improving the quality of instruction. There being a reasonable basis for the opinion reached and expressed by the State Board of Education, in the exercise of the legislative power conferred upon it by the Constitution of North Carolina, this Court is not authorized to substitute its judgment for that of the State Board

of Education and to declare the regulation, adopted by the Board, invalid on the ground that, in our opinion, some other method for earning the required credits for renewal would be equally as satisfactory in result.

Since the regulation adopted by the State Board of Education cannot be deemed unreasonable or arbitrary in relation to the objective of improved instruction, there is no basis for holding its application to the plaintiff, and others similarly situated, is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution or of the Law of the Land Clause in Art. I, § 19, of the Constitution of North Carolina.

We find no error in any of the conclusions of law reached by the trial court.

Affirmed.

STATE OF NORTH CAROLINA v. RALPH L. STIMPSON

No. 97

(Filed 15 December 1971)

1. **Homicide § 31— maximum penalty for involuntary manslaughter**

The maximum term of imprisonment for involuntary manslaughter is ten years.

2. **Homicide § 6— pointing loaded gun at another — accidental discharge — manslaughter**

At common law and under G.S. 14-18, one who points a loaded gun at another, though without intention of discharging it, is guilty of manslaughter if the gun goes off accidentally and kills.

3. **Homicide § 30— failure to submit involuntary manslaughter**

In this prosecution for second degree murder or manslaughter, the trial court erred in failing to instruct the jury with reference to involuntary manslaughter and to submit to the jury whether defendant was guilty of involuntary manslaughter where defendant presented evidence tending to show that although he had drawn his pistol on the victim, he did not intend to discharge it, and that the pistol accidentally discharged when the victim attempted to grab the pistol and struck his hand.

4. Criminal Law § 86— impeachment of defendant — cross-examination as to indictment for another crime

In this homicide prosecution in which defendant offered evidence and contended that the discharge of his pistol was accidental and not intentional, the trial court committed prejudicial error in allowing the solicitor to cross-examine defendant, for the purpose of impeachment, as to whether he had been indicted for murder in New York State in 1964.

APPEAL by defendant from *Johnston, J.*, March 29, 1971 Session of GUILFORD Superior Court, transferred from the Court of Appeals for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant was indicted, in the form prescribed by G.S. 15-144, for the murder of Lillian Holland on September 19, 1970, and tried thereon for murder in the second degree or manslaughter.

Evidence was offered by the State and by defendant.

Uncontradicted evidence tends to show the facts narrated in the following four paragraphs.

Mrs. Lillian Holland (Miss Lillie) and her daughter, Mrs. Betty Carpenter (Betty), resided in the first floor apartment at 1541 Gorrell Street in Greensboro. Another occupant, one Otis Perry, paid "to sleep there and [get] his meals." A stairway at the back of the Holland-Carpenter apartment led to an upstairs apartment where defendant resided.

William D. Thomas (Thomas), who lived in the same neighborhood, visited the Holland-Carpenter residence "quite often." Mrs. Daisy Degraffenreidt (Miss Daisy) was a neighbor and good friend of "Miss Lillie" and "would oftentimes drop by and see her and visit with her."

A bullet discharged from the pistol in the hand of defendant proximately caused Miss Lillie's death. The bullet entered "at the base of the neck on the left side." Death occurred at 4:00 a.m. on September 19, 1970, as the result of injury inflicted at a late hour of September 18, 1970, or at an early hour of September 19, 1970.

When the pistol fired, six persons were in the Holland-Carpenter apartment, namely, Miss Lillie, Thomas, Miss Daisy,

defendant, Betty and Otis Perry. Betty and Perry were asleep. Betty was in her bedroom, lying across her bed, fully dressed. Perry was on "a little green couch; . . . balled up in a knot, sleeping-snoring." Betty was aroused by the pistol shot. Perry was awakened when Betty "bumped into his head."

Betty and defendant were the only witnesses who testified to events of Friday, September 18th, prior to the occasion when Miss Lillie was fatally injured.

According to Betty: Defendant was known to her only by the name of "Neighbor." Around noon on September 18th, defendant came to the back of the Holland-Carpenter apartment and, stating he was too drunk to drive, asked Betty to drive his car and get him a bottle of whiskey, giving her a five dollar bill. She did not know how to start the car so defendant got in the car with her. They started toward the A.B.C. Store on Market Street. Along the way, they stopped at Alberta Young's house. Alberta got in the car and rode with them to the liquor store where they picked up a bottle of whiskey. On their way back they stopped at the Paradise Cafe where they saw "Barbara." With Alberta and Barbara in the back seat, Betty drove "to our backyard," where she parked defendant's car. At that time, defendant "flung the keys away." She did not know where he threw the keys; "[he] just throwed them." They went into the Holland-Carpenter apartment where Betty washed some glasses and the four of them sat down and drank the whole pint of whiskey. Then defendant "went up his back steps" to his room. When Alberta and Barbara left, she locked her screen door and "laid back down." After sleeping three hours, she got up, "went back down to the Paradise," where she saw Alberta and they "got to drinking beer." Later, when she returned, her mother had come home from work and opened the door for her. Betty went and "laid down on the bed." She remained asleep until "[t]he crack of the gun woke her up." She was then fully dressed. She jumped from her bed and ran from her bedroom. Miss Daisy and Thomas were in the kitchen, standing beside a little cabinet, "crouched down like they were afraid." She did not see defendant. "The door was closing as [she] ran in the room." Through the door space between the kitchen and the living room, she saw her mother on the couch, "slumped over," blood on her neck. She "called the ambulance."

On cross-examination, she denied that she had bought seven or eight pints of liquor for her mother from the liquor store; denied that she had had any conversation with defendant about going to a store for some groceries; and stated that, although liquor had been sold in the house where she and her mother lived, none had been sold "for a long time." She also testified on cross-examination, in conflict with the testimony of Thomas and of Miss Daisy, that there was a pint of liquor sitting on the floor of the living room beside the coffee table and it looked like "maybe two or three drinks had been drunk out of it . . . ." She also testified that it was about midnight when she heard the crack of the gun; that she called the police; that she estimated it was thirty-five minutes or more before either the ambulance or the police arrived.

According to defendant: On September 18th, he lived next door to Miss Lillie and Betty. Each addressed the other simply as "Neighbor." He went to Miss Lillie's from time to time and had bought whiskey from Miss Lillie. Thomas (State's witness) was at Miss Lillie's every time he (defendant) went there. On September 18th, about 11:00 a.m., defendant "went over there to get a drink of liquor." Betty, who came to the door, said: "We don't have any." He then told Betty he was going to the store. Betty said she would go with him. He asked her if she could drive. When she told him she could and showed him her license, he remarked that he did not feel "so good" and told Betty to drive. At a liquor store, Betty bought "seven pints for herself and one for [him]," saying the seven pints were for her mother. Betty picked up two other girls and then drove to the yard of the Holland-Carpenter apartment and parked.

The three girls and defendant went in the apartment; Betty got some glasses and gave them drinks; and they sat there drinking and talking. Each had a full whiskey glass. When defendant and one of the girls asked for another drink, Betty replied that "she didn't have anymore," and that she "wasn't going to sell that because that was her mother's." Thereupon he told her: "I'll tell you what, you said you were going to get some food. I'll give you the car key if you will go out and get me a pint of whiskey." She said she would do this and he gave her his car keys and $3.25. The keys to his apartment were with his car keys. He went upstairs and lay down but about forty-five minutes later he got up and went to the window and saw his car was still "sitting there." He went to the door of the Holland-

Carpenter apartment and knocked two or three times but nobody answered. He then went to his car and "cut off" the "little button under the dashboard that you cut off to keep anybody from stealing it." Shortly after he returned to his apartment, he saw Betty and her two girl friends come around the house to the back door. He heard Betty say: "[H]e's done something to the car." He went to the back door and said: "Come back here and bring my keys and my money." Betty said she would be right back but "kept on going." He told her: "Don't mess around with my money and keys." When he last saw them, Betty and her two girl friends were crossing the street.

After waiting in vain for about two hours for Betty, he asked a neighbor, Mrs. Davidson, to watch his door, and told her the girl next door had his keys and he did not want "nobody to come in." When Mrs. Davidson agreed to do this, he got "a fellow" to take him to the store where he got "some food to cook and another pint of whiskey." When he got back, "nobody still wasn't home" in the Holland-Carpenter apartment. He went upstairs, fixed something to eat and "kept watching out the window to see if anybody come back, and nobody never did come." When he lay down finally, about six o'clock, he "dropped off to sleep," lying across his bed. Up to that time he had seen "no lights or nothing like that on" in the Holland-Carpenter apartment. When he woke up, his clock said, "quarter to three." He had to go to work about five-thirty to six. He saw the lights were on in the Holland-Carpenter apartment and went over there to get his keys. He knocked on the door and addressed Miss Lillie as usual saying, "Hello, Neighbor."

Thomas, Miss Daisy and defendant are the only persons who testified as to what happened while defendant was in the front (living) room of the Holland-Carpenter apartment.

According to Thomas: Miss Lillie opened the front door for defendant. Defendant walked in and told Miss Lillie he wanted his keys. When she said she "didn't know anything about any keys," defendant said, "If you don't give me my keys, I'll shoot you," and then "he flashed the gun." When this occurred, Miss Lillie was sitting on the sofa and defendant was pointing the gun "about her head and neck,"—"not over a foot from her head, if that much." Defendant told him: "Don't move. If you do, I'll shoot you too." Thomas said nothing but ran with Miss

Daisy into the kitchen. "[A] minute or two" later, while he was in the kitchen, he "heard one shot" and turned and looked back. At that time, "the screen door went together" and he did not see defendant any more. When he went back into the living room, Miss Lillie "was still on the sofa," and he saw blood on her neck.

According to Miss Daisy: She, Miss Lillie and Thomas were in the living room playing whist when a man stepped in the door. Miss Lillie was sitting (on a sofa) with her back toward the door. The man asked Miss Lillie for "some keys" and she replied that she did not have the keys. Thereupon, the man said: "If you don't give me my keys, I'm going to shoot you." When this occurred, she (Miss Daisy) and Thomas went into the kitchen, "running, halfway," and then heard "the gun go off." She testified: "I have not seen [defendant] before this trial as I know of."

According to defendant: After Miss Lillie opened the door, she went back and sat on the settee "behind the door as you go in." Miss Daisy, whom he had not seen there before, was sitting near the kitchen door. Thomas was sitting near the wall. He "didn't see them playing any cards," but saw "a pint of liquor setting down by the settee." He told Miss Lillie that her daughter (Betty) had his keys; and, in response to Miss Lillie's inquiry as to what Betty was doing with them, he explained that he had given them to Betty to go to the store and that she did not come back. Miss Lillie told him that Betty was asleep and she wasn't going to wake her up. When he said he had to have his keys, Thomas asked Miss Lillie: "Do you want me to throw him out?" Defendant said, "You ain't going to throw me out until I get my keys," and Thomas "started over there to get [him]" and Miss Lillie "put her hand to her pocket." Defendant said to Miss Lillie: "Keep your hands off the gun. . . . All I want is my keys. Tell your daughter to come get them." She said nothing but "looked up like this with her hand on her gun." She had a "pearl handled gun, looked about new." Earlier an incident had occurred in which Miss Lillie "had the gun out." By now defendant had drawn his own pistol. Miss Daisy ran out of the room. When she started back in the door, defendant waved his hand and said, "don't come in here." Thomas was still standing "where he first got up" and was looking at him. With her free hand, Miss Lillie attempted to grab his pistol,

struck his hand and "the gun went off." He did not intend for this to happen. He and Miss Lillie had never had any trouble. She was "a good lady when she wasn't drinking." When his gun fired, Miss Lillie's gun fell on the seat beside her. He "just turned around and walked out the door" and "didn't see where she got shot."

Police Officer J. R. Howard testified that he went to 1541 Gorrell Street as directed by a radio call; that he arrived at approximately 1:20 a.m. on September 19th; that he entered the living room through the front door and found to his right a lady (Miss Lillie) "half slouched over on the couch"; that "she was bleeding rather extensively"; that he arrived some eight or ten minutes before the ambulance arrived to take Miss Lillie to the hospital; that he talked with Thomas and Miss Daisy; and that both Thomas and Miss Daisy then told him they were *in the living room* when the shooting occurred and saw it.

Other evidence consists primarily of statements subsequently made by the State's witnesses and by defendant to officers, tending to corroborate or contradict their testimony and bearing upon the credibility thereof.

The jury returned a verdict of guilty of manslaughter. Judgment, which imposed a prison sentence of fifteen years subject to specified credits, was pronounced. Defendant excepted and appealed, setting forth numerous assignments of error.

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

Wallace C. Harrelson, Public Defender, and Dale Shepherd, Assistant Public Defender, for defendant appellant.

BOBBITT, Chief Justice.

Defendant assigns as error (1) the court's failure to instruct the jury that they could return a verdict of guilty of involuntary manslaughter, and (2) the overruling of objections to the cross-examination of defendant, for purposes of impeachment, with reference to his having been indicted in a different case. Discussion will be confined to these assignments.

Manslaughter and involuntary manslaughter differ in degree of criminality. The differences involve the elements of each crime and the prescribed punishment for each.

Prior to the effective date (April 10, 1933) of Chapter 249, Public Laws of 1933, G.S. 14-18 provided that manslaughter, whether voluntary or involuntary, was punishable by imprisonment for not less than four months and not more than twenty years. The 1933 Act amended G.S. 14-18 by adding: "Provided, however, that in cases of involuntary manslaughter, the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both." "[T]he proviso was intended and designed to mitigate the punishment in cases of involuntary manslaughter, and to commit such punishment to the sound discretion of the trial judge." *State v. Dunn,* 208 N.C. 333, 335, 180 S.E. 708, 709 (1935).

[1] In *State v. Blackmon,* 260 N.C. 352, 132 S.E. 2d 880 (1963), it was held that a statute (G.S. 14-55) prescribing punishment "by fine or imprisonment in the State's prison, or both, in the discretion of the court," did not prescribe "specific punishment" within the meaning of that term as used in G.S. 14-2. On authority of *Blackmon,* it was held in *State v. Adams,* 266 N.C. 406, 146 S.E. 2d 505 (1966), that the maximum lawful term of imprisonment for involuntary manslaughter is ten years.

The court instructed the jury they could return a verdict of guilty of murder in the second degree, or a verdict of guilty of manslaughter, or a verdict of not guilty. Clearly the court was referring solely to voluntary manslaughter. The charge contains no reference to involuntary manslaughter. The sentence imposed by the judgment was permissible only upon conviction for voluntary manslaughter.

The court properly instructed the jury that, *if* the State satisfied the jury beyond a reasonable doubt that defendant by the use of his pistol, a deadly weapon, *intentionally* shot and thereby killed Miss Lillie, the law would raise two presumptions, (1) that the killing was unlawful, and (2) that it was done with malice. *State v. Barrow,* 276 N.C. 381, 390, 172 S.E. 2d 512, 518 (1970), and cases cited. The court did not instruct in the negative, that is, that these presumptions would *not* arise *unless* the State proved beyond a reasonable doubt that defendant *intentionally* shot Miss Lillie.

Defendant's testimony was explicit that he did not intentionally shoot Miss Lillie; that the discharge of his pistol was accidental. If the jury so found, there remained sufficient evi-

dence unfavorable to defendant to require instructions as to involuntary manslaughter and to support a verdict of guilty of involuntary manslaughter.

The following statement from *State v. Hovis,* 233 N.C. 359, 365, 64 S.E. 2d 564, 567-68 (1951), quoted in *State v. Foust,* 258 N.C. 453, 458-59, 128 S.E. 2d 889, 893 (1963), summarizes the legal principles applicable to the factual situation under consideration as follows:

". . . Where one engages in an unlawful and dangerous act, such as 'fooling with an old gun,' *i.e.,* using a loaded pistol in a careless and reckless manner, or pointing it at another, and kills the other by accident, he would be guilty of an unlawful homicide or manslaughter. G.S. 14-34; *S. v. Vines,* 93 N.C. 493; *S. v. Trollinger,* 162 N.C. 618, 77 S.E. 957; *S. v. Limerick,* 146 N.C. 649, 61 S.E. 568.

"Involuntary manslaughter has been defined to be, 'Where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done.' [Citations.]"

[2] At common law and under G.S. 14-18, "one who points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills," commits manslaughter. *State v. Coble,* 177 N.C. 588, 591, 99 S.E. 339, 341 (1919); *State v. Boldin,* 227 N.C. 594, 42 S.E. 2d 897 (1947).

[3] Based on legal principles stated above, which are restated and applied in *State v. Foust, supra,* and in *State v. Wrenn, ante,* 676, 185 S.E. 2d 129 (1971), we hold the evidence required the submission under appropriate instructions whether defendant was guilty of involuntary manslaughter.

As stated by Chief Justice Stacy in *State v. DeGraffenreid,* 223 N.C. 461, 463-64, 27 S.E. 2d 130, 132 (1943): "[T]he defendant is entitled to have the different views presented to the jury, under a proper charge, and an error in respect of the lesser offense is not cured by a verdict convicting the defendant of a higher offense charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a lesser degree of the same crime if the different views, arising on the evidence, had been correctly presented by the trial

court." Accord, *State v. Moore,* 275 N.C. 198, 211-12, 166 S.E. 2d 652, 661 (1969), and cases cited; *State v. Wrenn, supra.* The failure of the court to instruct the jury with reference to involuntary manslaughter and to submit to the jury whether defendant was guilty of involuntary manslaughter entitles defendant to a new trial.

Nothing stated herein is intended to affect defendant's contention that the circumstances under which he drew his pistol were such that this action was or appeared to be necessary to protect himself from death or great bodily harm.

[4] On cross-examination, the solicitor asked defendant if he had not been indicted for murder in New York State. Defendant's objection was overruled. Answering, defendant testified that he had been indicted for murder in New York State in 1964 but "wasn't found guilty" and "wasn't sentenced for it." Defendant's Assignment of Error No. 6 is based on his exception to the admission of this testimony.

The ruling of the trial judge was based on *State v. Maslin,* 195 N.C. 537, 143 S.E. 3 (1928), and decisions in accord with *Maslin,* which, in respect of the point now under consideration, have been overruled this day in *State v. Williams, ante,* 663, 185 S.E. 2d 174 (1971), for reasons fully stated therein.

Defendant, on trial for murder, offered evidence and contended that the discharge of the pistol was accidental and not intentional. Under these circumstances, the admission of the testimony, for the purposes of impeachment, to the effect that he had been indicted in New York State in 1964 for murder was prejudicial.

For the reasons stated, defendant is entitled to a new trial; the case is remanded for trial to determine whether defendant be guilty of voluntary manslaughter, or guilty of involuntary manslaughter, or not guilty.

New trial.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ALLEN v. HINSON

No. 69 PC.

Case below: 12 N.C. App. 515.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

CAMPBELL v. MAYBERRY

No. 72 PC.

Case below: 12 N.C. App. 469.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

CUMMINGS v. LOCKLEAR

No. 67 PC.

Case below: 12 N.C. App. 572.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

HODGE v. HODGE

No. 65 PC.

Case below: 12 N.C. App. 574.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

IN RE HOPPER and HOPPER v. MORGAN

No. 14 PC.

Case below: 11 N.C. App. 611.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

HORTON v. HORTON

No. 74 PC.

Case below: 12 N.C. App. 526.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

JOHNSON v. JOHNSON

No. 64 PC.

Case below: 12 N.C. App. 505.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

MANGUM v. SURLES

No. 66 PC.

Case below: 12 N.C. App. 547.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 7 December 1971.

PAGE v. SLOAN

No. 63 PC.

Case below: 12 N.C. App. 433.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 14 December 1971.

SNELLINGS v. ROBERTS

No. 70 PC.

Case below: 12 N.C. App. 476.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 December 1971.

STATE v. ANDREWS

No. 161

Case below: 12 N.C. App. 421.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 December 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. BAILEY

No. 71 PC.

Case below: 12 N.C. App. 494.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

STATE v. BRYANT

No. 62 PC.

Case below: 12 N.C. App. 530.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 9 December 1971.

STATE v. EDWARDS

No. 161.

Case below: 12 N.C. App. 421.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

STATE v. FLOWERS

No. 73 PC.

Case below: 12 N.C. App. 487.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

STATE v. KING

No. 60 PC.

Case below: 12 N.C. App. 568.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 December 1971.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. SHIRLEY

No. 55 PC.

Case below: 12 N.C. App. 440.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 December 1971.

UPTON v. UPTON

No. 68 PC.

Case below: 12 N.C. App. 579.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 December 1971.

UTILITIES COMM. v. TELEPHONE CO.

No. 76 PC.

Case below: 12 N.C. App. 543.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 December 1971.

APPENDIX

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA

The Rules Governing Admission to the Practice of Law in the State of North Carolina are hereby amended by rewriting the Rules as they appear in 277 N.C. 731-741 as follows:

RULE I

Compliance Necessary

Section 1. No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the State.

RULE II

Definitions

Section 1. The term "Board" as herein used refers to the "Board of Law Examiners of North Carolina."

Section 2. The term "Secretary" as herein used refers to the Secretary of the Board of Law Examiners of North Carolina.

RULE III

Applicants

Section 1. For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants." To be classified as a "general applicant," and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule VI hereof. To be classified as a "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule VII hereof.

Section 2. As soon as possible after the filing date for applications, the Secretary shall make public a list of both general and comity applicants for the ensuing examination.

RULE IV

Registration

Section 1. Every person seeking admission to practice law in the State of North Carolina as a general applicant shall register, by filing with the Secretary, upon forms prescribed by the Board.

Section 2. Each registration form shall be complete in every detail and must be accompanied by such other evidence or documents as may be prescribed by the Board.

Section 3. Registrations shall be filed with the Secretary at least eighteen (18) months prior to August 1 of the year in which the applicant expects to take the bar examination.

Section 4. Each registration by a resident of the State of North Carolina must be accompanied by a fee of $10.00 and each registration by a non-resident shall be accompanied by a fee of $25.00. An additional fee of $25.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the Board. No part of a registration fee shall be refunded for any reason whatsoever.

RULE V

Applications of General Applicants

Section 1. After complying with the registration provisions of Rule IV, applications for admission to an examination must be made upon forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application.

Section 2. Applications must be received and filed with the Secretary not later than 12:00 o'clock noon, Eastern Standard Time, *on the 10th day of January* of the year the applicant desires to take the written bar examination.

Section 3. Every application by a general applicant who is a resident of the State of North Carolina shall be accompanied by a fee of $75.00. Every application by a general applicant who is not a resident of the State of North Carolina shall be accompanied by a fee of $75.00 plus such fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a non-resident.

Section 4. No part of the fee required by Section 3 of this Rule V shall be refunded to the applicant unless the applicant shall file with the Secretary a written request to withdraw as an applicant, not later than the 15th day of June before the next examination, in which event not more than one-half (½) of the fee may be refunded to the applicant in the discretion of the Board; provided, however, no part

of any fee paid to the National Conference of Bar Examiners or its successor shall be refunded.

RULE VI

Requirements for General Applicants

Section 1. Before being certified (licensed) by the Board to practice law in the State of North Carolina, a general applicant shall:

(1) Be of good moral character and have satisfied the requirements of Rule VIII hereof;

(2) Have registered as a general applicant in accordance with the provisions of Rule IV hereof;

(3) Possess the legal educational qualifications as prescribed in Rule IX hereof;

(4) Be a citizen of the United States;

(5) Be of the age of at least eighteen (18) years;

(6) Be and continuously have been a bona fide citizen and resident of the State of North Carolina on and from the 15th day of June of the year in which the applicant takes the written Bar examination.

(7) If a non-resident at the time of filing his application, file with the Board a declaration of applicant's intent, in good faith, in form prescribed by the Board to become a citizen and resident of the State of North Carolina.

(8) Have filed formal application as a general applicant in accordance with Rule V hereof;

(9) Stand and pass a written bar examination as prescribed in Rule XI hereof.

RULE VII

Requirements for Comity Applicants

Section 1. Any attorney at law immigrating or who has heretofore immigrated to North Carolina from a sister state or from the District of Columbia or a territory of the United States, upon written application, may be certified (licensed) by the Board to practice law in the State of North Carolina,

without written examination, in the discretion of the Board, provided each such applicant shall:

(1) Be a citizen of the United States;

(2) File written application with the Secretary, upon such form as may be prescribed by the Board, not less than six (6) months before the application shall be considered by the Board.

(3) Pay to the Board with each written application a fee of $250.00, not more than $125.00 of which may be refunded to the applicant in the discretion of the Board if admission to practice law in the State of North Carolina is denied;

(4) Be and continuously have been a bona fide citizen and resident of the State of North Carolina for a period of a least sixty (60) days immediately prior to the consideration of his application to practice law in the State of North Carolina.

(5) Prove to the satisfaction of the Board:

a. That the applicant is licensed to practice law in a State having comity with North Carolina.

b. That the applicant has been actively and substantially engaged for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the Secretary in:

i. The practice of law as defined by G.S. 84-2.1, or

ii. Activities which would constitute the practice of law if done for the general public, or

iii. Serving as a Judge of a court of record, or

iv. Serving as a full time teacher in a law school approved by the Council of The North Carolina State Bar.

Time spent in active military service of the United States, not to exceed three (3) years, may be excluded in computing the five (5) year period referred to hereinabove;

(6) Satisfy the Board that the State in which the applicant is licensed and from which he seeks comity will admit attorneys licensed to practice in the State of North Carolina to the practice of law in such State without written examination.

(7) Be in good professional standing in the State from which he seeks comity.

(8) Furnish to the Board such evidence as may be required to satisfy the Board of his good moral character.

(9) Applicants must meet the educational requirements of Rule IX as hereinafter set out if first licensed to practice law after August 1971.

Section 2. No license shall be issued to any applicant for admission under this Rule VII except at the time of the annual licensing of the general applicants; provided, the Board may at any other time, in its discretion grant an interim permission to such comity applicants to practice law until license shall be issued.

RULE VIII

Section 1. Every applicant shall have the burden of proving that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public.

Section 2. All information furnished to the Board by an applicant, shall be deemed material and all such information shall be and become a permanent record of the Board.

Section 3. No one shall be certified (licensed) to practice law in this State by examination or comity:

(1) Who fails to disclose fully to the Board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to his professional conduct, whether same have been terminated or not, in this or any other state, or any Federal Court or other jurisdiction, or

(2) Who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the Federal Courts or other jurisdictions.

Section 4. Every applicant shall appear before a Bar Candidate Committee, appointed by the Chairman of the Board, in the Judicial District in which he resides, or in such other

judicial district as the Board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. The applicant shall give such information to the Committee as may be required on such forms as may be provided by the Board. A Bar Candidate Committee may require the applicant to make more than one appearance before the Committee and to furnish to the Committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be certified (licensed) to practice law in North Carolina. Each applicant will be advised of the time and place of his appearance before the Bar Candidate Committee.

Section 5. All investigations in reference to the moral character of an applicant may be informal, but shall be thorough, with the object of ascertaining the truth. Neither the hearsay rule, nor any other technical rule of evidence need be observed.

Section 6. Every applicant may be required to appear before the Board to be examined about any matter pertaining to his moral character.

Section 7. No new application or petition for reconsideration of a previous application from an applicant who has been denied permission to take the bar examination by the Board on the grounds of failure to prove good moral character shall be considered by the Board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for reapplication or petition for a reconsideration is granted by the Board.

RULE IX

Section 1. General Education. Each applicant to take the examination, prior to beginning the study of law, must have completed, at an accredited college or university an amount of academic work equal to 3/4 of the work required for a bachelor's degree at the university of the State in which the college or university is located. With his application he shall file an affidavit from such college or university furnishing all information that the Board shall require.

Section 2. Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a certificate (license) to practice law shall file

with the Secretary a certificate from the President, Dean or other proper official of the Law school approved by the Council of The North Carolina State Bar, a list of which is available in the office of the Secretary, or shall otherwise show to the satisfaction of the Board that the applicant has or will receive a law degree within sixty (60) days after the date of the written examination or that the applicant has successfully completed the courses required by the Council of The North Carolina State Bar, or will complete such courses within sixty (60) days after the date of the written examination provided in Rule XI, being the same courses as those set out in Rule XI, Sec. 3, hereof.

RULE X

Protest

Section 1. Any person may protest the application of any applicant to be admitted to the practice of law either by examination or as a matter of comity.

Section 2. Such protest shall be made in writing, signed by the person making the protest and bearing his home and business address, and shall be filed with the Secretary prior to the date on which the applicant is to be examined.

Section 3. The Secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

Section 4. In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the Board at a time and place to be designated by the Board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination; however, if the applicant passes the written examination, no certificate (license) to practice law shall be issued to him as provided by Rule XII until final disposition of the protest in favor of the applicant.

Section 5. Nothing herein contained shall prevent the Board on its own motion from withholding its certificate (license) to practice law until it has been fully satisfied as to the moral fitness of the applicant as provided by Rule VIII.

RULE XI

Examinations

Section 1. One written examination shall be held each year for those applying to be admitted to the practice of law in North Carolina as general applicants.

Section 2. The examination shall be held in the City of Raleigh and shall commence on the first Tuesday in August.

Section 3. The examination shall deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

Section 4. The Board shall determine what shall constitute the passing of an examination.

Section 5. No person shall be permitted to take the examination more than five (5) times within any ten (10) year period.

RULE XII

Certificate or License

Section 1. Upon compliance with the rules of the Board, and all orders of the Board, the Secretary, upon order of the Board shall issue a certificate (license) to practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

RULE XIII

Section 1. Any applicant may appeal from an adverse ruling or determination of the Board of Law Examiners as to his eligibility to take the written examination. After an applicant has successfully passed the written examination, he may appeal from any adverse ruling or determination withholding his certificate (license) to practice law from him.

Section 2. Any appealing applicant shall give notice of appeal in writing, within twenty (20) days after notice of such ruling or determination, and file with the Secretary his

written exceptions to the ruling or determination, which exceptions shall state the grounds of objection to such ruling or determination. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the Board becoming final.

Section 3. Within sixty days after receipt of the notice of appeal, the Secretary shall prepare, certify, and file with the clerk of the Superior Court of Wake County, at the expense of the appellant, the record of the case, comprising

(1) The application and supporting documents or papers filed by the applicant with the Board;

(2) A complete transcript of the testimony taken at the hearing;

(3) Copies of all pertinent documents and other written evidence introduced at the hearing;

(4) A copy of the decision of the Board; and

(5) A copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

Section 4. Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken except that in cases of alleged omissions or errors in the record. Testimony thereon may be taken by the court. The findings of fact by the Board, when supported by competent evidence shall be conclusive and binding upon the court. The court may affirm, reverse or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the Board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

Section 5. Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the Superior Court. No appeal bond shall be required of the Board.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina and Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 1st day of November, 1971.

B. E. JAMES, *Secretary-Treasurer*
The North Carolina State Bar

After examining the foregoing amendments of the Rules of the Board of Law Examiners as adopted by the Council of The North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 16th day of November, 1971.

WILLIAM H. BOBBITT, *Chief Justice*
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendments of the Rules of the Board of Law Examiners and the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 16th day of November, 1971.

MOORE, J.
For the Court

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

§ 3. Duties and Authority of Administrative Boards and Agencies

The provisions for Judicial Review of Decisions of Certain Administrative Agencies are inappropriate to challenge the authority of the Board of Paroles to reinstate a parolee's sentence so as to run at the expiration of the sentence currently being served by the parolee. *Jernigan v. State,* 556.

The principle forbidding the delegation of legislative powers without the establishment of appropriate standards has no application to the authority of the State Board of Education to promulgate and administer the regulations relating to the certification of public school teachers, since such authority is conferred by the State Constitution itself rather than by statute. *Guthrie v. Taylor,* 703.

AGRICULTURE

§ 9.5 Actions for Defective Seed

A seed dealer was not negligent in selling mislabeled tomato seed to the plaintiff, a farmer, where there was evidence that the dealer had purchased the seed from a reputable supplier, that the dealer received the seed already mislabeled as the variety desired by the plaintiff, and that this mislabeling could not be detected by an examination of the seed. *Gore v. Ball,* 192.

A seed dealer's warranty of tomato seed "to the extent of the purchase price" is contrary to the public policy of the State as declared in the Seed Law and is invalid. *Ibid.*

A seed retailer who contracted to sell and deliver Heinz 1350 tomato seed but who delivered instead seed of a completely different type of tomato is liable for damages for breach of contract; the measure of damages is the value of the crop which would have been raised had the seed been of the proper variety, less the value of the crop actually raised. *Ibid.*

APPEAL AND ERROR

§ 3. Review of Constitutional Questions

Supreme Court will not decide a constitutional question not raised or considered in the court below. *Wilcox v. Highway Comm.,* 185.

Purported appeal by juvenile from Court of Appeals based solely on assertion that district court's allowance of an amendment to the juvenile petition deprived him of a constitutional right presented no substantial constitutional question. *In re Jones,* 616.

§ 6. Orders Appealable

Orders transferring or refusing to transfer from one trial division to another are not immediately appealable. *Bryant v. Kelly,* 123.

§ 24. Form of and Necessity for Objections

Where there is no objection to the admission of evidence, the competency of the evidence is not presented. *Cogdill v. Highway Comm.,* 313.

§ 48. Harmless and Prejudicial Error in Admission of Evidence

In a nonjury trial there is a presumption that the judge disregarded incompetent evidence in making his decision. *Cogdill v. Highway Comm.,* 313.

APPEAL AND ERROR — Continued

§ 57. Findings

If the findings of fact are supported by competent evidence, they are binding on the Supreme Court even though there is evidence to the contrary. *Cogdill v. Highway Comm.*, 313.

§ 62. New Trial

Where case was improvidently transferred from superior to district court, Supreme Court orders that retrial be held in superior court. *Bryant v. Kelly*, 123.

§ 67. Force and Effect of Decisions of Supreme Court

A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case. *Insurance Co. v. Insurance Co.*, 240.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

A police officer had probable cause to make a warrantless arrest of a person who went to a place in the woods where stolen TV's were concealed and who looked around and then retraced his steps out of the woods. *S. v. Harris*, 307.

In order to justify an arrest without a warrant for a felony, it is not necessary to show that a felony was actually committed but only that the officer had reasonable ground to believe such an offense was committed. *S. v. Alexander*, 527.

Police officers had probable cause to arrest defendants without a warrant for armed robbery where they had been given descriptions of the robbers, one defendant had been identified by an informer and by two eyewitnesses from photographs, and both defendants had been identified by another informer. *Ibid.*

The very nature of the crime of armed robbery was sufficient to support a reasonable belief by officers that defendants would "evade arrest if not taken into custody." *Ibid.*

§ 7. Right of Person Arrested to Communicate with Friends or Counsel

Record does not support defendant's assertion that he was not permitted to communicate with friends or relatives after his arrest. *S. v. Richardson*, 621.

ASSAULT AND BATTERY

§ 4. Criminal Assault in General

An assault is committed in the perpetration of a robbery if made to overcome resistance, to effectuate flight, or to eliminate the possibility of identification by the victim, notwithstanding the assault may occur after the robber has taken possession of the victim's goods. *S. v. Richardson*, 621.

§ 5. Assault with a Deadly Weapon

The fact that a felonious assault is committed during the perpetration of armed robbery does not deprive the felonious assault of its character as a complete and separate felony. *S. v. Richardson*, 621.

ASSAULT AND BATTERY — Continued

When separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, verdicts of guilty as charged will support separate judgments for each crime. *Ibid.*

ATTORNEY AND CLIENT

§ 5. Representation of Client and Liabilities to Client

It is a lawyer's duty to represent his client, even though his objections and exceptions may frequently harass the judge. *S. v. Lynch*, 1.

AUTOMOBILES

§ 1. Authority to License Drivers and to Revoke or Suspend Licenses

The power to issue, suspend, or revoke a driver's license is vested exclusively in the Department of Motor Vehicles. *Joyner v. Garrett*, 226.

The 12-month suspension of petitioner's driver's license which the court imposed upon his plea of guilty to the charge of drunken driving did not preclude the Department of Motor Vehicles from suspending petitioner's driver's license for refusing to take a breathalyzer test at the time of his arrest for drunken driving. *Ibid.*

§ 2. Grounds and Procedures for Suspension or Revocation of Driver's Licenses

Any error occurring in the administrative hearing on the suspension of petitioner's driver's license is rendered harmless by the superior court hearing *de novo*. *Joyner v. Garrett*, 226.

The Department of Motor Vehicles has the burden of proof in a hearing de novo in superior court on the suspension of petitioner's driver's license for wilfully refusing to take a breathalyzer test. *Ibid.*

Petitioner waived his right to cross-examine the arresting officer at an administrative hearing on the suspension of his driver's license when he failed to assert such right. *Ibid.*

With respect to the statute authorizing 60-day suspension of driver's license upon the driver's wilful refusal to take a breathalyzer test, a finding by the Department of Motor Vehicles that the driver "did refuse" to take the breathalyzer test is equivalent to a finding that the driver "wilfully refused" to take the test. *Ibid.*

Arresting officer's affidavit that the petitioner wilfully refused to take a breathalyzer test is inadmissible in evidence upon objection by petitioner at an administrative hearing on the suspension of his license. *Ibid.*

A person whose driver's license was revoked from 2 January 1970 to 2 January 1971 and who had not complied with the statutory procedures for the restoration of his driving privilege when he committed a moving violation on 6 March 1971 *is held* not a person whose driver's license is in a "state of revocation" so as to authorize the revocation of his driving privilege under G.S. 20-28.1. *Ennis v. Garrett*, 612.

The Department of Motor Vehicles was bound by the judgment of a court of competent jurisdiction finding a person not guilty of driving while his license was revoked. *Ibid.*

AUTOMOBILES — Continued

§ 9. Turning Signals

The statute prescribing the giving of stop signals is inapplicable where defendant motorist had come to a complete stop prior to the time plaintiff had come into view. *Strickland v. Powell,* 183.

§ 43. Pleadings and Parties

Complaint was sufficient to raise issue of wilful and wanton negligence on part of automobile driver. *Brewer v. Harris,* 288.

§ 56. Vehicle Stopped or Parked on Highway

Issue of defendant's negligence in stopping his vehicle in plaintiff's lane of travel during a heavy rainstorm was properly submitted to the jury. *Strickland v. Powell,* 183.

§ 91. Issues

Plaintiff's evidence was sufficient to require submission of an issue as to wilful and wanton conduct of automobile driver in action for wrongful death of passenger in automobile which failed to negotiate a curve. *Brewer v. Harris,* 288.

§ 126. Competency and Relevancy of Evidence in Prosecution for Driving Under the Influence

It is not necessary to the admissibility of a breathalyzer test result that the State introduce a certified copy of the methods approved by the State Board of Health for administering the test. *S. v. Powell,* 608.

BOUNDARIES

§ 10. Sufficiency of Description and Admission of Evidence Aliunde

Description in a deed which merely referred to the property in question as "200 acres of the marsh and islands" that had been granted by a 1770 patent from the State, *held* patently and fatally defective. *S. v. Brooks,* 45.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1. Elements of Offense

The only distinction between first and second degree burglary is the element in first degree burglary requiring that the dwelling house be actually occupied at the time of the breaking and entering. *S. v. Allen,* 115.

§ 3. Indictment

Where a defendant charged with first degree burglary failed to object to the solicitor's election to seek a verdict no greater than second degree burglary, the defendant could not thereafter attack the verdict of second degree burglary on the ground all the evidence tended to show his guilt of first degree burglary. *S. v. Allen,* 115.

Solicitor's election to seek a verdict no greater than second degree burglary was in effect a stipulation that the dwelling house was not actually occupied at the time of the breaking and entering. *Ibid.*

CANCELLATION OF INSTRUMENTS

§ 10. Sufficiency of Evidence

Evidence that plaintiff's son secured plaintiff's signature on a blank note and deed of trust by falsely telling her that he wanted to mortgage

CONSTITUTIONAL LAW — Continued

Trial court properly sustained State's challenges for cause of prospective jurors who made it clear on voir dire that each of them had already made up his mind that he would not return a verdict pursuant to which defendant might lawfully be executed, whatever the evidence might be. *Ibid; S. v. Doss*, 413.

Imposition of death penalty for first-degree murder was not rendered unconstitutional by U. S. Supreme Court decisions where crime was committed and trial was held subsequent to the repeal of G.S. 15-162.1. *S. v. Doss*, 413.

§ 30. Due Process in Trial in General

Every person charged with crime has the right to the assistance of counsel at a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *S. v. Lynch*, 1.

Constitutional rights of defendant on trial for capital crime of first degree murder were not violated by single verdict procedure or by jury's unbridled discretion in determining whether to impose death penalty. *S. v. Westbrook*, 18; *S. v. Doss*, 413.

§ 31. Right of Confrontation and Access to Evidence

Trial court properly refused to allow the disclosure of the identity of an informer. *S. v. Fletcher*, 85.

§ 32. Right to Counsel

A minor who has arrived at the age of accountability for crime may waive counsel. *S. v. Lynch*, 1.

An indigent charged with a felony can waive his right to counsel only in writing. *Ibid.*

An indigent defendant in a capital case cannot waive his right to counsel at an in-custody interrogation. *S. v. Doss*, 413.

An accused person in a police line up must be advised of his right to counsel. *S. v. Williams*, 663.

§ 34. Double Jeopardy

Order of mistrial in a criminal case generally will not support a plea of former jeopardy. *S. v. Battle*, 484.

A defendant who entered a plea of guilty after his previously entered plea of former jeopardy was overruled thereby waived any right to dismissal of the charge on the ground of former jeopardy. *S. v. Hopkins*, 473.

§ 36. Cruel and Unusual Punishment

Death penalty for first degree murder is not cruel and unusual punishment. *S. v. Westbrook*, 18; *S. v. Doss*, 413.

It was not cruel and unusual punishment for the trial judge to impose the maximum sentence authorized by statute upon defendant's conviction of assault on a female with intent to commit rape. *S. v. Williams*, 515.

§ 37. Waiver of Constitutional Guaranties

A defendant who entered a plea of guilty after his previously entered plea of former jeopardy was overruled thereby waived any right to dismissal of the charge on the ground of former jeopardy. *S. v. Hopkins*, 473.

CONTRACTS

COURTS

CRIME AGAINST NATURE

CRIMINAL LAW

CRIMINAL LAW — Continued

§ 13. Jurisdiction in General

A judge of the district court had jurisdiction to enter judgment finding a defendant not guilty of a misdemeanor. *S. v. Harrell,* 464.

§ 18. Jurisdiction on Appeals to Superior Court

Where the State had no right to appeal from the district court to the superior court in a criminal case, the superior court did not have jurisdiction of the case and its granting of defendant's motion to quash was without effect. *S. v. Harrell,* 464.

§ 21. Preliminary Proceedings

Where an attorney had been appointed to represent two defendants charged with armed robbery, and the attorney retained by one defendant withdrew at the preliminary hearing, trial court did not err in denying a motion for continuance of the hearing and in holding the hearing with the court-appointed attorney representing both defendants. *S. v. Carnes,* 549.

§ 23. Pleas of Guilty

Acceptance of defendant's guilty plea will not be disturbed where it appears that the trial judge made the requisite findings that the plea was voluntarily and understandingly made. *S. v. Hunter,* 498; *S. v. Jackson,* 503.

There was plenary evidence to support court's findings that pleas of guilty to second degree murder and armed robbery were voluntary. *S. v. Witherspoon,* 490.

§ 25. Plea of Nolo Contendere

A plea of nolo contendere leaves open for review only the sufficiency of the indictment. *S. v. Smith,* 505.

§ 26. Plea of Former Jeopardy

Order of mistrial in a criminal case generally will not support a plea of former jeopardy. *S. v. Battle,* 484.

A defendant who entered a plea of guilty after his previously entered plea of former jeopardy was overruled thereby waived any right to dismissal of the charge on the ground of former jeopardy. *S. v. Hopkins,* 473.

When separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, verdicts of guilty as charged will support separate judgments for each crime. *S. v. Richardson,* 621.

§ 30. Pleas of the State

In a prosecution on indictment charging defendant with first degree burglary, the solicitor's announcement in open court that he would seek no verdict greater than burglary in the second degree, *held* proper. *S. v. Allen,* 115.

When the solicitor announces that he will not seek a conviction upon the maximum degree of the crime charged in the indictment, the sufficiency of the evidence to support a conviction of the lesser degree must be measured by the same standards which would be applied had the indictment charged only the lesser degree of the offense. *Ibid.*

CRIMINAL LAW — Continued

Where a defendant charged with first degree burglary failed to object to the solicitor's election to seek a verdict no greater than second degree burglary, the defendant could not thereafter attack the verdict of second degree burglary on the ground all the evidence tended to show his guilt of first degree burglary. *Ibid.*

§ 34. Evidence of Defendant's Guilt of Other Offenses

A nontestifying defendant was not prejudiced by a codefendant's testimony on cross-examination that he had met the defendant in the "Virginia State Pen." *S. v. Fletcher*, 85.

Testimony that defendant was a work release escapee at time the crime was committed was competent. *S. v. Doss*, 413.

Trial court did not err in admission of testimony that defendant was a work release prisoner and that such prisoners were picked up at the end of their work day by a bus stopping at the building where the alleged assault occurred. *S. v. Shutt*, 689.

When a defendant takes the stand, he may be cross-examined with respect to previous convictions regardless of his age at the time of such convictions. *S. v. Alexander*, 527.

Answer by defendant on cross-examination that he had been "convicted" of storebreaking and larceny when he was a juvenile was competent for impeachment purposes, and trial court did not err in failing to determine whether the charge was heard on a juvenile petition or on an indictment in superior court. *Ibid.*

§ 42. Articles and Clothing Connected with the Crime

Articles of clothing found upon homicide victim's body and photographs of the body were properly admitted in evidence, notwithstanding defendant in open court admitted the identity of the deceased, the location where the body was found, the general condition and cause of death. *S. v. Westbrook*, 18.

A small pen knife found on the body of deceased was sufficiently identified for its admission in evidence, although the proper procedure for introduction of real evidence was not strictly followed. *S. v. Winford*, 58.

§ 43. Photographs

In a homicide and kidnapping prosecution, photographs of the victim's body, which were used by physicians to illustrate their testimony, *held* properly admitted in evidence. *S. v. Chance*, 643.

§ 62. Lie Detector Tests

Admission of an officer's testimony that defendant had agreed to take a polygraph test did not constitute reversible error. *S. v. Williams*, 515.

§ 64. Evidence as to Intoxication or Use of Drugs

Defendant was not prejudiced when his codefendant was prevented from testifying as to whether defendant's intent to commit armed robbery was impaired or nullified by drugs. *S. v. Fletcher*, 85.

It is not necessary to the admissibility of a breathalyzer test result that the State introduce a certified copy of the methods approved by the State Board of Health for administering the test. *S. v. Powell*, 608.

CRIMINAL LAW — Continued

§ 66. Evidence of Identity by Sight

An accused may waive the right to counsel at lineup proceedings, the burden being on the State to show by clear and convincing evidence that such waiver was made freely, voluntarily and with full understanding. *S. v. Harris*, 177.

State offered clear and convincing evidence on voir dire which supports trial court's findings and conclusions that defendant voluntarily waived his right to counsel at pretrial lineup and that witness' in-court identification of defendant was of independent origin. *Ibid.*

A robbery victim's in-court identification of defendants as the perpetrators of the robbery is competent where the identification is based solely on the victim's observation of defendants during the robbery. *S. v. McVay*, 428.

Pretrial photographic identification procedure was not impermissibly suggestive, and in-court identification was of independent origin from the pretrial photographic identification. *S. v. Morris*, 477.

Identification of defendant as the perpetrator of an armed robbery was not weakened by the fact that, when the victim identified defendant 15 minutes after the robbery, defendant was not wearing the white hat and sun glasses that he wore during the robbery. *S. v. Banner*, 595.

In-court identifications of defendants were competent where they were independent in origin and not based on a pretrial lineup. *S. v. Alexander*, 527.

A witness' in-court identification of defendant was not tainted by the fact that the witness had seen defendant in custody of the police at a time when defendant was without counsel. *S. v. Williams*, 515; *S. v. Banner*, 595.

Although an assault victim observed the name "Kenneth" on the shirt of her assailant and was told by the police that the name of the man whose photograph she had selected as her assailant was Kenneth Shutt, a lineup subsequently conducted at a prison camp was not rendered unnecessarily suggestive by the fact that the men in the lineup wore uniform shirts on which their respective names appeared. *S. v. Shutt*, 689.

Trial court did not err in admission of assault victim's photographic identification of defendant as her assailant. *Ibid.*

Defendant's constitutional rights were violated by a pretrial lineup at which he was not represented by counsel, was not informed of his right to counsel, and did not waive his right to counsel. *Ibid.*

Trial court did not err in admission of assault victim's in-court identification of defendant, notwithstanding the victim had identified defendant in an illegal pretrial lineup, where the in-court identification was based on what the victim observed at the time of the alleged assault. *Ibid.*

Admission of evidence of an assault victim's identification of defendant at an illegal pretrial lineup was harmless error. *Ibid.*

Trial court did not err in permitting in-court identification of defendant by a robbery and assault victim without holding a voir dire hearing. *S. v. Richardson*, 621.

Rape victim's in-court identification of defendant as the perpetrator of the crime was properly admitted in evidence, notwithstanding the victim saw defendant in a police lineup at a time when defendant was without counsel and could not waive his right to counsel. *S. v. Chance*, 643.

Defendant's novel contention that the investigating officer did not take enough time in interrogating him, thereby violating his constitutional rights, held without merit. *S. v. Roseman*, 573.

A written confession signed by a 16-year-old defendant, together with his written waiver of counsel, was properly admitted in evidence on the trial for the offense of assault with intent to commit rape. *S. v. Williams*, 515.

Defendant's conversation with a police officer in her own home during the officer's investigation of a homicide was not an in-custody interrogation within the scope of Miranda v. Arizona. *S. v. Gladden*, 566.

Where a defendant in police custody volunteered statements which implicated him in the crimes of kidnapping and murder, the fact that defendant was not represented by counsel did not render the statements inadmissible notwithstanding defendant was entitled to counsel and could not waive such right. *S. v. Chance*, 643.

§ 76. Determination and Effect of Admissibility of Confession

Where there was no conflicting evidence on *voir dire*, the trial judge could admit a confession without making specific findings of fact. *S. v. Lynch*, 1.

Trial court should make its findings of fact concerning the admissibility of defendant's in-custody statements during the trial, not afterwards. *S. v. Doss*, 413.

Trial court's findings supported the admission of a minor's written confession into evidence. *S. v. Roseman*, 573.

The removal of the introductory paragraph from defendant's written confession, prior to the introduction of the confession into evidence, was not prejudicial to defendant. *Ibid.*

Police officer's testimony on *voir dire* provided ample evidence to support the court's findings and conclusions that defendant had been fully advised of her constitutional rights prior to making a statement to the officer. *S. v. Gladden*, 566.

§ 77. Admissions and Declarations

The trial court did not err in refusing to allow cross-examination of defendant's accomplice and a police officer as to the contents of defendant's statement to police officers which had been read to the accomplice between the time the accomplice signed his first statement to the investigating officers and the time he signed a supplementary statement, and in refusing to admit defendant's statement into evidence. *S. v. Westbrook*, 18.

Defendant cannot complain of the admission of testimony by police officers as to various self-serving declarations made by defendant to the officers, all of which tended to exonerate him. *S. v. Duboise*, 73.

§ 84. Evidence Obtained by Unlawful Means

Constitutional guaranties against unreasonable searches and seizures do not prohibit a seizure without a warrant when the contraband is fully disclosed and open to the eye and hand. *S. v. Duboise*, 73.

Consent of passenger was not necessary to valid search of automobile trunk where owner of automobile was present and consented to the search. *S. v. Grant*, 337.

CRIMINAL LAW — Continued

Trial court did not err in admission of a pistol which defendant voluntarily surrendered to the sheriff without first holding a voir dire hearing. *S. v. Richardson,* 621.

Admission, over objection, of evidence obtained in violation of a right guaranteed the defendant by the Constitution of the United States is harmless error only if the court can declare that there is no reasonable possibility that such evidence contributed to the conviction. *S. v. Shutt,* 689.

§ 86. Credibility of Defendant and Parties Interested

For purposes of impeachment, a defendant in a criminal case may not be cross-examined as to whether he has been indicted or is currently under indictment for a crime other than that for which he is on trial. *S. v. Williams,* 663.

It was prejudicial error for the solicitor to have elicited from defendant that he was under indictment for armed robbery in three other counties. *Ibid.*

The trial court committed prejudicial error in allowing the solicitor to cross-examine defendant as to whether he had been indicted for murder in New York State in 1964. *S. v. Stimpson,* 716.

§ 87. Direct Examination of Witnesses

The solicitor could properly refresh the recollection of his witness by asking him to read from a written statement that the witness had signed. *S. v. Chance,* 643.

§ 88. Cross-Examination of Witnesses

Trial court properly sustained an objection to defense counsel's asking the State's witness whether he had been told by his attorney that he would probably get help on a parole if he testified for the State. *S. v. Chance,* 643.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

In-custody statements by defendant's accomplice were properly admitted for purpose of corroborating the accomplice's testimony. *S. v. Westbrook,* 18.

Trial court properly permitted deputy sheriff to read from a typed transcript of a tape recording made by defendant's accomplice for purpose of corroborating the accomplice's testimony. *S. v. Doss,* 413.

The defendant in a capital case was not prejudiced when the trial court restricted his attempts to discredit the principal witnesses by showing inconsistencies in their testimony. *S. v. Chance,* 643.

§ 95. Admission of Evidence Competent for Restricted Purpose

In a joint trial of three defendants, error in admitting a statement by a defendant which implicated a nontestifying co-defendant was harmless beyond a reasonable doubt where there was overwhelming evidence of the co-defendant's guilt. *S. v. Fletcher,* 85.

§ 97. Introduction of Additional Evidence

Trial judge did not err in allowing State to present additional evidence after jury had begun its deliberations. *S. v. Shutt,* 689.

CRIMINAL LAW — Continued

§ 99. Expression of Opinion by Court on Evidence During Trial

Trial judge prejudiced the defendant's case when he instructed the court reporter to put an "overruled" after every objection made by defense counsel and when he thereafter failed to rule on 38 objections made by defense counsel. *S. v. Lynch*, 1.

Trial court did not express an opinion on defendant's alibi evidence in stating, "I can't see what the key has to do with this case, frankly." *S. v. Robinson*, 495.

§ 101. Custody and Conduct of Jury

Defendant was not prejudiced by failure of the trial court to instruct the jury prior to each recess during the trial that jurors should not discuss the case among themselves or allow anyone to discuss the case with them. *S. v. Alexander*, 527.

§ 102. Argument and Conduct of Counsel or Solicitor

The prosecuting attorney may use appropriate epithets which are warranted by the evidence and may vigorously urge the jury to convict and to impose the death penalty in light of the evidence. *S. v. Westbrook*, 18.

In this prosecution for first degree murder, prosecuting attorney's catalogue of criminal offenses committed on the day of the victim's death and on previous occasions by defendant and his alleged accomplice, his reminder to the jury of the callous contempt with which defendant and his accomplice had disposed of the victim's body, and his comment concerning the treatment of another person whom defendant and his accomplice had kidnapped earlier the same day of the homicide were supported by the testimony of defendant and his accomplice. *Ibid.*

Prosecuting attorney's characterizations of defendant and his accomplices as "two robbers, two thieves, two gunmen" and as "killers" was supported by the evidence. *Ibid.*

Where prosecuting attorney does not go outside the record and his characterizations of defendant are supported by evidence, defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument. *Ibid.*

Defendant convicted of rape is entitled to new trial by reason of the solicitor's inflammatory and prejudicial argument to the jury. *S. v. Smith*, 163.

§ 104. Consideration of Evidence on Motion to Nonsuit

On motion for nonsuit, defendant's evidence is considered only to the extent that it is favorable to the State. *S. v. Evans*, 447.

On motion for judgment of nonsuit, all admitted evidence favorable to the State, whether competent or incompetent, must be considered and must be deemed true. *S. v. Roseman*, 573.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

When the substantive evidence offered by the State is conflicting—some tending to inculpate and some tending to exculpate the defendant—it is sufficient to overrule a motion for judgment as of nonsuit. *S. v. McKnight*, 148.

CRIMINAL LAW — Continued

To withstand defendant's motion for nonsuit, there must be substantial evidence of every element of the crime. *S. v. Allred,* 398; *S. v. Evans,* 447.

§ 111. Form and Sufficiency of Instructions in General

Defendant's objection based on the speed with which the judge read the charge to the jury held without merit. *S. v. Jennings,* 604.

§ 112. Instructions on Burden of Proof and Presumptions

The court did not err in failing to instruct the jury that circumstantial evidence is sufficient to justify conviction only when the circumstances proved are inconsistent with the hypothesis that the accused was innocent and with every reasonable hypothesis except that of guilt, where the court fully charged the jury on the State's burden of proving defendant's guilt beyond a reasonable doubt, and defendant made no request for such an instruction. *S. v. Westbrook,* 18.

No set form of words is required to be used in instructing the jury upon the rule relating to the degree of proof required for conviction upon circumstantial evidence. *Ibid.*

§ 113. Statement of Evidence and Application of Law Thereto

In joint trial of two defendants for armed robbery, charge of the court was not susceptible to the construction that the jury should convict both defendants if it found either defendant committed the offense charged. *S. v. Alexander,* 527.

Trial court sufficiently stated the evidence relating to self-defense and explained the law arising thereon in this manslaughter prosecution. *S. v. Jennings,* 604.

§ 114. Expression of Opinion on Evidence in the Charge

Trial court did not express an opinion on the evidence in this homicide prosecution in its instruction that "all inferences in connection with the evidence, insofar as the court can discern, are directly connected with this other felony of crime against nature." *S. v. Doss,* 413.

§ 115. Instructions on Lesser Degrees of Crime

Necessity for instructing on lesser degrees of crime charged. *S. v. Duboise,* 73.

It is not an expression of opinion for the trial court to inform the jury that manslaughter does not arise on the evidence in the case. *Ibid.*

Erroneous failure to submit the question of defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged. *S. v. Wrenn,* 676.

§ 118. Charge on Contentions of the Parties

Instruction that the State contended that "defendant is guilty of murder in the second degree, or at least is guilty of murder" might have created some confusion in the minds of the jurors by the misuse of "murder" in lieu of "manslaughter." *S. v. Winford,* 58.

Record does not reflect that court spent more time in stating contentions of the State than in stating those for the defendant. *S. v. Doss,* 413.

CRIMINAL LAW — Continued

§ 120. Instruction on Right of Jury to Recommend Life Imprisonment or Mercy

In a prosecution charging defendant with rape, trial court's instructions to the jury, "You may find the defendant guilty of rape, as charged in the bill of indictment, and if you say no more, I will sentence him to die," held not prejudicial to defendant. *S. v. Chance*, 643.

§ 122. Additional Instructions After Initial Retirement of Jury

Trial court's additional instruction that the jury had at least three more days to deliberate on the case was not coercive. *S. v. McVay*, 428.

§ 127. Arrest of Judgment

A motion in arrest of judgment is one generally made after verdict to prevent entry of judgment based upon insufficiency of the indictment or some other defect appearing on the face of the record. *S. v. Fletcher*, 85.

Contention that a member of the grand jury was disqualified cannot be urged in arrest of judgment. *S. v. Roberts*, 500.

§ 128. Discretionary Power of Trial Court to Order Mistrial

Trial court did not abuse its discretion in declaring a mistrial after jury had been deliberating two hours and forty minutes without reaching a verdict. *S. v. Battle*, 484.

Newspaper article on defendants' trial which included the headline, "2 convicts land back in court," did not warrant the granting of a mistrial. *S. v. McVay*, 428.

§ 130. New Trial for Misconduct Affecting Jury

Trial court did not err in denial of defendant's motion for mistrial on ground that prior to the trial an unidentified person told a prospective juror, "Don't find any Black Panthers guilty." *S. v. Waddell*, 442.

§ 132. Setting Aside Verdict as Being Contrary to Weight of Evidence

Motion to set aside verdict as being against the weight of the evidence is addressed to the discretion of the trial court. *S. v. Moore*, 455; *S. v. Mason*, 435.

§ 135. Judgment and Sentence in Capital Case

Death penalty for first degree murder is not cruel and unusual punishment. *S. v. Westbrook*, 18; *S. v. Doss*, 413.

Trial court in capital cases did not err in excluding jurors who stated they would never vote to return a verdict requiring the death penalty. *S. v. Westbrook*, 18; *S. v. Doss*, 413; *S. v. Chance*, 643.

Constitutional rights of a defendant on trial for capital crime were not violated by the single verdict procedure or by the jury's unbridled discretion in determining whether to impose the death penalty. *S. v. Westbrook*, 18; *State v. Doss*, 413.

Imposition of the death penalty for first degree murder and rape was not rendered unconstitutional by U. S. Supreme Court decisions where crime was committed and trial was held subsequent to repeal of G.S. 15-162.1. *S. v. Doss*, 413; *S. v. Chance*, 643.

Pursuant to the mandate of the Supreme Court of the United States, first degree murder cases in which the defendants received the death

CRIMINAL LAW — Continued

sentence are remanded to the superior court with direction that the defendants be sentenced to life imprisonment in the State's prison. *S. v. Hill*, 371; *S. v. Atkinson*, 385, 386; *S. v. Williams*, 388; *S. v. Sanders*, 389; *S. v. Roseboro*, 391.

§ 145.5. Paroles

The Declaratory Judgment Act is an appropriate means whereby a prisoner who is currently serving a valid sentence for a crime committed during his parole may challenge an order of the Board of Paroles providing that the remainder of the sentence upon which the parole was revoked shall be served at the completion of the sentence for the crime committed during the parole. *Jernigan v. State*, 556.

The statute which empowers the Board of Paroles to order that the remainder of a parolee's sentence upon which his parole was revoked shall be served at the completion of the sentence imposed for a crime committed during the parole, *held* constitutional. *Ibid.*

§ 146. Appellate Jurisdiction of Supreme Court in Criminal Cases

Appeal from guilty plea presents face of record proper for review. *S. v. Roberts*, 500.

In capital cases the Supreme Court reviews the record ex mero motu. *S. v. Chance*, 643.

§ 149. Right of State to Appeal

The State cannot appeal from an order of mistrial. *S. v. Allen*, 492.

The State cannot appeal from a judgment which both declared a criminal statute unconstitutional and found defendant "not guilty." *S. v. Harrell*, 464.

§ 154. Case on Appeal

The Supreme Court awards defendant a new trial for numerous reporting errors in the transcript and admonishes an assistant solicitor for having accepted the record as a "correct statment of case on appeal" the same day the defendant served it on him. *S. v. Fields*, 460.

Defense counsel, as officers of the court, have an equal duty with the solicitor to see that reporting errors in the transcript are corrected. *S. v. Fields*, 460.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted

Where the charge is not brought forward in the record, it is presumed that the jury was charged correctly as to the law arising on the evidence. *S. v. Moore*, 455.

Defendant contended that the following portion of the charge, which was taken verbatim from the transcript, constituted an expression of opinion by the trial judge that he believed the testimony of the deputy sheriff: "A photograph was introduced in this case for the purpose of illustrating and explaining the testimony of the witness, I believe the deputy sheriff." *Held:* The absence of a comma after the word "believe" was obviously a reporting error in the transcript, and defendant's contention is without merit. *S. v. Fields*, 460.

The record certified to the Supreme Court imports verity, and the Court is bound by it. *Ibid.*

CRIMINAL LAW — Continued

§ 177. Determination and Disposition of Cause

The Supreme Court, upon its decision that petitioner properly filed its application for writ of *coram nobis* in the superior court rather than in the Supreme Court or Court of Appeals, remands the case to the Court of Appeals for consideration of the exceptions presented by petitioner's appeal from the *coram nobis* proceeding. *Dantzic v. State,* 212.

§ 180. Writ of Error Coram Nobis

A petitioner who did not appeal from the final judgment of the superior court in a criminal case must apply directly to that court, rather than to the Supreme Court or the Court of Appeals, for permission to file a writ of coram nobis to attack the judgment. *Dantzic v. State,* 212.

§ 181. Post Conviction Hearing

The Post Conviction Act was not applicable to challenge an order of the Paroles Board providing that the remainder of a parolee's sentence be served at the completion of the sentence for a crime committed during the parole. *Jernigan v. State,* 556.

DAMAGES

§ 8. Direct, Remote and Contributing Causes

In a farmer's action against a seed dealer for breach of contract arising out of the sale of mislabeled tomato seed, the rule against the allowance of speculative damages was not violated when the jury was permitted to estimate value of the crop which would have been produced had the seed been of the proper kind. *Gore v. Ball, Inc.,* 192.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

A justiciable controversy was presented in trustee's action seeking an interpretation of a testimentary trust as to distribution of land constituting the trust corpus to testator's widow and daughter upon termination of the trust. *Trust Co. v. Carr,* 539.

The Declaratory Judgment Act was available to a prisoner who sought to challenge an order of the Paroles Board providing that the remainder of his sentence be served at the completion of the sentence for a crime committed during the parole. *Jernigan v. State,* 556.

The courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters. *Ibid.*

EJECTMENT

§ 6. Nature and Essentials of Ejectment to Try Title

Whenever both parties claim under the same person, neither of them can deny his right, and as between them, the elder is the better title and must prevail. *King v. Lee,* 100.

§ 7. Burden of Proof

The burden was on petitioners in an action to try title as in ejectment to show title as alleged. *King v. Lee,* 100.

EJECTMENT — Continued

§ 10. Sufficiency of Evidence

Petitioners failed to establish ownership of land in controversy by their intestate at the time of his death and present ownership thereof by intestate's children as tenants in common. *King v. Lee*, 100.

Where there is a missing link in claimant's purported chain of title, the chain is severed and no benefit can accrue from the earlier conveyances. *S. v. Brooks*, 45.

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

Owner whose access to a public road is a right-of-way over adjoining property is entitled to just compensation when the State deprives him of this easement. *Ledford v. Highway Comm.*, 188.

Taking of plaintiffs' property occurred when Highway Commission erected a permanent fence obstructing their right-of-way across adjoining property which gave them access to a public road, not when plaintiffs first sought to use the easement and were prevented from doing so by the fence. *Ibid.*

Owner of land abutting highway has a special right of easement in the highway for access purposes. *Smith Co. v. Highway Comm.*, 328.

Plaintiff is entitled to recover compensation for injury to its entire 13-acre tract of land by reason of denial of its abutter's rights of access to existing highway when the highway was made a part of a controlled-access facility, not just for injury to a portion of the tract directly abutting the highway. *Ibid.*

§ 13. Actions by Owner for Compensation or Damages

Action by landowner under G.S. 136-111 to obtain compensation from Highway Commission for taking of his property was barred by two-year statute of limitations. *Wilcox v. Highway Comm.*, 185; *Ledford v. Highway Comm.*, 188.

Trial judge in a nonjury proceeding against the Highway Commission could consider evidence of damages for the limited purpose of finding that plaintiff had made a prima facie showing of substantial damages. *Cogdill v. Highway Comm.*, 313.

ESTATES

§ 3. Life Estates and Remainders

The life tenant of a one-half interest in realty may maintain a partition proceeding against the fee simple owner of the other one-half interest in the property. *Trust Co. v. Carr*, 539.

Life tenant had no standing to demand that the court determine whether remainder interest after her life estate is vested or contingent. *Ibid.*

EVIDENCE

§ 25. Relevancy and Competency of Maps

Any inconsistency between the testimony of the witnesses and a map introduced in evidence was a matter to be resolved by the trier of fact. *Cogdill v. Highway Comm.*, 313.

EVIDENCE — Continued

§ 40. Nonexpert Opinion Evidence

Lay witnesses who were familiar with bottomland traversed by creeks were competent to give an opinion as to the capacity of drainage culverts to carry off the flood waters of the creeks. *Cogdill v. Highway Comm.*, 313.

§ 54. Expert Testimony in Regard to Physics

An expert witness in the field of hydraulic engineering is competent to given an opinion as to the capacity of a highway drainage culvert to carry off flood waters of creeks traversing the locality. *Cogdill v. Highway Comm.*, 313.

EXECUTORS AND ADMINISTRATORS

§ 6. Title to and Control of Assets

The estate of a deceased person is not an agency for holding title to property, but is the property itself. *S. v. Jessup*, 108.

One who takes property belonging to an estate during the interval between decedent's death and the qualification of the personal representative is a constructive trustee for the benefit of the administrator. *Ibid.*

§ 8. Collection of Assets

One who takes and refuses to account to the personal representative is subject to the penalties provided for breach of trust. *S. v. Jessup*, 108.

FRAUD

§ 2. Fraud in the Factum

When one signs an instrument in blank, the plea of fraud in the factum is not available to him, notwithstanding he may have been induced to sign by false representations that the blanks would be filled in a certain way. *Creasman v. Savings & Loan Assoc.*, 361.

§ 12. Sufficiency of Evidence and Nonsuit

Evidence that plaintiff's son secured plaintiff's signature on a blank note and deed of trust by falsely telling her that he wanted to mortgage a trailer on her property for $600, and that he thereafter filled in the blanks so the note was for $6000 and the deed of trust encumbered plaintiff's home, held insufficient to be submitted to the jury in plaintiff's action against the lender to set aside the note and deed of trust. *Creasman v. Savings & Loan Assoc.*, 361.

GRAND JURY

§ 1. Selection and Qualification

Unsupported assertion that a member of the grand jury was unqualified because he had pled nolo contendere to a felony will not be considered by the appellate court. *S. v. Roberts*, 500.

Contention that a member of the grand jury was disqualified cannot be urged in arrest of judgment. *Ibid.*

HABEAS CORPUS

§ 2. Determination of Legality of Restraint

The writ of habeas corpus was not available to a defendant who sought to challenge an order of the Paroles Board providing that the remainder of a parolee's sentence be served at the completion of the sentence for a crime committed during the parole. *Jernigan v. State*, 556.

HOMICIDE

§ 6. Manslaughter

The crux of the crime of involuntary manslaughter is whether an accused unintentionally killed his victim by a wantom, reckless use of a firearm or other deadly weapon. *S. v. Wrenn*, 676.

One who points a loaded gun at another, though without intention of discharging it, is guilty of manslaughter if the gun goes off accidentally and kills. *S. v. Stimpson*, 716.

§ 9. Self-Defense

The right of self-defense rests upon necessity, real or apparent. *S. v. Gladden*, 566.

§ 14. Presumptions and Burden of Proof

Proof that knife used in stabbing decedent was deadly weapon was not prerequisite to a verdict of guilty of manslaughter. *S. v. Parker*, 168.

Defendant had burden of satisfying jury of facts which would reduce crime from second degree murder to manslaughter or excuse it altogether. *S. v. Duboise*, 73.

Presumptions from intentional use of deadly weapon causing death. *S. v. Duboise*, 73; *S. v. Parker*, 168; *S. v. Winford*, 58; *S. v. McIlwain*, 469; *S. v. Wrenn*, 676.

Defendant's assertion that the killing of his wife with a deadly weapon was accidental is not an affirmative defense which shifts the burden of proof to him to exculpate himself from a charge of murder. *S. v. Wrenn*, 676.

§ 15. Relevancy and Competency of Evidence

Witness' testimony on cross-examination relating to the location of defendant and deceased at the time of the homicide is admissible as testimony of common appearances. *S. v. Bell*, 173.

Small knife found on body of deceased was sufficiently identified for its admission in evidence, although proper procedure was not strictly followed. *S. v. Winford*, 58.

Articles of clothing found upon homicide victim's body and photographs of the body were properly admitted in evidence, notwithstanding defendant in open court admitted the identity of the deceased, the location where the body was found, the general condition and cause of death. *S. v. Westbrook*, 18.

Evidence bearing upon the atrocity of the offense and the callous disregard exhibited by the defendant toward the victim is especially relevant and material in a prosecution for a capital crime in which the punishment to be imposed is to be fixed by the jury. *Ibid.*

§ 18. Evidence of Premeditation and Deliberation

Premeditation and deliberation may be inferred from the vicious and brutal circumstances of the homicide. *S. v. Duboise*, 73.

HOMICIDE — Continued

Premeditation and deliberation are presumed when a homicide is perpetrated by means of torture. *Ibid.*

§ 20. Photographs and Physical Objects as Demonstrative Evidence

A small pen knife found on the body of deceased was sufficiently identified for its admission in evidence, although the proper procedure for introduction of real evidence was not strictly followed. *S. v. Winford,* 58.

Photographs of homicide victim's body were properly admitted for illustrative purposes. *S. v. Doss,* 413.

§ 21. Sufficiency of Evidence and Nonsuit

The State offered sufficient evidence to require that the issue of defendant's guilt of second degree murder be submitted to the jury, although some of the evidence introduced by the State might have been exculpatory. *S. v. McKnight,* 148.

State's evidence was sufficient to go to jury in prosecution for first degree murder committed during perpetration of the felony of sodomy. *S. v. Doss,* 413.

State's evidence of defendant's guilt of homicide was insufficient to go to the jury where there was no evidence that defendant fired the fatal shot. *S. v. Allred,* 398.

§ 23. Instructions in General

Instruction that the State contended that "defendant is guilty of murder in the second degree, or at least is guilty of murder" might have created some confusion in the minds of the jurors by the misuse of "murder" in lieu of "manslaughter." *S. v. Winford,* 58.

Trial court did not err in failing to give a detailed definition of crime against nature in prosecution for homicide committed during perpetration of a crime against nature. *S. v. Doss,* 413.

The use of the phrase "natural and probable result" in a homicide prosecution is disapproved. *S. v. Wrenn,* 676.

§ 24. Instructions on Presumptions and Burden of Proof

Trial court did not err in failing to instruct jury that it should return verdict of not guilty if the State had failed to satisfy it beyond a reasonable doubt that deceased came to his death as a proximate result of pistol wound inflicted by defendant. *S. v. Winford,* 58.

Erroneous instruction that law raises two presumptions when it is admitted or proven that defendant "intentionally killed" the deceased with a deadly weapon was not prejudicial to defendant. *Ibid.*

§ 26. Instructions on Second Degree Murder

Failure of the court in a single instance to charge that, in order for the jury to find defendant guilty of second degree murder, the State must prove that defendant "intentionally" shot deceased was not prejudicial error. *S. v. Gladden,* 566.

§ 27. Instructions on Manslaughter

Error, if any, in instructions referring to the circumstances by which defendant could reduce the crime from murder in the second degree to manslaughter was harmless where defendant was convicted of manslaughter. *S. v. Parker,* 168.

HOMICIDE — Continued

§ 28. Instructions on Defenses

Instruction that law justifies or excuses use of a deadly weapon to repel a simple assault is erroneous. *S. v. Winford*, 58.

Evidence in homicide prosecution did not warrant an instruction on the principle of the right to kill in self-defense which arises when defendant withdraws from combat and so notifies the deceased. *Ibid.*

Instruction which placed the burden on defendant to show "beyond a reasonable doubt" facts which would reduce crime from second degree murder to manslaughter constituted prejudicial error. *Ibid.*

Trial court sufficiently instructed the jury on apparent necessity in charging on self-defense, although neither "apparent" nor "apparently" appears in the instructions. *S. v. Gladden*, 566.

Trial court sufficiently stated the evidence relating to self-defense and explained the law arising thereon in this manslaughter prosecution. *S. v. Jennings*, 604.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

In prosecution for first degree murder, trial court did not err in failing to instruct jury on issue of manslaughter. *S. v. Duboise*, 73.

It is not an expression of opinion for the trial court to inform the jury that manslaughter does not arise on the evidence in the case. *Ibid.*

Defense of intoxication was not available where State's evidence established a homicide committed in the perpetration of the felony of sodomy on a 15-year-old boy under threat of gunfire and a knife. *S. v. Doss*, 413.

Trial court erred in failing to submit involuntary manslaughter as a possible verdict in this homicide prosecution where defendant's evidence was to the effect that he only intended to scare his wife and that the shotgun went off accidentally in a scuffle between the parties. *S. v. Wrenn*, 676.

Trial court erred in failing to submit involuntary manslaughter to the jury where defendant's evidence tended to show that his pistol accidentally discharged when the victim attempted to grab the pistol and struck defendant's hand. *S. v. Stimpson*, 716.

§ 31. Verdict and Sentence

Defendant's constitutional rights were not violated by the fact the jury is given absolute discretion to determine whether punishment for first degree murder should be death or life imprisonment or by fact that jury was required to return simultaneously its verdict upon issue of guilt and its determination of the punishment. *S. v. Westbrook*, 18; *S. v. Doss*, 413.

Imposition of death penalty for first degree murder was not rendered unconstitutional by U. S. Supreme Court decisions where crime was committed and trial was held subsequent to the repeal of G.S. 15-162.1. *S. v. Doss*, 413.

The maximum term of imprisonment for involuntary manslaughter is ten years. *S. v. Stimpson*, 716.

Pursuant to the mandate of the Supreme Court of the United States, first degree murder cases in which the defendants received the death sentence are remanded to the superior court with direction that the defendants be sentenced to life imprisonment in the State's prison. *S. v. Hill*, 371; *S. v. Atkinson*, 386; *S. v. Williams*, 388; *S. v. Sanders*, 389; *S. v. Roseboro*, 391.

INDICTMENT AND WARRANT

§ 7. Requisites and Sufficiency of Indictment

Signature of prosecuting officer is not essential to the validity of a bill of indictment. *S. v. Mason,* 435.

§ 11. Identification of Victim in Indictment

Indictment for armed robbery is not fatally defective in failing to allege the name of the owner of the property alleged to have been taken from a named person. *S. v. Mason,* 435.

A variance between the real name of a homicide victim and the name given in the indictment constitutes no ground for quashal of the indictment. *S. v. Allen,* 492.

§ 14. Grounds and Procedure on Motion to Quash

A motion to quash is proper to challenge the sufficiency of the indictment to charge a criminal offense. *S. v. Waddell,* 442.

§ 17. Variance Between Averment and Proof

A motion to dismiss is proper to challenge a variance between the indictment and the evidence. *S. v. Waddell,* 442.

There was no fatal variance between the indictment alleging armed robbery in which money was taken from the 7 Day Mart where "Jesse L. Brown was in attendance, said money being the property of Jesse L. Brown, t/b/d/a 7 Day Mart," and evidence that the 7 Day Mart was not owned by Jesse L. Brown. *Ibid.*

In a prosecution for assault with intent to commit rape, an instruction which gave the date of the offense as 24 April 1970 was not prejudicially erroneous on the ground that the indictment alleged the offense to have occurred on 25 April 1970. *S. v. Roseman,* 573.

INFANTS

§ 10. Commitment of Minors for Delinquency

District court acted within its discretion in allowing a juvenile petition to be amended to allege the ownership and value of property allegedly stolen by the juvenile. *In re Jones,* 616.

A 15-year-old defendant charged with the felonies of storebreaking and larceny may either be processed as a juvenile or tried in superior court. *S. v. Alexander,* 527.

Answer by defendant on cross-examination that he had been "convicted" of storebreaking and larceny when he was a juvenile was competent for impeachment purposes, and trial court did not err in failing to determine whether the charge was heard on a juvenile petition or on an indictment in superior court. *Ibid.*

INSURANCE

§ 80. Compulsory Insurance; Vehicle Financial Responsibility Act

The purpose of the Motor Vehicle Safety-Responsibility Act is to provide protection to the public from damages resulting from the negligent operation of automobiles by irresponsible persons. *Insurance Co. v. Insurance Co.,* 240.

INSURANCE — Continued

§ 84. Liability Coverage of Vehicle Under "Substitution" Provision

Definition of a "temporary substitute automobile." *Insurance Co. v. Insurance Co.*, 240.

A temporary automobile was being used at the time of the accident with the consent of the driver's father who was insured under a policy containing a substitute provision; consequently, the temporary vehicle, which replaced an automobile insured under the father's policy, was itself insured under the policy. *Ibid.*

An automobile was in need of immediate repair, within the meaning of a substitution provision, when the outside paint on the body of the car had begun to "spiderweb" and peel off, leaving the metal exposed. *Ibid.*

The father is the owner of an automobile operated exclusively by his minor son where the father registers the title in his own name. *Ibid.*

INTOXICATING LIQUOR

§ 2. Duties and Authority of ABC Boards; Beer and Wine Licenses

ABC Board's suspension of petitioner's retail beer and social establishment permits for various violations of statutes and regulations was supported by findings and evidence. *C'est Bon, Inc. v. Board of Alcoholic Control*, 140.

JURY

§ 5. Selection Generally and Personal Disqualifications

Trial court did not err in excusing on the ground of hardship a juror who had been accepted by both the State and by defendant and had been sworn but not impaneled. *S. v. Westbrook*, 18.

§ 7. Challenges

Trial court properly sustained State's challenges for cause of prospective jurors who made it clear on voir dire that each of them had already made up his mind that he would not return a verdict pursuant to which defendant might lawfully be executed, whatever the evidence might be. *S. v. Westbrook*, 18; *S. v. Doss*, 413; *S. v. Chance*, 643.

KIDNAPPING

§ 1. Prosecutions

No error appears on the face of the record in appeal from plea of guilty to kidnapping. *S. v. High*, 487.

LARCENY

§ 4. Warrant and Indictment

Indictment alleging larceny of money "of the estate of W. M. Jessup, deceased" is fatally defective. *S. v. Jessup*, 108.

LIBEL AND SLANDER

§ 2. Words Actionable Per Se

A false and unprivileged charge of embezzlement is actionable per se. *Stewart v. Check Corp.*, 278.

LIBEL AND SLANDER — Continued

§ 9. Qualified Privilege

Qualified privilege is an affirmative defense which must be specially pleaded; where qualified privilege exists, plaintiff cannot recover absent actual malice. *Stewart v. Check Corp.*, 278.

§ 10. Particular Applications of Qualified Privilege

Statements made by defendant's agent to defendant's customer relating to unreported payment of $100 by the customer to plaintiff to apply on the customer's debt to defendant were qualifiedly privileged, but a statement that plaintiff "has misappropriated funds other than this amount" is not qualifiedly privileged. *Stewart v. Check Corp.*, 278.

Statements made by defendant's agent to plaintiff's uncle and first cousin accusing plaintiff of misappropriating funds belonging to defendant were not qualifiedly privileged. *Ibid.*

§ 16. Sufficiency of Evidence and Nonsuit

Proof of actual malice is prerequisite to recovery of punitive damages in a defamation action. *Stewart v. Check Corp.*, 278.

Ordinarily, the court may not direct a verdict for the defendant when the evidence tends to show the publication by the defendant's agent of false statements of and concerning the plaintiff which are actionable *per se*. *Ibid.*

MASTER AND SERVANT

§ 10. Duration of Employment

A contract of employment which contains no provision for the duration of the employment is terminable at will. *Still v. Lance*, 254.

§ 69. Amount and Items of Workmen's Compensation Recovery

Definition of term "disability" as used in Workmen's Compensation Act and presumptions arising thereunder. *Watkins v. Motor Lines*, 132.

§ 77. Review of Compensation Award for Change of Condition

Plaintiff's claim for permanent partial disability involved a "change of condition" and was barred by the one-year statute of limitation. *Watkins v. Motor Lines*, 132.

Employee's evidence was sufficient to require the Industrial Commission to make findings of fact as to whether the employee was misled to his prejudice when an agent of the employer represented to him that the signing of Form 28B would not affect the employee's later claim for permanent disability. *Watkins v. Motor Lines*, 132.

§ 79. Persons Entitled to Compensation Payment

A father who wilfully abandoned his child during the child's minority loses all right to share in workmen's compensation benefits for death of the child. *Smith v. Exterminators*, 583.

§ 91. Filing of Claim for Workmen's Compensation

A father was not barred from participation in a workmen's compensation award for the death of his son by failure to file a claim therefor. *Smith v. Exterminators*, 583.

MUNICIPAL CORPORATIONS

NARCOTICS

NEGLIGENCE

ROBBERY — Continued

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Trial court did not err in failing to instruct on lesser included offenses in this armed robbery prosecution. *S. v. Carnes*, 549; *S. v. Banner*, 595.

Trial court in armed robbery prosecution did not err in failing to submit common law robbery. *S. v. Richardson*, 621.

§ 6. Verdict and Sentence

On appeal from defendant's conviction of armed robbery, the Supreme Court holds that no error appears on the face of the record proper. *S. v. Tinsley*, 482.

When separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, verdicts of guilty as charged will support separate judgments for each crime. *S. v. Richardson*, 621.

The fact that a felonious assault is committed during the perpetration of armed robbery does not deprive the felonious assault of its character as a complete and separate felony. *Ibid.*

RULES OF CIVIL PROCEDURE

§ 1. Scope of Rules

The Rules were applicable to a civil action commenced on 3 January 1968. *Gore v. Ball, Inc.*, 192.

§ 8. General Rules of Pleadings

The pleader may set forth two or more statements of a claim in the same count. *Gore v. Ball, Inc.*, 192.

§ 20. Permissive Joinder of Parties

In trustee's action seeking an interpretation of a testamentary trust as to the manner of distribution of lands to testator's widow and daughter, testator's daughter was a necessary and proper party. *Trust Co. v. Carr*, 539.

§ 41. Dismissal of Actions

Voluntary dismissal without prejudice is permissible only when so ordered by the court, in the exercise of its judicial discretion, upon finding that justice so requires. *King v. Lee*, 100.

§ 50. Motion for Directed Verdict

Court may not direct verdict in favor of party having burden of proof. *King v. Lee*, 100.

Upon remand of this action in ejectment to the superior court, petitioners are entitled to move, prior to the granting of defendants' motion for a directed verdict and the entry of a judgment adverse to petitioners, that an order be entered providing for a voluntary dismissal without prejudice upon such terms and conditions as justice requires; whether such order should be entered will be addressed to the discretion of the superior court. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 3. Application

Uniform Commercial Code is not applicable to transactions which occurred prior to the effective date of the Code. *Gore v. Ball, Inc.*, 192.

§ 71. Particular Transactions or Security Devices

A financing statement was sufficient to constitute a security agreement and to give the secured party a secured interest in farm crops which served as collateral for a crop loan. *Evans v. Everett*, 352.

§ 73. Security Agreement

A financing statement may serve as a security agreement if it meets the requirements of the Uniform Commercial Code. *Evans v. Everett*, 352.

WATERS AND WATERCOURSES

§ 7. Marsh and Tide Lands

In an action instituted by the State to remove cloud on title to a certain tract of coastal lands, the title to the tract is conclusively presumed in the State as a matter of law, where defendants failed to connect their title to the State's original grant of the tract in 1770. *S. v. Brooks*, 45.

WILLS

§ 28. General Rules of Construction

To effectuate the intention of the testator the court may transpose or supply words, phrases and clauses when the sense of the devise in question as collected from the context manifestly requires it. *Jernigan v. Lee*, 341.

§ 36. Defeasible Fees

Devise to testatrix' son and his heirs, but if he dies "without issue or heirs by him begotten," then to testatrix' daughter in fee, and if she dies without "any heir of her body living at her death," then to another, held to give the son a fee simple defeasible and to give the daughter an executory interest contingent upon the son's death without surviving issue. *Jernigan v. Lee*, 341.

Devise to testatrix' brother and "his heirs, if any, otherwise to his next of kin, who may be living at his death" is held to give the brother a fee defeasible upon his death without surviving issue. *Ibid.*

Death of executory devisee prior to termination of two defeasible fees which were interposed before his executory devise did not defeat the estate he would have taken had he survived the termination of the two preceding estates. *Ibid.*

§ 69. Conveyance of Title by Owners of Contingent Remainder

Contingent interest may be devised or conveyed provided the identity of persons who will take the estate upon the happening of the contingency be ascertained. *Jernigan v. Lee*, 341.

WITNESSES

§ 6. Evidence Competent to Impeach Witness

For purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial. *S. v. Williams*, 663.

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